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SOLVING THE PROCEDURAL PUZZLES OF THE TEXAS HEARTBEAT ACT AND ITS IMITATORS: *NEW YORK TIMES V. SULLIVAN* AS HISTORICAL ANALOGUE

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ABSTRACT

The Texas Heartbeat Act (S.B. 8) prohibits abortions following detection of a fetal heartbeat while delegating exclusive enforcement through private civil actions brought by "any person," regardless of injury, for statutory damages of a minimum of $10,000 per prohibited abortion. Texas sought to impose costly litigation and potentially crippling liability on reproductive health providers and rights advocates, with the hope of stopping abortion in the state. Prior to *Dobbs v. Jackson Women's Health Organization* overruling *Roe v. Wade* and eliminating constitutional protection for

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abortion, the law represented a unique threat to reproductive freedom. But states are spreading S.B. 8's exclusive private enforcement mechanism to other disfavored-but-protected activities, seeking to impose private civil liability.

This Article—the third in a series unpacking the procedural puzzles of S.B. 8 and its imitators—considers the historical analogue of *New York Times v. Sullivan*, the Court's foundational modern free speech case. *New York Times* arose out of a southern campaign to use state defamation law and private civil litigation to silence media outlets from reporting on Jim Crow and the Civil Rights Movement. That southern litigation campaign and S.B. 8 supporters shared a goal—deter locally unpopular but constitutionally protected activity through threat of hundreds of lawsuits and devastating civil liability and monetary exposure. But the defendants in *New York Times* could not and did not go to federal court ahead of any private lawsuit or seek to functionally enjoin the state's trial courts. The *Times* litigated the First Amendment defensively, with successful review to the Supreme Court of the United States. Contrary to the views and concerns of critics of S.B. 8 and new copycats, rights holders can follow the same process to challenge the substantive validity of privately enforced laws. The history of *New York Times* shows the way.

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I. INTRODUCTION

Dobbs v. Jackson Women's Health Organization overruled *Roe v. Wade* and eliminated the constitutional right to reproductive freedom.[1] It purported to end litigation and judicial decision-making over abortion and to leave the issue to the political process,[2] although it teed up new constitutional questions for judicial resolution.[3]

Dobbs also rendered the Texas Heartbeat Act a footnote in the larger battle over reproductive freedom. Enacted and colloquially known as S.B. 8, that state law prohibits abortions after detection of a fetal heartbeat (around six weeks of pregnancy).[4] The law relies on exclusive private enforcement; no state or local government or officer can bring an enforcement action for a violation of the law.[5] The law creates a private cause of action empowering "any person"—regardless of injury, interest, or personal connection to any abortion[6]—to sue a provider or other person who performs or aids or abets any post-heartbeat abortion. This "any person" can recover statutory damages of not less than $10,000 per prohibited abortion, attorney's fees, and injunctive relief.[7] Without constitutional protection for reproductive freedom, S.B. 8's ban on post-heartbeat abortions becomes inconsequential, as Texas enacted a "trigger law," effective thirty days after *Dobbs*,

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022).

2. *Id.* at 2279, 2284. *See generally* David S. Cohen et al., *The New Abortion Battleground*, 122 COLUM. L. REV. (forthcoming 2023) (manuscript at 1–2) (on file with the *Houston Law Review*).

3. *See generally* Cohen et al., *supra* note 2 (manuscript at 2–3); *Dobbs*, 142 S. Ct. at 2336–37 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

4. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212 (West 2021)).

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

6. Scholars deride this as legal "vigilante behavior." Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 107 CORNELL L. REV. (forthcoming 2023) (manuscript at 33) (on file with the *Houston Law Review*).

7. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)–(b) (West 2021).

prohibiting abortion except to save the mother's life.[8] *Dobbs* also strips practical force from *Whole Woman's Health v. Jackson*, where the Supreme Court eliminated most avenues for challenging S.B. 8's constitutional validity through offensive pre-enforcement federal litigation,[9] holding that providers and advocates could not ask a federal court to enjoin private state litigation before it begins, especially by prohibiting state court clerks from filing and state judges from adjudicating state law cases.[10]

Reducing S.B. 8 and *Whole Woman's Health* to footnotes in the constitutional war over reproductive freedom is ironic. For several months beginning in August 2021, S.B. 8 and the Court's refusal to allow an offensive pre-enforcement challenge to it represented the paramount threat to reproductive freedom.[11] Critics argued that Texas deployed "an array of stratagems designed to shield its unconstitutional law from judicial review,"[12] "nullif[ied]" Supreme Court precedent and federal constitutional rights,[13] and

8. H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021); *see* Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047, 1080, 1085 (2022) [hereinafter Wasserman, *Zombie Laws*]; MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 210 (2020); Mary Ziegler, *The Price of Privacy, 1973 to the Present*, 37 HARV. J.L. & GENDER 285, 322 (2014). Texas also threatened to enforce its never-repealed pre-*Roe* abortion bans. TEX. REV. CIV. STAT. ANN. ART. 4512.1–6 (West 1974); Erin Douglas & Eleanor Klibanoff, *Abortions in Texas Have Stopped After Attorney General Ken Paxton Said Pre-*Roe *Bans Could Be in Effect, Clinics Say*, TEX. TRIBUNE (June 24, 2022), https://texastribune.org/2022/06/24/texas-clinics-abortions-whole-womans-health/ [https://perma.cc/2PSY-F8D9]. *But see* McCorvey v. Hill, 385 F.3d 846, 849 (5th Cir. 2004) (holding that Texas had impliedly repealed its pre-*Roe* abortion ban through post-*Roe* non-ban regulations).

9. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 538–39 (2021); Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 197–99 (2022) [hereinafter Rhodes & Wasserman, *Potential for Defensive Litigation*]; Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1058 (2022) [hereinafter Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*]. The Court allowed limited offensive claims against the state boards that license and regulate medical providers. *Whole Woman's Health*, 142 S. Ct. at 535, 539; *id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part). But the Texas Supreme Court, on a certified question from the Fifth Circuit, interpreted S.B. 8 to prohibit these state boards from enforcing the law, Whole Woman's Health v. Jackson, 642 S.W.3d. 569, 583 (Tex. 2022), prompting the Fifth Circuit to order dismissal of the case. Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra*, at 1060–64.

10. *See* Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1044–45, 1061–77.

11. *Id.* at 1041–43.

12. *Whole Woman's Health*, 142 S. Ct. at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

13. *Id.* at 550 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

"betray[ed]" the people of Texas and constitutional government.[14] The law succeeded in its goal. Abortions after the sixth week of pregnancy (often before a person is aware of the pregnancy), comprising as much as 90% of abortions prior to S.B. 8's enactment,[15] became largely unavailable in the state;[16] the number of abortions performed dropped by approximately half.[17]

S.B. 8 used the threat of costly private litigation and crippling civil liability to chill then-constitutionally protected reproductive freedom activities. *Dobbs* obviates the need for such indirect regulation; states can enforce now-constitutionally valid abortion bans through government-enforced civil and criminal penalties. Rather than a conclusive threat, *Whole Woman's Health* offered a harbinger of *Roe*'s demise, *Dobbs* was the other shoe dropping on the constitutional right to reproductive freedom.[18]

While *Dobbs* changes the constitutional landscape, S.B. 8 and its discontents were never confined to the heartbeat ban or to abortion. Jon Michaels and David Noll describe S.B. 8 as a species of "rights suppressing laws" that "deploy private, civil litigation to stoke culture wars, embolden and reward favored partisans in those culture wars at the expense of subordinated groups, encourage vigilantism, and—ultimately—entrench minoritarian rule."[19] Abortion providers warned the judiciary of S.B. 8 copycats:

> Today it is abortion providers and those who assist them; tomorrow it might be gun buyers who face liability for every purchase. Churches 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 for obtaining a marriage license. And

14. *Id.* at 546 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

15. Complaint for Declaratory Judgment and Injunctive Relief—Class Action ¶ 91, Whole Woman's Health v. Jackson, No. 21-CV-616 (W.D. Tex. July 13, 2021) [hereinafter WWH Complaint]; *see also* Christina Caron, *What Does It Really Mean to Be 6 Weeks Pregnant?*, N.Y. TIMES (May 18, 2019), https://nytimes.com/2019/05/18/parenting/abortion-six-weeks-pregnant.html [https://perma.cc/SZQ7-H6MW].

16. *Whole Woman's Health*, 142 S. Ct. at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part); Transcript of Oral Argument at 66–67, United States v. Texas, 142 S. Ct. 14 (2021) (No. 21-588) [hereinafter United States v. Texas Argument] (statement of Justice Kagan).

17. United States v. Texas Argument, *supra* note 16, at 66–67.

18. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2349–50 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

19. Michaels & Noll, *supra* note 6 (manuscript at 12).

> Black families could face lawsuits for enrolling their children in public schools.[20]

Justice Sotomayor sounded a similar alarm:

> New permutations of S. B. 8 are coming. In the months since this Court failed to enjoin the law, legislators in several States have discussed or introduced legislation that replicates its scheme to target locally disfavored rights. What are federal courts to do if, for example, a State effectively prohibits worship by a disfavored religious minority through crushing "private" litigation burdens amplified by skewed court procedures, but does a better job than Texas of disclaiming all enforcement by state officials? Perhaps nothing at all, says this Court.[21]

States have made these predictions reality. S.B. 8 and *Whole Woman's Health* emboldened states to follow Texas in prohibiting abortions through exclusive private enforcement.[22] An unenacted Missouri proposal prohibits its citizens from traveling out of state to receive abortions—a likely new post-*Dobbs* abortion-litigation flashpoint[23]—through private civil actions against those who provide information, transportation, money, or other support for any abortion, in or out of state.[24] Anti-choice organizations offered a model statute doing the same.[25]

This trend is not confined to abortion. States used private civil actions for damages, attorney's fees, and other relief—in whole or part—to enforce new laws targeting underrepresented and marginalized groups. They prohibited teaching race and other "divisive" concepts in schools (under the guise of banning "critical race theory");[26] prohibited discussions of sexual orientation and

20. WWH Complaint, *supra* note 15, ¶ 18.

21. *Whole Woman's Health*, 142 S. Ct. at 551 (Sotomayor, J., concurring in the judgment in part and dissenting in part); *see* Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1037.

22. *See, e.g.*, H.B. 4327, 58th Leg., 2d Sess. (Okla. 2022); H.B. 2779, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022); S.B. 1309, 66th Leg., 2d Sess. (Idaho 2022).

23. Cohen et al., *supra* note 2 (manuscript at 7–8, 16–17); *see also Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

24. H.B. 1677, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

25. Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022), https://washingtonpost.com/politics/2022/06/29/abortion-state-lines/ [https://perma.cc/BKZ8-QH2Q].

26. *See* H.B. 7, 2022 Leg., Reg. Sess. (Fla. 2022) (to be codified at FLA. STAT. § 1000.05(4) (2022)).

gender identity in schools;[27] and limited trans students' participation in schools and sports.[28] States restricted certain speech through private litigation—"ag-gag" laws preventing critics of commercial farming from employing certain investigative techniques[29] and laws prohibiting private social media providers from moderating speech and speakers on their sites.[30] Nor is this legislative strategy ideologically one-sided. California authorized exclusive private litigation against sellers, manufacturers, and distributors of certain firearms, as Illinois considered similar laws.[31]

Creative legislative minds may concoct unlimited methods for using the threat of crippling civil litigation and liability to deter constitutionally protected but locally unpopular activity. For example, a state committed to stopping racist hate speech might authorize exclusive private civil litigation for extensive damages by "any person" against those who present or display racially discriminatory, derogatory, or offensive ideas and messages.[32]

Our prior work shows that S.B. 8's private-enforcement scheme is not constitutionally defective—*Whole Woman's Health* properly rejected most offensive litigation challenging S.B. 8 because defensive litigation of rights is possible and consistent with due process, litigation norms, and constitutional judicial review. These arguments apply to S.B. 8 and any rights-suppressing laws, real or hypothetical. Our prior arguments show that, as with S.B. 8, inevitable copycat laws are not constitutionally defective in relying on private enforcement and leave room for constitutional challenges in offensive and defensive postures.[33]

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27. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (to be codified at FLA. STAT. § 1001.42(c) (2022)).

28. FLA. STAT. § 1006.205 (2022); H.B. 11, 64th Leg., Gen. Sess. (Utah 2022) (to be codified at UTAH CODE ANN. § 53G-6-901-903 (2022)).

29. ARK. CODE ANN. § 16-118-113(b), (e) (2021); Animal Legal Def. Fund v. Vaught, 8 F.4th 714, 717 (8th Cir. 2021); Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 216–17.

30. TEX. CIV. PRAC. & REM. CODE ANN. §§ 143A.002, .007(a)–(b) (West 2021); FLA. STAT. §§ 106.072, 501.20141(6) (2022). The Eleventh Circuit declared the Florida law invalid. NetChoice LLC v. Att'y Gen. Fla., 34 F.4th 1196, 1203 (11th Cir. 2022). The Fifth Circuit declared the Texas law valid. NetChoice, LLC v. Paxton, No. 21-51178, 2022 WL 4285917, at *1–2 (5th Cir. Sept. 16, 2022).

31. S.B. 1327, 2022 Leg., Reg. Sess. (Cal. 2022); Michaels & Noll, *supra* note 6 (manuscript at 45).

32. Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 213.

33. *See generally id.*; Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9.

During the *Whole Woman's Health* argument, Texas Solicitor General Judd Stone twice compared the situation under S.B. 8 to *New York Times v. Sullivan*,[34] the foundational modern free speech case.[35] Like S.B. 8—and by extension real and hypothetical copycat laws targeting constitutionally protected but locally unpopular activity—state defamation law is enforced through private civil damages litigation. Like abortion providers and advocates under S.B. 8, the *New York Times* defendants faced severe monetary exposure through the cost of litigation and potential liability.[36] But defendants in *New York Times* did not and could not run to federal court ahead of any private defamation lawsuit or seek to functionally enjoin the state's trial courts.[37] They litigated defensively, unsuccessfully in state court before prevailing on review to the Supreme Court of the United States.[38]

The factual circumstances and procedural posture of *New York Times* contributes to its substantive First Amendment guarantees.[39] The case arose out of a coordinated southern campaign wielding state defamation law and private civil litigation to silence the Civil Rights Movement and the northern media covering it, using the cost of litigation and actual or threatened judgments to deter them from protesting, reporting, and exposing the racist face of the segregated South.[40] In Alabama, the *Times* faced $5.6 million in judgments from eleven suits,

34. Transcript of Oral Argument at 61, 85, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463).

35. *See* LEE LEVINE & STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *NEW YORK TIMES V. SULLIVAN* 29, 31–32 (2014); ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 5–8, 32 (1991); Harry Kalven, Jr., *The* New York Times *Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 205, 221 n.125; Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 79; Mary-Rose Papandrea, *The Story of* New York Times v. Sullivan, *in* FIRST AMENDMENT STORIES 229, 230 (Richard W. Garnett & Andrew Koppelman eds., 2012); Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 810, 832 (2016); Howard M. Wasserman, *A Jurisdictional Perspective on* New York Times v. Sullivan, 107 NW. U. L. REV. 901, 903 (2013) [hereinafter Wasserman, *Jurisdictional*]. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 264 (1964).

36. WWH Complaint, *supra* note 15, ¶ 8; *N.Y. Times Co.*, 376 U.S. at 295.

37. *Cf.* WWH Complaint, *supra* note 15, ¶ 15.

38. *N.Y. Times Co.*, 376 U.S. at 264.

39. Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 220, 237–39 (1987); David McGowan, *A Bipartisan Case Against* New York Times v. Sullivan, 1 J. FREE SPEECH L. 509 (2022); Wasserman, *Jurisdictional*, *supra* note 35, at 903.

40. LEVINE & WERMIEL, *supra* note 35, at 13–15; LEWIS, *supra* note 35, at 35–36; Kalven, *supra* note 35, at 200; David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 763–65 (2020); Papandrea, *supra* note 35, at 238; Wasserman, *Jurisdictional*, *supra* note 35, at 909–10.

including $3 million from five suits arising from the editorial advertisement at issue in *New York Times*.[41] By the early 1960s, potential southern libel judgments against media outlets approached $300 million (more than $2.7 billion in 2022 dollars).[42] L.B. Sullivan, the plaintiff in *New York Times*, recovered $500,000, the largest defamation judgment in Alabama history.[43]

The analogy to S.B. 8 and its imitators should be obvious. S.B. 8 authorized private civil litigation in state court to deter locally unpopular—but at the time constitutionally protected—activity by threat of hundreds of lawsuits and multiple big-money judgments. Texas lawmakers presumed and hoped that plaintiffs would prevail in some or all this litigation, breaking providers under the weight of devastating litigation costs and judgments or causing them to abandon the state rather than face the wave of lawsuits and liability. Overwhelming litigation costs, threatened liability, and substantial statutory and punitive damages combined to destroy access to abortion and reproductive health care in the state,[44] even before the Court overruled *Roe*.[45]

This historical analogue undermines the common criticism that exclusive private civil enforcement shields laws from judicial review, nullifies constitutional rights, and betrays constitutional government. *New York Times* demonstrates that defensive constitutional litigation—raising constitutional rights as a defense to avoid private civil damages liability and having the Court declare rights in that posture—is common, consistent with ordinary rules and procedures of constitutional litigation, and sufficient to protect and vindicate substantive constitutional liberties. As the Supreme Court declared Alabama defamation law constitutionally invalid based on the paper's First Amendment defenses, so might a pre-*Dobbs* court have declared the heartbeat ban constitutionally invalid based on the provider's defenses. And so might a court declare invalid a law prohibiting Twitter from moderating speech on its site based on Twitter's First Amendment

41. LEWIS, *supra* note 35, at 35; *N.Y. Times Co.*, 376 U.S. at 294–95 (Black, J., concurring).

42. LEWIS, *supra* note 35, at 36; Papandrea, *supra* note 35, at 237.

43. LEVINE & WERMIEL, *supra* note 35, at 8; LEWIS, *supra* note 35, at 35; Papandrea, *supra* note 35, at 241–42.

44. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting); Michaels & Noll, *supra* note 6 (manuscript at 3).

45. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

defenses.[46] Yet no Justice picked up Stone's point or cited *New York Times* in *Whole Woman's Health*. Although the majority acknowledged that "somewhat analogous complaints" could be lodged against S.B. 8 and tort law,[47] the Court failed to appreciate the complete overlap between what S.B. 8 and its imitators have wrought and the legal, factual, and historical milieu through which the Court laid the cornerstone of the modern First Amendment sixty years ago.

Dissenting from denial of emergency interim relief to stop enforcement when S.B. 8 took effect on September 1, Justice Breyer argued that there "may be other not-very-new procedural bottles that can also adequately hold what is, in essence, very old and very important legal wine: The ability to ask the Judiciary to protect an individual from the invasion of a constitutional right."[48] Justice Breyer was correct but drew the wrong conclusion. Defensive litigation provides that not-very-new procedural bottle, one the *New York Times* Court deemed sufficient to protect from invasion the "very old and very important" freedom of speech. That process remains available for "very old and very important" reproductive freedom, racial equality, and LGBTQ+ rights.

The southern strategy of defamation suits against northern media created a looming disaster for the First Amendment and for the Civil Rights Movement that the media publicized to an awakening nation.[49] That explains the Court's willingness to take the case and to resolve the substantive First Amendment issues as it did.[50] But no one in 1960 suggested that the media having to defend those defamation suits in state court represented a "disaster for the rule of law."[51] Alabama defamation law was blatantly unconstitutional because it violated substantive free speech norms, not because it was privately enforced or because the *Times* had to vindicate its rights defensively. S.B. 8 was blatantly unconstitutional pre-*Dobbs* because it violated substantive reproductive freedom, not because it was privately enforced or

46. *See* NetChoice, LLC v. Att'y Gen. Fla., 34 F.4th 1196, 1203 (11th Cir. 2022). *But see* NetChoice, LLC v. Paxton, No. 21-51178, 2022 WL 4285917, at *2, 52 (5th Cir. Sept. 16, 2022).

47. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535 (2021).

48. *Whole Woman's Health*, 141 S. Ct. at 2497 (Breyer, J., dissenting).

49. LEVINE, *supra* note 35, at 35; McGowan, *supra* note 39, at 513; Neuborne, *supra* note 35, at 79; Papandrea, *supra* note 35, at 252.

50. McGowan, *supra* note 39, at 509; Neuborne, *supra* note 35, at 79.

51. *In re* Whole Woman's Health, 142 S. Ct. 701, 705 (2022) (Sotomayor, J., dissenting).

because providers had to vindicate the Fourteenth Amendment defensively. A prohibition on discussing sexual orientation in the classroom might be blatantly unconstitutional because it violates the rights of teachers and LGBT+ students, not because it is privately enforceable. A prohibition on possessing assault weapons might be blatantly unconstitutional because it violates gun owners' substantive Second Amendment guarantees, not because it is privately enforceable.

New York Times v. Sullivan illustrates why offensive litigation is not constitutionally required and why defensive litigation is sufficient to vindicate constitutional rights. This Article compares the legal, factual, and historical context of *New York Times* to that of S.B. 8 (and, by extension, current and future imitators, real and hypothetical) to demonstrate that such laws are neither unprecedented nor immunized from constitutional judicial review.

II. DEFENSIVE CONSTITUTIONAL LITIGATION AND EXCLUSIVE PRIVATE ENFORCEMENT

Many laws—grounded in tort or statute—are enforced through private civil litigation, requiring defensive litigation of constitutional limits on those laws. That defensive posture is sufficient to vindicate existing and establish new substantive constitutional guarantees. The story of *New York Times v. Sullivan* illustrates the point and provides guidance for vindicating substantive constitutional rights threatened by the new species of exclusive private enforcement schemes reflected in S.B. 8 and its copycats.

A. New York Times *and the Southern Defamation Campaign*

Scholars have told the story of *New York Times v. Sullivan*.[52] We recount those portions demonstrating the case's real-world and procedural framing.

Beginning in the late 1950s, government officials and societal leaders throughout the Jim Crow South devised and pursued a plan: utilize civil defamation litigation under plaintiff-friendly state law to silence civil rights leaders and the national press that, in covering the Civil Rights Movement, exposed to the nation the

52. Anthony Lewis and Mary-Rose Papandrea provide definitive accounts. *See generally* LEWIS, *supra* note 35; Papandrea, *supra* note 35. *See* LEVINE & WERMIEL, *supra* note 35, at 1–31; Logan, *supra* note 40, at 771–73; McGowan, *supra* note 39, at 510–16.

face of a racist society.[53] The cost, burden, and expense of defending against a wave of defamation lawsuits combined with crippling civil judgments became an official weapon against critics of southern government and society.[54] In Alabama, the *Times* faced $5.6 million in judgments from eleven suits, while CBS faced judgments totaling $1.7 million from five suits.[55] By the early 1960s, potential southern libel judgments against media outlets approached $300 million.[56]

New York Times arose against this backdrop. In March 1960, the *Times* published an editorial advertisement titled "Heed Their Rising Voices."[57] The ad described non-violent protests throughout the South, especially by students, and the "unprecedented wave of terror," intimidation, and violence that rose to meet them.[58] With respect to Montgomery, Alabama:

> In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.[59]

The ad shifted to a plea for financial support for Martin Luther King, Jr., in defending against various state arrests and charges; for the student protesters; and for the right to vote.[60] The statement was endorsed by a who's who of public figures and signed by twenty civil rights leaders.[61]

The ad contained minor inaccuracies, including about events in Montgomery: the dining hall was not padlocked; student leaders were expelled over a different protest; the police never "ring[ed]"

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53. LEWIS, *supra* note 35, at 35–36, 42–43; Kalven, *supra* note 35, at 200; Logan, *supra* note 40, at 764–65; Papandrea, *supra* note 35, at 237–38.

54. *See* LEVINE & WERMIEL, *supra* note 35, at 4–6; LEWIS, *supra* note 35, at 35–36; Kalven, *supra* note 35, at 200; Logan, *supra* note 40, at 763–65; Papandrea, *supra* note 35, at 237–38; Wasserman, *Jurisdictional*, *supra* note 35, at 909–10.

55. LEWIS, *supra* note 35, at 151; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring).

56. LEWIS, *supra* note 35, at 6, 36; Papandrea, *supra* note 35, at 237.

57. LEWIS, *supra* note 35, at 6.

58. *Id.* at 6–7.

59. *Id.* at 7.

60. Papandrea, *supra* note 35, at 232.

61. *Id.*

the campus, although they deployed nearby and arrested more than thirty students and faculty who left campus following the protest; and the students never followed through on the mass refusal to register.[62] Also, they sang "The Star-Spangled Banner" rather than "My Country, 'Tis of Thee."[63]

State and local officials filed five lawsuits in Alabama state court, seeking a total of more than $3 million (more than $27 million in 2022).[64] L.B. Sullivan, the Montgomery commissioner of public safety, filed one lawsuit. Sullivan oversaw the police, fire, scales, and cemeteries departments; although he did not manage day-to-day operations, department heads reported to him.[65] Sullivan named the *Times* and four signatories to the ad who were citizens of Alabama—Reverends Ralph Abernathy, Joseph Lowery, S.S. Seay, Sr., and Fred Shuttlesworth.[66]

Sullivan's suit was tried before Judge Walter Burgwyn Jones (a Confederate sympathizer and segregationist who may have worked with southern officials to develop this litigation strategy) and a jury of white southerners whose photos appeared in local papers.[67] The jury awarded Sullivan $500,000 (more than $4.4 million in 2022), the largest defamation judgment in Alabama history.[68] Judgment in hand and as appellate review proceeded, Sullivan enforced the judgment against the four individual defendants. Utilizing state procedures, officials seized and sold at auction automobiles, real estate, and other property, prompting one defendant to flee Alabama for a ministry in Ohio.[69] One year after Sullivan's victory, Montgomery Mayor Earl James won a second $500,000 defamation judgment over the ad.[70]

In targeting the northern press with defamation suits, Sullivan and other plaintiffs sought to use the cost of defending

62. LEWIS, *supra* note 35, at 30–31; McGowan, *supra* note 39, at 510; Papandrea, *supra* note 35, at 233–34.

63. LEWIS, *supra* note 35, at 31; McGowan, *supra* note 39, at 510; Papandrea, *supra* note 35, at 233.

64. LEVINE & WERMIEL, *supra* note 35, at 6; LEWIS, *supra* note 35, at 12–14; Logan, *supra* note 40, at 765; Papandrea, *supra* note 35, at 237.

65. *Id.* at 10; Papandrea, *supra* note 35, at 236.

66. LEVINE & WERMIEL, *supra* note 35, at 6; LEWIS, *supra* note 35, at 11–12; Papandrea, *supra* note 35, at 236; Wasserman, *Jurisdictional*, *supra* note 35, at 903–06. The Alabama defendants destroyed complete diversity and added forum defendants, preventing the *Times* from removing to federal court. *Id.* at 905–07.

67. LEWIS, *supra* note 35, at 26–27; McGowan, *supra* note 39, at 511.

68. LEVINE & WERMIEL, *supra* note 35, at 8; LEWIS, *supra* note 35, at 33, 35; Papandrea, *supra* note 35, at 242.

69. LEWIS, *supra* note 35, at 162.

70. *Id.* at 35.

litigation and the threat of massive liability to drive northern reporters out of the South and to "choke off a process that was educating the country about the nature of racism and was affecting political attitudes on that issue."[71] The campaign threatened media outlets and individual civil rights activists with financial ruin while forcing cash-strapped civil rights organizations such as the Southern Christian Leadership Conference (SCLC) to spend enormous legal fees.[72]

This strategy affected more than the speech rights of newspapers and activists. Scholars credit media coverage of the movement with exposing the abuses of Jim Crow and catalyzing the legislative success of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[73] Race and civil rights concerns drove the Court's First Amendment decision as much as free speech concerns.[74] Had southern officials succeeded in weaponizing private civil litigation, the public benefits from media coverage vanish; Jim Crow—with its attendant racism and racist violence—continues and thrives.[75]

On review of the Alabama Supreme Court, the Supreme Court of the United States handed the *Times* and the First Amendment its most significant victory. The Court recognized the First Amendment's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," which "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[76] Public officials pursuing state law defamation claims must prove by clear and convincing evidence that the challenged statement is false and spoken with actual malice (knowledge of or reckless disregard for its falsity).[77] They also must show that the statement is "of and concerning" them, that it identifies and

71. LEWIS, *supra* note 35, at 42; LEVINE & WERMIEL, *supra* note 35, at 12; *see also* Logan, *supra* note 40, at 765; McGowan, *supra* note 39, at 513.

72. LEVINE & WERMIEL, *supra* note 35, at 11–12.

73. GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 358–59 (2007); LEWIS, *supra* note 35, at 36, 40–42.

74. McGowan, *supra* note 39, at 514; Neuborne, *supra* note 35, at 79.

75. LEWIS, *supra* note 35, at 36–37, 221.

76. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); LEVINE & WERMIEL, *supra* note 35, at 28; Papandrea, *supra* note 35, at 248.

77. *N.Y. Times Co.*, 376 U.S. at 279–80, 285–86; LEVINE & WERMIEL, *supra* note 35, at 29–30; Papandrea, *supra* note 35, at 249–50.

defames them in some personal way.[78] The Court also ended the litigation by asserting the power to independently review constitutional facts on appeal; the record showed that the plaintiff could not prove truth or actual malice by the new clear and convincing evidence standard, obviating the need for remand or further proceedings in state court.[79] Alexander Meiklejohn lauded the First Amendment victory as "an occasion for dancing in the streets."[80]

Yet no one—now or sixty years ago—suggests that the southern defamation campaign denied the *Times* and other southern defamation defendants federal judicial review or the opportunity to vindicate their rights. No one suggests the *Times*'s First Amendment rights were violated by having to defend these lawsuits in state court rather than being able to pursue offensive litigation in federal district court. No one suggests that the *Times* should or could have sued Judge Jones or the clerk of the state court to stop them from accepting or adjudicating the suit.[81] No one suggests, as Justice Breyer did as to S.B. 8, that the "very bringing into effect" of Alabama defamation law violated the First Amendment rights of the *New York Times* or Abernathy, Shuttlesworth, and company.[82]

Rather, *New York Times* exemplifies defensive constitutional litigation. State action, necessary for the First Amendment to apply, existed where Alabama courts employed Alabama statutory and common law defamation rules to impose civil liability against constitutionally protected speech.[83] The *Times* protected and vindicated its constitutional interests by raising the First Amendment as a shield and a way to avoid liability in the state court lawsuit. Due process and the First Amendment required no more.

78. *N.Y. Times Co.*, 376 U.S. at 288; LEVINE & WERMIEL, *supra* note 35, at 30; LEWIS, *supra* note 35, at 149.

79. *N.Y. Times Co.*, 376 U.S. at 285–86; LEVINE & WERMIEL, *supra* note 35, at 31; LEWIS, *supra* note 35, at 147–48; Logan, *supra* note 40, at 772, 790–91; Papandrea, *supra* note 35, at 251.

80. Kalven, *supra* note 35, at 221 n.125.

81. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532–33 (2021). *But see id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 548 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

82. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2497 (2021) (Breyer, J., dissenting).

83. *N.Y. Times Co.*, 376 U.S. at 265.

B. The Ghost of New York Times *in S.B. 8 and Its Imitators*

S.B. 8 prohibits abortions after detection of a fetal heartbeat.[84] This effectively prohibits abortions after five to six weeks of pregnancy (often before a person is aware of the pregnancy), a category comprising as much as 90% of Texas abortions prior to S.B. 8's enactment.[85] The law was clearly constitutionally invalid under the Supreme Court's pre-*Dobbs* reproductive freedom jurisprudence, under which states could not prohibit abortions prior to fetal viability,[86] at twenty-three to twenty-six weeks of pregnancy.

Many states participated in a pre-*Dobbs* wave of state restrictions on pre-viability abortions.[87] S.B. 8 stands out for its enforcement mechanism. It prohibits public enforcement—no state or local government or officer can bring an enforcement action for a violation of the ban on post-heartbeat abortions.[88] It creates a private cause of action empowering "any person"—regardless of injury, interest, or personal connection to any abortion—to sue a provider or other person who performs or aids or abets any post-heartbeat abortion. Any person can recover statutory damages of not less than $10,000 per statutorily prohibited abortion, attorney's fees, and injunctive relief.[89]

This procedural framework forces providers into defensive litigation: a provider performs a statutorily prohibited abortion in violation of the law; "any person" files suit against that provider in state court; and the provider argues in defense that S.B. 8's prohibition on post-heartbeat abortions is constitutionally invalid

84. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE §§ 171.203–171.205).

85. WWH Complaint, *supra* note 15, ¶ 91; *see also* Caron, *supra* note 15.

86. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 860 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *see* Roe v. Wade, 410 U.S. 113, 162–63 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

87. Bryant v. Woodall, 1 F.4th 280, 283 (4th Cir. 2021); Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682, 686 (8th Cir. 2021); Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam); Planned Parenthood S. Atl. v. Wilson, 527 F. Supp. 3d 801, 806 (D.S.C. 2021); SisterSong Women of Color Reprod. Just. Collective v. Kemp, 472 F. Supp. 3d 1297, 1314 (N.D. Ga. 2020); Robinson v. Marshall, 415 F. Supp. 3d. 1053, 1055, 1057–58 (M.D. Ala. 2019); *see also Dobbs*, 142 S. Ct. at 2349–50 (Breyer, Sotomayor, and Kagan, JJ., dissenting)); ZIEGLER, *supra* note 8, at 210–11.

88. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE § 171.207(a)).

89. *Id.* (codified at TEX. HEALTH & SAFETY CODE § 171.208(a)–(b)).

and cannot provide the basis for civil liability, requiring dismissal of the action and judgment in favor of the provider.[90]

S.B. 8 is not a one-off enactment. Critics warn of imitator and copycat "rights suppressing laws." Abortion providers in *Whole Woman's Health* warned:

> Today it is abortion providers and those who assist them; tomorrow it might be gun buyers who face liability for every purchase. Churches 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 for obtaining a marriage license. And Black families could face lawsuits for enrolling their children in public schools.[91]

Justice Sotomayor followed that in her *Whole Woman's Health* dissent:

> New permutations of S. B. 8 are coming. In the months since this Court failed to enjoin the law, legislators in several States have discussed or introduced legislation that replicates its scheme to target locally disfavored rights. What are federal courts to do if, for example, a State effectively prohibits worship by a disfavored religious minority through crushing "private" litigation burdens amplified by skewed court procedures, but does a better job than Texas of disclaiming all enforcement by state officials? Perhaps nothing at all, says this Court.[92]

In rejecting the pre-enforcement challenge to S.B. 8, the Court "effectively invite[d] other States to refine S.B. 8's model for nullifying federal rights."[93]

States have made these predictions reality for abortion and other activities they hope to deter or halt—from trans-student participation in girls' sports to teaching race in U.S. history courses to discussing gender identity in school to controlling speech on web sites to possession of firearms.[94] The hypothetical applications and extensions remain boundless.[95]

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90. Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1033–34.

91. WWH Complaint, *supra* note 15, ¶ 18.

92. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 551 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

93. *Id.* at 545–46.

94. *Supra* notes 26–31 and accompanying text.

95. *Supra* note 32 and accompanying text.

But privately enforced state law raised the specter of rights-violating imitators before S.B. 8. Justice Black sounded this alarm in *New York Times*:

> There is no reason to believe that there are not more such huge verdicts lurking . . . around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public officials . . . . Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.[96]

The analogy between *New York Times* on one hand and S.B. 8 and real or hypothetical copycats on the other is unmistakable. Like their Alabama forebears, these laws use private state court civil litigation to deter locally unpopular but arguably constitutionally protected activity through the cost of litigation and threat of multiple big-money lawsuits and judgments.[97] Lawmakers presume and hope that plaintiffs will prevail in some or all of this litigation, breaking rights holders under the weight of devastating litigation costs and judgments or causing them to cease the targeted activity in the state rather than face the wave of lawsuits and liability.

The threat of S.B. 8 litigation and liability destroyed access to reproductive health care in Texas even before *Dobbs*, just as Alabama officials hoped the threat of defamation litigation would destroy civil rights protests and media coverage of Jim Crow's racist violence.[98] And both worked, at least for a time.[99] The *Times* pulled its reporters from Alabama and stopped covering events on the ground.[100] Texas abortion providers complied with the

96. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 294–95 (1964) (Black, J., concurring); *see* LEWIS, *supra* note 35, at 151–52.

97. Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 206.

98. McGowan, *supra* note 39, at 514–15; *New Texas Abortion Law Likely to Unleash a Torrent of Lawsuits Against Online Education, Advocacy and Other Speech*, ELEC. FRONTIER FOUND. (Sept. 2, 2021), https://eff.org/deeplinks/2021/09/new-texas-abortion-law-likely-unleash-torrent-lawsuits-against-online-education [https://perma.cc/963Q-VVLW].

99. LEWIS, *supra* note 35, at 43; Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, NEW ENG. J. MED. (June 22, 2022), https://nejm.org/doi/full/10.1056/NEJMp2207423 [https://perma.cc/C82E-AYEE].

100. LEWIS, *supra* note 35, at 43.

heartbeat ban, ceasing abortions or limiting the practice to those in which no heartbeat was or could be detected.[101]

III. *NEW YORK TIMES* AND PRIVATE ENFORCEMENT SCHEMES

The history of *New York Times* demonstrates several things. Rights holders can challenge constitutionally suspect laws with private enforcement schemes consistent with ordinary constitutional rules and procedures.[102] Defensive litigation offers the "not-very-new procedural bottles" that Justice Breyer and critics seek against these laws.[103] Meaningful distinctions between the legal and procedural contexts of S.B. 8 (and its imitators) and *New York Times* fail—or show that the *Times* occupied a worse procedural position than the targets of S.B. 8 and its imitators.

A. Degree of Exposure

One might argue that the *Times*'s defamation exposure was more contained.

Any of millions of random and unconnected "any person[s]" can sue a provider under S.B. 8 for a minimum of $10,000 per statutorily prohibited abortion.[104] Any of millions of random "any persons" can sue a California possessor of an assault weapon for a minimum of $10,000.[105] Any of millions of people can sue over discussions of sexual orientation or gender identity in a Florida school.[106] These laws empower a limitless universe of potential plaintiffs suing over conduct that does not affect them beyond playing to their sense of grievance.[107] In theory, by contrast, the *Times* controlled its legal exposure by deciding who to write about and what to say about them, thereby limiting potential plaintiffs and damage awards.

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101. Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 198; Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1043; *see also In re* Whole Woman's Health, 142 S. Ct. 701, 702 (2022) (Sotomayor, J., dissenting); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545–46 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

102. *See* Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 241; Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1037.

103. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2497 (2021) (Breyer, J., dissenting).

104. *Supra* note 7 and accompanying text.

105. S.B. 1327, 2022 Leg., Reg. Sess. (Cal. 2022).

106. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (to be codified at FLA. STAT. § 1001.42(c) (2022)).

107. Michaels & Noll, *supra* note 6 (manuscript at 22, 28).

But the distinction is not so sharp. The *Times* could not have identified L.B. Sullivan as a potential plaintiff when deciding to publish "Heed." The ad did not mention, describe, or refer to Sullivan or his actions. It referred "to everyone and no one at the same time" by identifying the "police," "state authorities," and "Southern violators,"[108] none of which mentions or describes Sullivan or his office (which did not manage daily police operations). Sullivan's initial demand for a retraction and apology "puzzled" the *Times's* attorneys; they could not identify what statements to retract because they could not understand how the ad's statements reflected on him.[109] Other than being a city commissioner in Montgomery and having police officials report to him, Sullivan was as random a defamation plaintiff with respect to that ad[110] as "any person" bringing an S.B. 8 action over a random abortion, suing over possession of an assault weapon, or suing over the teaching of slavery in the local public high school. And Sullivan was not the only random potential plaintiff. Alabama Governor John Patterson, Montgomery Mayor Earl James, a second city commissioner, and a former city commissioner sued over the ad[111]—although, as with Sullivan, none was named or described in the ad and none obviously qualified as police, state authorities, or southern violators.

Nor could the *Times* control its damage exposure. Were the ad of and concerning Sullivan, it is "laughable" to believe that it harmed rather than enhanced his reputation.[112] It described southern officials hostile to civil rights and the Civil Rights Movement restraining and restricting protesters who dared challenge segregation—the issues on which Sullivan had campaigned and won office.[113] Sullivan burnished his public reputation as a fighter for Jim Crow segregation during the Freedom Rides one year later, failing to provide police protection at the bus terminal despite promising to do so, allowing a mob to assault the riders.[114]

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108. Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 793 (1986).

109. LEWIS, *supra* note 35, at 12; McGowan, *supra* note 39, at 510–11; Papandrea, *supra* note 35, at 236.

110. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 288–90 (1964).

111. LEWIS, *supra* note 35, at 35, 151.

112. *N.Y. Times Co.*, 376 U.S. at 294 (Black, J., concurring); Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 94 (2012).

113. LEWIS, *supra* note 35, at 6; Papandrea, *supra* note 35, at 236.

114. LEWIS, *supra* note 35, at 10–11.

The southern defamation campaign pursued a tort of "libel on government," or more broadly, libel on the community and southern society. Plaintiffs attempted to transmute impersonal criticism of government, government conduct, and the Jim Crow South into criticism of the individuals comprising government and the community.[115] The five lawsuits over "Heed" followed this theory—by inaccurately (however insignificantly) criticizing conduct of government entities within Alabama, the ad inaccurately criticized individual officials comprising government.[116] *New York Times* rejected this "alchemy," requiring a statement be "of and concerning" a readily identifiable person.[117]

But when the ad ran in March 1960, a large universe of individuals stood ready to sue the *Times*, claim that criticizing southern society and government criticized them and their individual roles in southern society and government, and demand substantial damages. A description of government conduct subjected the publication to suits and liability at the hands of "any person" bearing any connection or relationship to the government, agency, or conduct described. The paper could not control who might emerge from that universe with a lawsuit.[118]

In fact, the *Times* faced greater financial exposure under Alabama defamation law than a provider faces under S.B. 8. While an infinite number of "any persons" can sue over one abortion, one person can recover for any abortion; a provider avoids financial liability by showing that it paid the full statutory damages of $10,000 (or more) for that abortion.[119] California's assault-weapons copycat contains a similar single-recovery limitation.[120] A defendant can be liable once for one statutory violation, although he bears the cost of defending multiple suits over one statutory violation.

"Heed," by contrast, gave rise to multiple lawsuits and multiple substantial damages awards.[121] Five lawsuits produced

115. *N.Y. Times Co.*, 376 U.S. at 291–92 (citing City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923)); LEWIS, *supra* note 35, at 160.

116. *See supra* notes 64–71 and accompanying text; LEWIS, *supra* note 35, at 44–45.

117. *N.Y. Times Co.*, 376 U.S. at 292; *see also* Rosenblatt v. Baer, 383 U.S. 75, 82–83 (1966); LEVINE & WERMIEL, *supra* note 35, at 52.

118. *N.Y. Times Co.*, 376 U.S. at 277.

119. S.B. 8, 87th Leg., Reg. Sess. § 3 (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE § 171.208(c)).

120. S.B. 1327, 2022 Leg., Reg. Sess. (Cal. 2022).

121. *N.Y. Times Co.*, 376 U.S. at 278; LEWIS, *supra* note 35, at 35, 146; Papandrea, *supra* note 35, at 249.

two $500,000 judgments and exposure of another $2 million.[122] The paper might not have survived these and other judgments.[123] Any government official could be a "southern violator," thus any official with a tenuous connection to the governmental unit or department described could recover similar amounts, expanding the paper's potential liability.[124] And that random official could seek historically large judgments, violating traditional principles of general and punitive damages.[125]

During the *Whole Woman's Health* argument, Texas Solicitor General Stone analogized an S.B. 8 suit to a tort of "outrage," where an individual becomes aware of a noncompliant abortion and it causes her moral or psychological outrage and thus harm for which the law allows recovery.[126] Michaels and Noll deride this use of tort law.[127]

But the southern defamation campaign of the early 1960s used defamation the same way—segregationists and segregationist officials sought to recover for psychological harm and outrage they experienced because media reported segregationist society's views and actions. They were "aggrieved" by media coverage of the legal regime and culture they supported and defended, and they engaged the courts to amplify and remedy those grievances. The southern strategy, S.B. 8, and S.B.8 copycats share broad conceptions of harm allowing claims by large pools of potential plaintiffs seeking substantial monetary recovery.

B. Blatant Invalidity

One might distinguish S.B. 8 pre-*Dobbs* from 1960s Alabama defamation law on the relative timing of the invalid substantive enactment and the judicial constitutional precedent.

Alabama defamation law predated *New York Times v. Sullivan*; the decision declaring state law constitutionally violative marked the Court's first use of free speech to limit defamation law,[128] switching "the orbit of libel law from far out

122. LEWIS, *supra* note 35, at 35.

123. *N.Y. Times Co.*, 376 U.S. at 278; LEWIS, *supra* note 35, at 35.

124. *See N.Y. Times Co.*, 376 U.S. at 257–58; *id.* at 295 (Black, J., concurring).

125. Epstein, *supra* note 108, at 793–94.

126. Transcript of Oral Argument, *supra* note 34, at 47–49.

127. Michaels & Noll, *supra* note 6 (manuscript at 32).

128. *See* Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453, 2454–55 (2022) (Thomas, J., dissenting from denial of certiorari); Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 2426 (Gorsuch,

frozen darkness to the sunny warmth of the first amendment."[129] S.B. 8 postdates *Roe* and *Casey* by decades; Texas enacted the law contrary to and in the face of long-standing judicial precedent holding that states cannot prohibit pre-viability abortions and knowing the heartbeat ban was judicially unenforceable unless and until the Court overruled precedent.[130] The Alabama and Texas legal positions diverged as to precedent. Alabama officials wanted to retain existing state law under existing constitutional doctrine; Texas created new law to change existing constitutional jurisprudence.

Nevertheless, the contexts share legal uncertainty—whether state law, privately enforced, is constitutionally valid. The relative timing of the challenged state law and federal judicial precedent should not affect how rights holders challenge these laws nor suggest problems with the primacy of defensive litigation.

1. New Laws and Old Precedent. States operate in a system of "judicial departmentalism"—judicial precedent binds courts in adjudicating cases but does not constrain legislatures deciding to enact laws or executives in deciding to enforce laws.[131] A state can enact new laws, retain existing laws, and enforce laws in the face of contrary judicial precedent, using independent judgment as to what the Constitution permits.[132] These "zombie laws" are "undead"—alive in being on the law books and alive in being subject to some enforcement efforts or threats but dead in that enforcement fails when those efforts reduce to judicial disputes.[133] S.B. 8 qualified as a zombie law when enacted in 2021, a new law enacted in the face of existing adverse judicial precedent; Texas

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J., dissenting from denial of certiorari); LEVINE & WERMIEL, *supra* note 35, at 12–13, 33; LEWIS, *supra* note 35, at 103; Epstein, *supra* note 108, at 789–90; Logan, *supra* note 40, at 769–70, 774–75; Papandrea, *supra* note 35, at 243–44.

129. William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution*,*"* 25 WM. & MARY L. REV. 793, 793 (1984).

130. Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1032; Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

131. Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1721, 1725–26, 1728 (2017); Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1082, 1116–17 (2020) [hereinafter Wasserman, *Departmentalism*].

132. Wasserman, *Departmentalism*, *supra* note 131, at 1117–19; *see also* Wasserman, *Zombie Laws*, *supra* note 8, at 1080, 1082–84.

133. Wasserman, *Zombie Laws*, *supra* note 8, at 1058–59; *see* Pool v. City of Houston, 978 F.3d 307, 309, 312–13 (5th Cir. 2020).

lawmakers (and "any person" bringing suit through competent counsel) knew any enforcement would fail until *Dobbs* changed judicial precedent and "de-zombified" the law.[134]

A legislature does not violate the Constitution in enacting a zombie law and the enactment or existence of a zombie law does not represent an independent constitutional defect.[135] States may use existing and new legislation to prompt the Court to change its jurisprudence. The Alabama legislature would have been within its constitutional power to retain its defamation law following *New York Times*, hoping for a more favorable result in the future. S.B. 8 joined a parade of new abortion restrictions designed to create the litigation prompting the Court to overrule *Roe* and *Casey*.[136] Arkansas's legislature pleaded with the Court to use its new law, despite its inconsistency with controlling precedent, as a vehicle for jurisprudential change.[137] Dismissing Alabama defamation law, these new abortion restrictions, or any new private-enforcement imitator as blatantly unconstitutional begs the question. The laws may be constitutionally invalid under judicial precedent and in the courts but not more broadly. Litigation, including defensive litigation in response to enforcement of the challenged law, must resolve the constitutional issues as to any individual rights holder.

During the *Whole Woman's Health* argument, Chief Justice Roberts questioned Texas Solicitor General Stone about judicial departmentalism and zombie laws, probing the suggestion in an amicus brief that "states have every prerogative to adopt interpretations of the Constitution that differ from the Supreme Court's."[138] Stone ran far and fast from the idea, insisting that the state "will absolutely faithfully apply any decisions of this Court, as they understand them" and that all Texas officials will "take the interpretations from this Court and federal law and to faithfully implement them."[139] Stone's position is understandable—Chief Justice Roberts was not receptive to

134. *See* Wasserman, *Zombie Laws*, *supra* note 8, at 1062, 1064–65.

135. *See Whole Woman's Health*, 142 S. Ct at 535; California v. Texas, 141 S. Ct. 2104, 2115–16 (2021); Massachusetts v. Mellon, 262 U.S. 447, 483 (1923); Poe v. Ullman, 367 U.S. 497, 507 (1961); Support Working Animals, Inc. v. Governor of Fla., 8 F.4th 1198, 1203 (11th Cir. 2021); Wasserman, *Departmentalism*, *supra* note 131, at 1083–85; Wasserman *Zombie Laws*, *supra* note 8, at 1052, 1082–85.

136. *See supra* note 87 and accompanying text.

137. S.B. 6, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

138. Transcript of Oral Argument, *supra* note 34, at 76–77.

139. *Id.* at 77.

judicial departmentalism,[140] however descriptively accurate it might be.

The distinction between existing and new law might affect initial evaluation of a lawsuit. Given the heartbeat ban's clear pre-*Dobbs* constitutional invalidity and the certain failure of any lawsuit enforcing that provision in a court bound by *Roe* and *Casey*, any S.B. 8 action was non-meritorious, perhaps frivolous and sanctionable, when filed.[141] Given the absence of contrary judicial precedent, on the other hand, Sullivan's lawsuit was not frivolous or sanctionable when filed; Alabama defamation law became judicially unenforceable after the Court's decision four years into Sullivan's suit.[142]

But this goes to the appropriate outcome of private civil litigation, not to whether private civil litigation represents an ordinary and acceptable procedure for enforcing state law or for raising and litigating constitutional challenges to that law. Attorneys for the *Times* were forthright about seeking constitutional change. They raised First Amendment defenses in state court, expecting them to fail without meaningful judicial scrutiny.[143] They centered the First Amendment before the Supreme Court, using the case as a "frontal constitutional attack" on state tort law.[144]

Not knowing how the Court would receive their constitutional arguments, the *Times*'s attorneys appealed to the Court's substantive constitutional goals.[145] They knew the immediate beneficiaries would be civil rights activists and the sympathetic media covering them.[146] The case fit the Court's larger jurisprudential project of rejecting "talismanic immunity" from the First Amendment for certain categories of speech; labeling speech "defamation" should not strip its constitutional protection.[147] That project had special force in disputes over the role of free expression

140. *See Whole Woman's Health*, 142 S. Ct. at 543–45 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

141. *But see* TEX. HEALTH & SAFETY CODE §§ 171.201–171.212 (West 2021).

142. *See supra* Part II.

143. LEWIS, *supra* note 35, at 45; Logan, *supra* note 40, at 767.

144. LEWIS, *supra* note 35, at 106–08; Logan, *supra* note 40, at 768–69.

145. LEWIS, *supra* note 35, at 106; Logan, *supra* note 40, at 768–69.

146. *See* McGowan, *supra* note 39, at 509–10, 513.

147. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268–69 (1964); Kalven, *supra* note 35, at 201; Charles W. "Rocky" Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 411–17 (2014).

around race, civil rights, and Jim Crow during a volatile historical period.[148]

The current Court does not share a jurisprudential project of expanding reproductive freedom—quite the opposite, as the Court overruled *Roe* and *Casey* several months after *Whole Woman's Health*. But everyone on the Court recognized S.B. 8's unusual structure and its obvious constitutional invalidity under then-prevailing judicial precedent.[149] Had the Court not eliminated all abortion protections in *Dobbs*, the Justices would have considered the heartbeat ban's substantive validity when presented with a procedurally appropriate vehicle at the appropriate time—one originating in state court, litigated defensively, and coming from the state's highest court.[150] They will do the same with challenges to privately enforced copycats targeting assault weapons, out-of-state abortions, and racist speech.

2. New Laws and New Precedent. Judicial precedent changes.[151] Judicial departmentalism—granting executive and legislative discretion to pursue independent constitutional understandings—enables that change. Legislatures possess and wield the power to enact, and enforcers possess and wield the power to enforce, new laws challenging or questioning judicial precedent. Enforcement produces new litigation through which courts change, overrule, or retain precedent.[152]

a. Unstable Precedent. In rejecting the *New York Times* analogy, critics assume the First Amendment regime is more stable and less threatened than the reproductive freedom regime. Free speech scholars regard *New York Times* as a foundational free speech case and the genesis of the modern speech-protective

148. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450–52, 482 (1985); Kalven, *supra* note 35, at 192–93; Neuborne, *supra* note 35, at 78–79; *see, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 230 (1963); NAACP v. Button, 371 U.S. 415, 428–29 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958).

149. *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021); *id.* at 2496 (Roberts, C.J., dissenting); *id.* at 2498 (Sotomayor, J., dissenting).

150. *See* Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 229, 231, 234–35, 238–45.

151. *See, e.g.*, Jonathan F. Mitchell, *The Writ-Of-Erasure Fallacy*, 104 VA. L. REV. 933, 1008 (2018); Charles W. "Rocky" Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383, 405–08 (2018); Walsh, *supra* note 131, at 1728; Wasserman, *Departmentalism*, *supra* note 131, at 1119.

152. Wasserman, *Zombie Laws*, *supra* note 8, at 1080–83; Wasserman, *Departmentalism*, *supra* note 131, at 1119.

First Amendment.[153] The judgment was unanimous, all Justices agreeing that the First Amendment precluded liability.[154] First Amendment rights holders (such as speakers or newspapers compelled to challenge the constitutional validity of defamation law defensively), the argument goes, enjoy the protection of solid precedent and do not risk liability. Reproductive rights holders feared—correctly, in light of *Dobbs*—that they would lose on the substantive constitutional merits and face liability in defensive litigation.

This reflects a substantive rather than procedural problem. The valid concern that rights holders will fail on the constitutional merits is agnostic to the posture in which they litigate those rights. Because *Dobbs* eliminates any constitutional right to abortion, pregnant patients lack a substantive legal right to receive certain abortion services and providers lack any constitutional protection for statutory-violative conduct. This renders S.B. 8's heartbeat ban constitutionally valid, meaning providers lose constitutional challenges to the law whether they pursue offensive litigation or raise the Fourteenth Amendment as a defense.

b. Changing First Amendment Doctrine. The free speech jurisprudence around defamation is not as stable as critics suggest. *New York Times*'s consensus and speech-protectiveness collapsed in ensuing decades. Subsequent cases divided a changing Court, which declined to adopt the broadest doctrinal scope and accord speakers the broadest protection.[155] The doctrine has long had critics, as political and media environments have evolved.[156]

Those criticisms have increased in volume and frequency. Justice Thomas has on three occasions called for the Court to overrule *New York Times*, arguing that it has no basis in the original understanding of the First Amendment and licenses

153. *See supra* note 35 and accompanying text.

154. Justice Brennan wrote for a six-Justice majority. Justices Black, Douglas, and Goldberg concurred in the result, urging a more speech-protective position prohibiting public officials from recovering for defamation. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., joined by Douglas, J., concurring); *id.* at 297–98 (Goldberg, J., joined by Douglas, J., concurring in the result).

155. LEVINE & WERMIEL, *supra* note 35, at 36; LEWIS, *supra* note 35, at 198–99; Papandrea, *supra* note 35, at 253–55.

156. *See, e.g.*, Epstein, *supra* note 108, at 817–18; Logan, *supra* note 40, at 779–80; McGowan, *supra* note 39, at 516–20; Papandrea, *supra* note 35, at 259–61.

speakers to lie with impunity.[157] Justice Gorsuch took a shorter step in urging the Court to address questions about its continued viability in a new expressive environment.[158] Two lower court judges urged the Supreme Court to overrule precedent,[159] while others faced, but rejected, explicit requests to ignore it.[160] Scholars have identified doctrinal defects and urged changes or limitations, especially as to the scope and application of the actual malice rule beyond public officials.[161] Republican and conservative political figures and organizations have pursued a litigation campaign against critics reminiscent of 1960s Alabama.[162]

Legislators may be more willing to flex their departmentalism muscles in enacting a zombie law—one patently and obviously inconsistent with existing constitutional jurisprudence—when they foresee jurisprudential changes de-zombifying that law.[163] Texas and other states restricting abortion predicted, or at least hoped for, the coming regime on reproductive freedom and wanted to provide the legal catalyst. Recent criticisms of *New York Times* incentivize sympathetic state legislatures to pursue the same gambit—amend defamation law to align with these preferred tort policies and to create the litigation necessary to reconsider or overrule and to establish a new First Amendment regime.

A state might begin small, requiring defendants to prove truth by a preponderance of the evidence, rather than plaintiffs proving falsity by clear and convincing evidence.[164] It might relax

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157. Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453, 2454–55 (2022) (Thomas, J., dissenting from denial of certiorari); Berisha v. Lawson, 141 S. Ct. 2424, 2424–25 (2021) (Thomas, J., dissenting from denial of certiorari); McKee v. Cosby, 139 S. Ct. 675, 676, 682 (2019) (Thomas, J., concurring in denial of certiorari).

158. *Berisha*, 141 S. Ct. at 2427, 2429 (Gorsuch, J., dissenting from denial of certiorari).

159. Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting in part); Mastandrea v. Snow, 333 So. 3d 326, 328 (Fla. Dist. Ct. App. 2022) (Thomas, J., concurring).

160. Nunes v. Lizza, 12 F.4th 890, 899 (8th Cir. 2021); Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1253 n.9 (11th Cir. 2021); Nunes v. Wash. Post Co., 513 F. Supp. 3d 1, 9–10 (D.D.C. 2020); Palin v. N.Y. Times Co., 482 F. Supp. 3d 208, 214–15 (S.D.N.Y. 2020).

161. *See* Logan, *supra* note 40, at 777–78; McGowan, *supra* note 39, at 541.

162. *See, e.g.*, *Lizza*, 12 F.4th at 894–95; Palin v. N.Y. Times Co., No. 17-CV-4853, 2022 WL 599271, at *1 (S.D.N.Y. Mar. 1, 2022); Nunes v. CNN, 520 F. Supp. 3d 549, 553–54 (S.D.N.Y. 2021); *Wash. Post Co.*, 513 F. Supp. 3d at 3–4; Donald J. Trump for President, Inc. v. CNN Broad., Inc., 500 F. Supp. 3d 1349, 1352 (N.D. Ga. 2020); Michael M. Grynbaum, *Trump Sues CNN for Defamation, Seeking $475 Million*, N.Y. TIMES (Oct. 3, 2022) https://www.nytimes.com/2022/10/03/business/media/trump-cnn-lawsuit.html [https://perma.cc/AZ92-Z4WN].

163. *See, e.g.*, Wasserman, *Zombie Laws*, *supra* note 8, at 1083–84.

164. *See, e.g.*, Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 773–74 (1986).

the "of and concerning" element, allowing liability for speech that does not clearly identify or describe the plaintiff and expanding the universe of people who might sue over false statements about a general entity such as "government," "police," or "southern violators."[165] It might limit actual malice to public officials, inapplicable to people merely because of their fame,[166] or it might replace actual malice with a lesser state of mind,[167] so long as the plaintiff shows some fault.[168]

This is no idle concern. Staffers for Florida Governor Ron DeSantis drafted, although did not introduce, legislation amending state defamation law in a manner inconsistent with aspects of the *New York Times* regime.[169] The proposal excepted from the definition of public figure (obligated to prove actual malice) non-elected and non-appointed government employees, making it easier for rank-and-file police officers to prevail against critics.[170] It defined failure to validate or corroborate a statement as evidence of actual malice, despite caselaw requiring affirmative subjective knowledge of falsity.[171] It presumed statements by anonymous sources to be false, despite general protection for anonymous speech.[172]

Alternatively, a legislature might push for greater First Amendment change. It might regulate "fake news," proscribing

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165. *See* Rosenblatt v. Baer, 383 U.S. 75, 81–83 (1966); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 290–92 (1964); LEWIS, *supra* note 35, at 160.

166. *See* Logan, *supra* note 40, at 812. *But see* Milkovich v. Lorain J. Co., 497 U.S. 1, 14–15 (1990); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result).

167. *See, e.g.*, Logan, *supra* note 40, at 813; McGowan, *supra* note 39, at 541.

168. McGowan, *supra* note 39, at 541.

169. Sarah Rumpf, *DeSantis' Office Pushed for Bill to Weaken Media's Protections Against Defamation Suits by Public Figures*, MEDIAITE (May 18, 2022, 6:18 PM), https://mediaite.com/politics/desantis-office-pushed-for-a-bill-to-weaken-medias-protections-against-defamation-suits-by-public-figures/ [https://perma.cc/4Y7Z-K9X2].

170. *See* Skyler Swisher, *Gov. DeSantis' Office Considered a Bill to Target Libel Laws, Records Show*, TAMPA BAY TIMES (May 18, 2022), https://tampabay.com/news/florida-politics/2022/05/18/gov-desantis-office-considered-a-bill-to-target-libel-laws-records-show/ [https://perma.cc/REP7-QKRE]; St. Amant v. Thompson, 390 U.S. 727, 730 (1968); Rogers v. Smith, No. 20-517, 2022 WL 1524329, at *3 (E.D. La. May 13, 2022); Jones v. Buzzfeed, Inc., No. 7:19-CV-00403, 2022 WL 803382, at *21 n.10 (N.D. Ala. Mar. 15, 2022); LEVINE & WERMIEL, *supra* note 35, at 84–85. *But see* Young v. Gannett Satellite Info. Network, Inc., 734 F.3d 544, 549–50 (6th Cir. 2013).

171. Swisher, *supra* note 170; *St. Amant*, 390 U.S. at 731–32; McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1508–09 (D.C. Cir. 1996); Palin v. N.Y. Times Co., No. 17-CV-4853, 2022 WL 599271, at *18 (S.D.N.Y. Mar. 1, 2022); Loeb v. New Times Commc'ns Corp., 497 F. Supp. 85, 92–93 (S.D.N.Y. 1980); LEVINE & WERMIEL, *supra* note 35, at 86.

172. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995). *See generally* JEFF KOSSEFF, THE UNITED STATES OF ANONYMOUS: HOW THE FIRST AMENDMENT SHAPED ONLINE SPEECH 7 (2022).

(through private civil litigation) "deliberate, public communication as truthful of a verifiably false and material statement of fact regarding a matter of public concern,"[173] despite First Amendment skepticism against government bodies defining political truth.[174] It might make privately actionable expression of insulting, demeaning, or negative statements about government and public officials, regardless of truth or accuracy; this violates First Amendment protection for utterances that do not state actual facts,[175] First Amendment protection for publication of truthful, lawfully obtained information,[176] and the First Amendment's categorical rejection of seditious liable and actionable criticism of government.[177]

Each change redefines the tort of defamation and the speech that can form the basis for private civil liability. Each would have a chilling effect on speakers. Each enables a new campaign of litigation to silence critics reminiscent of 1960s Alabama.

Nevertheless, none alters the procedural posture in which a speaker asserts First Amendment challenges. The proposed laws would be enforced through private civil damages litigation, not through any public mechanism. As with S.B. 8, they leave no public target for offensive litigation and no public official for a court to enjoin.[178] No one expects the federal courts to enjoin state court clerks or state judges from allowing state litigation to proceed in state court. No speaker or media outlet could challenge these laws other than by publishing violative statements, getting sued, and raising the First Amendment as a defense. The First Amendment would be litigated defensively, as it was in *New York Times* and as it has been in defamation cases since.

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173. Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truth About Lies*, 62 WM. & MARY L. REV. 357, 367 (2020).

174. *Id.* at 379.

175. *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 20–21 (1990); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51–52 (1988).

176. Bartnicki v. Vopper, 532 U.S. 514, 533–34 (2001); Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989).

177. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275–76 (1964); Kalven, *supra* note 35, at 204–05.

178. Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 214–15. Most states lack criminal defamation laws and those that do rarely enforce them; criminal defamation enforcement is thought of as "essentially dead," although some states might bring it back. *See* Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2313 (2021). Offensive litigation is possible to challenge a criminal defamation law and stop prosecution, providing judicial precedent to defeat future civil actions. But a court may reject an offensive challenge given the unlikelihood of prosecution. *Cf.* Poe v. Ullman, 367 U.S. 497, 501–02 (1961).

Reproductive freedom (pre-*Dobbs*) and S.B. 8 cannot be materially distinguished from free speech and these hypothetical defamation laws. They contradict, and are invalid and unenforceable under, existing judicial First Amendment precedent. But none contradicts or is invalid and unenforceable to a greater degree than S.B. 8 contradicted, and was invalid and unenforceable under, pre-*Dobbs* judicial Fourteenth Amendment precedent. If the former body of state law must be and can be challenged defensively, so can S.B. 8 and its copycats.

3. New Laws and Open Constitutional Questions. Pre-*Dobbs*, S.B. 8's invalidity under the Fourteenth Amendment right to abortion was beyond debate. Post-*Dobbs*, its validity as under the Fourteenth Amendment right to abortion is beyond debate.[179]

Some S.B. 8 imitators present a different problem—their constitutional validity or invalidity is not clearly established or obvious under current judicial precedent. Describing all privately enforced laws as "the transfer of rights from doctors, patients, teachers, and students to easily offended private attorneys general"[180] prematurely assumes the existence of rights in the former group.

Controlling caselaw does not resolve whether a state can apply its abortion restrictions extraterritorially.[181] In considering social media regulations, courts apply First Amendment precedent established for newspapers and parades to the new context of social media and must explain why old law controls a new medium.[182] Supreme Court precedent does not clearly establish a right for trans students to participate in sports or to use school bathrooms corresponding to their identified gender, although

179. S.B. 8 remains subject to constitutional challenge under the Texas Constitution. *See* Order Declaring Certain Civil Procedures Unconstitutional and Issuing Declaratory Judgment at 29, 47, Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179 (98th Dist. Ct. Travis Cnty. Tex. Dec. 9, 2021), https://reason.com/wp-content/uploads/2021/12/Van-Stean-v-Texas-Right-to-Life-order-12-9-21.pdf [https://perma.cc/6C59-EM7M]; Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 229–34. It also may violate other provisions of the federal Constitution, such as the First Amendment.

180. Michaels & Noll, *supra* note 6 (manuscript at 31).

181. Cohen et al., *supra* note 2 (manuscript at 16–28).

182. NetChoice, LLC v. Paxton, No. 21-51178, 2022 WL 4285917, at *13 (5th Cir. Sept. 16, 2022); NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1203, 1210–14 (11th Cir. 2022); *cf.* NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1716–17 (2022) (Alito, J., dissenting from grant of application to vacate stay).

lower courts have begun resolving those issues.[183] Supreme Court precedent does not clearly establish the right of public secondary teachers to teach as they wish without control or oversight by the school, school board, or state; it does not clearly establish a right of students or parents to have certain matters included in the curriculum or taught in a certain way.[184]

One may believe those rights should or do exist under a proper interpretation of the Constitution or federal statutes such as Title VI and Title IX. But judicially created precedent has not reached that point at the moment states enact these laws or at the moment "any person" brings a private enforcement action. Whatever criticisms advocates might direct at the authors and enforcers of new rights-suppressing laws, they cannot be accused of ignoring controlling Supreme Court precedent. They have not enacted zombie laws, where existing judicial precedent places their constitutional invalidity "beyond debate."[185]

These copycats do hinder the creation of new rights. A public school cannot grant trans students (sub-constitutional) rights to participate in sports or to use the proper bathroom or give students the best historical understanding of race in America; the reality or threat of being sued and subject to substantial damages under state law at the hands of a random vigilante "any person" chills the school's efforts. That represents a legal loss for students and their supporters, while undermining the school's power to protect certain marginalized groups. But it does not contradict existing judicial precedent. And it does not demonstrate a fundamental federal constitutional defect in private enforcement of state law.

C. Litigation Options

S.B. 8 critics decry the "madness"[186] of exclusive private enforcement, describing the absence of federal offensive litigation to the constitutional validity of the heartbeat ban (and thus to

183. *Cf.* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619–20 (4th Cir. 2020); Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 318 F. Supp. 3d 1293, 1320 (M.D. Fla. 2018).

184. Eugene Volokh, *Who Decides What Is Taught in Government-Run K-12 Schools?*, VOLOKH CONSPIRACY (Mar. 21, 2022, 8:01 AM), https://reason.com/volokh/2022/03/21/who-decides-what-is-taught-in-government-run-k-12-schools/ [https://perma.cc/C2LU-X34E]; *see* Ali v. Woodbridge Twp. Sch. Dist., 957 F.3d 174, 184 (3d Cir. 2020); Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Sch. Dist., 624 F.3d 332, 340 (6th Cir. 2010).

185. Wasserman, *Zombie Laws*, *supra* note 8, at 1063–64.

186. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

imitators) as an effort to thwart federal judicial review.[187] Michaels and Noll go further; private-enforcement schemes represent "more than a way to insulate attacks on fundamental rights from constitutional scrutiny" but "an effort to reframe power in America, restructure intergovernmental, intergroup, and interpersonal relations, and advance an illiberal, partisan political agenda."[188]

Anthony Colangelo dismisses such criticisms as "hypnosis," an unusual structure causing critics to find constitutional defects within ordinary procedure.[189] The *New York Times* analogue demonstrates that hypnosis by showing that channeling some constitutional litigation into a defensive posture is neither unusual nor an independent constitutional violation. The analogue also reveals an irony—people seeking to challenge the constitutional validity of S.B. 8 (pre-*Dobbs*) and its imitators enjoy more litigation options than did the *Times* in 1960 Alabama or do speakers and media outlets facing reformed defamation law.

1. Offensive Litigation Options. Rights-suppressing laws have not eliminated all offensive litigation options. Some copycats combine public and private enforcement, leaving rights holders a path to challenge the law through an offensive pre-enforcement suit against a responsible executive officer.[190]

S.B. 8 left small openings for offensive challenge. *Whole Woman's Health* hinted at lawsuits against medical licensing boards,[191] although the Texas Supreme Court closed that door as a matter of state statutory interpretation.[192] Another opening recognizes that S.B. 8 "any person" plaintiffs perform the traditional and exclusive public function of enforcing state law for public benefit, pursuant to a delegation of exclusive state authority to vindicate not personal injuries (on which most private tort plaintiffs sue) but the public good.[193] They therefore act under

187. *Id.* at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 548 (Sotomayor, J., concurring in the judgment in part and dissenting in part); Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 191.

188. Michaels & Noll, *supra* note 6 (manuscript at 25).

189. Anthony J. Colangelo, *Suing Texas Senate Bill 8 Plaintiffs Under Federal Law for Violations of Constitutional Rights*, 74 SMU L. REV. F. 136, 137 (2021).

190. *See, e.g.*, S.B. 6-C, 2022 Leg., Reg. Sess. (Fla. 2022); NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1207 (11th Cir. 2022).

191. *See Whole Woman's Health*, 142 S. Ct. at 535–36.

192. Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022).

193. Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1081–82.

color of state law and should be subject to suit under § 1983 for attempting to enforce the constitutionally invalid law.[194] Having been sued or facing suit by some identified "any person," abortion providers or advocates could respond with a suit in federal court. They might seek to enjoin "any person" from pursuing an S.B. 8 action.[195] Or they might finish (successfully) defending in state court, then sue in federal court to recover damages reflecting the costs and burdens of that state court defense.[196]

The *Times* and other speakers lack similar offensive options. Ordinary civil plaintiffs, lacking the exclusive enforcement authority and public focus as S.B. 8 "any person" plaintiffs, do not act under color of state law.[197] No matter how constitutionally defective the state law being enforced, the ordinary act of pursuing civil litigation does not subject the state law plaintiff to subsequent constitutional liability in federal court. Defensive litigation provides a sufficient forum and basis for raising the First Amendment against violative laws,[198] even where it is obvious from the outset that the constitutional defense should and will prevail and defeat liability.

2. Different Targets. S.B. 8 and 1960s Alabama defamation law share one procedural detail—private litigation targeted the rights holder or someone acting on behalf of the rights holder. Southern officials sued the *Times* over its published story, placing the *Times* on the hook for two half-million-dollar judgments. "Any person" sues the doctor, clinic, funder, or abortion rights advocate, placing them on the hook for at least $10,000 and attorney's fees. Some imitators share this detail. "Any person" sues the person who possesses an assault weapon in California, placing the possessor on the hook for at least $10,000.[199] "Any person" targets whoever provides Missouri residents with information and access to out-of-Missouri abortions, placing them on the hook for at least $10,000 and attorney's fees.[200]

Other copycats differ. They target not the rights holder or those who assist the rights holder in exercising her rights but the

194. *See id.* at 1079–84.

195. *See id.* at 1084–87.

196. *See id.* at 1091.

197. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991); Dennis v. Sparks, 449 U.S. 24, 28 (1980); Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1079–80.

198. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 538 (2021).

199. S.B. 1327, 2022 Leg., Reg. Sess. (Cal. 2022).

200. *See* H.B. 1677, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

local government that creates sub-constitutional rights for one group to the displeasure of the competing state law-empowered group. For example, those objecting to trans girls participating in girls' sports or using girls' bathrooms do not sue or impose state law liability on the girl or her family; they sue and impose state law liability on the teacher, school, or school board,[201] compelling the school to amend its sports or bathroom policies to avoid those consequences. This dampens rights as much as S.B. 8 or expansive defamation law—the trans-girl athlete loses a right to play against other girls. But the privately enforced state law does not threaten the athlete with direct litigation burdens and crippling monetary liability. It threatens the school, which declines to protect that athlete out of fear for its litigation burdens and monetary liability.

This triangulation creates opportunities for offensive litigation. The threat of a state-law action by objecting "any person" parents prompts the school to prohibit trans girls from participating in girls' sports or from using the girls' bathroom. But that new prohibition represents official public-school policy for which the school can be liable to the excluded student.[202] If a trans girl possesses a federal constitutional or statutory right to play girls sports or to use the girls' bathroom, she can pursue offensive litigation to vindicate that federal right, asking a court to enjoin the school from enforcing its policy prohibiting her federally protected participation or to award damages for past enforcement. That the school acts out of fear of state law liability rather than genuine policy commitment does not matter; it enacts public policy, subject to offensive challenge in federal court.

The *Times* lacked such offensive options in attempting to report about racism in Jim Crow Alabama. No triangulation offered a target for offensive litigation. The paper could only report, get sued, and raise the First Amendment in defense through multiple judicial layers.

Whether that trans athlete has a federal constitutional or statutory right and the likelihood of success in her offensive suit remains to be seen. But that is the point. The debate is and should focus on substantive federal rights, not over how those rights are litigated and vindicated or rejected. That was never the concern in *New York Times*. It should not be the concern as to state restrictions on reproductive freedom, the right to possess firearms,

201. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (to be codified at FLA. STAT. § 1001.42(8)(c)(7)(b)(II)).

202. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690 (1978).

LGBTQ+ rights, or any substantive constitutional liberty that states target via S.B. 8 imitators.

3. Creating Defensive Litigation. Rights holders forced into a defensive posture surrender control over the time, forum, and posture in which they vindicate their constitutional rights.[203] They also lose power to ensure litigation and judicial resolution. If "any person" does not sue to enforce the defective state law, the rights holder cannot raise the Constitution as a defense and the court cannot declare the law constitutionally invalid.

S.B. 8 took effect on September 1, 2021. When the Supreme Court denied interim relief that day,[204] most providers complied with state law, ceasing or limiting abortions to those in which no heartbeat was or could be detected.[205] A leading proponent of the law argued that "[n]o rational abortion provider would violate this law."[206] He was correct, as abortions after the sixth week of pregnancy became largely unavailable in the state[207] and the number of abortions performed in the state dropped by approximately half.[208] The absence of prohibited post-heartbeat abortions meant the absence of S.B. 8 lawsuits, which meant the absence of constitutional litigation and adjudication. If no one violates the law, "any person" cannot sue over any violation; if "any person" does not sue, providers cannot defend and obtain a judicial pronouncement on the suspect law's constitutional invalidity.

That might have been the point of S.B. 8. The anti-choice movement preferred that no one file suit, as the risk of a barrage of lawsuits, liability, and substantial damages deterred providers from engaging in business as usual. Activists acknowledged that their S.B. 8 strategy was not to bring lawsuits and recover damages but to allow the inchoate threat of lawsuits, liability, and

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203. Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1052–53; *see also Whole Woman's Health*, 142 S. Ct. at 537–38.

204. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2494–96 (2021).

205. Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 198; Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1043–45; *see also In re* Whole Woman's Health, 142 S. Ct. 701, 702 (2022) (Sotomayor, J., dissenting from denial of mandamus); *Whole Woman's Health*, 142 S. Ct. at 545–46 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

206. Transcript of Oral Argument, *supra* note 34, at 4, 12.

207. *Whole Woman's Health*, 142 S. Ct. at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part); *see also* United States v. Texas Argument, *supra* note 16, at 67 (statement of Justice Kagan).

208. United States v. Texas Argument, *supra* note 16, at 67 (statement of Justice Kagan).

damages to chill providers into ceasing abortion services, without opportunity for litigation.[209]

Some copycats produce the same conundrum. Consider proposals prohibiting anyone from offering information or support for out-of-state abortions.[210] Fearing suit and liability, an abortion support group ceases providing to citizens of a state in which abortion is illegal (e.g., Missouri) information and support for abortions in a state in which it is legal (e.g., Illinois). Because the group does not speak about out-of-state abortions (that is, because the group does not violate the statute), no one can bring a lawsuit, which means no constitutional litigation and no opportunity for the group to assert and vindicate its First Amendment rights. And, as under S.B. 8, anti-choice activists may refrain from suing rather than litigate, and risk losing, the constitutional issues, prolonging the uncertainty and thus the chill on constitutionally protected conduct.

The solution is the friendly plaintiff—one not ideologically opposed to abortion so not strategically inclined to refrain from suit to maintain the chilling effect on providers.[211] Texas's S.B. 8 and Missouri's H.B. 1677 authorize claims by "any person," unmodified by additional considerations or limitations, "against any person" who performs or aids a violative abortion or violates the law's substantive provisions.[212] Neither statute says "any person ideologically opposed to reproductive freedom or otherwise wishing to stop abortion."[213] Defensive litigation against S.B. 8 became possible when one doctor performed one post-heartbeat abortion and announced having done so in the *Washington Post*,[214]

209. Ruth Graham et al., *Lawsuits Filed Against Texas Doctor Could Be Best Tests of Abortion Law*, N.Y. TIMES (Nov. 1, 2021), https://nytimes.com/2021/09/21/us/texas-abortion-lawsuits.html [https://perma.cc/G8ZS-BF9T].

210. *See, e.g.*, H.B. 1677, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022); TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021).

211. Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 222–24, 235.

212. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a); H.B. 1677, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

213. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208(a); H.B. 1677, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

214. Alan Braid, Opinion, *Why I Violated Texas's Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021, 4:01 PM), https://washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid [https://perma.cc/2YWE-YYPA]; *see also* Michael Levenson, *Texas Doctor Says He Performed an Abortion in Defiance of New State Law*, N.Y. TIMES (Oct. 15, 2021), https://nytimes.com/2021/09/18/us/texas-abortion-alan-braid.html [https://perma.cc/QB6B-JFHP].

triggering three lawsuits.[215] Two plaintiffs purporting to support (or at least not oppose) reproductive freedom sued in part to create the litigation necessary for providers to challenge and courts to adjudicate the heartbeat ban's constitutional validity.[216] Anti-choice activists were not pleased, complaining that these suits by these plaintiffs contravened S.B. 8's purpose.[217] Missouri's proposed prohibition on out-of-state abortions may yield a similar process—an abortion rights supporter sues an out-of-state provider to create the litigation necessary for the provider to challenge the constitutional validity of state law.

The *Times* and speakers challenging expanded defamation law lack the friendly-plaintiff option. Defamation requires an identifiable person about whom the speaker spoke or wrote in a negative way, not a random "any person" with no injury, no interest, and no connection to the challenged speech. A newspaper cannot rely on a random sympathetic plaintiff, about whom the paper has not written, to create litigation and an opportunity to litigate their First Amendment rights. It must publish the story and face litigation. Or it must stop speaking about certain subjects or individuals to avoid litigation, surrendering to the chilling effect that prompted the *Times* to pull its reporter from Alabama[218] and that the Court identified as a First Amendment problem.[219]

4. Procedures. S.B. 8 critics argue that defensive litigation is insufficient because Texas imposed unique pro-plaintiff procedures, "rigging"[220] the process and rendering defensive litigation "uniquely punitive for those sued."[221] S.B. 8's procedural "anomalies," in addition to extraordinary monetary exposure, include allowing venue in the plaintiff's county of residence rather than the defendant's residence or the county in which a

215. *See generally* Complaint for Interpleader and Declaratory Judgment at 2, Braid v. Stilley, No. 1:21-CV-05283 (N.D. Ill. Oct. 5, 2021), https://reproductiverights.org/wp-content/uploads/2021/10/TX-SB-8-Illinois-Filing.pdf [https://perma.cc/T9RQ-5DBY]; Plaintiff's Complaint at 1, Stilley v. Braid, 2021CI19940 (438th Dist. Ct., Bexar Cnty. Sept. 20, 2021); Complaint at 1, Gomez v. Braid, 2021CI19920 (224th Dist. Ct., Bexar Cnty. Sept. 20, 2021).

216. Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 222–24; Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1043–44.

217. Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 222.

218. LEWIS, *supra* note 35, at 43.

219. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300–01 (1964); McGowan, *supra* note 39, at 513.

220. WWH Complaint, *supra* note 15, ¶ 80.

221. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

substantial part of the events occurred (thereby subjecting a provider to potential suit anywhere in Texas)[222] and eliminating common law defenses of nonmutual preclusion.[223]

Providers can raise and litigate federal constitutional objections to state procedural limitations in a defensive posture; a state court must ignore constitutionally defective procedural limitations and allow defendants to assert those defenses and use them to avoid liability. For example, if due process limits the scope of state venue, providers raise that issue in the state suit and the state court must dismiss on that ground; the court's failure to properly resolve federal defects in state procedure provides a distinct basis for Supreme Court review of the state court judgment.[224]

New York Times proves the point. Alabama defamation law as applied disregarded traditional common law defamation principles.[225] The Court focused on procedure as much as substantive First Amendment liberty.[226] It established three significant procedural limitations protecting speakers against liability, although not from private suit. A defamation plaintiff must prove that the challenged statements are false and made with actual malice,[227] flipping the common law rule placing the burden of persuasion on the defendant to prove the statements are true.[228] The plaintiff must prove falsity and actual malice by clear and convincing evidence rather than the default preponderance of the evidence.[229] And a reviewing court owes no deference to the trial court's determinations, performing independent appellate review on constitutional facts marking the outer boundary of constitutional protection for the speech at issue.[230]

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222. TEX. HEALTH & SAFETY CODE ANN. §§ 171.209–171.210 (West 2021); Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 195–96.

223. TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(5) (West 2021); *Whole Woman's Health*, 142 S. Ct. at 546 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

224. Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1075; Rhodes & Wasserman, *Potential for Defensive Litigation*, *supra* note 9, at 202, 238–39; *see, e.g*, Nelson v. Colorado, 137 S. Ct. 1257–58 (2017).

225. Epstein, *supra* note 108, at 792–94.

226. Matheson, *supra* note 39, at 220–22, 237–39.

227. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Logan, *supra* note 40, at 791.

228. Logan, *supra* note 40, at 791.

229. *N.Y. Times Co.*, 376 U.S. at 285–86; Matheson, *supra* note 39, at 220, 239–41.

230. *See N.Y. Times Co.*, 376 U.S. at 285–86; LEVINE & WERMIEL, *supra* note 35, at 31; LEWIS, *supra* note 35, at 147–48; Logan, *supra* note 40, at 772, 790; Matheson, *supra* note 39, at 220; *see also* Papandrea, *supra* note 35, at 251.

The procedural limits in Alabama defamation law did not "depriv[e] them of effective post-enforcement adjudication," as Justice Sotomayor argued about the procedural limits in S.B. 8.[231] They provided additional federal constitutional bases for avoiding liability in defensive litigation, which the Supreme Court adopted in finding for the *Times*. That the Court might reach a different conclusion as to procedural limits in S.B. 8 or a copycat speaks not to litigation posture or procedural rules but to the underlying substantive right. It was and remains proper, effective, and sufficient to challenge state procedure in defensive litigation, rather than as a basis for offensive litigation.

IV. CONCLUSION

Prior to *Dobbs*, S.B. 8 created the perfect storm. The law undermined the right to reproductive freedom, the most salient political issue for a Democratic administration and "the Left's 'darling privilege.'"[232] The law was "flagrantly"[233] or "patently"[234] invalid, contradicting existing and direct judicial precedent and judicially unenforceable until that precedent changed. The law appeared "unprecedented,"[235] the first attempt to delegate exclusive enforcement power to uninjured and unconnected private plaintiffs to protecting public interests, by depriving reproductive health providers and advocates of the ordinary path to challenging abortion restrictions through offensive pre-enforcement litigation. That states could or did follow suit in other areas informed criticisms that S.B. 8 "nullif[ied]"[236] Supreme Court precedent, "betray[ed]"[237] the constitutional system, and created a "disaster for the rule of law."[238]

The *New York Times* confronted a similar storm in 1960. It faced millions in potential liability from a deluge of specious

231. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 547 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

232. Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314, 332 (2002); *see also* ZIEGLER, *supra* note 8, at 135–38, 212.

233. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting).

234. *Id.* at 2500 (Kagan, J., dissenting).

235. *Id.* at 2496 (Roberts, C.J., dissenting).

236. *Whole Woman's Health*, 142 S. Ct. at 545 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

237. *Id.* at 546 (Sotomayor, J., concurring in the judgement in part and dissenting in part).

238. *In re* Whole Woman's Health, 142 S. Ct. 701, 705 (2022) (Sotomayor, J., dissenting from denial of mandamus).

defamation claims pursuant to a coordinated campaign of private civil litigation under unfavorable state law. While armed with First Amendment arguments against Alabama defamation law, the paper could not be certain how persuasive the Supreme Court would find those arguments or how it would resolve the constitutional issues. Defeat would have sparked disaster for the press, the First Amendment, the Civil Rights Movement, and the cause of racial justice.

No one argued, then or now, that the *Times* suffered an independent constitutional violation from having to raise the First Amendment as a defense to those claims.[239] No one suggested that the Constitution and the rule of law guaranteed the *Times* an opportunity to pursue offensive litigation in federal district court to stop or deter state litigation. The *Times* litigated the First Amendment defensively and prevailed on review in the Supreme Court. Defensive litigation offered a "not-very-new procedural bottle[]" to challenge and stop an invasion of constitutional rights.[240]

The analogy between *New York Times* and S.B. 8 and its imitators holds. No legal or constitutional argument justifies treating rights holders differently in their challenges to S.B. 8's heartbeat ban or other privately enforced state laws; they enjoyed similar opportunities to defend the lawsuits and to avoid liability based on federal constitutional defenses. In fact, providers enjoyed greater options in challenging S.B. 8 than did the *Times* and media outlets in 1960. Limited and unique opportunities for offensive litigation remain.[241] And aspects of S.B. 8 may be invalid under the Texas Constitution, allowing providers to avoid liability regardless of *Dobbs* and any federal right to reproductive freedom.[242]

The real concerns for critics of S.B. 8 and its imitators are substantive. They fear the Court will not be as receptive to their constitutional defenses as the Court was to the *Times*'s First Amendment defenses. *Dobbs* made that fear real as to reproductive freedom. Rights holders facing prospective copycat

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239. One of us argued that jurisdictional rules should have allowed the *Times* to remove to federal court. Wasserman, *Jurisdictional*, *supra* note 35, at 904–07. That does not change the defensive posture in which it had to litigate.

240. *Whole Woman's Health*, 141 S. Ct. at 2497 (Breyer, J., dissenting).

241. Wasserman & Rhodes, *Limits and Opportunities of Offensive Litigation*, *supra* note 9, at 1060–64, 1077, 1079–84.

242. Order Declaring Certain Civil Procedures Unconstitutional and Issuing Declaratory Judgment, *supra* note 179, at 29, 47.

laws—abortion information groups, public school history teachers, social media sites, or trans athletes—fear similar losses.

But differences in substantive rights and the likelihood of success in challenging state law should not affect procedure or the posture in which courts adjudicate rights and evaluate the constitutional validity of state law. Defensive litigation, in 1960 and now, provides an appropriate and sufficient opportunity for litigating and vindicating federal constitutional rights. How those rights do or should fare in court represents a distinct concern.