

EX PARTE YOUNG REDUX

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ABSTRACT

Trump v. CASA, Inc., the first high-profile Supreme Court case challenging President Trump's birthright-citizenship executive order, cemented a seismic shift in federal courts' authority to issue injunctions against government defendants' unconstitutional acts. An earlier stage of that shift was evident in 2021 with the failure of a lawsuit intended to shield Texans from the Lone Star State's Senate Bill (S.B.) 8—a statutory scheme prohibiting abortions far earlier in pregnancy than Roe v. Wade and its progeny allowed. The problem for the challengers in Whole Woman's Health v. Jackson was that S.B. 8 permitted enforcement only by private parties through civil suits, including for substantial money damages. That made it impossible to rely on the usual procedure for contesting state laws in federal court ahead of their application: seeking declaratory or injunctive relief against the government officials responsible for enforcing them.

"Were it not for sovereign immunity," one scholar wrote, "the logical defendant in a suit to enjoin the enforcement of S.B. 8's ban on pre-viability abortions would have been the state of Texas." In the face of state "bounty" schemes, this Article challenges that near-universal assumption about the scope and strength of sovereign immunity, arguing that even with sovereign immunity, a logical defendant in a suit to enjoin the enforcement of S.B. 8's ban on pre-viability abortions may have been Texas. The Article does so by analyzing the development of the law surrounding Ex parte Young, the 1908 case permitting federal courts to prevent state officials from enforcing unconstitutional state statutes—and by advocating a meaningful but relatively modest extension to allow suits for declaratory or injunctive relief

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against states themselves in limited circumstances. There are two principal ways to understand Young doctrine: the first aimed at upholding the rule of law by protecting structural constitutional values, the second aimed at preserving the judicial role by maintaining consistency with historical remedies. With a deep dive into each approach, this Article argues that both support state suability as a plausible path to keeping government generally within the bounds of law. Along the way, the Article examines what CASA, as part of the Supreme Court's broader turn toward history and tradition, means for this "bedrock" area of civil-rights litigation.

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INTRODUCTION

Trump v. CASA, Inc., the high-profile 2025 Supreme Court case that was supposedly about birthright citizenship but was actually about universal injunctions, cemented a seismic shift in the construction of federal courts' authority to issue equitable relief against government defendants' unconstitutional acts.¹ An earlier stage of that shift was evident in 2021, when the Court precipitated the demise of a lawsuit intended to shield Texans from the Lone Star State's Senate Bill (S.B.) 8—a statutory scheme prohibiting abortions far earlier in pregnancy than *Roe v. Wade* and its progeny, which then retained precedential force, allowed.² The problem for the plaintiff abortion providers and abortion-rights advocates in *Whole Woman's Health v. Jackson* was that S.B. 8 permitted enforcement only by private parties through civil suits, including for substantial money damages.³ That made it difficult to invoke the usual procedure for challenging state laws in federal court in advance of their application:

1. 606 U.S. 831 (2025).
2. See *Whole Woman's Health v. Jackson*, 595 U.S. 30, 35–36, 39, 43 (2021).
3. *Id.* at 35–36.

seeking declaratory or injunctive relief against the government officials responsible for enforcing them.

“Were it not for sovereign immunity,” Professor David Strauss wrote in a postmortem on the case, “the logical defendant in a suit to enjoin the enforcement of S.B. 8’s ban on pre-viability abortions would have been the state of Texas.”⁴ In the face of state “bounty” schemes, this Article challenges that near-universal assumption about the scope and strength of sovereign immunity, arguing that even *with* sovereign immunity, a logical defendant in a suit to enjoin the enforcement of S.B. 8’s ban on pre-viability abortions may have been Texas. The Article does so by analyzing the development of the law surrounding *Ex parte Young*, the 1908 decision permitting federal courts to prevent state officials from enforcing unconstitutional state statutes⁵—and by advocating a meaningful but relatively modest extension of that doctrine to allow suits for declaratory or injunctive relief against states themselves in limited circumstances. Along the way, the Article examines what *CASA*, as part of the broader turn toward history and tradition in understanding federal courts’ equity jurisdiction, means for plaintiffs seeking to prevent the implementation of allegedly unconstitutional state laws backed by coercive private-enforcement processes.

Young is one of the most important cases facilitating the protection of constitutional rights in American law.⁶ *Roe* was a *Young* suit.⁷ Under some understandings, *Brown v. Board of Education* was too.⁸ More recent examples include *Obergefell v. Hodges*, which recognized a right to same-sex marriage,⁹ and *303 Creative LLC v. Elenis*, which recognized a right to refuse to make websites celebrating such marriages.¹⁰ Since it came down, *Young* has provided “a ‘bedrock’ foundation for suits to enjoin enforcement of unconstitutional state (and federal) law.”¹¹ Before *Young*, regulated

4. David A. Strauss, *Rights, Remedies, and Texas’s S.B. 8*, 2022 SUP. CT. REV. 81, 92.

5. 209 U.S. 123 (1908).

6. See WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1191 (8th ed. 2025) (“In its wake, Judge Henry Friendly described [*Young*] as the ‘fountainhead’ of civil rights enforcement; Professor Charles Alan Wright called it ‘indispensable’ . . .”).

7. See *Roe v. Wade*, 410 U.S. 113, 120 (1973).

8. 347 U.S. 483 (1954); John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2520 (1998).

9. 576 U.S. 644, 653–56 (2015) (relevant procedural background); *id.* at 681 (substantive conclusion).

10. 600 U.S. 570, 589 (2023) (substantive conclusion); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1168, 1170 (10th Cir. 2021) (relevant procedural background), *rev’d*, 600 U.S. 570.

11. BAUDE ET AL., *supra* note 6, at 1190 (quoting Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURTS STORIES* 247 (Vicki C. Jackson & Judith Resnik eds., 2010)).

parties could assert that laws were unconstitutional in defending against government enforcement actions (the “post-enforcement” approach).¹² But that procedure required them to endure the possibility of civil penalties, criminal punishments, and practical expenses if their arguments failed. *Young*, by contrast, allowed regulated parties to procure anticipatory declaratory or injunctive relief forbidding the application of unconstitutional laws through future enforcement actions (the “pre-enforcement” approach).¹³

In *Jackson*, the plaintiffs sued various Texas state officials. But none were “sufficiently connected . . . with the duty of enforcement” to be susceptible to relief under the “narrow” reading of *Young* the Court adopted.¹⁴ And the sole private defendant’s assertion that he did not intend to enforce S.B. 8 against the plaintiffs defeated their ability to sue him too.¹⁵ The potential consequences for violating S.B. 8 were severe: Anyone who procured an abortion, assisted in procuring an abortion, or even intended to assist in procuring an abortion was subject to a civil action by any member of the public for statutory damages of *at least* \$10,000, and a single abortion could potentially spur multiple suits.¹⁶ The plaintiffs argued that hardly anyone would risk such onerous penalties to pursue the post-enforcement approach to judicial review—and that the statute restricted their ability to raise constitutional defenses anyway.¹⁷ Indeed, S.B. 8’s results were stark, with Justice Sotomayor observing in dissent that “[t]he chilling effect” on abortions in Texas had “been near total.”¹⁸

12. See Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1315 (2023).

13. See 209 U.S. 123, 161–62 (1908).

14. *Id.* at 161; *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 39 (2021). The Court did permit a *Young* suit to proceed against four officials from medical licensing agencies that it thought “may or must take enforcement actions” under the statute. *Jackson*, 595 U.S. at 45–46. In response to a certified question on remand, however, the Supreme Court of Texas said state law did not provide any such enforcement authority, which ended the plaintiffs’ challenge. *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022); *Whole Woman’s Health v. Jackson*, 31 F.4th 1004, 1006 (5th Cir. 2022) (instructing the district court to “dismiss all challenges to the private enforcement provisions of the statute”).

15. *Jackson*, 595 U.S. at 48.

16. TEX. HEALTH & SAFETY CODE ANN. §§ 171.208(a), (b), (c)(5), 171.210(a)(4) (West, Westlaw through 2025 Reg. and 2d Called Sess. 89th Legis.). The statute did provide that “a court may not award relief . . . if the defendant demonstrates that the defendant previously paid the full amount of statutory damages . . . in a previous action for that particular abortion performed or induced.” *Id.* § 171.208(c). But that only protected against new judgments after the defendant had “paid the full amount of statutory damages” from a previous judgment. *Id.* (emphasis added).

17. See Petitioners’ Brief at 6–10, *Jackson*, 595 U.S. 30 (No. 21-463) (discussing S.B. 8’s “*in terrorem*” effects and procedural disadvantages for defendants).

18. *Jackson*, 595 U.S. at 62 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

Texas's S.B. 8 strategy did not just succeed: It spread. Other states adopted private-enforcement mechanisms to implement abortion limitations.¹⁹ And while *Dobbs v. Jackson Women's Health Organization* soon eliminated the federal constitutional right to abortion,²⁰ actual and imaginable state attempts to evade judicial review of regulations controlling constitutionally significant conduct have not stopped there. California passed a gun-control measure concededly patterned after S.B. 8, for instance.²¹ As the *Jackson* plaintiffs argued: "Churches and religious leaders could be hauled into far-flung courts to defend their religious practices because someone somewhere disagrees with them. Same-sex couples could be sued by neighbors because they obtained a marriage license."²²

The S.B. 8 challengers sued what seemed like everyone they could envision to try to get the law held unconstitutional: the Texas Attorney General, a slate of state licensing officials, putative classes of state-court judges and clerks, and a private individual who, they argued, had threatened to enforce the law against parties like them.²³ But the plaintiffs did not sue Texas itself. That may have been a missed opportunity. For while the existing law of state sovereign immunity would not have recognized such a suit, the Supreme Court—where everyone thought the case was heading—can adjust the existing law of state sovereign immunity where warranted. And for the reasons explored below, *Young*'s logic and lineage may well support doing so to make the pre-enforcement approach to judicial review available against states in limited circumstances.

In four parts, this Article examines the structural and historical development of *Young* doctrine, advocates a meaningful but relatively modest extension to include declaratory and injunctive relief against states in narrow situations, and responds to some potential questions and concerns about that shift. Throughout, the Article recognizes and respects the foundational role of state sovereignty in American federalism. States have sovereign authority to write laws of any kind into their code, but under the Supremacy Clause, they do not have sovereign authority to enforce laws that conflict with the U.S. Constitution, whether they rely on executive

19. Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [<https://perma.cc/DNZ2-HM4N>].

20. 597 U.S. 215, 232 (2022).

21. Andrew Willinger, *California's New 'Bounty-Hunter' Gun Law*, BLOOMBERG L. (Aug. 15, 2022), <https://news.bloomberglaw.com/us-law-week/californias-new-bounty-hunter-gun-law> [<https://perma.cc/8APE-X3HP>]; see *infra* note 102 and accompanying text.

22. Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support at 28, *Whole Woman's Health v. Jackson*, 556 F. Supp. 3d 595 (W.D. Tex. 2021) (No. 21-cv-00616), *aff'd in part, rev'd in part, and remanded*, *Jackson*, 595 U.S. 30.

23. *Jackson*, 556 F. Supp. 3d at 607–08, 631.

officials, judicial personnel, or private delegees to do so.²⁴ The ideas discussed here support and sustain state sovereignty as part of this dual-governmental system in multiple ways—including, among others, by working within the logical structure of the Court’s state-protective immunity jurisprudence; by limiting the proposal for extending *Young* suits to the doctrine’s original context of negative relief against enforcement; by confining plaintiffs’ ability to attain *Young* relief against states themselves to the context of private-enforcement schemes that sound in the tradition of public law and where reasonably necessary to obtain meaningful judicial relief in light of alternative processes; and by explaining how the consequences of such suits would be functionally indistinguishable from the legal implications of presently permissible actions against government agents in their official capacities.

Part I presents *Young* as originally decided, through the lens of the S.B. 8 challenge in *Jackson*, and as potentially extended to provide relief against states themselves. The Article then describes how the Court and commentators have taken two contrasting and competing approaches to understanding *Young* doctrine, with the earlier approach centering on structural constitutional concerns and the more recent approach centering on the history of equitable remedies. Part II focuses on the structural conception of *Young*. This approach understands the doctrine as a means adaptable to the ends of maintaining the supremacy of federal law and the availability of judicial review—and should support state suability where necessary to keep official conduct generally within constitutional constraints.

Part III turns to the historical conception of *Young*, beginning by explaining the two dominant understandings of the doctrine’s derivation. The first, which has been advanced by Professor John Harrison and which I call the “revisionist” version because it undermines implications suggesting a broad scope of relief, posits that the *Young* remedy traces back to the antisuit injunction—a mechanism that allowed parties to present assertions that would have been defensive positions at law as affirmative grounds for relief in equity. The second, which has been advanced by Professor James Pfander and which I call the “restorationist” version because it vindicates implications suggesting a broad scope of relief, posits that the remedy stems from three “administrative writs” (mandamus, certiorari, and prohibition) that crossed from English common law into American equity during the nineteenth century. This Part then analyzes the issue of state suability under both the revisionist and restorationist versions of the historical conception,

24. See U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

addressing methodological uncertainties and ultimately arguing that each framework provides support for allowing plaintiffs to sue states themselves in the limited circumstances under consideration here.

Part IV responds to some potential questions and concerns, especially regarding the state-action requirement for constitutional litigation and the practicalities of issuing declaratory and injunctive relief against states. Functionally, this Part points out, *none of this is new*. Federal courts regularly enter declaratory and injunctive relief against states, including in cases brought by the federal government to block the operation of allegedly unconstitutional statutes. At bottom, this Article argues that where states seek to control constitutionally significant conduct by circumventing judicial review, the law makes room to hold them accountable in federal court without diminishing state sovereignty.

I. *EX PARTE YOUNG*: THEN AND NOW

Decided shortly after the turn of the century in 1908, *Young* was a spectacle from the start. As Professor Strauss has put it, by challenging both constitutional limits and litigation conventions, “the state statute in *Ex parte Young*—a regulation of railroad rates—was the S.B. 8 of its time.”²⁵ The following discussion first details that decision and then describes its role in challenging the S.B. 8 of *our* time: S.B. 8. A brief discussion of a possible future path follows.

A. *The Original Case*

With Ford’s Model T yet to hit the market,²⁶ railroad rates were exceptionally important to individuals and businesses alike. Minnesota legislators wanted to mandate rate reductions, but they worried that railroads would succeed in contending they were unconstitutionally confiscatory.²⁷ So the state’s attorney general, Edward Young, hatched a two-part plan to prevent the railroads’ resort to court.²⁸ First, the enacting legislation included draconian penalties for violating the rate reductions. The intent here was to impede the post-enforcement approach to judicial

25. Strauss, *supra* note 4, at 95.

26. *Ford Motor Company Unveils the Model T*, HISTORY (Jan. 31, 2025), <https://www.history.com/this-day-in-history/ford-motor-company-unveils-the-model-t> [https://perma.cc/YK42-PSM9] (putting that date at October 1, 1908).

27. John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 991 (2008).

28. *Id.* at 991–92.

review by dissuading railroads and their agents from transgressing the law.²⁹ As the Supreme Court would explain:

For disobedience to the freight act the officers, directors, agents, and employés of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. . . . The company itself would also, in case of disobedience, be liable to the immense fines provided for ³⁰

Second, the legislation withheld enforcement authority from the regular rate-setting commission and did not specifically grant such authority to any other state official.³¹ The intent here was to impede the pre-enforcement approach to judicial review by removing the potential targets of suits for injunctions.³²

Young's plan, however, failed to prevent the railroads' shareholders from filing what were effectively derivative suits in federal court.³³ The suits sought to prevent the railroads from complying with the rate reductions, which the shareholders argued violated the Due Process Clause, the Equal Protection Clause, and (apparently) the Commerce Clause of the U.S. Constitution.³⁴ The shareholders sued Young, among other parties, seeking an injunction forbidding him from enforcing the rates.³⁵ The circuit court obliged in part, preliminarily enjoining implementation of the commodity rates.³⁶ Along the way, the court rejected Young's assertion of sovereign immunity.³⁷ Rather than await final judgment with the potential to file a petition for certiorari in the Supreme Court on a permanent injunction, Young hurried the process along by filing a mandamus action against one

29. *Id.*

30. *Ex parte Young*, 209 U.S. 123, 145 (1908).

31. Harrison, *supra* note 27, at 991.

32. *Id.*

33. *See Young*, 209 U.S. at 129 (statement of the case). Nowadays, shareholders file derivative suits in the name of the corporation. *See Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991) ("A shareholder derivative suit is a uniquely equitable remedy in which a shareholder asserts on behalf of a corporation a claim belonging not to the shareholder, but to the corporation."), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). In *Young*, the complainants named the railroads as defendants. 209 U.S. at 129 (statement of the case).

34. *Young*, 209 U.S. at 130–31 (statement of the case); *id.* at 145 (majority opinion).

35. *Id.* at 129–30 (statement of the case).

36. *Id.* at 132–33.

37. *Id.* at 132.

of the railroads in state court in defiance of the circuit court's order.³⁸ That led the circuit court to hold him in contempt, fine him \$100, and order the U.S. marshal to place him in custody (which in practice meant requiring him to check in each day) until he withdrew the mandamus case.³⁹ Young's custodial status permitted him to petition the Supreme Court for an original writ of habeas corpus: hence the caption in the resultant case, *Ex parte Young*.⁴⁰ That posture, in turn, allowed the Justices to evaluate the constitutionality of the Minnesota legislation for the purpose of determining whether the circuit court's injunction and the ensuing contempt order were valid.⁴¹

In a majority opinion by Justice Peckham, the Court held the rate legislation unconstitutional.⁴² Critically, and often lost in lessons on the case, it was not the rates themselves on which the majority focused: It was the penalties for violating them.⁴³ Quoting a previous case, the Court reasoned that "when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed," there arises "a serious question whether the party is not deprived of the equal protection of the laws."⁴⁴ That was the situation in *Young*, Peckham continued, for "[t]he officers and employes could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid."⁴⁵ Where a law "impos[es] such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained," the Court held, that law "is . . . unconstitutional."⁴⁶

The Court then addressed Young's (legally antecedent) assertion of sovereign immunity.⁴⁷ The Court walked through precedent, developing

38. *Id.* at 133; Harrison, *supra* note 27, at 993.

39. *Young*, 209 U.S. at 133–34 (statement of the case); Harrison, *supra* note 27, at 993.

40. *Young*, 209 U.S. at 126 (statement of the case); Harrison, *supra* note 27, at 993.

41. Harrison, *supra* note 27, at 993.

42. *Young*, 209 U.S. at 148 (majority opinion).

43. *Id.* ("We hold . . . that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates.").

44. *Id.* at 146 (quoting *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 102 (1901)).

45. *Id.*

46. *Id.* at 147.

47. *See id.* at 149–68.

what lawyers now call the “real-party-in-interest” doctrine.⁴⁸ This produced the rough synthesis that where parties proceeded against state officials, suits seeking relief that would necessarily run against the state itself (as in contract) were forbidden, while suits seeking relief that could theoretically run against the official (as in tort) were permitted.⁴⁹ Applying that rule, the Court refused to grant sovereign immunity, suggesting that for Young to enforce an unconstitutional statute against the railroads would work a sufficiently tort-like injury.⁵⁰

Striving to distinguish a prior case, the Court wrote that “[i]n making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act.”⁵¹ Otherwise, the Court continued, “it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.”⁵² That standard was satisfied in the case at bar, where Young, as attorney general, enjoyed general enforcement authority within the state.⁵³ The fact that the rate legislation did not grant Young specific enforcement authority was of no moment.⁵⁴

Young contended that the complainants sued him “as an officer, to whose discretion is confided the use of the name of the State of Minnesota,” and that they had no interest in “any action [he] might take or bring as an ordinary individual.”⁵⁵ The Court responded that “[i]f the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution,” his conduct “comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”⁵⁶ The notion that “notwithstanding the obvious impact on the State itself, . . . sovereign immunity does not apply because an official who acts unconstitutionally is ‘stripped of his official or

48. See *id.* at 150–56; see also Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1850 (2007) (discussing the “treatment of real parties in interest” in the context of state sovereign immunity).

49. See *Young*, 209 U.S. at 150–56.

50. See, e.g., *id.* at 160 (“It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity.”); *id.* at 167 (“The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject matter.”).

51. *Id.* at 157.

52. *Id.*

53. *Id.* at 157–58.

54. *Id.* at 157.

55. *Id.* at 159.

56. *Id.* at 159–60.

representative character” is the famous “fiction” for which *Young* became known.⁵⁷ And that fiction produced *Young*’s “paradox”⁵⁸—that “an official’s unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment.”⁵⁹

The balance of the opinion intertwines two themes. The first involves a *Lochner*-esque reverence for property rights and business interests characteristic of contemporary case law.⁶⁰ The second emphasizes the importance of maintaining the supremacy of federal constitutional rights over attempted state incursions⁶¹—especially when considered alongside the related holding that the Minnesota legislation was unconstitutional for making judicial review difficult to attain. The point was not necessarily that a *federal* court needed to decide such claims. Although federal adjudication seemed to be the majority’s preference, Peckham left room for state tribunals to entertain federal constitutional challenges.⁶² The point, instead, was that *some* court should stand ready to hear constitutional challenges before regulated parties were forced to face catastrophic consequences.⁶³ “[B]eing of a judicial nature [the question of the sufficiency of rates] ought to be settled at the earliest moment by some court,” the majority declared.⁶⁴ “[A]nd when a Federal court first obtains jurisdiction it ought, on general principles of jurisprudence, to be permitted to finish the inquiry and make a conclusive judgment to the exclusion of all other courts.”⁶⁵

Eventually, it became well-recognized that plaintiffs could bring pre-enforcement challenges to allegedly unconstitutional state laws in suits under 42 U.S.C. § 1983,⁶⁶ which provides for “an action at law, suit in

57. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104–05 (1984) (quoting *Young*, 209 U.S. at 160).

58. Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1517 n.175 (1987).

59. *Pennhurst*, 465 U.S. at 105.

60. See, e.g., *Young*, 209 U.S. at 166 (“It cannot be to the real interest of anyone to injure or cripple the resources of the railroad companies of the country, because the prosperity of both the railroads and the country is most intimately connected.”).

61. See, e.g., *id.* at 167 (“The State cannot . . . impart to the official immunity from responsibility to the supreme authority of the United States.”).

62. Compare *id.* at 165 (“To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid.”), with *id.* (“The courts having jurisdiction, Federal or state, should at all times be open to [investors in railroads] as well as to others, for the purpose of protecting their property and their legal rights.”).

63. See *id.* (“This risk the company ought not to be required to take.”).

64. *Id.* at 166.

65. *Id.*

66. See, e.g., *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 386–93 (1988) (providing relevant procedural background, including explaining that “[p]laintiffs brought suit under 42 U.S.C. § 1983

equity, or other proper proceeding for redress” against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”⁶⁷ But *Young* remains relevant to state sovereign immunity in such suits, since the Supreme Court has held that the set of “person[s]” against whom Section 1983 cases can proceed does not include states.⁶⁸ To sue state officials under Section 1983 in their official capacity, which causes the resulting judgment to run against successors in office (among other things, as discussed below),⁶⁹ thus requires some mechanism for bypassing state sovereign immunity. *Young* continues to provide that means.⁷⁰

B. The Current Court

Fast-forward more than a century, to the Supreme Court’s rejection of *Young* claims in the 2021 *Jackson* case. As outlined above, the plaintiff abortion providers and abortion-rights advocates levied a pre-enforcement challenge to Texas’s S.B. 8.⁷¹ Known as a “heartbeat” act, S.B. 8 prohibited most abortions and assistance in procuring them beginning at the first sign of detectable embryonic “cardiac activity,”⁷² which generally occurs around six weeks into a pregnancy’s term.⁷³ Measurement of term length begins at the start of the menstrual cycle in which conception occurs—meaning that a pregnancy “starts” about two weeks *before* conception.⁷⁴ Women commonly do not learn they might be pregnant at least until they miss their period four weeks into the term—and often later, given natural variation and other factors.⁷⁵ The result is that many people will not know they are

against the Arlington County Chief of Police” and stating that “[w]e are not troubled by the pre-enforcement nature of this suit”).

67. 42 U.S.C. § 1983.

68. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989).

69. See *infra* notes 167–71 and accompanying text; see also *Will*, 491 U.S. at 71 n.10 (“Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 . . .”).

70. See *T.M. ex rel. H.C. v. DeWine*, 49 F.4th 1082, 1087–88 (6th Cir. 2022).

71. See *supra* Introduction.

72. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201(1), 171.203(b), 171.204(a), 171.208(a) (West, Westlaw through 2025 Reg. and 2d Called Sess. 89th Legis.).

73. See Venkatesh A. Murugan, Bryan O’Sullivan Murphy, Carolyn Dupuis, Alan Goldstein & Young H. Kim, *Role of Ultrasound in the Evaluation of First-Trimester Pregnancies in the Acute Setting*, 39 ULTRASONOGRAPHY 178, 181 (2020).

74. See *id.* at 178.

75. See Amy M. Branum & Katherine A. Ahrens, *Trends in Timing of Pregnancy Awareness Among US Women*, 21 MATERNAL & CHILD HEALTH J. 715, 715 (2017) (presenting results from a large study that “[a]mong all pregnancies reported, [mean] gestational age at time of pregnancy awareness

pregnant before a six-week window closes—and that even for those who do, it may be difficult to make the decisions and arrangements necessary to obtain an abortion before the time limit runs out.⁷⁶

When the Texas legislature enacted S.B. 8 in May 2021,⁷⁷ constitutional case law protected a federal right to abortion. *Roe* first recognized that right in 1973,⁷⁸ and *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirmed and reframed it in 1992.⁷⁹ Under *Casey*'s formulation, a law was invalid for imposing an “undue burden” on the right to abortion if its “purpose or effect” was “to place a substantial obstacle” in the way of obtaining the procedure before fetal viability.⁸⁰ The Court overturned *Roe* and *Casey* in 2022, holding in *Dobbs* that “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.”⁸¹ When it largely rejected the S.B. 8 challenge in December 2021 (after refusing to provide the plaintiffs preliminary relief upon the law's effective date in September⁸²), the Court had heard oral argument in *Dobbs* but not yet decided that case.⁸³ So *Roe* and *Casey* remained good law. And heartbeat bills like S.B. 8 openly defied that precedent by prohibiting abortions months before any possibility of fetal viability.⁸⁴

was 5.5 weeks” and that “the prevalence of late pregnancy awareness,” defined as “≥7 weeks’ gestation,” “was 23 %”; *see also id.* at 725 (noting an inability to examine “whether [respondents] were measuring pregnancy length using time from conception, first missed period or last menstrual period”).

76. *See* Roni Caryn Rabin, *Answers to Questions About the Texas Abortion Law*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/01/health/texas-abortion-law-facts.html> [<https://perma.cc/9AL5-Y3FS>]. In light of these counting conventions, it makes no sense—and is deeply misleading—for government officials and commentators to assert, as Texas Governor Greg Abbott did, that S.B. 8 “provides at least six weeks for a person to be able to get an abortion.” Amy Sherman, *Texas Gov. Greg Abbott Is Wrong About Pregnancy, Abortion Timeline*, POLITIFACT (Sept. 9, 2021), <https://www.politifact.com/factchecks/2021/sep/09/greg-abbott/texas-gov-abbott-wrong-about-pregnancy-abortion-ti/> [<https://perma.cc/A2JE-X7WH>].

77. *See* Shannon Najmabadi, *Gov. Greg Abbott Signs into Law One of Nation's Strictest Abortion Measures, Banning Procedure as Early as Six Weeks into a Pregnancy*, TEX. TRIB. (May 19, 2021), <https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortions-law/> [<https://perma.cc/G4W8-LV2D>].

78. 410 U.S. 113, 153 (1973).

79. 505 U.S. 833, 845–46 (1992).

80. *Id.* at 878 (opinion of O'Connor, Kennedy & Souter, JJ.).

81. 597 U.S. 215, 231 (2022).

82. *See* *Whole Woman's Health v. Jackson*, 595 U.S. 30, 38 (2021).

83. Docket, *Dobbs*, 597 U.S. 215 (No. 19-1392).

84. Flouting *Roe* and *Casey* was the primary purpose behind S.B. 8. *See* Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html> [<https://perma.cc/A4ZK-VZAV>] (quoting Jonathan Mitchell, “the conceptual force behind the legislation,” as stating that “[t]he political branches have been too willing to cede control of constitutional interpretation to the federal judiciary,” that “there are ways to counter the judiciary's constitutional pronouncements,” and that “Texas has shown that the states need not adopt a posture of learned helplessness in response to

S.B. 8's framers sought to avoid pre-enforcement judicial review by relegating implementation to private civil actions for statutory damages and injunctions by any member of the public—thus making it difficult to target an executive official for classic *Young*-style relief.⁸⁵ S.B. 8's framers also sought to avoid post-enforcement judicial review by making the statutory damages prohibitively expensive at \$10,000 *minimum* per abortion per suit and by compounding the consequences through asymmetrical cost-shifting and preclusion-stripping provisions (meaning that multiple plaintiffs could obtain judgments for a single abortion), among other things—all of which minimized the prospect of people violating the act to test its constitutionality.⁸⁶ Similar strategies failed in *Young*, but they succeeded in *Jackson*.

The challengers sued eight defendants: a state-court judge and clerk (in anticipation of seeking to certify classes of all state-court judges and clerks), the state attorney general, four leaders of state medical licensing agencies, and one private party.⁸⁷ In a majority opinion written by Justice Gorsuch and joined by Justices Alito, Kavanaugh, and Barrett in full and Justice Thomas in part, the Court labeled *Young* “a narrow exception” to state sovereign immunity that was “grounded in traditional equity practice.”⁸⁸ State-court judges and clerks do not fit within that exception, the Court explained, for they usually “do not enforce state laws as executive officials might.”⁸⁹ Indeed, *Young* itself declared that “‘an injunction against a state court’ or its ‘machinery’ ‘would be a violation of the whole scheme of our Government.’”⁹⁰ The Court dispatched the attorney general as a defendant because he did not possess any authority to enforce S.B. 8, putting him

questionable or unconstitutional court rulings”). Nevertheless, S.B. 8 gestured at complying with those decisions by purporting to provide an affirmative defense, subject to various substantive and evidentiary hurdles, for defendants who could show that plaintiffs’ claimed relief would “impose an undue burden on [a] woman or . . . group of women seeking an abortion.” TEX. HEALTH & SAFETY CODE ANN. § 171.209(b)(2) (West, Westlaw through 2025 Reg. and 2d Called Sess. 89th Legis.). As Justice Sotomayor explained in *Jackson*, there were good reasons to see that defense as “redefin[ing]” *Casey*’s undue-burden standard “to be a shell of what the Constitution require[d].” *Jackson*, 595 U.S. at 64–65 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

85. See *Jackson*, 595 U.S. at 59 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (“Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review.”); *id.* at 65 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (“If enforced, [various provisions of S.B. 8 would] prevent providers from seeking effective pre-enforcement relief (in both state and federal court) while simultaneously depriving them of effective post-enforcement adjudication . . .”).

86. See *id.* at 59 (Roberts, C.J., concurring in the judgment in part and dissenting in part); see also *id.* at 63–64, 64 n.2 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (discussing still additional ways in which S.B. rendered “litigation uniquely punitive for those sued” and included “considerable departures from the norm in Texas courts and in most courts across the Nation”).

87. *Id.* at 36–37, 39 (majority opinion).

88. *Id.* at 39.

89. *Id.*

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

beyond *Young*'s reach.⁹¹ And the Court ordered the private party's dismissal for standing reasons, as the plaintiffs did not contest his "sworn declarations . . . attesting" that he held "no intention to file an S. B. 8 suit against them."⁹²

The Court saw the case differently for the four licensing officials. "On the briefing and argument before us," Gorsuch stated, "it appears that these particular defendants fall within the scope of *Ex parte Young*'s historic exception to state sovereign immunity."⁹³ Each, the Court said, was allowed or obliged to pursue enforcement actions against individuals who violated the Texas Health and Safety Code, which included S.B. 8.⁹⁴ On remand, however, the Fifth Circuit certified the question of the licensing officials' authority to the Supreme Court of Texas, which held that the officials could not enforce S.B. 8 in any way, shape, or form.⁹⁵ That effectively ended the challenge two months after *Jackson* (and two months before *Dobbs*) came down.⁹⁶

In one of the partial dissents, Justice Sotomayor said that the short-term "chilling effect" of S.B. 8 on the right to abortion in Texas was "near total"—and warned that the majority's decision "clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree."⁹⁷ Indeed, other legislatures quickly took up aspects of S.B. 8's strategy. Idaho and Oklahoma enacted abortion laws with private-enforcement regimes before *Dobbs* came down,⁹⁸ and numerous other states considered doing so.⁹⁹ As

91. *Id.* at 43–44.

92. *Id.* at 48.

93. *Id.* at 45. Justice Thomas did not join this section of Justice Gorsuch's opinion. *See id.* at 52 (Thomas, J., concurring in part and dissenting in part). But all the other Justices agreed that the case could proceed against the licensing officials. *See id.* at 51 (majority opinion) (discussing the consensus among "eight Justices").

94. *Id.* at 45–46 (majority opinion).

95. *See Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 573–74, 583 (Tex. 2022) (concluding "that Texas law does not grant the state-agency executives named as defendants in this case any authority to enforce the Act's requirements, either directly or indirectly" because "Senate Bill 8 provides that its requirements may be enforced by a private civil action, that no state official may bring or participate as a party in any such action, that such an action is the exclusive means to enforce the requirements, and that these restrictions apply notwithstanding any other law").

96. *See Whole Woman's Health v. Jackson*, 31 F.4th 1004, 1006 (5th Cir. 2022) (instructing the district court to "dismiss all challenges to the private enforcement provisions of the statute").

97. *Jackson*, 595 U.S. at 62, 72 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

98. *See* S.B. 1309, 66th Leg., 2d Reg. Sess. (Idaho 2022) (enacted); S.B. 1503, 58th Leg., 2d Reg. Sess. (Okla. 2022) (enacted), *invalidated by* Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023).

99. *See* Caroline Kitchener, *Lawmakers Are Racing to Mimic the Texas Abortion Law in Their Own States. They Say the Bills Will Fly Through.*, WASH. POST (Oct. 19, 2021), <https://www.washingtonpost.com/gender-identity/lawmakers-are-racing-to-mimic-the-texas-abortion-law-in-their-own-states-they-say-the-bills-will-fly-through/> [<https://perma.cc/BTM6-QLDT>].

Professors Jon Michaels and David Noll wrote in 2023, S.B. 8 was part of “a broader trend among state legislatures”—with “GOP-controlled legislatures leading the charge”—of “at least a hundred bills . . . introduced since 2021” seeking “to use private rights of action to penalize and suppress highly personal and often constitutionally protected activities.”¹⁰⁰

As a matter of institutional realism,¹⁰¹ it makes sense that states would target rights that seem insecure (like the right to abortion did shortly before *Dobbs* was decided), for those are the rights that holders would feel least confident exercising against the threat of exorbitant penalties. The political and legal landscape can shift quickly, however, and even in the immediate aftermath of Texas’s move, some liberal state officials encouraged tit-for-tat reactions to S.B. 8. “‘If Texas can use a law to ban a woman’s right to choose and to put her health at risk, we will use that same law to save lives and improve the health and safety of the people of the State of California,’” Governor Gavin Newsom said in support of a bill instituting gun regulations backed by a similar enforcement regime.¹⁰² Indeed, the fact that *Young* relief has persisted as a cornerstone of civil-rights litigation despite arising from a decision protecting a constitutional right that courts no longer recognize provides powerful evidence that *Jackson*’s limitation of *Young* relief will likewise transcend the substantive area of law involved in that case. *Jackson*, that is, was only about abortion to the extent that *Young* was only about economic substantive due process—which is to say, not at all.

100. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1190–91 (2023). Another instantiation of the private-enforcement trend involves seeking to strengthen rights perceived as favored by the current Supreme Court. For instance, the Missouri Second Amendment Preservation Act, which allowed private enforcement only, Petition for Writ of Certiorari at 4, 17, Missouri v. United States, 146 S. Ct. 90 (2025) (mem.) (No. 24-796), was supposed to make the state a “Second Amendment sanctuary,” see Glenn Thrush, *Inside Missouri’s ‘2nd Amendment Sanctuary’ Fight*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/2021/09/09/us/politics/missouri-gun-law.html> [<https://perma.cc/QX4P-BBTM>]. It did so by declaring that a wide swath of “federal acts, laws, executive orders, administrative orders, rules, and regulations” would “be considered infringements on the people’s right to keep and bear arms” and by instructing state and local officials not to recognize or support them. MO. REV. STAT. §§ 1.410–1.485 (West, Westlaw through 2025 First Reg. and First and Second Extraordinary Sess. of the 103d Gen. Assemb.), *invalidated by* United States v. Missouri, 114 F.4th 980 (8th Cir. 2024) (holding that “the Act purports to invalidate federal law in violation of the Supremacy Clause”), *cert denied*, 146 S. Ct. 90 (2025) (mem.).

101. See generally Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1.

102. Kimberly Kindy & Alice Crites, *The Texas Abortion Ban Created a ‘Vigilante’ Loophole. Both Parties Are Rushing to Take Advantage.*, WASH. POST (Feb. 22, 2022), <https://www.washingtonpost.com/politics/2022/02/22/texas-abortion-law-vigilante-loophole-supreme-court/> [<https://perma.cc/92QM-LL4F>]; see Meredith Deliso, *California Governor Signs Gun Bill Modeled After Texas Abortion Law*, ABC NEWS (July 22, 2022), <https://abcnews.go.com/Politics/california-governor-signs-gun-bill-modeled-texas-abortion/story?id=87253528> [<https://perma.cc/R8CY-EGBF>]; see also, e.g., Nic Flosi, *‘Protecting Heartbeats Act’: Illinois Gun Bill Inspired by Texas Abortion Law*, FOX 32 CHI. (Sept. 28, 2021), <https://www.fox32chicago.com/news/protecting-heartbeats-act-illinois-gun-bill-inspired-by-texas-abortion-law> [<https://perma.cc/CE94-GYY9>] (discussing Illinois legislation that relied on similar logic).

C. A Future Possibility

Scholars have analyzed the recent trend toward private enforcement of public policies from a variety of perspectives—with some placing private-enforcement procedures in historical context,¹⁰³ some evaluating their use on legal and normative grounds,¹⁰⁴ and some offering criteria for separating proper from problematic schemes.¹⁰⁵ The present project instead returns to a suggestion the majority made in *Jackson*: that “we do not prejudge the possibility” that “further viable avenues to contest the law’s compliance with the Federal Constitution may be possible.”¹⁰⁶ Justice Sotomayor expressed a similar sentiment, writing that “some path to relief not recognized today may yet exist.”¹⁰⁷ It is worth asking, therefore, what alternatives could prove acceptable in future cases presenting similar concerns.

One “possibility,” as Professor Ann Woolhandler has noted, “is to allow a suit against the state” itself.¹⁰⁸ As it happens, the Supreme Court considered such a suit alongside *Jackson*, in the form of a challenge to S.B. 8 brought by the United States under President Biden’s Justice

103. See, e.g., Jennifer A. Brobst, *Perilous Private Enforcement Strategies: From Posses and Citizen’s Arrest to Texas Heartbeat Statutes*, 14 CONLAWNOW 11, 14–20 (2022); Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. 1259, 1269–95 (2023).

104. See, e.g., Matthew I. Hall & Eliza K. Hall, *Can State Legislatures Strip Federal Courts of Jurisdiction to Review State Laws?*, 76 FLA. L. REV. F. 50, 57–65 (2024) (arguing that “delegation of governmental standing to private individuals is permissible only when it satisfies the requirements of agency or assignment—which these laws do not”; that “vigilante enforcement is impermissible in American law because it creates a mechanism for bias, harassment, and abuse of process”; and that “principles of separation of powers also restrict delegation of state executive authority to vigilantes” (heading capitalization omitted)); Huq, *supra* note 103, at 1309–27 (describing “the moral economy of private suppression” and providing “several normative critiques of private suppression based on its effects upon state–individual and peer-to-peer relationships” (heading capitalization omitted)); Charles W. “Rocky” Rhodes & Howard M. Wasserman, *Judicial Process and Vigilante Federalism*, 108 CORNELL L. REV. ONLINE 125, 128 (2023) (arguing in favor of “the commonality of private-enforcement schemes and the many ways rights holders can challenge the constitutional validity of the underlying restrictions”).

105. See Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1488–91 (2022) (describing a participatory-democracy theory to help distinguish superior and inferior uses of private-enforcement mechanisms); see also Matthew A. Shapiro, *Procedural Wrongdoing*, 48 BYU L. REV. 197, 275 (2022) (discussing how “many critics of [S.B. 8] who otherwise support private enforcement have . . . condemn[ed] it as an abuse of the private enforcement model that licenses ‘vigilantism’ for the improper purpose of subverting judicially recognized abortion rights and even democracy itself,” thus focusing on “the reasons for which a private enforcement regime is instituted”).

106. *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 49 (2021).

107. *Id.* at 73 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

108. Ann Woolhandler, *State Separation of Powers and the Federal Courts*, 31 WM. & MARY BILL RTS. J. 633, 659 (2023).

Department.¹⁰⁹ The Court granted cert before judgment in *United States v. Texas* the same day as in *Jackson* and heard argument in the cases back-to-back.¹¹⁰ But upon deciding *Jackson*, the Court dismissed the cert petition in *United States v. Texas* as improvidently granted.¹¹¹ As is common, the Court provided nary a word of explanation; all we know is that Justice Sotomayor dissented from the dismissal.¹¹² That ruling had the effect of returning the federal-government suit to the Fifth Circuit, which had stayed the district court's preliminary injunction.¹¹³ Ultimately, the United States sought dismissal after *Dobbs* was decided.¹¹⁴

Some of the issues discussed in the briefing and at argument in *United States v. Texas* were unique to federal-government suits.¹¹⁵ So the Court could have harbored doubts about the United States's challenge for reasons that would not carry over to private-party challenges. More practically, the Justices could have thought there was no need to bother with the federal-government suit given that a majority approved the case's continuing against the licensing officials in *Jackson*.¹¹⁶ In any event, even if the federal government *can* sue states to challenge constitutionally suspect laws with coercive private-enforcement schemes, it will not always do so. Surely the Trump Administration would not have sought to block S.B. 8, for instance; nor did the Biden Administration contest California's copycat gun-control measure. In other contexts, as in certain environmental and civil-rights statutes, both the federal government and private plaintiffs can enforce legal duties against regulated entities (which sometimes include states).¹¹⁷ So whether private plaintiffs can bring suit against states to challenge coercive private-enforcement regimes remains an important question.

109. See *United States v. Texas*, 566 F. Supp. 3d 605, 690 (W.D. Tex.) (granting preliminary injunction against S.B. 8's enforcement), *stay granted*, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021), *cert. before judgment dismissed*, 595 U.S. 74, 75 (2021).

110. See Docket, *Jackson*, 595 U.S. 30 (No. 21-463); Docket, *United States v. Texas*, 595 U.S. 74 (No. 21-588).

111. *United States v. Texas*, 595 U.S. at 75.

112. *Id.* at 76.

113. See *United States v. Texas*, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021).

114. See *United States v. Texas*, No. 21-CV-796, 2022 WL 18495065, at *1 (W.D. Tex. Aug. 29, 2022).

115. For example, Texas argued that “[p]urported ‘sovereign interests’ do not give the United States standing here.” Brief for Respondents Jackson, Carlton, Thomas, Young, Benz, Paxton, and the State of Texas at 34, *United States v. Texas*, 595 U.S. 74 (No. 21-588).

116. See James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, 102 TEX. L. REV. 769, 779 (2024).

117. See, e.g., Clean Air Act, 42 U.S.C. § 7413 (providing for federal-government enforcement); *id.* § 7604(a) (providing for citizen suits); Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (providing for dual federal-government and aggrieved-person enforcement); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456–57 (1976) (holding that 42 U.S.C. § 2000e(a) abrogates state sovereign immunity for Title VII suits).

To be sure, extending *Young*'s scope in this way would represent a formal, and to some extent conceptual, shift toward greater acceptance of suing states in their own names. But as the ensuing discussion describes, it would cohere well with the logical structure of the Supreme Court's state-protective immunity jurisprudence. Some particular limitations would also be important to supporting and sustaining state sovereignty. First, plaintiffs should be able to attain *Young* relief against states themselves only in the context of private-enforcement schemes that sound in the tradition of public, not private, law. As Dean John Goldberg and Professor Benjamin Zipursky have argued with respect to S.B. 8, "the combination of the law's deterrent aims (and remedial provisions in furtherance of those aims) and the absence of any plausible claim for redress based on a legal wrong done to . . . the plaintiff" allows us to "infer[] that plaintiffs who sue under the Texas Act are mere delegates of state power."¹¹⁸ Accordingly, "[u]nderstanding the difference between rights of action that vindicate individual rights, on the one hand, and rights of action that merely serve public policy goals, on the other,"¹¹⁹ could allow challengers to dispute the constitutionality of the latter kind of scheme without throwing all of state regulatory and common law into question.

Second, plaintiffs should be able to sue states themselves only in those extraordinary circumstances where doing so appears reasonably necessary to obtain meaningful judicial relief in light of alternative processes. That was the rationale by which *Young* allowed suit against a state attorney general under relatively novel circumstances,¹²⁰ and it is the rationale by which equity more generally changes and adjusts.¹²¹ What precisely would count as an adequate alternative process would be context-specific, such that this project cannot envision all potential nuances. But as in *Young*, suits should be potentially available only where states have essentially foreclosed both pre- and post-enforcement judicial review—with respect to the latter, by making statutory damages or other aspects of the regime so punitive as to produce an *in terrorem* effect for the objectively reasonable regulated party. And while the fate of all regulated parties should not necessarily depend on the litigation prospects of one or two intrepid test plaintiffs, the fact and extent of parties' willingness to violate statutes should bear on courts' assessments of whether the schemes actually present penalties

118. John C.P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469, 490 (2021) (emphasis omitted).

119. *Id.*

120. See *supra* Section I.A.

121. See *Younger v. Harris*, 401 U.S. 37, 43 (1971) (stating that a "basic doctrine of equity jurisprudence" is "that courts of equity should not act . . . when the moving party has an adequate remedy at law").

exorbitant enough to permit suits against states. In light of the Madisonian Compromise (which reflects comity with state-court systems by permitting Congress to abstain from creating lower federal courts¹²²), moreover, the availability of pre-enforcement review in state court for federal constitutional violations—if capable of providing effective relief—should qualify as an adequate alternative process.

Third, in issuing judgments against future conduct by government defendants, courts can and should start with declaratory relief and proceed to more forceful injunctive remedies only where necessary to attain compliance with the law.¹²³

At bottom, federal law has never provided a remedy for every constitutional violation affecting every person in every set of circumstances. But our “constitutional tradition” has long “demand[ed] an overall structure of remedies adequate to preserve . . . a regime of government under law.”¹²⁴ The end-run encouraged by *Jackson* poses a serious threat to that tradition—a threat that suits against states in limited situations could thwart without diminishing our constitutional system’s respect for state sovereignty.¹²⁵

II. EXTENDING *YOUNG*: THE STRUCTURAL APPROACH

Recall Professor Strauss’s assertion that “[w]ere it not for sovereign immunity, the logical defendant in a suit to enjoin the enforcement of S.B. 8’s ban on pre-viability abortions would have been the state of Texas.”¹²⁶ But perhaps even *with* sovereign immunity, a logical defendant

122. See BAUDE ET AL., *supra* note 6, at 9–10.

123. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.”); see also William Baude, Samuel L. Bray & Marin K. Levy, *Remedies for a Constitutional Crisis*, 139 HARV. L. REV. 1747, 1759 (2026) (“Given the judiciary’s reluctance to control the President’s conduct—manifested, for example, in the authority suggesting that the president may not be enjoined—the courts may want to opt for decisions that state what the law is, without specifying the steps that need to be taken to give it effect. This is paradigmatically true of the declaratory judgment” (footnote omitted)).

124. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1789–90 (1991); see Katherine Mims Crocker, *To Keep Government Generally Within the Bounds of Law*, 139 HARV. L. REV. 1734, 1735–37 (2026) (discussing this principle in light of current threats to judicial review).

125. As an alternative, Congress could act to amend Section 1983 or otherwise make clear that states themselves are suable in pre-enforcement challenges to allegedly unconstitutional state laws. Congress should have the authority to abrogate, or withdraw, state sovereign immunity in this context because Section 1983 represents a direct exercise of Congress’s enforcement authority under Section 5 of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); Katherine Mims Crocker, *Reconsidering Section 1983’s Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523, 532, 537 (2021). But Congress does not do much these days.

126. Strauss, *supra* note 4, at 92.

against which to seek declaratory or injunctive relief would have been Texas. One could argue as much under either of the dominant approaches to conceptualizing *Young*, which I call the “structural” approach and the “historical” approach.

A. Articulating the Structural Approach

At least during the latter half of the twentieth century, *Young* was primarily understood through a structural constitutional lens. This approach comprehends the purpose of *Young* as maintaining both the supremacy of federal law (an aspect of federalism in our constitutional structure) and the availability of judicial review (an aspect of the separation of powers in our constitutional structure)—and understands the doctrine as adaptable to achieve those ends. As the Supreme Court put it in 1984: “[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’”¹²⁷ On that view, *Young* doctrine is integral to “establish[ing] the modern framework for federal protection of constitutional rights from state interference”¹²⁸—and is thus “‘indispensable to . . . the rule of law’” itself.¹²⁹

On a theoretical level, the structural conception commonly regards *Young* as creating both a cause of action implied from the Constitution and an exception to state sovereign immunity.¹³⁰ It is forward-looking, seeking to prevent abuses of authority by maintaining an equilibrium among government institutions, which requires adjusting to new situations as they arise. And it is functionalist in the sense that the approach focuses on the effects of legal rules on real-world circumstances.¹³¹

The dissenting opinions in *CASA* provide a recent illustration of similar structural reasoning in a closely related context. The question presented concerned whether federal courts could issue “universal” (also called

127. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)).

128. *Perez v. Ledesma*, 401 U.S. 82, 107 (1971) (Brennan, J., concurring in part and dissenting in part).

129. *Id.* at 110 (quoting CHARLES ALAN WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 186 (2d ed. 1970)).

130. See Harrison, *supra* note 27, at 990–91. The structural conception thus accords with the view that constitutional rights impose affirmative governmental duties not to act in certain ways—an understanding that Professor Garrett West calls the “constitutional-duty framework.” E. Garrett West, *Refining Constitutional Torts*, 134 *YALE L.J.* 858, 864–65, 877 (2025).

131. See *Functionalism*, *BLACK’S LAW DICTIONARY* (12th ed. 2024) (defining this “methodological approach to law” as “focusing on the effects of rules in practice . . . rather than on the precise statements of the rules themselves”).

“nationwide”) injunctions against unconstitutional government actions.¹³² Rejecting the majority’s conclusion that such injunctions did not have sufficient historical support,¹³³ Justice Jackson’s solo dissent focused on *the structural ends* of equity in public law. “[W]hat it means to have a system of government that is bounded by law is that everyone is constrained by the law, no exceptions,” Jackson said.¹³⁴ “And for that to actually happen, courts must have the power to order everyone . . . to follow the law—full stop.”¹³⁵ By concentrating “solely [on] the scope of judicial authority,” she contended, the majority “ignor[ed] (or forg[ot]) the concomitant expansion of executive power that results when the equitable remedial power of judges is needlessly restricted.”¹³⁶

Justice Sotomayor’s principal dissent, joined by Justices Kagan and Jackson, focused on *the adjustable means* of equity in public law. “Adaptability has always been a hallmark of equity,” Sotomayor asserted—“especially with regard to the scope of its remedies.”¹³⁷ Sotomayor argued that the Judiciary Act of 1789—the initial statutory provision as to federal courts’ equity jurisdiction—“codified equity itself, not merely a static list of remedies.”¹³⁸ Accordingly, she contended, *Young* represented “one respect” in which “equitable relief in the United States has evolved . . . to protect rights and redress wrongs,”¹³⁹ for “the threatened conduct of the defendant would not have been an actionable wrong at common law.”¹⁴⁰

Indicative of the structural approach is how, within a few decades, *Young*-type claims expanded to provide relief beyond the paradigmatic pre-enforcement injunction.¹⁴¹ That is why Professor Harrison calls *Brown* “[t]he most famous *Ex parte Young* lawsuit in [the twentieth] century.”¹⁴² In addition to “actions to enjoin the state from commencing judicial

132. *Trump v. CASA, Inc.*, 606 U.S. 831, 837, 837 n.1 (2025).

133. *See id.* at 844–46.

134. *Id.* at 922 (Jackson, J., dissenting).

135. *Id.*

136. *Id.* at 926 n.1.

137. *Id.* at 895 (Sotomayor, J., dissenting).

138. *Id.* at 906.

139. *Id.* at 907.

140. *Id.* (quoting RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 958–59 (5th ed. 2003)).

141. Harrison points to *Sterling v. Constantin*, which prohibited the Governor of Texas from reducing oil production, 287 U.S. 378, 403–04 (1932), as an early instance of this expansion. *See* Harrison, *supra* note 27, at 1009 n.86. He also observes that “[s]ome Justices, writing for themselves, apparently regarded the license of *Young* as extending beyond physical invasions and the institution of proceedings.” *Id.* Here, he cites Justice Black’s separate opinion in *Colegrove v. Green*, 328 U.S. 549, 568 (1946) (Black, J., dissenting), a voting-rights case, for relying on *Young* to sidestep state sovereign immunity. Harrison, *supra* note 27, at 1009 n.86. Black also invoked *Young* in *Colegrove* for the direct proposition that federal courts should “exercise their equity power” to enjoin the use of malapportioned congressional districts created by state officials. *Colegrove*, 328 U.S. at 574 (Black, J., dissenting).

142. Harrison, *supra* note 8, at 2520.

proceedings against the plaintiff,” he explains, *Young* suits have “come to include proceedings to enjoin other kinds of state action, including the administration of programs of public benefit,” like education.¹⁴³

Young suits have also come to include not just proceedings seeking negative relief (which tells a defendant *not to* do something), but also proceedings seeking affirmative relief (which tells a defendant *to* do something).¹⁴⁴ The 1979 case *Quern v. Jordan* provides an example.¹⁴⁵ The district court had determined that Illinois government parties wrongfully withheld welfare payments due under federal law.¹⁴⁶ “[U]nder the landmark decision in *Ex parte Young*,” then-Justice Rehnquist wrote for the majority, “a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury.”¹⁴⁷ The Justices therefore upheld a remedial order requiring state officials to mail notices to plaintiff class members informing them of administrative procedures that could determine whether they were owed benefits (despite having rejected an order actually awarding such benefits at a previous stage of the same case).¹⁴⁸

The affirmative relief available in *Young*-type claims can include complex “structural” injunctions, which may involve detailed federal-court oversight of regimens designed to cure constitutional violations in state and

143. *Id.* at 2519–20. To be sure, *Brown* is not universally—or perhaps even commonly—regarded as a *Young* suit. One reason may be that the most well-known defendants, like the Board of Education of Topeka, Kansas, were local-government, not state, entities and officials. Local-government parties are not entitled to state sovereign immunity, see *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890)—and thus would not fall within an understanding of *Young* as creating an exception to such immunity. But that is not a problem for Harrison, who rejects the premise that *Young* affected sovereign immunity in the first place. See Harrison, *supra* note 27, at 996. Plus, some of the defendants in *Brown*’s consolidated cases were indeed state parties. For their part, *Gebhart v. Belton* and *Bulah v. Gebhart* were “brought against the members of the [Delaware] State Board of Education.” *Gebhart v. Belton*, 91 A.2d 137, 139 (Del. 1952), *aff’d sub nom.* *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955). What is more, *Brown* came down several years before *Monroe v. Pape*, 365 U.S. 167 (1961), which permitted plaintiffs to sue local-government officials under Section 1983 relatively broadly, and even longer before *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which held that local-government entities were likewise suable under Section 1983. *Brown*, therefore, would probably not have been regarded as a Section 1983 suit, which makes *Young* a credible candidate for providing (or at least recognizing) *Brown*’s cause of action.

144. See *Negative Injunction*, BLACK’S LAW DICTIONARY (12th ed. 2024); *Affirmative Injunction*, *supra*.

145. 440 U.S. 332 (1979).

146. See *id.* at 333–34.

147. *Id.* at 337.

148. See *id.* at 334; *Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974).

local institutions like school systems and prisons.¹⁴⁹ *Brown* provides a good example here too—in the form of *Brown II*’s instruction that on remand, the district courts would retain jurisdiction to issue equitable decrees throughout the time needed “to effectuate a transition to a racially nondiscriminatory school system.”¹⁵⁰ During that period, *Brown II* said, the lower courts could “consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas . . . , and revision of local laws and regulations.”¹⁵¹

B. Application to Suits Against States

According to the structural conception of *Young*, the rule of law depends on federal courts being able to prevent states from violating people’s constitutional rights. Consequently, if states can eliminate all meaningful judicial review of a constitutionally suspect law by delegating enforcement to the public at large, the structural approach should support extending *Young* to plausible new defendants to maintain the status quo.

The Supreme Court’s 1963 decision in *Bantam Books, Inc. v. Sullivan* is instructive.¹⁵² The Rhode Island legislature established the Rhode Island Commission to Encourage Morality in Youth for the purpose of “educat[ing] the public” about “‘obscene, indecent or impure’” books and magazines and such.¹⁵³ The commission set about investigating publishers of “objectionable” materials, soliciting their “cooperation,” and “reminding” them that it had a “duty to recommend to the Attorney General prosecution of purveyors of obscenity.”¹⁵⁴ Bookmakers filed suit against the commission’s members, alleging unconstitutional intimidation under the First Amendment.¹⁵⁵

The commissioners argued that they were not susceptible to suit because they had no actual enforcement authority with respect to the state’s obscenity laws.¹⁵⁶ The Court declared that argument “untenable.”¹⁵⁷ Calling the commission’s undertakings “a scheme of state censorship effectuated by

149. Jonathan L. Marshfield, *Rethinking Structural Injunctions in State Constitutional Litigation*, 85 LA. L. REV. 491, 495 (2025) (describing “the ‘structural injunction’” as “an injunction . . . directing a political branch of government to develop and implement a remedial policy that conforms to constitutional requirements”).

150. *Brown II*, 349 U.S. 294, 301 (1955).

151. *Id.* at 300–01.

152. *See* 372 U.S. 58 (1963).

153. *Id.* at 59 (quoting H.R. Res. 1000, Gen. Assemb., Jan. Sess., 1956 R.I. Acts & Resolves 1102, 1102–03).

154. *Id.* at 60–62.

155. *Id.* at 60–61, 64.

156. *Id.* at 66.

157. *Id.*

extralegal sanctions,” the Justices remarked that “[w]e are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.”¹⁵⁸ For “[i]t is not as if this were not regulation by the State of Rhode Island,” the majority reasoned, citing *Young*.¹⁵⁹ Indeed, the Court concluded, by “obviating the need to employ criminal sanctions, the State has . . . eliminated the safeguards of the criminal process.”¹⁶⁰ The system thus represented “a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.”¹⁶¹

Bantam Books understood *Young* as empowering federal courts not just to protect constitutional rights in the classic executive pre-enforcement context, but also to counteract states’ clever attempts to violate rights without resort to traditional enforcement methods. If a case’s factual and institutional circumstances demand some adjustment to legal doctrine to achieve that objective, then so be it, the Justices made clear: Courts are well warranted “to look through forms to the substance” of the state enforcement framework.¹⁶² One way to view this idea, to quote Professor Garrett West, is that “adjudication of constitutional public law should be tailored to the circumstances in which the adjudication of constitutional public law better advances the constitutional interest protected by the rule of public law.”¹⁶³ And one situation where adjudication might “better enforce the interests protected by the relevant constitutional provision or the constitutional system generally,” West explains, involves “relax[ing] the restrictions on proper parties under *Ex parte Young*” in cases akin to *Jackson*.¹⁶⁴

One could say that the adjustment in *Bantam Books* (softening the idea of enforcement authority) was relatively small, while the adjustment considered here (making states amenable to suit) seems more significant. But since *Young* was decided, the Court has repeatedly adjusted the surrounding doctrine to respond to evolving challenges to the rule of law, including by allowing affirmative and structural remedies.¹⁶⁵ The present proposal would not intrude on state sovereignty in the ways critics of broader relief commonly question because it fits within the doctrine’s

158. *Id.* at 67, 72.

159. *Id.* at 68.

160. *Id.* at 69–70.

161. *Id.* at 70.

162. *Id.* at 67.

163. E. Garrett West, *Constitutional Private Law*, 103 WASH. U. L. REV. 409, 471 (2025).

164. *Id.* at 472.

165. *See supra* Section II.A.

original context of providing only negative relief against acts aimed at enforcing the challenged state law.¹⁶⁶

In addition, swapping states themselves for state officials as defendants in *Young* litigation would be functionally inconsequential. As the Court has explained, *Young* “allows suits . . . for declaratory or injunctive relief against state officers *in their official capacities*.”¹⁶⁷ And “[i]n an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign itself.”¹⁶⁸ The distinction between an official-capacity suit and a personal-capacity (or individual-capacity) suit makes a difference here. In the official-capacity context, “death or replacement of the named official will result in automatic substitution of the official’s successor in office.”¹⁶⁹ Among other things, that means the government cannot continuously duck *Young* suits through serial replacements of an office’s occupant. What is more, declaratory or injunctive relief against a government official in their official capacity binds not only that official and their successors, but also the government itself.¹⁷⁰ For “[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.”¹⁷¹ The practical effects on state sovereignty of *Young* suits against states, therefore, should match the practical effects on state sovereignty of *Young* suits against state officials, which the law already allows.

As it turns out, the partially dissenting Justices in *Jackson* all would have held court clerks suable—a meaningful doctrinal modification. And they would have done so because they adopted a structural orientation toward *Young*. Writing for himself and Justices Breyer, Sotomayor, and Kagan, Chief Justice Roberts acknowledged that clerks are generally not adverse to the parties in litigation and that *Young* had specifically disclaimed any authority to enjoin judicial operations.¹⁷² Nevertheless, Roberts pointed to

166. See, e.g., Harrison, *supra* note 27, at 1019 (arguing against understanding *Young* as allowing affirmative relief).

167. Reed v. Goertz, 598 U.S. 230, 234 (2023) (emphasis added).

168. Lewis v. Clarke, 581 U.S. 155, 162 (2017).

169. Kentucky v. Graham, 473 U.S. 159, 166 n.11 (1985); see FED. R. CIV. P. 25(d); FED. R. APP. P. 43(c)(2). Not so in the personal-capacity context, where “should the official [sic] die pending final resolution . . . , the plaintiff would have to pursue his action against the decedent’s estate,” *Graham*, 473 U.S. at 166 n.11—an unhelpful remedy given that what the plaintiff wants in the circumstances considered here is to prevent unconstitutional state action.

170. See, e.g., ACLU v. Johnson, 194 F.3d 1149, 1163 (10th Cir. 1999) (holding in a *Young* suit that an injunction against certain state officials in their official capacities bound the holders of other state offices because it effectively provided relief against the state itself).

171. *Graham*, 473 U.S. at 166.

172. Whole Woman’s Health v. Jackson, 595 U.S. 30, 60–61 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part) (citing *Ex parte Young*, 209 U.S. 123, 163 (1908)).

the evolution of equity over time, with “[d]ecisions after *Young* . . . recogniz[ing] that suits to enjoin state court proceedings may be proper.”¹⁷³

More fundamentally, Roberts argued, “this conclusion is consistent with the entire thrust of *Young* itself.”¹⁷⁴ For “[j]ust as in *Young*, those sued under S. B. 8 will be ‘harass[ed] . . . with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment.’”¹⁷⁵ Approving the adaptability of *Young* relief to address innovative attempts to evade constitutional constraints, Roberts contended that “[a]ny novelty in this remedy is a direct result of the novelty of Texas’s scheme.”¹⁷⁶ And he signed off with a robust espousal of judicial power to preserve the structural integrity of—and the rule of law within—the American constitutional scheme. Quoting Chief Justice Marshall, Roberts wrote that “[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.”¹⁷⁷ The right in question “does not matter,” he insisted: “[I]t is the role of the Supreme Court in our constitutional system that is at stake.”¹⁷⁸

Justice Sotomayor put the point even more plainly. “[T]he Court,” she argued, “has emphasized that ‘the principles undergirding the *Ex parte Young* doctrine’ may ‘support its application’ to new circumstances, ‘novelty notwithstanding.’”¹⁷⁹ And because S.B. 8 was *intended* “to evade *Young* as historically applied,” the majority’s decision “to shield it from scrutiny based on its novelty” was “especially perverse.”¹⁸⁰ By failing to respond more forcefully to this “brazen challenge to our federal structure,” she contended, the majority “effectively invites other States to refine S. B. 8’s model for nullifying federal rights” and “betrays not only the citizens of Texas, but also our constitutional system of government.”¹⁸¹

The foregoing assumes that the theory of unconstitutionality under which a plaintiff seeks to challenge a state law backed by a coercive private-enforcement scheme relates to the law’s substantive provisions—to S.B. 8’s

173. *Id.* at 61 (first citing *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); and then citing *Pulliam v. Allen*, 466 U.S. 522, 525 (1984)).

174. *Id.*

175. *Id.* (quoting *Young*, 209 U.S. at 160).

176. *Id.*

177. *Id.* at 62 (quoting *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809)).

178. *Id.*

179. *Id.* at 68 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (quoting *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 261 (2011)).

180. *Id.*

181. *Id.* at 63, 71. The dissenters would have also held the attorney general suable because of his general authority to enforce state law. *See id.* at 60 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 73 (Sotomayor, J., concurring in the judgment in part and dissenting in part). But that reasoning does not differ much from the similar holding in *Young* itself. *See supra* Section I.A.

restrictions on abortion, for example. But what if the plaintiff also seeks to challenge as unconstitutional the process-related arrangements through which such laws are aimed at avoiding judicial review?

In *Jackson*, the majority stressed that “[t]his Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court.”¹⁸² That is correct as a matter of black-letter law. For starters, even if there was a constitutional right to pre-enforcement judicial review in *some* court, it could not be limited to federal tribunals because under the Madisonian Compromise, Congress has the prerogative to refrain from establishing lower federal courts at all.¹⁸³ Congress could therefore create a federal cause of action to provide pre-enforcement judicial review under the U.S. Constitution solely in state court (especially if the states create no mechanism for such review themselves). As a descriptive matter, however, the Court has never held that any constitutional claim must be available to any particular plaintiff in any judicial forum on a pre-enforcement basis.

That does not mean that state legislatures can attempt to prevent federal constitutional review at their fancy by engaging in the two-step maneuver of (1) eliminating resort to pre-enforcement review by excluding executive enforcement and (2) eliminating resort to post-enforcement review by making the law’s penalties prohibitively steep. If federal law forecloses judicial review of a state statute in any given case through limitations built into Article III (including congressional control over statutory jurisdiction and causes of action), the argument could go, then so be it. But the U.S. Constitution need not afford state legislatures the same prerogative. Indeed, that was *Young*’s primary holding. The Court first held the Minnesota rate act invalid for precluding any realistic possibility of federal constitutional review.¹⁸⁴ Only then did it address the issue of sovereign immunity for which the case has become known.¹⁸⁵

As an aside in *Jackson*, Justice Sotomayor stated that for S.B. 8 to prevent abortion providers from obtaining both pre- and post-enforcement judicial review “potentially violat[ed] procedural due process.”¹⁸⁶ Procedural due process represents one possible source of a constitutional problem with coercive private-enforcement regimes, but there are others. In particular, if the problem with statutes like the rate reduction in *Young* and the abortion ban in *Jackson* can arise only with respect to state laws, structural federalism principles must contribute to the constitutional issue in

182. *Jackson*, 595 U.S. at 49.

183. See BAUDE ET AL., *supra* note 6, at 9–10.

184. See *supra* Section I.A.

185. See *supra* Section I.A.

186. *Jackson*, 595 U.S. at 65 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

play. Consider Supremacy Clause preemption, as recognized in Chief Justice Marshall's opinion for the Court in *McCulloch v. Maryland*, under which states cannot regulate in ways that threaten the integrity of federal institutions.¹⁸⁷ In *McCulloch*, Maryland sought to tax the Bank of the United States directly.¹⁸⁸ In the present context, states (like Texas) are trying to undermine federal courts' constitutional pronouncements indirectly—but that distinction should not necessarily make a difference.

To be sure, the challengers did not clearly raise a claim along these lines in *Jackson*,¹⁸⁹ and the majority paid almost no mind to the possibility of this kind of constitutional problem. Litigants and courts could flesh out the issue moving forward, however. And one need not be confident that the process-related aspects of statutes like S.B. 8 are unconstitutional for the prospect to matter. If the question poses meaningful concerns, the canon of constitutional avoidance could counsel reading otherwise unclear statutory provisions to allow judicial review¹⁹⁰—as in *Young* itself, where the Court's construction of Minnesota law as authorizing the attorney general to enforce the rate legislation essentially cured the process-related constitutional defect the majority initially identified.¹⁹¹

Where the constitutional argument is that a statute's substantive regulations violate a plaintiff's rights (as with the *Roe*-based argument in *Jackson*), it makes sense that the plaintiff should proceed against any officials associated with the statute's potential enforcement who are available to sue—and should be permitted to proceed against the state if no such officials exist. But where the constitutional argument is that there are *no* officials associated with the statute's enforcement who are available to sue, the “fiction” from *Young* that officials can be treated as individuals for

187. See 17 U.S. (4 Wheat.) 316, 431 (1819) (“[T]hat there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, [is a] proposition[] not to be denied.”); see also NEIL S. SIEGEL, *THE COLLECTIVE-ACTION CONSTITUTION* 25–26 (2024) (explaining how in *McCulloch*, “Marshall concludes that the US Constitution embodies a fundamental belief in ‘the overriding importance of national union as against the centrifugal forces of state parochialism’” and “interprets the Constitution in light of this purpose”).

188. See *McCulloch*, 17 U.S. (4 Wheat.) at 317–19 (syllabus).

189. The challengers did raise a somewhat related equal-protection claim, but it focused more on the argument that potential S.B. 8 defendants were “single[d] out” and “treat[ed] . . . differently from all other defendants in civil litigation in Texas” than on the underlying process deficiencies. Complaint for Declaratory and Injunctive Relief—Class Action at 40, *Whole Woman’s Health v. Jackson*, 556 F. Supp. 3d 595 (W.D. Tex.) (No. 21-CV-616), *aff’d in part, rev’d in part, and remanded*, 595 U.S. 30 (2021).

190. See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1945 (1997) (“[C]urrent doctrine obliges federal courts to construe statutes to save them from unconstitutionality when fairly possible. The duty to issue saving constructions underpins two central tenets of federal statutory interpretation. The first tenet is the canon of avoidance, which in its modern form directs courts to construe ambiguous acts of Congress to avoid substantial constitutional questions.” (footnote omitted)).

191. See *supra* Section I.A.

purposes of constitutional litigation has no practical effect. Instead, the state is the most logical defendant from the start.

Under the structural approach, in sum, there is a strong case for extending *Young* to suits against states in certain challenges to constitutionally suspect state laws with coercive private-enforcement regimes. Indeed, multiple current members of the Supreme Court—Chief Justice Roberts and Justices Sotomayor and Kagan—have expressed an openness to making new kinds of state-government defendants suable under *Young* where necessary to counteract new kinds of state-government schemes to deprive people of constitutional rights. Justice Jackson, too, has endorsed an expansive view of equity’s capacity to fortify judicial power in the face of increasing attacks on the rule of law by other government institutions.

III. EXTENDING *YOUNG*: THE HISTORICAL APPROACH

The structural conception continues to animate the way that much of the judiciary and scholarly community understands *Young*. In the last quarter century, however, functionalist approaches to federal courts’ equity jurisdiction have seen a significant retrenchment, with the Supreme Court and some prominent academics instead adopting a traditionalist orientation. As the historical approach has become ascendant, debates on the details of its deployment have bubbled up. Through the lens of different accounts—one revisionist, one restorationist—of the place and import of *Young* in the sweep of American jurisprudence, the following discussion explores the rise of the historical approach and uncertainties surrounding its implementation before turning to the effects of the competing versions on the prospect of suits against states.

A. *Articulating the Historical Approach*

In 1999, the Supreme Court decided a contract case called *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*¹⁹² At issue was the propriety of a preliminary injunction forbidding the defendant from divesting the amount necessary to satisfy a potential judgment on the plaintiffs’ damages claims. Justice Scalia’s majority opinion tied the availability of equitable remedies to the Judiciary Act of 1789, which (echoing Article III¹⁹³) was the initial statutory provision as to federal courts’ jurisdiction over “suits . . . in equity.”¹⁹⁴ In light of that provision,

192. 527 U.S. 308 (1999).

193. See U.S. CONST. art. III, § 2 (stating that “[t]he judicial Power shall extend to all Cases, in Law and Equity,” that fall within certain subject matters).

194. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

the Court declared that “the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.”¹⁹⁵ Despite stipulating that “[w]e do not question the proposition that equity is flexible,” the majority concluded that federal courts may not “create remedies previously unknown to equity jurisprudence.”¹⁹⁶ The Court held that the asset-freezing injunction at bar failed that test.¹⁹⁷

For herself and three colleagues, Justice Ginsburg filed a forceful opinion dissenting in relevant part. “In my view,” she wrote, “the Court relies on an unjustifiably static conception of equity jurisdiction.”¹⁹⁸ While the Justices had always “defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England,” Ginsburg argued, “we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.”¹⁹⁹ Ginsburg emphasized the importance of equity’s adaptability to do justice in changing circumstances, quoting precedent and scholarship praising its “[f]lexibility” and “capacity of expansion.”²⁰⁰ Notably, she cited the supervisory role assigned to district courts after *Brown* as an example of the Court’s “uph[olding] diverse injunctions that would have been beyond the contemplation of the 18th-century Chancellor.”²⁰¹

Grupo Mexicano reflected and reinforced a shift toward “a historically inflected methodology” for construing federal courts’ equity jurisdiction.²⁰² Although adherents do not agree on all aspects of this kind of approach,

195. *Grupo Mexicano*, 527 U.S. at 318 (quoting ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)).

196. *Id.* at 322, 332.

197. *Id.* at 333.

198. *Id.* at 336 (Ginsburg, J., concurring in part and dissenting in part).

199. *Id.*

200. *Id.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (“Flexibility rather than rigidity has distinguished [federal equity jurisdiction].” (alteration in original))); *id.* at 337 (quoting 1 SPENCER W. SYMONS, POMEROY’S EQUITY JURISPRUDENCE § 67, at 89 (5th ed. 1941) (“[The] American system of equity is preserved and maintained . . . to render the national jurisprudence as a whole adequate to the social needs. . . . [I]t possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age.” (second, third, and fourth alterations in original))); *see also id.* at 336–37 (collecting additional citations).

201. *Id.* at 337, 337 n.4; *see supra* text accompanying notes 150–51 (discussing this role).

202. James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1269 (2020). Compare Riley T. Keenan, *Functional Federal Equity*, 74 ALA. L. REV. 879, 881 (2023) (asserting that “the Court’s pivot [toward a historical approach to construing equity jurisdiction] marks a striking departure from past practice”), with Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1002–03 (2015) (“What the Court is doing is not new in the sense of a dramatic break with the immediate past. . . . Yet before the new equity cases the Court seemed unsure of how much force to give the historical distinctions between legal and equitable remedies.”).

using what Professor Pfander and Jacob Wentzel have described as “equitable traditionalism,” commentators have often “sought to confine federal equity power to the forms of equitable intervention common in the English High Court of Chancery at the time judicial power was first conferred on the lower federal courts in 1789.”²⁰³ Nowadays, a historically informed understanding of equity in American law is especially associated with Professor Samuel Bray, whom the Supreme Court vindicated in *CASA* by holding that universal injunctions were insufficiently justified by historical practices.²⁰⁴

Echoing *Grupo Mexicano* (though without citing it), the Court adopted a strict historical approach to *Young* in *Jackson*. Justice Gorsuch’s opinion declared that “[t]he equitable powers of federal courts are limited by historical practice” and repeated that proposition like a mantra throughout.²⁰⁵ *Young* complied with this limitation, Gorsuch explained, because it allowed a “narrow” kind of relief “grounded in traditional equity practice.”²⁰⁶ But *Young* and other “older ‘wooden’ authorities” could not justify expanding the powers of equity to reach beyond “those [executive] officials who possess authority to enforce a challenged state law,” Gorsuch said.²⁰⁷ For “one thing this Court may never do is disregard the traditional limits on the jurisdiction of federal courts just to see a favored result win the day.”²⁰⁸

While the structural approach to *Young* doctrine is forward-looking, the historical approach is backward-focused because it ties the lawfulness of equity practices to their conformity with the past. And while the structural approach is functionalist, the historical approach is formalist in the sense that it adopts a supposedly objective understanding of the relevant statutory text (“equity”).²⁰⁹ These descriptions are all relative, of course. The

203. Pfander & Wentzel, *supra* note 202, at 1269, 1271–72.

204. See *Trump v. CASA, Inc.*, 606 U.S. 831, 842–43 (2025) (“[U]nder longstanding equity practice in England, there was no remedy ‘remotely like a national injunction.’” (quoting Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425 (2017))); *id.* at 844 (“[U]niversal injunctions were not a feature of federal-court litigation until sometime in the 20th century.” (citing Bray, *supra*, at 448–52)).

205. *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 44 (2021); see also, e.g., *id.* (describing “traditional equitable principles” limiting courts from enjoining everyone and from enjoining actual laws); *id.* at 45 (stating that “precedents requir[e] federal courts to abide by traditional equitable principles”); *id.* at 46 (plurality opinion) (agreeing that “suits seeking equitable relief against executive officials are permissible only when supported by tradition”); *id.* at 50 (majority opinion) (stating that “this Court has always required . . . compliance with traditional rules of equitable practice”).

206. *Id.* at 39 (majority opinion).

207. *Id.* at 41–42 (quoting *id.* at 68 (Sotomayor, J., concurring in the judgment in part and dissenting in part)); *id.* at 46 (plurality opinion).

208. *Id.* at 51.

209. See *Formalism*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining this “approach to law, and esp. to constitutional and statutory interpretation,” as “holding that where an authoritative text

structural approach accords some weight to text and tradition, for instance.²¹⁰ And *Grupo Mexicano* insisted that the historical approach allows some adjustments in light of changed conditions.²¹¹ But the structural understanding is more forward-looking and functionalist, and the historical understanding is more backward-looking and formalist.

As the historical approach to federal courts' equity jurisdiction has gained influence alongside turns toward "history and tradition" in constitutional and statutory interpretation more broadly,²¹² two competing versions of the *Young* remedy's jurisprudential pedigree have emerged. I call the first the "revisionist" version because its originator argues that viewing *Young* through this lens should prompt the reconsideration, and narrowing, of prominent implications from the doctrine. I call the second the "restorationist" version because its originators argue that viewing *Young* this way should revive confidence in a relatively expansive understanding of the doctrine's implications. As the discussion below captures, these theories derive in part from different ideas about the content and uses of the relevant historical record—about what sources equitable traditionalism should take into account and to what ends.

1. The Revisionist Version

Professor Harrison has been the primary proponent of the revisionist version of *Young*'s historical conception, which a majority on the Supreme Court has recently, but tangentially, endorsed. Harrison advocates regarding *Young* as adopting an incremental innovation to the longstanding equitable mechanism known as the antisuit injunction.²¹³ *Young*, he says, "approved the use against a state officer of a standard tool of equity, an injunction to restrain proceedings at law," whereby "a party who would be the defendant

governs, meaning is to be derived from its words . . . [and that] the standards for deciding what constitutes following the rules is objectively ascertainable"—as well as "an interpretive method whereby the judge adheres to the words rather than pursuing the text's unexpressed purposes (purposivism) or evaluating its consequences (consequentialism)").

210. See, e.g., *Trump v. CASA, Inc.*, 606 U.S. 831, 899 (2025) (Sotomayor, J., dissenting) ("[T]he issuance of broad equitable relief intended to benefit parties and nonparties has deep roots in equity's history and in this Court's precedents.").

211. See *supra* note 196 and accompanying text.

212. See Dov Fox & Mary Ziegler, *The Lost History of "History and Tradition,"* 98 S. CAL. L. REV. 1, 1 (2024) ("The Supreme Court has decided one blockbuster after another by appealing to 'history and tradition,' deploying this trope to remake key features of the constitutional landscape: from overturning *Roe* to abolishing affirmative action; from narrowing the scope of public accommodations to widening the margin for church/state entanglements.").

213. Harrison, *supra* note 27, at 990.

in a corresponding lawsuit can enforce in equity a legal position that would be a defense at law.”²¹⁴

Antisuit injunctions trace back essentially to the start of chancery—and were elemental to equity’s rise.²¹⁵ As Professor John Norton Pomeroy explained: “Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction.”²¹⁶ Thus, “during its formative periods, the equitable jurisdiction was built up through the instrumentality of the injunction restraining the prosecution of legal actions.”²¹⁷ Potential defendants at law could use antisuit injunctions in equity “to present a defense that was not recognized at law”²¹⁸—such as where a party was “deprived of his rights by fraud, or accident, or mistake.”²¹⁹ Or they could use antisuit injunctions where a position “would be inadequately protected by being raised as a defense in a legal proceeding”²²⁰—such as where “some distinctively equitable relief” like “a cancellation or a reformation of the instrument sued upon” was necessary to satisfy “the ends of justice.”²²¹ Accordingly, not all prospective legal defendants could avail themselves of this equitable tool: One had to make the familiar showing that legal remedies were inadequate.²²² But as the fact that remedies like contract reformation could accompany antisuit injunctions shows, where a suit was cognizable in equity, this device was adaptable to “determine the whole cause” for the purpose of providing “a full settlement of the controversy” and “a complete protection of the defendant’s rights.”²²³

While courts and commentators have described *Young* as establishing an exception to sovereign immunity and creating a new cause of action,²²⁴ Harrison disputes both characterizations. Since “[s]overeign immunity

214. *Id.*

215. 4 JOHN NORTON POMEROY, JR., POMEROY’S EQUITY JURISPRUDENCE § 1360, at 2699 (3d ed. 1905) (“The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction.”).

216. *Id.* § 1360, at 2699–700.

217. *Id.* § 1360, at 2700.

218. Harrison, *supra* note 27, at 997.

219. 2 MELVILLE M. BIGELOW, STORY’S COMMENTARIES ON EQUITY JURISPRUDENCE § 877, at 191 (13th ed., Boston, Little, Brown & Co. 1886).

220. Harrison, *supra* note 27, at 997–98.

221. POMEROY, *supra* note 215, at § 1363, at 2706.

222. *Id.*

223. *Id.*

224. *See, e.g.,* Whole Woman’s Health v. Jackson, 595 U.S. 30, 39 (2021) (“Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity. To be sure, in *Ex parte Young*, this Court recognized a narrow exception grounded in traditional equity practice” (internal citation omitted)); BAUDE ET AL., *supra* note 6, at 1199 (“One account holds that *Ex parte Young* viewed the Constitution itself as implying a federal right of action to secure relief from threatened enforcement of an unconstitutional law. Such a conception of the right to sue as springing directly from the Fourteenth Amendment was once widely shared.”).

permits private people to assert defenses against the government,” he argues, “a suit against an officer that enforces a defense is consistent with sovereign immunity, not an exception to it.”²²⁵ Likewise, because “[a]ntisuit injunctions have long been a standard tool of equity, . . . in approving one the Court in *Young* did not recognize a novel cause of action applicable only to government officers.”²²⁶ This history also falsifies the idea that *Young* fashioned a fiction allowing courts to ignore the effect of equitable relief on states, Harrison argues. Since raising defenses against the government does not violate sovereign immunity, seeking an antisuit injunction against a government official “does not require a fiction to cover up a violation of sovereign immunity.”²²⁷ Finally, this understanding resolves *Young*’s ostensible paradox, Harrison asserts. Because the susceptibility of officials to antisuit injunctions does “not derive from a rule applying only to the State[s], . . . there is no paradox” by which defendants need “both to affirm and deny” that they are part of the government.²²⁸

While the Court purported to apply an exacting historical analysis in *Jackson*, only Justice Thomas’s solo opinion specifically endorsed the revisionist theory.²²⁹ In *CASA*, by contrast, the majority gestured at the antisuit rationale. Dissenting from the conclusion that universal injunctions were too far afield from traditional equitable practices, Justice Sotomayor relied on *Young* to argue that the majority’s historical inquiry was unacceptably static. The *Young* remedy, she asserted, “traces back to the equity practice of mid-19th century courts”—and thus “finds no analogue in the relief exercised in the English Court of Chancery, which could not enjoin the Crown or English officers.”²³⁰ Attempting to brush that point aside in a footnote, the majority responded that “[h]istorically, a court of equity could issue an antisuit injunction to prevent an officer from engaging in tortious conduct.”²³¹

225. Harrison, *supra* note 27, at 990. This conception accords with the view that constitutional rights operate only against the backdrop of subconstitutional legal processes to nullify ultra vires exercises of governmental power. See *id.* at 1004, 1019–21. Professor West calls that understanding of constitutional rights the “nullification framework.” West, *supra* note 130, at 863–64.

226. Harrison, *supra* note 27, at 989.

227. *Id.*

228. *Id.* at 990.

229. See *Jackson*, 595 U.S. at 53 (Thomas, J., concurring in part and dissenting in part) (“The negative injunction remedy against state officials countenanced in *Ex parte Young* is a ‘standard tool of equity’ that federal courts have authority to entertain under their traditional equitable jurisdiction.” (quoting Harrison, *supra* note 27, at 990)).

230. *Trump v. CASA, Inc.*, 606 U.S. 831, 907 (2025) (Sotomayor, J., dissenting).

231. *Id.* at 846 n.9 (majority opinion). The majority conflated two lines of precedent here—one authorizing antisuit injunctions based on proactive assertions of what would have been defenses at law, which did not involve tort-like behavior, and a second authorizing both damages and injunctive relief

Professor Harrison's account of *Young* is revisionist in the sense that it prompts questions about whether some prominent doctrinal implications from the decision "need to be reconsidered."²³² Of particular pertinence here, Harrison contends that if *Young* did not create a new exception to sovereign immunity but instead continued an old exclusion, we should not see the decision as licensing (further) exceptions.²³³ Accordingly, he asserts, *Young* should not allow litigants to subject state defendants to affirmative injunctive relief, whether in the contract sphere or otherwise.²³⁴

2. *The Restorationist Version*

Some scholars see *Young*'s history differently than Professor Harrison does—and contend that a more complete picture of the remedy's precursors would justify its present scope. In particular, Professor Pfander and Mr. Wentzel have argued that the pedigree for relief preventing the implementation of unlawful statutes includes a trio of writs that crossed from law into equity.²³⁵ "Because equity emerged as a 'supplementary' system which 'at every point . . . presupposed the existence of common law,'" they assert, a traditionalist examination should view equity "in its historical context—not in isolation from, but in relation to, the relief available at common law."²³⁶ And here, that context includes the writs of mandamus, certiorari, and prohibition—all of which began as means for the common-law Court of King's Bench to supervise the nascent British administrative state.²³⁷ Throughout the nineteenth century in the United States, Pfander and Wentzel argue, those writs merged into and expanded the preexisting writ of injunction in equity.²³⁸

Mandamus, certiorari, and prohibition previously served as tools to review the conduct of lower or specialized courts.²³⁹ In the early seventeenth century, however, with the Privy Council proving impotent to hold early administrative officials accountable to the law in large part because of that body's close ties to the Crown, Sir Edward Coke led the King's Bench in

against government officials acting under unconstitutional legal mandates, which did. *See* Harrison, *supra* note 27, at 1017–18 (contrasting these lines of precedent). But the distinction does not necessarily make a difference for the majority's point that *Young* can claim some historical credibility from the antisuit tradition.

232. Harrison, *supra* note 27, at 1018–19.

233. *See id.* at 1019–20.

234. *See id.* at 1019.

235. Pfander & Wentzel, *supra* note 202, at 1276–81.

236. *Id.* at 1275–76 (alteration in original) (quoting F.W. MAITLAND, *EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW* 17–20 (A.H. Chaytor & W.J. Whittaker eds., 1910 repr.) (1909)).

237. *Id.* at 1276–77.

238. *Id.* at 1279–81.

239. *Id.* at 1295–96.

repurposing those writs to help supervise government more broadly.²⁴⁰ In *Bagg's Case* in 1614, for example, Coke used the writ of restitution, the forerunner of mandamus, to order a local council to restore a man's "franchise and freedom" based on the jurisdictional theory that "to this Court of King's Bench belongs [the] authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or . . . any manner of misgovernment."²⁴¹

As Pfander and Wentzel explain: "From the mid-seventeenth through the mid-nineteenth centuries, King's Bench zealously oversaw 'the business of local government' by 'keeping subordinate bodies within their legal limitations by writs of certiorari and prohibition' and 'ordering them to perform their duties by writs of mandamus.'"²⁴² In particular, certiorari and mandamus "quickly established themselves as 'the twin pillars of the common law of judicial control,' the former serving to quash unlawful exercises of discretionary authority and the latter to compel the performance of nondiscretionary duties."²⁴³ Prohibition, meanwhile, worked as an adjunct to certiorari—with prohibition empowering the court to avert unlawful judicial or administrative action before it occurred and certiorari empowering the court to annul such action after it happened.²⁴⁴

Across the pond, mandamus made a conspicuous appearance as a means of supervising executive action in *Marbury v. Madison*, which the Supreme Court decided in 1803.²⁴⁵ The ultimate holding of Chief Justice Marshall's opinion for the Court was, of course, that the Justices did not have jurisdiction to issue the writ to require the delivery of William Marbury's commission.²⁴⁶ But that was as a matter of the Court's original jurisdiction; Marshall went out of his way to make clear that mandamus was an appropriate remedy for federal courts to grant more generally.²⁴⁷ Nevertheless, Chief Justice Taney reduced the scope of the writ with *Decatur v. Paulding* in 1840²⁴⁸—"a move that enjoyed little support in

240. *Id.*

241. *Id.* at 1296–98 (alterations in original) (emphasis omitted) (quoting James Bagg's Case (1615) 77 Eng. Rep. 1271, 1277–78, 1281; 11 Co. Rep. 93 b, 98 a, 99 b).

242. *Id.* at 1299 (footnote omitted) (quoting LORD WOOLF, JEFFREY JOWELL & ANDREW LE SUEUR, *DE SMITH'S JUDICIAL REVIEW* 787 (6th ed. 2007)).

243. *Id.* (quoting LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 176, 328 (1965)).

244. *Id.* at 1300.

245. 5 U.S. (1 Cranch) 137 (1803).

246. *See id.* at 173–76.

247. *See* Pfander & Wentzel, *supra* note 202, at 1306–07; *Marbury*, 5 U.S. (1 Cranch) at 173 ("This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired, [w]hether it can issue from *this court*." (emphasis added)).

248. 39 U.S. (14 Pet.) 497 (1840).

mandamus tradition,” Pfander and Wentzel assert.²⁴⁹ Mandamus thereafter applied in federal court only to correct blatantly obvious instances of unlawful executive action.²⁵⁰ But compared with their experience at the federal level, the writs of mandamus and certiorari “fared much better at the state level, where they remained important ‘organ[s] of administrative oversight and control’ for much of the nineteenth century.”²⁵¹ The writ of prohibition, meanwhile, fell into disuse against executive officials.²⁵² That, Pfander and Wentzel argue, both explicitly and implicitly contributed to state courts’ expanded reliance on the equitable writ of injunction, which could also serve to declare government action unlawful on a prospective basis.²⁵³

Indeed, Pfander and Wentzel assert that in the latter half of the nineteenth century, the injunction in equity subsumed much of the function previously fulfilled by the administrative writs at law.²⁵⁴ The admixture owed much to New York’s Field Code, which in 1848 made law and equity available in a single action and provided a pattern for other states to follow in reforming their own procedural rules.²⁵⁵ “Once state judges had access to both common law and equitable remedies in the same action,” Pfander and Wentzel explain, “they exhibited a much greater willingness to utilize those of equity, which by their very nature were more ‘readily adaptable to [the] practical needs of [the] modern system of judicial review.’”²⁵⁶ In addition to prohibition’s desuetude, for example, Pfander and Wentzel point to the problem that mandamus relief was entirely affirmative, leaving a gap for equity to fill where petitioners sought the fulfillment of nondiscretionary government duties via negative relief.²⁵⁷

In the federal system, Pfander and Wentzel argue, the injunction’s public-law province grew from preventing tort-like conduct by government officials and canceling invalid patents before the Civil War to requiring lawful conduct more generally on the part of government parties in the postbellum period.²⁵⁸ Although earlier cases inaugurated the transition, Pfander and Wentzel contend that congressional enactment in 1875 of what

249. Pfander & Wentzel, *supra* note 202, at 1307–08.

250. *Id.* at 1308.

251. *Id.* at 1311 (alteration in original) (footnote omitted) (quoting James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1524 n.35 (2001)).

252. *Id.* at 1311, 1317–18.

253. *Id.* at 1317–18.

254. *Id.* at 1318.

255. *Id.* at 1319–20.

256. *Id.* at 1320 (alterations in original) (quoting Kenneth Culp Davis, *Mandatory Relief from Administrative Action in the Federal Courts*, 22 U. CHI. L. REV. 585, 608 (1955)).

257. *Id.* at 1320–21.

258. *Id.* at 1324–27, 1330.

was effectively the first statute to confer general federal-question jurisdiction on the federal courts was critical to this crescendo.²⁵⁹ Shortly thereafter, they explain, “the lower federal courts ‘began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action’ based ‘on the theory that [they] needed only a grant of jurisdiction . . . in order to exercise the powers of a court of equity.’”²⁶⁰ And “[f]rom that moment forward, federal courts at all levels routinely recognized the availability of equitable relief against unlawful government action.”²⁶¹

This trend persisted through the end of the nineteenth century, producing multiple decisions on which *Young* relied.²⁶² “In case after case challenging unlawful state action, the Supreme Court continued to invoke the common law tradition in support of the interposition of equity,” Pfander and Wentzel observe, including in *Allen v. Baltimore & Ohio Railroad Co.*, *Poindexter v. Greenhow*, *Pennoyer v. McConaughy*, and *Reagan v. Farmers’ Loan & Trust Co.*²⁶³ On this understanding, *Young* was but a marginal variation on a deeply rooted and resonant theme. The inapplicability of sovereign immunity to this conception of *Young* is not difficult to understand, Pfander and Wentzel contend.²⁶⁴ For the English law from which the relevant injunctions grew viewed the administrative writs as “command[ing] rogue officers to do ‘right and justice’” and thus “‘never regarded officers as possessing any particular immunities resulting from their position as officers.’”²⁶⁵

Just as Professor Harrison’s project is revisionist in the sense that it purports to undermine doctrinal implications from *Young* suggesting a broad scope of relief, Pfander and Wentzel’s project is restorationist in the sense that it seeks to vindicate such implications. As especially relevant here, Pfander and Wentzel argue that “[t]he common law origin story expands the potential scope of federal remediation well beyond the negation remedy

259. *Id.* at 1329–30; see Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 720, 720 n.19 (1986) (describing a brief period, between 1801 and 1802, when Congress previously granted general federal-question jurisdiction).

260. Pfander & Wentzel, *supra* note 202, at 1330 (alterations in original) (quoting Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 949 (2011)).

261. *Id.*

262. *Id.* at 1331.

263. *Id.*; see *Allen v. Balt. & Ohio R.R. Co. (Virginia Coupon Cases)*, 114 U.S. 311, 315 (1885); *Poindexter v. Greenhow (Virginia Coupon Cases)*, 114 U.S. 270, 293 (1885); *Pennoyer v. McConaughy*, 140 U.S. 1, 12–17 (1891); *Reagan v. Farmers’ Loan & Tr. Co.*, 154 U.S. 362, 400–13 (1894).

264. Pfander & Wentzel, *supra* note 202, at 1335–36.

265. *Id.* (first quoting THOMAS TAPPING, *THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS, AS IT OBTAINS BOTH IN ENGLAND, AND IN IRELAND* 5 (London, William Benning & Co. 1848); and then quoting FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 396 (1905)).

contemplated in Harrison’s antisuit model.”²⁶⁶ Locating *Young*’s roots in the administrative writs allows courts to award affirmative injunctive relief against government defendants where necessary to maintain consistency with the law, they contend. For the administrative writs themselves offered a “relatively expansive collection of remedies.”²⁶⁷

B. Application to Suits Against States

With the above understandings of the historical approach to federal courts’ equity jurisdiction, we can ask how the revisionist and restorationist versions of *Young*’s background might apply to suits against states challenging laws backed by coercive private-enforcement schemes. But before we get to that particular question, it is worth considering a more general methodological matter.

Grupo Mexicano professed “not [to] question the proposition that equity is flexible.”²⁶⁸ But the Court offered few clues about what that might mean. At what point, then, does bending traditional remedies cause a prohibited break with the past? “[R]elief that has been specifically disclaimed by longstanding judicial precedent” is especially suspicious, *Grupo Mexicano* suggested.²⁶⁹ And “wrenching departure[s] from past practice” (as well as “dramatic departure[s] from prior practice” and “substantial expansion[s] of past practice”) fall within the purview of Congress, not the courts.²⁷⁰ But combined with the caveat that some unspecified amount of flexibility is fine, those standards seem quite vague.

CASA does not provide much clarity either. In dissent, Justice Sotomayor asserted that *Grupo Mexicano* “does not dictate the level of generality” at which to compare past and present remedies—and criticized the majority for “fundamentally misunderstand[ing] the nature of equity by freezing in amber the precise remedies available” in 1789.²⁷¹ Rejecting that characterization, Justice Barrett’s opinion for the Court pointed to *Grupo Mexicano*: “We said it before, and say it again: ‘[E]quity is flexible.’”²⁷² “At the same time,” the majority continued, this “flexibility is confined within the broad boundaries of traditional equitable relief,” meaning that “[a] modern device need not have an exact historical match, but . . . must have a founding-era antecedent.”²⁷³ Universal injunctions did not qualify because

266. *Id.* at 1343.

267. *Id.* at 1343–44.

268. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

269. *Id.*

270. *Id.* at 322, 328, 329.

271. *Trump v. CASA, Inc.*, 606 U.S. 831, 907 (2025) (Sotomayor, J., dissenting).

272. *Id.* at 846 (majority opinion) (alteration in original) (internal citation omitted) (quoting *Grupo Mexicano*, 527 U.S. at 322).

273. *Id.* at 846–47 (quoting *Grupo Mexicano*, 527 U.S. at 322).

“a sufficiently comparable predecessor” was not “available from a court of equity at the time of our country’s inception.”²⁷⁴ But that just begs the question of what qualifies as a “sufficiently comparable predecessor.” Class actions, it seems, are close enough to the historical form of litigation known as the bill of peace.²⁷⁵ But petitions for universal injunctions are not.²⁷⁶ And despite describing differences between bills of peace and requests for universal injunctions (and borrowing a memorable dragon metaphor),²⁷⁷ the Court again neglected to provide a transferable test to guide future inquiries into when differences in remedial degree become differences in jurisdictional kind.

For his part, Professor Bray finds *Grupo Mexicano*’s approach overly rigid. He has argued that by placing so much weight on the particular remedies available in 1789, Justice Scalia’s majority opinion “was seeking an equity that seemed almost frozen in time.”²⁷⁸ But, he continues, “the solution is not to turn to the ‘grand aims of equity’ offered by the dissent.”²⁷⁹ For the principles of “flexibility and adaptability,” when “standing apart from more specific equitable doctrines and practices, offer no guidance to lower courts.”²⁸⁰ Instead, Bray praises the Court’s post-*Grupo Mexicano* synthesis of an “artificial” and “idealized” history that “tend[s] to draw from the equity of the middle-to-late nineteenth century and the early twentieth century” but that “sometimes” includes “more recent cases and scholarship” as well.²⁸¹ That body of law, he submits, combines the virtues of having both a core of definite content, as Congress would expect in enacting laws referencing “equitable” relief, and equity’s characteristic “capacity for change” by way of “modest updating.”²⁸²

One aspect of *Grupo Mexicano* that would have seemed pertinent made no appearance in *CASA*. In *Grupo Mexicano*, the parties requesting equitable relief pointed to *United States v. First National City Bank*, a 1965 decision in a federal tax-assessment suit where the Court approved a preliminary injunction preventing a bank from transferring assets belonging

274. *Id.* at 847.

275. *Id.* at 848–49.

276. *See id.*

277. *See id.* (“As Chief Judge Sutton aptly put it, ‘[t]he domesticated animal known as a bill of peace looks nothing like the dragon of nationwide injunctions.’” (alteration in original) (quoting *Arizona v. Biden*, 40 F.4th 375, 397 (6th Cir. 2022) (Sutton, C.J., concurring))).

278. Bray, *supra* note 202, at 1010–12.

279. *Id.* at 1012.

280. *Id.*

281. *Id.* at 1001, 1022.

282. *Id.* at 1023; *see id.* at 1019–23. Professor Bray provides further insights into equity’s flexibility and adaptability, with an analysis of how *CASA* handled those concepts, in a forthcoming article. *See generally* Samuel L. Bray, *How Equity Changes*, 2026 SUP. CT. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6226118 [<https://perma.cc/B2DS-GQWX>].

to the taxpayer in question.²⁸³ *Grupo Mexicano* declared *First National* distinguishable on multiple grounds, one being that it “relied in part on the doctrine that courts of equity will ‘go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.’”²⁸⁴ That principle did not bear on *Grupo Mexicano* because the suit involved only a contract claim between private parties.²⁸⁵ Of course, *CASA*—where the paramount public interest in constitutional governance was front and center—was not limited to private transactions. But the Court applied *Grupo Mexicano* there without considering the public–private distinction.

As it turns out, the idea that federal courts’ equity jurisdiction can expand to accommodate matters that implicate the public interest traces back at least as far back as 1856. In *Dodge v. Woolsey*, the complainant was a citizen of Connecticut who owned stock in an Ohio bank.²⁸⁶ He filed what amounted to a shareholder derivative suit against the bank’s directors and a county official charged with collecting a state tax from the bank.²⁸⁷ Seeking to enjoin the tax’s enforcement, he alleged that the measure, which a recent revision to the state constitution had authorized, violated Article I’s Contract Clause because it exceeded the maximum levy permitted by the bank’s state charter.²⁸⁸ As the sole defendant contesting the case, the tax collector argued that federal courts lacked equity jurisdiction over derivative suits.²⁸⁹ The majority opinion by Justice Wayne rejected that argument. While acknowledging “a conflict of judicial authority” that had existed until at least a couple years prior,²⁹⁰ the Court asserted that “[i]t is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members,” including for purposes of enjoining corporate managers from violating their companies’ charters.²⁹¹ Critically, that jurisdiction also reached the tax collector, the Court said, for it was appropriate to issue

283. See *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 325 (1999); *United States v. First Nat’l City Bank*, 379 U.S. 378, 379–80, 385 (1965).

284. *Grupo Mexicano*, 527 U.S. at 326 (quoting *First Nat’l*, 379 U.S. at 383).

285. See *id.* at 310–13.

286. 59 U.S. (18 How.) 331, 336 (1856).

287. See *id.* Similar to the situation in *Young*, see *supra* note 33, the complainant in *Dodge* named the bank as a defendant. See 59 U.S. (18 How.) at 336.

288. *Dodge*, 59 U.S. (18 How.) at 336–39.

289. *Id.* at 339–40.

290. *Id.* at 341; see *id.* at 343 (stating that “the best argued and judicially considered case which we know upon the point” had initially “decided that courts of equity have no jurisdiction over corporations as such at the suit of a stockholder for violations of charter” but had recently “reviewed and recalled that conclusion” on rehearing).

291. *Id.* at 341–43.

injunctive relief against “any proceedings by individuals, in whatever character they may profess to act.”²⁹²

The Court relied on the public interest to justify this expansion. “[I]t has been found necessary,” the majority asserted, “for prevention of injuries for which common-law courts were inadequate, to entertain in equity such a jurisdiction in the progressive development of the powers and effects of private corporations upon all the business and interests of society.”²⁹³ Indeed, the Court pronounced, “it was not [the complainant’s] interest alone which would be affected by the result” of his challenge to the state tax.²⁹⁴ “Hundreds” of people were “concerned in the question,” and “millions upon millions of banking capital” would “be affected.”²⁹⁵ Nor was the public interest limited to pecuniary concerns. The balance of the opinion, which rejected defenses based on manufactured diversity jurisdiction and state sovereign immunity, presaged *Young* by insisting on the importance of making federal courts available to keep government within constitutional bounds. Because “it was thought that [Congress] and the state legislatures might pass laws conflicting with the letter or the spirit of the constitution under which they legislated,” the Court stated, “it became necessary to make a judicial department for the United States,” without which “neither the powers of the constitution nor the purposes for which they were given could have been attained.”²⁹⁶ Summing things up by quoting Alexander Hamilton from *Federalist No. 22* (which he incorrectly attributed to James Madison), Wayne declared that “[l]aws are a dead letter without courts to expound and define their true meaning and operation.”²⁹⁷

In sum, *Grupo Mexicano* “does not dictate the level of generality” at which to assess present equitable practices against their historical precursors.²⁹⁸ Neither does *CASA*. But since at least 1855, including in *Grupo Mexicano* itself, the Court has reasoned that decisions regarding the scope of federal courts’ equity jurisdiction may respond to the public interest in the relief requested. And in cases like *Dodge* and *Young*, that principle has applied to questions about the propriety of raising constitutional claims against particular governmental parties. At the very least, then, the analysis should allow more leeway in the present context than the Court accorded in *Grupo Mexicano* itself—an assertion that dovetails with Professor Bray’s

292. *Id.* at 341.

293. *Id.*

294. *Id.* at 356.

295. *Id.*

296. *Id.* at 355–56.

297. *Id.* at 357 (quoting THE FEDERALIST NO. 22 (Alexander Hamilton)).

298. *Trump v. CASA, Inc.*, 606 U.S. 831, 907 (2025) (Sotomayor, J., dissenting).

argument that rigid application of the historical approach misunderstands the “music” of equity.²⁹⁹

1. *The Revisionist Version*

According to the Supreme Court, federal courts may not “create remedies previously unknown to equity jurisprudence,” with past cases focusing on “the jurisdiction in equity exercised by the High Court of Chancery in England” at the time of the divided bench in 1789.³⁰⁰ Looking to that period, Professor Harrison’s revisionist version of *Young* views suits against government officials to prevent the enforcement of unconstitutional laws as falling within the traditional lineage of antisuit injunctions.³⁰¹ To what extent might that approach permit plaintiffs to sue states themselves in constitutional challenges to state laws backed by private-enforcement schemes?

There are meaningful ways in which the litigation underlying *Young* looked like a conventional antisuit case—and in which suing states to contest constitutionally suspect laws with coercive private-enforcement schemes, like S.B. 8, would too. The litigation underlying *Young* looked like a conventional antisuit case in the sense that the complainants presented “several grounds on which it would be unreasonable to demand that the railroads violate the rates, wait to be sued by Minnesota, and present their federal arguments as defenses,” such that their defenses were practically unavailable at law.³⁰² The same would be true for suits against states challenging private-enforcement schemes with immense penalties for violating them. The litigation underlying *Young* also looked like a conventional antisuit case because the complainants sought only negative relief. The same would be true for suits against states challenging private-enforcement schemes like S.B. 8, where parties just want to avoid the application of constitutionally suspect regulations and where the remedy would not partake of the affirmative qualities that some see as too far removed from *Young*’s roots.³⁰³ In these ways, allowing suits against states in the circumstances envisioned here would not intrude on state sovereignty any more than *Young* itself did—which, in Harrison’s formulation, was not at all.

299. Bray, *supra* note 202, at 1012.

300. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318, 332 (1999).

301. See *supra* Section III.A.1.

302. Harrison, *supra* note 27, at 1002.

303. For that reason, *Alabama v. Pugh*—a short opinion holding in the context of a *Young*-style suit seeking affirmative relief that sovereign immunity bars federal courts from issuing “mandatory injunction[s]” against state entities, 438 U.S. 781, 781–82, 782 n.2 (1978)—should not control this situation.

Young did not characterize itself as an antisuit case. And while *Young*'s "reasoning is in important ways congruent with the anti-suit explanation,"³⁰⁴ even under the revisionist view, the decision also represents a step beyond that framework. The main proposition for which *Young* has become known—that the Constitution strips an official who enforces an ultra vires law from his identification with the state—was not novel, but its application to the circumstances at bar broke ground. As Professor Harrison has observed, *Young* "was a watershed for good reason."³⁰⁵ The Minnesota attorney general "had a plan to avoid judicial review by making the traditional way of obtaining it too costly."³⁰⁶ The Court "found that arrangement per se unconstitutional."³⁰⁷ And "[b]y approving the anticipatory proceeding brought by a person subject to a statute, the Court substantially changed the law of constitutional remedies."³⁰⁸ What is more, *Young* accomplished that alteration through a series of smaller changes—including declaring a technically available defense to a public enforcement proceeding an inadequate remedy, curtailing the idea that equity will not interfere with criminal processes, likening the enforcement of an unconstitutional statute to a tort, and "fritter[ing] away or put[ting] out of sight" inconvenient precedent.³⁰⁹

Accordingly, to the extent the current Court abides *Young*'s "substantial[] change[]" to constitutional remedies as consistent with equitable traditionalism (which it says it does),³¹⁰ the Court should also abide further adjustments of similar or smaller scope as part of "the proposition that equity is flexible" (which it says it believes).³¹¹ As discussed above, allowing suits against states in this context would have no practical effect other than changing the name of the defendant. And in the enforcement analogue of *Young* as an antisuit action, the state (or the "People") would have been the plaintiff (or the prosecution) anyway. The hypothetical enforcement action, that is, would not have been brought in the names of the executive officials against whom *Young* allowed suit; it would have been brought in the name of the state itself. As Professor Woolhandler has observed, Harrison's "argu[ment] that the antisuit injunction is really a defensive action" thus suggests "that a suit against the state should be

304. Harrison, *supra* note 27, at 990–91.

305. *Id.* at 1019.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Ex parte Young*, 209 U.S. 123, 193 (1908) (Harlan, J., dissenting); *see id.* at 149–68 (majority opinion).

310. Harrison, *supra* note 27, at 1019; *see Trump v. CASA, Inc.*, 606 U.S. 831, 846 n.9 (2025).

311. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 322 (1999); *see CASA*, 606 U.S. at 846.

allowed under the reasoning of *Cohens v. Virginia*.³¹² *Cohens* made clear that for regulated parties to defend against—and appeal unfavorable judgments in—state enforcement actions does not offend sovereign immunity.³¹³ Plus, Woolhandler adds, “[t]his argument could be bolstered by the Court’s repeatedly treating the state as a proper party to defend the constitutionality of its laws, even if its officials are not involved in enforcement of the law.”³¹⁴

Professor Harrison touches on the significance, or not, of *Young* doctrine’s substituting officials as antisuitor-action defendants for states as enforcement-action plaintiffs. “Because the railroads’ complaint . . . did not name Minnesota as a defendant” in *Young* itself, he notes, “it was consistent with a purely formal principle that a State may not be made a defendant on the record.”³¹⁵ Sovereign immunity “may” include a rule like that, Harrison hypothesizes, “derived ultimately from ideas about personal jurisdiction.”³¹⁶ But he correctly notes that “sovereign immunity is mainly about the substance of a decree’s effect on a state,” such that “[c]ourts must look behind the form to the substance.”³¹⁷ Accordingly, Harrison argues, “[a] suit seeking an order that an officer make a payment from the state treasury is indeed really one in which the state is a defendant, because the nominal plaintiffs seek affirmative relief.”³¹⁸ In the case underlying *Young*, “the nominal plaintiffs wanted nothing more from the State than to be let alone; in more formal legal terms, they sought to assert a defense, not a claim for affirmative relief,” thus maintaining consistency with state sovereign

312. Woolhandler, *supra* note 108, at 659 (citing Harrison, *supra* note 27, at 996, 1000, 1004).

313. 19 U.S. (6 Wheat.) 264, 405–12 (1821).

314. Woolhandler, *supra* note 108, at 659. As Woolhandler points out, *see id.*, Professor Tara Grove provides a useful collection of such cases. *See* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 859–68 (2016).

315. Harrison, *supra* note 27, at 1001.

316. *Id.* Professor Caleb Nelson, in particular, has argued that “many members of the Founding generation thought that a ‘Case’ or ‘Controversy’ did not exist unless both sides either voluntarily appeared or could be haled before the court.” Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565 (2002) (quoting U.S. CONST. art. III, § 2). “Traditionally, courts could not command unconsenting states to appear at the behest of an individual,” Nelson states, such that “[f]or members of the Founding generation who believed in sovereign immunity, the concept was relevant to personal jurisdiction rather than subject matter jurisdiction.” *Id.* The Supreme Court, however, has not consistently adopted this framing of state sovereign immunity, as Nelson acknowledges. *Id.* at 1566 (“[T]he Court has created a single doctrine of ‘sovereign immunity’ that reflects a strange cross between ideas of subject matter jurisdiction and ideas of personal jurisdiction.”). And the Court has allowed suits against unconsenting states in certain contexts even beyond congressional abrogation based on the purported “‘plan of the Convention,’ which is shorthand for ‘the structure of the original Constitution itself.’” *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 500 (2021) (quoting *Alden v. Maine*, 527 U.S. 706, 728 (1999)); *see, e.g.*, *United States v. Texas*, 143 U.S. 621, 644–45 (1892) (reasoning that the federal government can sue unconsenting states because “the permanence of the Union might be endangered” otherwise); *Cohens*, 19 U.S. (6 Wheat.) at 406–07 (reasoning that states themselves can sue unconsenting states based on similar logic).

317. Harrison, *supra* note 27, at 1001.

318. *Id.*

immunity.³¹⁹ That analysis arguably supports making states suable where necessary to attain judicial review. To draw the line at allowing suits against state officials without allowing suits against states themselves *even where there are no officials against whom to file suit* is to place not just form, but also fiction, over function.

Further support for this argument may come from an unexpected source. The Supreme Court's 1890 decision in *Hans v. Louisiana* is famous for adopting an understanding of state sovereign immunity that is broader than the text of the Eleventh Amendment.³²⁰ In the dispute at bar, *Hans* rejected an attack under the Contract Clause on an amendment to the Louisiana Constitution that disavowed the state's obligation to honor certain bonds.³²¹ Some have argued that the Court's extension of immunity to suits against complainants' own states did not include constitutional questions on the theory that the action in *Hans* itself was "nothing more than a common-law contract claim."³²² But even assuming that the decision's capacious articulation of sovereign immunity did include constitutional claims, *Hans* left room to pursue constitutional defenses through declaratory or injunctive relief—including, arguably, against states themselves.

Toward the end of the majority opinion, Justice Bradley included the cryptic proviso that "[w]hilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment."³²³ Given the outcome in *Hans*, what modes of "judicial[] resist[ance]" could Bradley have had in mind? In one of the *Virginia Coupon Cases* five years earlier, Bradley wrote that "where the State or its officers moves against" a citizen, "he may defend himself, in every proper way, by *habeas corpus*, by defence to prosecutions, by actions brought on his own behalf, by injunction, by mandamus."³²⁴ Bradley continued: "Any one of these modes of redress, suitable to his case, is open to him."³²⁵ For "[a] citizen cannot, in any way, be harassed, injured or destroyed by unconstitutional laws without having some legal means of resistance or redress."³²⁶

319. *Id.*

320. *See* 134 U.S. 1 (1890).

321. *Id.* at 10–11, 15–16.

322. William Burnham, *Taming the Eleventh Amendment Without Overruling Hans v. Louisiana*, 40 CASE W. RES. L. REV. 931, 931–33 (1990).

323. *Hans*, 134 U.S. at 20–21.

324. *Marye v. Parsons (Virginia Coupon Cases)*, 114 U.S. 325, 335–36 (1885) (Bradley, J., dissenting).

325. *Id.* at 336.

326. *Id.*

This was a strong sentiment, and it may support antisuit actions against states qua states where necessary to obtain relief from unconstitutional regulation—and should help show why such actions would not diminish state sovereignty. For (at the risk of repetition) the quotations above acknowledge that a citizen may need to “*defend himself*” from movements of “the State” or “its officers”—including “by actions brought on his own behalf” and “by injunctions”—and emphasizes that he “cannot, *in any way*, be harassed, injured, or destroyed by unconstitutional laws” absent legal recourse. Sovereign immunity had nothing to say about purely defensive positions against the enforcement of unconstitutional laws, Bradley contended, even where asserted from the complainant’s side of a case. “The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce the State into a fulfillment of its contracts,” he argued.³²⁷ “The one is an indefeasible right, a right which cannot be taken away; the other is never a right, but may or may not be conceded by the State”³²⁸ In the same *Virginia Coupon Cases* opinion, moreover, Bradley pooh-poohed the formalist distinction between suits against states and suits against state officials as “mere pretence” in the context of the real-party-in-interest doctrine.³²⁹ If a state “act[s] unconstitutionally,” he contended, it is silly to say it is “not the State that acts.”³³⁰

More broadly, *Hans*, like many early sovereign-immunity cases, was a suit about money a state allegedly owed during a period of post-war turmoil. Were states required to pay such debts, the thinking went, they faced the prospect of real financial harm.³³¹ The Supreme Court vigilantly protected states’ treasuries in those circumstances—and in others seeking to impose affirmative or monetary obligations on states.³³² But where citizens alleged constitutional violations absent attempts to access state coffers, as in the *Hans* proviso, the Court proved far less solicitous of sovereign immunity. *Young* continued that trend. To be sure, the Rehnquist Court insisted that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”³³³ But

327. *Id.*

328. *Id.*

329. *Id.* at 335.

330. *Id.*

331. See Ernest A. Young, *Its Hour Come Round at Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 HARV. J.L. & PUB. POL’Y 593, 597–601 (2012).

332. See *supra* Section I.A.

333. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); see also *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (stating that “the immunity is designed to protect” “the dignity and respect afforded a State”). The theory was that “[t]he founding generation thought it ‘neither becoming nor convenient that the several States of the Union, invested with that large

the fact that courts have long issued functionally indistinguishable remedies against state officials in their official capacities suggests that whatever a state's dignity entails, *Young* relief against states should not impermissibly impinge on it. (And the fact that the federal government, which also enjoys sovereign immunity, has long allowed private parties to seek declaratory and injunctive remedies against the United States to prevent the enforcement of unconstitutional statutes bolsters that suggestion.³³⁴) Accordingly, whether viewed from a structural or revisionist historical perspective, *Young* supports the notion that where necessary to avoid crippling consequences from unconstitutional laws, as in the coercive private-enforcement context, plaintiffs should be able to seek relief against states themselves.

The 1899 case *Fitts v. McGhee* may complicate that conclusion.³³⁵ In *Fitts*, Alabama set maximum tolls for crossing a bridge.³³⁶ The penalty for charging higher tolls was twenty dollars per offense, payable to the overcharged individual and recoverable before a justice of the peace or notary public.³³⁷ As *Young* explained, "No officer of the State had any official connection with the recovery of such penalties."³³⁸ The complainants (the company that owned the bridge and two individual receivers), sued Alabama and various executive officials on claims that the statutory rate was unconstitutionally low.³³⁹ As relief, they sought an injunction prohibiting the officials "and all persons whomsoever" from enforcing the act.³⁴⁰ Even after the complainants voluntarily dismissed the suit against the state itself, the Court granted the defendants sovereign

residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" Alden v. Maine, 527 U.S. 706, 748 (1999) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)); see also *id.* at 715 (affirming that "immunity from private suits" was "central to sovereign dignity").

334. In particular, the Administrative Procedures Act provides that

[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

5 U.S.C. § 702.

335. See 172 U.S. 516 (1899).

336. *Id.* at 516 (statement of the case).

337. *Id.*

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

339. *Fitts*, 172 U.S. at 516–17 (statement of the case).

340. *Id.* at 517–19, 521–22.

immunity.³⁴¹ Absent any executive official with enforcement authority for the complainants to target as akin to a tortfeasor, the Court explained, “this suit against its officers is really one against the State.”³⁴² *Young* relied on that aspect of *Fitts*’s analysis to distinguish the case, reasoning that Minnesota’s attorney general was a proper defendant because despite the statute in question not assigning him any specific duties, he could implement the maximum rates under his general enforcement authority.³⁴³

There are real tensions between the overall conceptions of state sovereign immunity articulated in *Fitts* (which Justice Harlan authored) and *Young* (from which Harlan alone dissented).³⁴⁴ It is not clear, therefore, that *Fitts* remains good law. The Court did not even cite it in *Jackson*, notwithstanding the obvious similarities. But specific aspects of *Fitts* also distinguish it from cases like *Young* and *Jackson*. Despite declaring themselves “remediless,”³⁴⁵ the *Fitts* complainants and other parties subject to the maximum tolls could have sought defensive relief elsewhere. The penalty of twenty dollars for violating the statute in question was not so onerous as to dissuade parties from testing it. Indeed, the complaint itself alleged that “frequent and numerous demands had been made by persons on foot, on horseback and in vehicles of the toll-gate keeper at the bridge to pass them over at the rate of toll fixed by the act”—and that when the toll-taker refused, the travelers paid under protest and threatened to sue.³⁴⁶ All those persons “were too numerous to be made parties” in the challenge to the tolls.³⁴⁷ But the complainants added one threat-maker, William Gilliam, as a defendant, and the circuit court entered an injunction against him.³⁴⁸ While the complainants’ challenge was pending in federal court, moreover, a state grand jury issued indictments “some one hundred in number” against two of the bridge owner’s toll-takers under a separate statute making it a crime to charge rates that were higher than specified in a company’s charter or (if the charter did not include a toll) that were otherwise “unreasonable.”³⁴⁹

All this mattered to the Supreme Court. With respect to the threats of suit against the bridge owner, the Court declared that “the citizen is not without

341. *Id.* at 528–29 (majority opinion).

342. *Id.* at 529–30.

343. *See Young*, 209 U.S. at 156–61; *see also supra* Section I.B.

344. *See, e.g., Young*, 209 U.S. at 175 (Harlan, J., dissenting) (“This principle [of allowing federal courts to grant the kind of relief at issue], if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the National and state governments.”).

345. *Fitts*, 172 U.S. at 517 (statement of the case).

346. *Id.* at 518–19.

347. *Id.* at 519.

348. *Id.* at 519–22.

349. *Id.* at 520 (quoting Alabama statute).

effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land” because “he can make his defence upon the ground that the statute is unconstitutional and void.”³⁵⁰ Likewise with respect to the criminal indictments against the bridge owner’s toll-takers: “Let them appear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States.”³⁵¹

There are still more distinctions between *Fitts* on the one hand and *Young*-type cases on the other. The fact that the toll dispute had progressed to state criminal proceedings was especially salient in *Fitts* for both equity and federalism reasons. Equity “has no jurisdiction over the prosecution, the punishment or the pardon of crimes and misdemeanors,” the Court said.³⁵² And state tribunals are “competent” and duty-bound “to enforce the mandates of the supreme law of the land.”³⁵³ The Justices observed that if the toll-takers’ constitutional defense failed all the way up the state-court system, “the judgment may be reexamined by this court upon writ of error.”³⁵⁴ Foreshadowing what is now known as *Younger* abstention,³⁵⁵ the Court thus concluded that the complainants furnished “no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court.”³⁵⁶ Finally, the complainants premised their due-process and equal-protection claims on property rights they attributed to a state contract.³⁵⁷ That maneuver could have brought the case within the real-party-in-interest precedent granting state sovereign immunity in contract disputes.³⁵⁸

In short, *Fitts* did not involve parties for whom judicial review of an allegedly unconstitutional statute was practically unavailable. It also presented especially sensitive equity and federalism issues and exhibited connections to the forbidden contract context. All these aspects make the Court’s rejection of injunctive relief and invocation of sovereign immunity there distinguishable from the situation potentially justifying *Young* suits against states raising constitutional challenges to laws with coercive private-enforcement schemes where complainants have no effective alternative means of review.

350. *Id.* at 530 (majority opinion).

351. *Id.* at 532.

352. *Id.* at 531 (quoting *In re Sawyer*, 124 U.S. 200, 210 (1888)).

353. *Id.* at 532.

354. *Id.*

355. See *Younger v. Harris*, 401 U.S. 37, 41 (1971) (recognizing a “national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances”).

356. *Fitts*, 172 U.S. at 532.

357. See *id.* at 517 (statement of the case).

358. See *supra* Section I.A.

2. *The Restorationist Version*

The restorationist version of *Young*, championed by Professor Pfander and Mr. Wentzel, posits that preventive relief against unlawful executive action derives less from antisuit injunctions and more from three common-law “administrative writs”: mandamus, certiorari, and prohibition.³⁵⁹ Two aspects of this theory are especially relevant to the issue of state suability in constitutional challenges to laws with coercive private-enforcement schemes. The first concerns the relevant time period for the inquiry. The second concerns what understanding suits seeking the administrative writs as “public actions” may mean for state sovereign immunity today.

Pfander and Wentzel are skeptical about the Supreme Court’s close focus on equitable practices as of 1789. “One can question this turn to history as the measure of federal equity today,” they observe.³⁶⁰ “Times and contexts have changed; equitable forms tailored to an eighteenth-century English constitutional monarchy may not fit the remedial needs of suitors in a twenty-first century republic.”³⁶¹ Nevertheless, they say, “accepting the premise that historical precursors can help inform the scope of appropriate equitable relief today, one must take care to get the history right.”³⁶²

Analyzing *CASA*, Professor Jack Goldsmith has sought to do just that. In *CASA*, the Court accepted *Grupo Mexicano*’s recognition of 1789 as the pertinent historical touchpoint on the ground that “[t]he Judiciary Act of 1789 endowed federal courts with jurisdiction over ‘all suits . . . in equity,’ and still today, this statute ‘is what authorizes the federal courts to issue equitable remedies.’”³⁶³ The problem, Goldsmith asserts, is that while one could view the Judiciary Act of 1789 as the source of equity jurisdiction for the kinds of cases federal courts could adjudicate at that time, that logic should see later enactments as responsible for conferring equity jurisdiction over other kinds of cases.³⁶⁴ Accordingly, “[i]t made at least some sense”

359. See *supra* Section III.A.2.

360. Pfander & Wentzel, *supra* note 202, at 1275.

361. *Id.*

362. *Id.* at 1275–76.

363. *Trump v. CASA, Inc.*, 606 U.S. 831, 841 (2025) (second alteration in original) (first quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; and then quoting SAMUEL L. BRAY & EMILY SHERWIN, AMES, CHAFEE, AND RE ON REMEDIES 442 (4th ed. 2024)).

364. Jack Goldsmith, *A Legal Mistake at the Heart of Trump v. CASA?*, EXEC. FUNCTIONS (July 11, 2025), <https://executivefunctions.substack.com/p/a-legal-mistake-at-the-heart-of-trump> [https://perma.cc/EBP2-MQTW] [hereinafter Goldsmith, *A Legal Mistake*]. In addition, Goldsmith reasons that the Court in *CASA* “also erred—or perhaps more accurately, uttered an anachronism, due to *Erie Railroad Co. v. Tompkins*—in saying that [the Judiciary Act of 1789] authorized equitable remedies at all.” *Id.* (referencing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). That is because “courts applied equitable remedies as a form of *general law* at the founding, and in some guise until 1938,” which “meant that equitable remedies applied in 1789 and thereafter absent any positive law authorization, and

for *Grupo Mexicano* to look to 1789 because *Grupo Mexicano* was a diversity case, and the Judiciary Act of 1789 provides the statutory foundation for federal courts to decide diversity cases.³⁶⁵ *CASA*, by contrast, should have looked to 1875 because *CASA* was a federal-question case and general federal-question jurisdiction traces back to a statute from that year.³⁶⁶ So, “on the Court’s own logic,” Goldsmith asserts, “the temporal focus should have been on 1875, not 1789.”³⁶⁷

CASA concerned universal injunctions. Accepting *arguendo* the Court’s conclusion that “universal injunctions were not a feature of federal-court litigation until sometime in the 20th century,”³⁶⁸ Goldsmith notes that the distinction between practices as of 1789 and 1875 might not have made a difference in that case.³⁶⁹ But he observes that it “might well matter in other federal question cases, and in particular might influence the future contours of *Ex parte Young*.”³⁷⁰ For—as Pfander and Wentzel have demonstrated— “[p]rinciples of equity and equitable remedies changed in nontrivial ways between 1789 and 1875, and were in flux in the post-Civil War period.”³⁷¹ In addition, looking to the development of equitable practices over the course of the 1800s (and even somewhat past *Young*) would dovetail with Professor Bray’s endorsement of “draw[ing] from the equity of the middle-to-late nineteenth century and the early twentieth century.”³⁷²

would not have been deemed in 1789 to have been ‘authorized’ by a jurisdictional statute.” *Id.* Goldsmith develops these arguments further in Jack Goldsmith, Essay, *Interim Orders, The Presidency, and Judicial Supremacy*, 139 HARV. L. REV. 86, 114–19 (2025).

365. Goldsmith, *A Legal Mistake*, *supra* note 364; see Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (“[T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”).

366. Goldsmith, *A Legal Mistake*, *supra* note 364; see Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (“[T]he circuit courts of the United States shall have original cognizance . . . of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . .”).

367. Goldsmith, *A Legal Mistake*, *supra* note 364.

368. *CASA*, 606 U.S. at 844.

369. Goldsmith, *A Legal Mistake*, *supra* note 364.

370. *Id.*

371. *Id.* Pfander and Wentzel write that “[c]ourts in the United States relied on English common law forms to oversee the nascent administrative state well into the nineteenth century” but that “[t]hen, as the courts of equity came to perceive common law remedies as inadequate, they offered injunctive relief that drew inspiration from the common law.” Pfander & Wentzel, *supra* note 202, at 1276. “That trend,” they explain, “accelerated sharply in the latter half of the nineteenth century, entering the Supreme Court soon after the Civil War and spreading to the lower federal courts once Congress granted them general federal question jurisdiction in 1875.” *Id.*

372. Bray, *supra* note 202, at 1022; see *supra* Section III.B. In his forthcoming article, Professor Bray proposes understanding Supreme Court precedent as “treating the Judiciary Act of 1789 as a reception statute for the law of equity.” Bray, *supra* note 282 (manuscript at 43). That view, Bray argues, “explains why the date of the grant of subject-matter jurisdiction does not matter for the extent of

If the Court were to prove more willing to consider post-1789 developments, the restorationist argument that equity underwent a significant expansion in the public-law arena during the nineteenth century to integrate effective tools for controlling unlawful government conduct could support the incremental step of extending *Young* to suits against states in the circumstances under consideration here. That should be especially true in light of the federal legislative and judicial focus during Reconstruction on compelling state conduct to conform to federal law—which helped motivate the establishment of general federal-question jurisdiction in the first place.³⁷³ And it should also be true in light of how federal courts understood such jurisdiction at the time as relaxing traditional restraints on the injunction’s reach.³⁷⁴

Understanding *Young*’s history as incorporating the administrative writs also affects the sovereign-immunity analysis. At common law in England, government officials could not assert sovereign immunity against requests for mandamus, certiorari, or prohibition.³⁷⁵ The unavailability of that defense arose from the “unique procedural posture” of suits seeking the writs as “public actions” descended from the *actio popularis* at Roman law.³⁷⁶ That understanding, Pfander and Wentzel explain, meant that private parties “typically prosecuted” the writs “in the name of the Crown” and that

equitable jurisdiction (whether 1789 as in *Grupo Mexicano* . . . or 1875 as in *CASA*),” “why the law of equity is not static” in that “reception statutes were not understood as forever freezing the common law,” and “why English Chancery practice was the default in the federal courts” but “could be set aside by federal court rules.” *Id.* at 44–45. Among other things, that logic helps refute a focus on the Process Act of 1792 as a relatively rigid originalist touchpoint for assessing present-day equitable practices. See Andrew S. Oldham, Adam I. Steene & John W. Tienken, *The Ex Parte Young Cause of Action: A Riddle, Wrapped in a Mystery, Inside an Enigma*, 120 NW. U. L. REV. 1697, 1707 (2026) (arguing that “through the Process Act of 1792,” Congress “require[d] federal courts to adopt the equitable principles that subsisted in England,” such that “federal courts were to look to the jurisprudence of English Chancery practice at the time of the Founding . . . to determine whether a party was entitled to an equitable remedy”).

373. See Collins, *supra* note 259, at 720–22 (“The conferral of [general federal-question jurisdiction in 1875] was part of a larger substantive law and jurisdictional revolution that was an outgrowth of the Civil War and Reconstruction.”); see also BAUDE ET AL., *supra* note 6, at 1025 (“Congress expanded federal jurisdiction considerably in 1875, doing so in part to address state court hostility to the newly free citizens of the United States and in part for other reasons.”).

374. See Pfander & Wentzel, *supra* note 202, at 1330–32; see also Merrill, *supra* note 260, at 949 (“After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action. They did so on the theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action, in order to exercise the powers of a court of equity in ruling on a request to enjoin agency action.” (footnote omitted)); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 122 (1998) (“[T]he 1875 grant of jurisdiction is best interpreted as an authorization for federal equity courts to engage in lawmaking—or . . . for them . . . to continue developing [the preexisting federal equity] law in the common-law tradition. That was what federal equity courts did, and the administrative common law of judicial review grew up within that tradition.”).

375. Pfander & Wentzel, *supra* note 202, at 1335.

376. *Id.* at 1310, 1335–36.

the writs issued as a “‘command’” “‘from the monarch herself.’”³⁷⁷ The law surrounding the administrative writs thus associated the sovereign not with the defendant, but with the plaintiff and the court—which makes the absence of sovereign immunity entirely logical.

The public character of the administrative writs followed them into the United States. “Understood in England as proceedings brought in the name of the Crown, administrative writs evolved in the American republic into suits brought (much like criminal proceedings) in the name of the people,” Pfander and Wentzel explain.³⁷⁸ Proceedings seeking mandamus, certiorari, or prohibition were captioned accordingly, “with federal courts naming the plaintiff as ‘*United States ex rel. [relator]*’ or even just ‘*United States,*’ and state courts doing the same with the words ‘*state,*’ ‘*commonwealth,*’ or ‘*people.*’”³⁷⁹ American courts likewise rejected bids for sovereign immunity in such circumstances.³⁸⁰ In one case before the Supreme Judicial Court of Massachusetts, for example, a private railroad that owned land taken by a state-owned railroad challenged the applicable compensation scheme.³⁸¹ The private railroad sought a writ of prohibition against county commissioners to stop a proceeding that would have assessed the amount of damages due under the suspect statute.³⁸² The court declared that “[t]he fact that an agent of the Commonwealth is the adverse party in the proceedings before the county commissioners affords no reason for refusing the writ.”³⁸³ For “[a] writ of prohibition, like a writ of mandamus or of certiorari, is properly sued out in the name of the Crown or the State.”³⁸⁴

Pfander and Wentzel’s argument that this history renders sovereign immunity unavailable in *Young*-style suits should reach cases against states themselves—and thus further supports the idea that such suits would not diminish state sovereignty. The character of *Young*-style cases as public actions brought (now figuratively) in the name of the tribunal’s sovereign is key. For in federal courts, the tribunal’s sovereign is the United States, and states cannot claim sovereign immunity from suits prosecuted by the federal government. When the United States sues a state, Justice Harlan explained for the Supreme Court in 1892, the state “is not called to the bar . . . at the suit of an individual, but at the suit of the government established for the

377. *Id.* at 1301–02 (alteration omitted) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *110).

378. *Id.* at 1336.

379. *Id.*

380. *Id.* at 1336–37.

381. *Conn. River R.R. Co. v. Cnty. Comm’rs of Franklin*, 127 Mass. 50, 52 (1879).

382. *Id.*

383. *Id.* at 59.

384. *Id.*

common and equal benefit of the people of all the States.”³⁸⁵ And “[t]he submission to judicial solution of controversies arising between these two governments . . . does no violence to the inherent nature of sovereignty.”³⁸⁶

The Court wrestled with the implications of this principle for mixed private and public suits in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, decided in 2000.³⁸⁷ The question was whether private plaintiffs could sue state entities under the False Claims Act (FCA).³⁸⁸ Tracing back to 1863, the FCA provides for civil liability against “any person” who, among other things, makes “false or fraudulent claim[s] for payment or approval” by the United States.³⁸⁹ The act authorizes qui tam litigation by which private plaintiffs (called “relators”) can sue both for themselves “and for the United States Government” “in the name of the Government.”³⁹⁰ Alternatively, the United States can bring FCA actions itself.³⁹¹ Where qui tam relators file suit, the United States may intervene and lead the litigation.³⁹² Whether the United States intervenes or not, relators are entitled to a portion of any proceeds (which generally include treble damages, civil penalties, attorneys’ fees, and costs), with the majority going to the federal government.³⁹³ Like the administrative writs, scholars have linked qui tam suits in the American tradition to the Roman *actio popularis*.³⁹⁴

In *Stevens*, a qui tam relator sued the Vermont Agency of Natural Resources on the theory that it inflated the amount of time its employees spent working on projects funded by the Environmental Protection Agency, such that the state agency received more federal grant money than it was owed.³⁹⁵ The United States chose not to intervene, and the state agency moved to dismiss on two relevant grounds: (1) that state entities were not “person[s]” who could be sued under the FCA and (2) that state entities had sovereign immunity from qui tam litigation in federal court.³⁹⁶ Justice Scalia’s majority opinion resolved the case on the first ground, holding that

385. *United States v. Texas*, 143 U.S. 621, 646 (1892).

386. *Id.*

387. 529 U.S. 765 (2000).

388. *Id.* at 768.

389. 31 U.S.C. § 3729(a)(1)(A).

390. *Id.* § 3730(b)(1).

391. *Id.* § 3730(a).

392. *Id.* § 3730(b)(2), (c)(3).

393. *Id.* §§ 3729(a), 3730(d)(1)–(2).

394. See, e.g., James E. Pfander, *Standing to Sue: Lessons from Scotland’s Actio Popularis*, 66 DUKE L.J. 1493, 1503 n.41 (2017) (stating that “the medieval tradition of informer and *qui tam* litigation in England” “may have its roots in Roman law” and that “[i]ndeed, Blackstone describes the proceedings in question as ‘popular actions,’ implying that he perceived a connection to Roman precursors” (quoting 3 BLACKSTONE, *supra* note 377, at *161)).

395. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 770 (2000).

396. *Id.*

the FCA's text did not extend liability to state entities.³⁹⁷ The Court then stated that "the doctrine that statutes should be construed so as to avoid difficult constitutional questions" "buttressed" that conclusion.³⁹⁸ "We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment," the Court continued.³⁹⁹ "[B]ut we note that there is 'a serious doubt' on that score."⁴⁰⁰

That last sentence may seem to suggest that the Court was sympathetic to the state agency's assertion of sovereign immunity (if one does not look too closely, since the sentence can be read to say there is "a serious doubt" about whether the suits in question "would run afoul of the Eleventh Amendment"⁴⁰¹). But the fact that the majority found the matter "difficult" and took care to "express no view on the question" in the midst of a period when the Court was repeatedly and aggressively expanding state sovereign immunity indicates that the argument against such immunity was substantial.⁴⁰²

Return, for a moment, to the founding. For the century between the Constitution's ratification in 1788 and *Hans* in 1890,⁴⁰³ uncertainty mired much of the law surrounding state sovereign immunity. The status of the doctrine under the unamended Constitution, which expressly contemplated federal-court cognizance of suits involving states,⁴⁰⁴ was notoriously fuzzy. Of interest, though, all controversy during the constitutional drafting and ratification processes over the possibility of suing unconsenting states was focused on diversity jurisdiction rather than federal-question jurisdiction.⁴⁰⁵ By negative implication, then, the framers and public may not have viewed sovereign immunity as extending to federal-question suits. Or they may have "thought very little about" the issue.⁴⁰⁶ The English and early

397. *Id.* at 787.

398. *Id.*

399. *Id.*

400. *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

401. *Id.* The phrasing is at least ambiguous. But in the context of this case and the Court's broader sovereign-immunity jurisprudence, plus given the quotation of Justice Brandeis's opinion in *Ashwander* (which refers to situations where "'a serious doubt of constitutionality is raised,'" 297 U.S. at 348 (Brandeis, J., concurring) (emphasis added) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))), it seems likely that the majority thought the sovereign-immunity issue was significant.

402. *Stevens*, 529 U.S. at 787; see Ernest A. Young, *State Sovereign Immunity After the Revolution*, 102 TEX. L. REV. 697, 697, 729–30 (2024) (identifying 1996 to 2001 as the core of the "revolution" marked by "an era of dramatic expansion of states' sovereign immunity from suits by private parties").

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

404. See U.S. CONST. art. III, § 2.

405. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1071–72 (1983).

406. *Id.* at 1072.

American experience with the administrative writs, especially when understood as public actions, could support the former possibility.

Additional evidence likewise suggests that state sovereign immunity may not have reached constitutional questions at the founding. When Edmund Randolph, a constitutional framer and the then-Attorney General of the United States, successfully argued against sovereign immunity in the 1793 case *Chisholm v. Georgia*, he portrayed any possibility that the doctrine extended to constitutional issues as a *reductio ad absurdum*.⁴⁰⁷ Even Justice Iredell, who led the effort to ratify the Constitution in North Carolina, distinguished between common-law and federal-question claims in his *Chisholm* dissent.⁴⁰⁸ “[E]ven if the Constitution would admit of the exercise of such a power” in the latter context, he said, “a new law” conferring statutory jurisdiction would be “necessary for the purpose, since no part of the existing law applies.”⁴⁰⁹ One could see that “new law” in the conferral of equity power as part of the grant of general federal-question jurisdiction in 1875. By awarding injunctive relief against a wide array of unlawful state-government action, the conduct of contemporary federal courts in response to that law supports such a possibility.

To bring this analysis full circle: The Eleventh Amendment, which was ratified in response to *Chisholm*, did not obviously reach federal-question suits, at least where complainants proceeded against their own states.⁴¹⁰ (Chief Justice Marshall suggested as much in *Cohens*, for example.⁴¹¹) To

407. “What is to be done,” Randolph asked, “if in consequence of a bill of attainder, or an *ex post facto* law, the estate of a citizen shall be confiscated, and deposited in the treasury of a State?” 2 U.S. (2 Dall.) 419, 422 (1793) (reporting Randolph’s argument). Or “[w]hat,” Randolph continued, “if a State should adulterate or coin money below the Congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts?” *Id.* “What if a State should impair her own contracts?” *Id.* “These evils, and others which might be enumerated like them,” Randolph contended, “cannot be corrected without a suit against the State.” *Id.*

408. See *id.* at 449 (opinion of Iredell, J.). Then-Professor (now-Judge) William Fletcher describes this distinction in detail. See Fletcher, *supra* note 405, at 1056–57. One can also read Iredell’s opinion as differentiating between federal-question suits seeking “the recovery of money” from those pursuing other “consequence[s]”—and as suggesting that the latter were the most likely kind of suits to pass constitutional muster. *Chisholm*, 2 U.S. (2 Dall.) at 449–50 (opinion of Iredell, J.) (“[M]y present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving [sic] this consequence, and that nothing but express words, or an insurmountable implication . . . would authorise the deduction of so high a power.”).

409. *Chisholm*, 2 U.S. (2 Dall.) at 449 (opinion of Iredell, J.).

410. See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). *Chisholm* itself involved a common-law assumpsit claim in federal court under diversity jurisdiction. See Fletcher, *supra* note 405, at 1055–56.

411. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821) (“If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted ‘by a citizen of another State, or by a citizen or subject of any foreign State.’”); *id.* (“[A]nd we have already seen, that in its origin, the

be sure, this point is contestable and, while helpful, not necessary to the broader argument offered here.⁴¹² And in any event, *Hans* extended state sovereign immunity to situations beyond the Eleventh Amendment's text.⁴¹³ But again, Justice Bradley's proviso in *Hans* about "judicial[] resist[ance]"—especially when understood in light of his argument in the *Virginia Coupon Cases* about a citizen's "indefeasible right" to "defend himself" against "be[ing] harassed, injured or destroyed by unconstitutional laws"⁴¹⁴—suggests that suits seeking to prevent the enforcement of such laws may not be subject to sovereign immunity.⁴¹⁵ That principle would extend not only to antisuit injunctions, as argued above, but also (quoting Bradley again) to "actions brought on [the citizen's] own behalf" more broadly—including to those requesting administrative writs like "mandamus" and, indeed, to those seeking "injunction[s]" at large,⁴¹⁶ as in *Young*.

IV. EXTENDING *YOUNG*: PARTIES AND PRACTICALITIES

The foregoing discussion argues that both the structural and historical accounts of *Young* provide support for allowing plaintiffs to sue states to challenge laws with coercive private-enforcement schemes in some circumstances—and that doing so would not diminish state sovereignty in our federalist system. Echoing the dissenters in the *Jackson S.B. 8* case, commentators have suggested additional strategies for holding state-government defendants constitutionally accountable in this context. Some

judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties."); see also Fletcher, *supra* note 405, at 1060–63 (surveying evidence in favor of this argument).

412. Professor Nelson's theory of sovereign immunity as a doctrine of personal jurisdiction at the Founding, for instance, would not distinguish between different fonts of subject-matter jurisdiction. See Nelson, *supra* note 316, at 1565 ("For members of the Founding generation who believed in sovereign immunity, the concept was relevant to personal jurisdiction rather than subject matter jurisdiction."). And Professor Bradford Clark has argued that the Founders "assum[ed] that the Constitution neither imposed nor permitted Congress to impose affirmative obligations on states," such that "there would never be any suits against states to enforce such obligations." Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1820 (2010). While "the Constitution imposed important negative prohibitions on states," Clark contends, those "provisions could be enforced in suits between individuals or as federal defenses to enforcement actions brought by states." *Id.* at 1819. Accordingly, he concludes, "the [Eleventh] Amendment's ban on all suits by out-of-state citizens was a complete solution to the problem of suits by individuals against states" as permitted by *Chisholm*, "and thus created no anomaly." *Id.* at 1820.

413. See *supra* Section III.B.1.

414. *Virginia Coupon Cases*, 114 U.S. 325, 335–36 (1885) (Bradley, J., dissenting).

415. *Hans v. Louisiana*, 134 U.S. 1, 20–21 (1890).

416. *Virginia Coupon Cases*, 114 U.S. at 335–36 (Bradley, J., dissenting).

have called for court clerks to face suit.⁴¹⁷ Others would allow actions against state courts and judges themselves.⁴¹⁸ Still others advocate holding high-level executive officials like attorneys general susceptible to suit, notwithstanding state attempts to divest them of authority to implement particular laws.⁴¹⁹ Additional scholars have fashioned multifaceted litigation arrangements that are admirable for their creativity but doubtful for their complexity.⁴²⁰

Fully exploring and evaluating these alternatives falls beyond the scope of this project. It is fair to say, however, that they are all subject to substantial legal and practical complications. In contrast, the discussion that follows seeks to show that allowing suits against states in this context should prove relatively straightforward. This discussion responds to some potential questions and concerns, especially regarding the state-action requirement for constitutional litigation and the details of declaratory and injunctive relief against states.

A. State Action

“[T]he action inhibited by the first section of the Fourteenth Amendment”—through which the Due Process Clause, the Equal Protection Clause, and most of the Bill of Rights apply to states—“is only such action as may fairly be said to be that of the States.”⁴²¹ This state-action requirement means that the Fourteenth Amendment, like most of the Constitution, “erects no shield against merely private conduct, however

417. See, e.g., Strauss, *supra* note 4, at 95 (arguing that from *Jackson*, “the clerks present the strongest case” for suability).

418. See, e.g., Alexandra Nickerson & Kellen Funk, *When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action*, 111 CALIF. L. REV. 1763, 1764, 1825–28 (2023) (presenting an argument “that particularly vexing problems like bounty statutes and bail abuses can be directly restrained by prospective relief against state judges in appropriate cases”); Pfander, *supra* note 116, at 785, 787 (arguing that the writ of prohibition is “an attractive vehicle for a challenge to unconventional statutes like S.B. 8” and explaining that “[t]he 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”).

419. See, e.g., Woolhandler, *supra* note 108, at 658–59 (“If . . . the private enforcement scheme, including its attempt to circumvent federal court jurisdiction, is unconstitutional, perhaps the [Supreme] Court should treat the provisions as inoperative in determining against whom an anticipatory action can be brought. The Attorney General could then be treated as the default enforcer of state law.” (footnote omitted)).

420. See, e.g., Note, *Private Attorneys General and the Defendant Class Action*, 135 HARV. L. REV. 1419, 1419, 1422–40 (2022) (contending that “a defendant class action is a viable mechanism for enjoining the enforcement of unconstitutional laws by private attorneys general” and addressing potential counterarguments arising from Article III doctrine, Federal Rule of Civil Procedure 23, and due-process concerns); Delia Parker, Note, *Interpleader as a Vehicle for Challenging the Constitutionality of Private Citizen Action Statutes*, 92 FORDHAM L. REV. 1155, 1184, 1187–93 (2023) (contending that “interpleader relief should be afforded to individuals in private citizen action statutes, including Texas S.B. 8 and similarly structured statutes, to avoid improperly exposing individuals to multiple liability or inconsistent judgments”).

421. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

discriminatory or wrongful.”⁴²² *Young*-type suits usually target the state action inherent in executing the law—and thus name executive officials as defendants. But that does not mean that constitutionally cognizable state action is limited to the executive context.

The legislature engages in state action by enacting legislation.⁴²³ Prominent precedent like *Shelley v. Kraemer* and *New York Times v. Sullivan* tells us that the judiciary also engages in state action by implementing the law.⁴²⁴ *Shelley* likewise suggests that private plaintiffs can engage in state action by enlisting the judiciary to enforce legal obligations,⁴²⁵ and other cases make clear that private individuals can exercise state power where deputized to do so.⁴²⁶ As the United States argued in *United States v. Texas*, the federal-government suit challenging S.B. 8:

S.B. 8 is a statute enacted by the Texas legislature, signed by the Texas governor, and enforceable in Texas courts. In a calculated effort to evade judicial review, the law delegates the State’s enforcement authority to members of the public who have no connection to the prohibited conduct. But it is the State that has empowered and encouraged those plaintiffs to sue. And it is the State that crafted this unprecedented regime in a deliberate attempt to make constitutionally protected abortions unavailable in Texas.⁴²⁷

Dean Goldberg and Professor Zipursky agree: “[S]uits by S.B. 8 plaintiffs are in fact enforcement actions by the state because the state has actually deputized these plaintiffs to enforce Texas law.”⁴²⁸

422. *Id.*

423. See *Walker v. City of Birmingham*, 388 U.S. 307, 337–38 (1967) (Douglas, J., dissenting) (“The decree of a state court is ‘state’ action in the constitutional sense as much as the action of the state police, the state prosecutor, the state legislature, or the Governor himself.” (internal citation omitted)).

424. See *Shelley*, 334 U.S. at 12–14; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); see also *Strauss*, *supra* note 4, at 92 (“A state can violate the Constitution by enforcing a judgment in a private civil action; *Shelley v. Kraemer* and *New York Times v. Sullivan* establish that.” (footnotes omitted)).

425. See 334 U.S. at 19 (“[T]he States have made available to such individuals the full coercive power of government to deny to petitioners . . . the enjoyment of [their] rights . . .”).

426. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (explaining that the test for whether conduct by a private party constitutes state action asks “whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority” and “whether the private party charged with the deprivation could be described in all fairness as a state actor”); *id.* at 622 (“Although private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, our cases have found state action when private parties make extensive use of state procedures with ‘the overt, significant assistance of state officials.’” (internal citation omitted) (quoting *Tulsa Pro. Collection Servs. v. Pope*, 485 U.S. 478, 486 (1988))).

427. Brief for the United States at 31, *United States v. Texas*, 595 U.S. 74 (2021) (No. 21-588).

428. Goldberg & Zipursky, *supra* note 118, at 487. As Professor West explains in a forthcoming article, *Shelley v. Kraemer* “depends on two distinct conclusions.” E. Garrett West, *A Functional Theory*

Plaintiffs, however, cannot necessarily sue to prevent all state actors from engaging in any state action. Attempts to subject legislative action to injunctive restraint would be problematic under absolute-immunity doctrine and principles enshrined in the First Amendment, the Guarantee Clause, and structural concepts of separated powers and state sovereignty, for example. And *Jackson* discussed practical difficulties that suing judicial employees could arguably entail.⁴²⁹ Even if someone seeking to challenge a coercive private-enforcement scheme could satisfy standing doctrine for purposes of suing a prospective private plaintiff, moreover, any resulting declaratory judgment or injunction would not automatically bind *all* prospective private plaintiffs. And endeavoring to sue the millions of members of the public who could one day move to enforce a statute like S.B. 8 would ensnare the challenger in an endless cycle of whack-a-mole-style litigation.

Given all this, to quote the Solicitor General's brief in *United States v. Texas*, where "[i]t is . . . plain" that state action "is responsible for . . . constitutional violations" in the coercive private-enforcement context, where there is no official susceptible to effective relief, and where "sovereign immunity does not apply," "[i]t should be equally plain" that the state itself "can be enjoined to prevent those violations."⁴³⁰ Doing so, moreover, should not require an express statutory cause of action. The structural account often views *Young* as creating an implied cause of action,⁴³¹ and both versions of the historical account view *Young* as rooted in jurisdictional traditions that provide sufficient support for courts to render equitable relief.⁴³² As Justice Scalia wrote for the Supreme Court in 2015:

of *State Action*, 121 NW. U. L. REV. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6745621 [<https://perma.cc/G2C7-9WRF>] (manuscript at 15). "The first is that the judicial enforcement of [a] racially restrictive covenant is a form of state action"—a conclusion West characterizes as "obviously correct." *Id.* West argues that "[t]he controversial aspect of *Shelley*" actually comes from "the second conclusion: that the state action at issue, judicial enforcement of a racially restrictive covenant, contravened the Equal Protection Clause." *Id.* For while "[t]he Supremacy Clause binds state judges to follow the Constitution, and legislation or a common-law rule restricting property ownership to a particular race would be invalid and unenforceable," "[t]he question in *Shelley* was whether . . . a generally applicable legal rule of that kind could make racially restrictive covenants enforceable." *Id.* (emphasis added). The present context presents the former condition (a challenge to the prospective enforcement of legislation targeting a particular constitutional protection) rather than the latter (a challenge to the implementation of a generally applicable subconstitutional regime)—and thus should not generate the sort of controversy that *Shelley* has.

429. See *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39–41 (2021).

430. Brief for the United States, *supra* note 427, at 31.

431. See *supra* Section II.A.

432. See Harrison, *supra* note 27, at 1014 ("Anti-suit injunctions did not have to be invented in 1908, but were a familiar equitable remedy Their cause of action, in the sense of their entitlement to affirmative relief, came from standard principles of equity."); Pfander & Wentzel, *supra* note 202, at 1346–47 (arguing that "concerns with the source of the right to sue in *Ex parte Young* arise as a result of the Supreme Court's distinctly modern preference for express statutory rights of action" and that "[i]n the old days, . . . a grant of jurisdiction was viewed as enough to set in motion an independent body of

“The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.”⁴³³

B. State Agents

How can winning declaratory or injunctive relief against a corporate body like a state, which can act only through natural persons, prevent constitutional violations? Federal Rule of Civil Procedure 65(d) provides that injunctions bind not only “the parties,” but also their “officers, agents, servants, employees, and attorneys” (which I just call their “agents” here).⁴³⁴ And an analogous tenet applies in the preclusion context, which governs the effects of declaratory judgments.⁴³⁵

Courts regularly apply this principle to government officials. In one Tenth Circuit case, for instance, the court reasoned that “a facial challenge to a New Mexico statute, brought against the governor and attorney general of New Mexico in their official capacities,” constituted “an action against the State of New Mexico,” such that the resulting injunction could bind non-party district attorneys from enforcing the subject law.⁴³⁶ In the present context, then, declaratory judgments or injunctions against states should bind any executive officials who might have ancillary authority to implement the regime in question. Such relief could also potentially bind the state-court clerks who would docket private-enforcement actions and the state-court judges who would decide them—all of whom the federal government sought to restrain in *United States v. Texas*.⁴³⁷

While it is difficult to find case law specifically holding clerks and judges bound under Rule 65(d) and preclusion doctrine, the reason does not appear to be that they are not government agents. (Of course they are.) Instead, at least for clerks, the reason appears to be that before *Jackson*, if a clerk’s

federal equity,” such that “federal courts began regularly ‘entertaining bills of equity that sought to enjoin allegedly unlawful administrative action’ once Congress conferred federal question jurisdiction in 1875” (quoting Merrill, *supra* note 260, at 949)).

433. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

434. FED. R. CIV. P. 65(d)(2)(A)–(B).

435. *See* *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402–03 (1940) (“There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.”); *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023) (“[T]he point of a declaratory judgment ‘is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by *res judicata*.’” (quoting 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4446 (3d ed. Supp. 2022))).

436. *ACLU v. Johnson*, 194 F.3d 1149, 1163–64 (10th Cir. 1999); *see also* *Am. Librs. Ass’n v. Pataki*, 969 F. Supp. 160, 163 (S.D.N.Y. 1997) (very similar).

437. *See* Brief for the United States, *supra* note 427, at 37–40.

conduct in handling an enforcement action was an immediate cause of a person's constitutional injury, that person just sued the clerk directly. In a Third Circuit case, for instance, the court allowed the plaintiff to sue the local prothonotary (an old-fashioned term for the "chief clerk in certain courts of law"⁴³⁸) to challenge Pennsylvania's post-judgment garnishment procedures as violative of due process and preempted by federal statute.⁴³⁹ Performance of "the duties of the prothonotary" in "issuing the writ of execution" "had the same effect on the plaintiff's rights that the Supreme Court found critical in *Ex Parte Young*," the court declared.⁴⁴⁰ That action was an "immediate cause[] of the attachment and freezing of [the plaintiff's] bank accounts," such that if the garnishment procedures were unconstitutional, the prothonotary's actions "caused an injury to [the plaintiff's] legal rights."⁴⁴¹ *Jackson* foreclosed the path of suing clerks and judges directly in the private-enforcement context.⁴⁴² But that does not mean that a plaintiff could not accomplish a similar outcome by suing the government for whom clerks and judges work in a proper controversy—especially given the legal and practical differences and protections that would flow from the latter posture.⁴⁴³

Rule 65(d) also says that injunctions bind "other persons who are in active concert or participation with" the parties or their agents.⁴⁴⁴ In the present context, that could include plaintiffs who attempt to sue under an unconstitutional private-enforcement scheme after the entry of an injunction against the state—another target in *United States v. Texas*.⁴⁴⁵ Courts have made clear that "active concert or participation" is broad, such that the persons to whom this provision applies need not be subject to the control of government defendants. In the famous 1972 case *United States v. Hall*, for instance, the Fifth Circuit held that Rule 65(d) allowed the district court to reach an outside agitator who fomented "racial unrest and violence" against the implementation of a school-desegregation decree.⁴⁴⁶

This procedural pathway includes legal and practical protections for those bound by declaratory or injunctive relief against states. Rule 65(d) applies only where the relevant persons have "receive[d] actual notice of

438. *Prothonotary*, BLACK'S LAW DICTIONARY (12th ed. 2024).

439. *See* *Finberg v. Sullivan*, 634 F.2d 50, 52–53 (3d Cir.), *adhered to*, 658 F.2d 93 (3d Cir. 1980) (en banc).

440. *Id.* at 54.

441. *Id.* More recently, the Eleventh Circuit relied on similar reasoning in a standing analysis to allow a plaintiff to sue a court clerk to challenge Georgia's post-judgment garnishment statute. *See Strickland v. Alexander*, 772 F.3d 876, 878–89, 885–86 (11th Cir. 2014).

442. *See supra* Section I.B.

443. *See infra* text accompanying notes 447–56.

444. FED. R. CIV. P. 65(d)(2)(C).

445. *See* Brief for the United States, *supra* note 427, at 33–37.

446. *United States v. Hall*, 472 F.2d 261, 262–63, 266–68 (5th Cir. 1972).

[the injunction] by personal service or otherwise.”⁴⁴⁷ So neither judicial clerks nor prospective private-enforcement plaintiffs (for example) would be caught unawares about the legal responsibilities imposed by an injunction. And courts could require states themselves to provide instructions about how to effectuate such remedies.

In granting preliminary relief in the federal government’s S.B. 8 challenge, for instance, the district court specified that its injunction against Texas prohibited the state’s “officers, officials, agents, employees, and any other persons or entities acting on its behalf”—among them “state court judges and state court clerks”—“from enforcing [S.B. 8], including accepting or docketing, maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit brought pursuant to [S.B. 8].”⁴⁴⁸ And the court ordered the state to facilitate notice by “distribut[ing] this preliminary injunction to all state court judges and state court clerks” and by publishing it on “public-facing court websites with a visible, easy-to-understand instruction to the public that S.B. 8 lawsuits will not be accepted by Texas courts.”⁴⁴⁹ In addition, the court recognized that Texas itself might have better ideas about “the particulars” of this process—and thus made clear that “the State may propose different means of disseminating this information,” so long as those means would “still achieve the goals of informing the state judiciary and plainly informing the public of this preliminary injunction and its effect.”⁴⁵⁰

What is more, the fact that particular persons are bound by declaratory or injunctive relief as agents of a corporate body does not make them parties to the underlying litigation, as suing them directly would. That should eliminate many of the anxieties and everyday burdens attendant to being sued—and should also address the Supreme Court’s concerns from *Jackson*, both doctrinal and prudential, about naming state-court judges and clerks as defendants.⁴⁵¹ The adverseness requirement, for instance, would be satisfied by the challenger’s oppositional stance with respect to the state as an overarching entity;⁴⁵² there is no requirement that plaintiffs demonstrate an adverse relationship as to each agent of a corporate defendant that a declaratory judgment or injunction will bind. Remedial details could be left

447. FED. R. CIV. P. 65(d)(2).

448. *United States v. Texas*, 566 F. Supp. 3d 605, 691 (W.D. Tex.), *stay granted*, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021), *cert. before judgment dismissed*, 595 U.S. 74, 75 (2021).

449. *Id.*

450. *Id.*

451. *See Whole Woman’s Health v. Jackson*, 595 U.S. 30, 39–41 (2021).

452. *See id.* (expressing concerns along these lines).

to the state defendant to resolve, meaning that responsibility for complying with court orders would not fall, even as a formal matter, on the shoulders of individual state-court judges and clerks.⁴⁵³ Nor would judges and clerks have to worry about obtaining legal representation for federal-court challenges—or about their defense potentially contravening their duty of neutrality.⁴⁵⁴ Likewise, enjoining or granting declaratory relief against states is not the same as “enjoin[ing] the world at large” or “purport[ing] to enjoin challenged ‘laws themselves,’”⁴⁵⁵ such that pursuing this strategy does not commit the so-called “writ-of-erasure fallacy.”⁴⁵⁶ The state would be the defendant, so the state (a sophisticated litigant) would handle representational and strategic decisions through the same channels as usual.

Beyond the basics, it should not be necessary for federal courts to anticipate or mandate every jot and tittle about how states should respond to a declaratory judgment or comply with their injunctive obligations. State lawyers and leaders should be capable of determining such matters in good faith, and for federal courts to interfere overmuch with the inner workings of state administration could raise independent sovereignty concerns. If challengers believe that state agents or private parties are disrespecting a declaratory judgment or injunction, courts can provide tailored guidance—and, if necessary, consequences for contempt.⁴⁵⁷ As the district court declared in the federal government’s S.B. 8 challenge: “Despite the Texas

453. See *id.* at 40 (same).

454. See *id.* at 40–41 (same).

455. *Id.* at 44 (first quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930); and then quoting *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (denial of application for injunctive relief)).

456. See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 935–36 (2018) (“The belief that federal courts ‘strike down’ unconstitutional statutes is widely held throughout our legal and political culture. But that is an imprecise and misleading description of the power of judicial review.” (footnote omitted)); *id.* at 936 (“The power of judicial review . . . permits a court to decline to enforce a statute in a particular case or controversy, and it permits a court to enjoin executive officials from taking steps to enforce a statute . . .” (footnote omitted)). Mr. Mitchell’s article does not appear to contemplate suing states directly in constitutional litigation, notwithstanding that federal-plaintiff challenges regularly present in that posture.

457. As Professor Nicholas Parrillo has demonstrated, federal courts have achieved compliance on the part of state entities and officials subject to injunctions without widespread resort to contempt sanctions. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 702 (2018) (reporting that “[s]tate and local agencies have a norm of complying with federal court orders” and that “contempt sanctions against state and local government defendants are rare in an absolute sense, though more common and more clearly available than sanctions against federal defendants” (emphasis omitted)). When necessary, federal courts are willing to levy monetary fines against state entities (including against state officials sued in their official capacities)—and have been able to do so without running afoul of state sovereign immunity. *Id.* at 705–06. In theory, federal courts could also place state officials in custody for contempt, as occurred in *Young* itself. But in reality, “jailing of state or local officials is extremely rare.” *Id.* at 741. Aside from Kim Davis, a Kentucky county clerk who violated a federal-court injunction by refusing to issue licenses for same-sex marriages, Professor Parrillo “[f]ound] no examples . . . in the last century.” *Id.* at 740–41. Davis was jailed for six days until her deputies agreed to issue the licenses. *Id.*

Attorney General's lack of clarity about what the State would do in the face of a preliminary injunction, this Court trusts that the State will identify the correct state officers, officials, judges, clerks, and employees to comply with this Order."⁴⁵⁸ Accordingly, the court said it would "rel[y] on the Texas Attorney General's representation that the State 'would [not] want to do anything that could lead to contempt.'"⁴⁵⁹

Critically, *none of this is new*. Federal courts regularly enter declaratory and injunctive relief against states, including in cases brought by the federal government to block the operation of allegedly unconstitutional statutes.⁴⁶⁰ The Supreme Court itself "frequently issues injunctions binding upon states" in the exercise of its original jurisdiction over "Controversies between two or more States."⁴⁶¹ More often than not, those injunctions include express reference to restraining the state parties' "officers," "agents," and the like.⁴⁶² Some dating back to the early twentieth century even purport to operate against a state's "citizens" or on other private persons.⁴⁶³ The point is that declaratory judgments and injunctions against states are well known to federal courts and have proven workable for quite a long time.

There is little reason to think that circumstances would play out differently in the context of constitutional challenges to state laws with coercive private-enforcement schemes. But even if Rule 65(d) and preclusion doctrine somehow failed to include clerks, judges, or private-enforcement plaintiffs within the scope of injunctions or declaratory judgments against states, the merits reasoning underlying such relief should permit private-enforcement defendants with declaratory judgments or

458. *United States v. Texas*, 566 F. Supp. 3d 605, 691 (W.D. Tex.), *stay granted*, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021), *cert. before judgment dismissed*, 595 U.S. 74, 75 (2021).

459. *Id.* (quoting a hearing transcript). Of course, to the extent a state official or would-be private-enforcement plaintiff wants to challenge the constitutional interpretation underlying a declaratory or injunctive remedy in this context in a future case, they could defy the judgment and risk the consequences. If a court with the authority to do so then repudiates that interpretation, the state could presumably obtain relief from the declaratory or injunctive remedy. *See* FED. R. CIV. P. 60(b)(5)–(6) (providing that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" if "applying it prospectively is no longer equitable" or for "any other reason that justifies relief").

460. *See* *United States v. Missouri*, 114 F.4th 980, 986 (8th Cir. 2024) (collecting cases in which "the United States has sued . . . to enjoin a state law's implementation and enforcement or for other appropriate relief"), *cert denied*, 146 S. Ct. 90 (2025) (mem.).

461. Robert D. Cheren, *Environmental Controversies "Between Two or More States,"* 31 PACE ENV'T L. REV. 105, 161–63 (2014) (collecting cases in which the Court has "issue[d] injunctions binding upon states"); U.S. CONST. art. III, § 2.

462. Cheren, *supra* note 461, at 161, 161 n.206 (collecting language specifying the scope of injunctions).

463. *Id.*

injunctions to obtain efficient dismissals of suits. Or if such private-enforcement defendants learn of private-enforcement plaintiffs' future plans to sue (which should overcome the standing hurdle identified in *Jackson*⁴⁶⁴), they should be able to obtain anticipatory relief against such filings.⁴⁶⁵

CONCLUSION

Sovereign immunity provides states potent protection from suits in federal court. But it does not grant them power to disregard citizens' declared constitutional rights, like in the context of the Texas S.B. 8 abortion ban. This Article has demonstrated how sovereign immunity should not foreclose plaintiffs from obtaining declaratory and injunctive relief against states themselves when states themselves make other avenues to judicial review effectively impassable. To do so, the Article has examined the development of the doctrine surrounding *Ex parte Young*, which permits plaintiffs to sue state officials to prevent the enforcement of unconstitutional statutes, as a matter of both structural constitutional values and historical interpretive fidelity. Working through theoretical controversies and methodological uncertainties in the wake of the Supreme Court's recent decision in *Trump v. CASA, Inc.*, the Article has articulated and applied structural and historical accounts of *Young* to argue for state suability in limited circumstances involving coercive private-enforcement schemes aimed at evading constitutional accountability.

464. See *supra* Section I.B.

465. Indeed, those are procedural routes through which *Shelley v. Kraemer* has rendered racially restrictive covenants practically inoperable. See *Barrows v. Jackson*, 346 U.S. 249, 251–53, 260 (1953) (affirming a judgment sustaining a demurrer to a complaint seeking money damages against a property seller for violating a racially restrictive covenant); Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107, 127 n.106 (2004) (noting that “[t]here were a string of actions after *Shelley* seeking declarations that covenants were void” and pointing to *Capitol Federal Savings & Loan Ass’n v. Smith*, 316 P.2d 252 (Colo. 1957), and *Erickson v. Sunset Memorial Park Ass’n*, 108 N.W.2d 434 (Minn. 1961), as successful examples).