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TEXAS, ABORTION, AND STATE ACTION

Alexander J. Lindvall*

ABSTRACT

The Texas Legislature recently passed what the Supreme Court describes as an “unprecedented” statutory scheme. Texas’s new law allows private, everyday citizens to sue anyone who assists a woman in obtaining an abortion after her sixth week of pregnancy. It’s clear that Texas chose this unusual enforcement mechanism to try to circumvent the Constitution’s “state action” requirement. Before a plaintiff can challenge a policy or action on constitutional grounds, they must show that the government somehow had a hand in causing their harm. But this Texas law strips the government of its enforcement power and instead gives it to everyday citizens, thereby allowing the law’s defenders to argue that the law does not trigger constitutional protections.

*This short article argues that the courts should have little trouble concluding that this law and its unusual enforcement mechanism amount to state action, meaning this law is subject to normal constitutional scrutiny. The Supreme Court’s decisions in *Shelley v. Kraemer*, *Edmonson v. Leesville Concrete Co.*, and *Terry v. Adams* make clear that private parties can be considered state actors, especially when they are working with the express approval of the government and when the courts are required to hand down rulings that seemingly infringe on well-settled constitutional protections. These decisions, among others, show that the private-citizen plaintiffs deputized under this new Texas law must be treated as state actors who are subject to constitutional limitations.*

* * * *

The Texas Legislature recently passed what the Supreme Court describes as an “unprecedented” statutory scheme.¹ This new law outlaws abortions

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1. *Whole Woman’s Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *1 (U.S. Sep. 1, 2021) (Roberts, C.J., dissenting).

performed after a fetal heartbeat is detectable,² which usually occurs around the sixth week of pregnancy.³ Other states have passed, or at least proposed, similar laws in the past,⁴ but what makes this Texas law “unprecedented” is its *enforcement* mechanism.⁵

Typically, when a person violates a law, the government (through the police and local prosecutors) is tasked with punishing the person and ensuring that the law is properly enforced.⁶ The Texas law, on the other hand, strips the government of its enforcement power and instead gives it to everyday citizens.⁷

If a private citizen in Texas believes someone performed an abortion after the sixth week of pregnancy, that citizen can file a lawsuit against whoever “perform[ed] or induce[d]” the abortion and whoever “aid[ed] or abet[ted] the performance or inducement” of the abortion.⁸ If the citizen can then prove that an abortion was performed after the woman’s sixth week of pregnancy, the court is required to issue an order preventing the woman from receiving a future abortion (which means the court will then have a part in monitoring her sexual activity).⁹ The court is also required to award the private-citizen plaintiff at least \$10,000 for each illegal abortion they discovered.¹⁰ As Justice Sotomayor put it: “In effect, the Texas Legislature has deputized the State’s citizens as bounty hunters, offering them cash prizes for civilly prosecuting their neighbors’ medical procedures.”¹¹

Under existing Supreme Court precedent—*Roe v. Wade*,¹² *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹³ and many others¹⁴—outlawing abortions performed after the sixth week of pregnancy is blatantly unconstitutional.¹⁵ (The Court may decide to overrule those cases in the future, but for the time being, *Roe* is still the law of the land.)

But this law presents a less-talked-about threshold question: Does the Constitution prevent *a private citizen* from seeking to enforce an

2. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201, 171.204.

3. Anna North & Catherine Kim, *The “Heartbeat” Bills that Could Ban Almost All Abortions*, *Explained*, VOX, <https://www.vox.com/policy-and-politics/2019/4/19/18412384/abortion-heartbeat-bill-georgia-louisiana-ohio-2019> [https://perma.cc/BXM7-973B] (June 28, 2019, 9:50 AM).

4. *See, e.g., id.*

5. *Jackson*, 2021 WL 3910722, at *1–2 (Roberts, C.J., dissenting).

6. *See id.*

7. *Id.* at *3 (Sotomayor, J., dissenting).

8. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(1), (2).

9. *Id.* § 171.208(b)(1).

10. *Id.* § 171.208(b)(2). The law requires judges to award prevailing claimants “an amount of *not less than* \$10,000” for each illegal abortion discovered, plus their “costs and attorney’s fees.” *Id.* § 171.208(b)(2), (3) (emphasis added). There is no limit to the amount the judge can award. *See id.*

11. *Jackson*, 2021 WL 3910722, at *3 (Sotomayor, J., dissenting).

12. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

13. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992).

14. *E.g.*, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2132–33 (2020); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 83–84 (1976).

15. *Casey*, 505 U.S. at 845–46; *Roe*, 410 U.S. at 163–64.

unconstitutional policy in the courts? The Constitution contains what is called a “state action” requirement.¹⁶ The Constitution prevents *the government* from interfering with individual rights; it does not prevent *private parties* from interfering with your rights.¹⁷ As such, before a plaintiff can challenge a policy or action on constitutional grounds, they must show that the government somehow had a hand in causing their harm.¹⁸ (To use a simple example: If a private person tells you to shut up, they haven’t violated your First Amendment rights;¹⁹ but if the government tells you to shut up, it may be unconstitutionally stifling your freedom of speech.²⁰)

But the state action doctrine—like most legal doctrines—has exceptions and workarounds. Perhaps the most famous example came in *Shelley v. Kraemer*.²¹ In *Shelley*, a group of private homeowners in St. Louis, Missouri, signed a restrictive covenant that prevented “any person not of the Caucasian race” from owning or occupying houses in the neighborhood.²² Years later, a black family (the Shelleys) purchased a house in the neighborhood, and one of their neighbors (the Kraemers) filed a lawsuit to enforce this racially discriminatory restrictive covenant, asking the court to vacate the sale and kick the family out of the neighborhood.²³

The Missouri Supreme Court ultimately agreed to enforce the covenant, finding that the covenant “violated no rights guaranteed . . . by the Federal Constitution” because it was created by private parties.²⁴ On appeal, however, the U.S. Supreme Court reversed, holding that there was “no doubt” that the state action requirement was satisfied because the plaintiff was seeking to enforce this covenant *in a state court*.²⁵ The *Shelley* Court found that the judiciary is just as much a part of the government as the legislature and executive.²⁶ When a judge enforces a racist, discriminatory contract, it places its stamp of approval on the document—and this is something the Fourteenth Amendment cannot allow, the Court found.²⁷ Judges, in other words, are state

16. *E.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1002–03 (1982); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982).

17. *Hudgens v. NLRB*, 424 U.S. 507, 513, 521 (1976) (holding that a private shopping mall cannot violate its patrons’ First Amendment rights); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (holding that a private club does not violate the Constitution when it discriminates against people because of their race); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (“[The Fourteenth Amendment] erects no shield against merely private conduct, however discriminatory or wrongful.”).

18. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721–22 (1961).

19. *See Hudgens*, 424 U.S. at 513, 520–21.

20. *See Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *Cohen v. California*, 403 U.S. 15, 16, 26 (1971) (holding that the government violated a citizen’s First Amendment rights by punishing him for wearing a shirt that said “Fuck the Draft”).

21. *Shelley*, 334 U.S. at 19–20.

22. *Id.* at 4–5.

23. *Id.* at 5–6.

24. *Id.* at 6 (citing *Kraemer v. Shelley*, 198 S.W.2d 679, 683 (Mo. 1946)).

25. *Id.* at 19.

26. *Id.* at 19–20.

27. *Id.* at 20.

actors, and their judicial actions are limited by the Constitution.²⁸

Similarly, in *Edmonson v. Leesville Concrete Co.*,²⁹ the Court held that a private litigant in a court case can engage in state action if they “make extensive use of state procedures with the overt, significant assistance of state officials.”³⁰ Specifically, the *Edmonson* Court found that a private litigant and the courts violate the Fourteenth Amendment when they use (and allow) racially discriminatory peremptory challenges.³¹ The peremptory challenge system is a product of the state: “peremptory challenges have no utility outside the jury system, a system [that] the government alone administers.”³² As such, judges (state actors) are constitutionally obligated to ensure that the court system isn’t used to discriminate against people because of their race.³³

And in *Terry v. Adams*,³⁴ the Court held that the state cannot circumvent the state action doctrine by delegating traditional government functions to private parties.³⁵ Texas has historically been creative when it comes to violating people’s constitutional rights. In 1927, for example, the Court struck down a Texas law preventing black voters from participating in primary elections.³⁶ And in 1944, the Court was forced to strike down a “reenacted” version of this same Texas law.³⁷ Realizing the Court was primed to strike down any overtly racist voting laws, a Texas county tried a new trick: it delegated its control over polling stations to a private, racially discriminatory organization.³⁸

The theory was that a private organization could not engage in state action, and therefore could discriminate against would-be black voters without running afoul of the Fourteenth and Fifteenth Amendments.³⁹ The *Terry* Court was not impressed or persuaded. The Court described the county’s attempted workaround as “a flagrant abuse” of the electoral process and noted that the government was “no more than [a] perfunctory ratifier[]” of unconstitutional racial discrimination.⁴⁰ The Court concluded: “It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of [a racially discriminatory] election.”⁴¹

Relating these decisions back to Texas’s new abortion law, it seems clear that the state cannot circumvent the state action requirement simply by delegating its enforcement powers to private litigants. For one, it would force the judiciary to

28. *Id.*

29. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

30. *Id.* at 622 (internal quotation omitted).

31. *Id.* at 624, 628.

32. *Id.* at 622.

33. *Id.* at 622–24, 628 (explaining the role of a trial judge and explaining how their actions must conform to the requirements of the Fourteenth Amendment).

34. *Terry v. Adams*, 345 U.S. 461 (1953).

35. *Id.* at 469.

36. *Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

37. *Smith v. Allwright*, 321 U.S. 649, 658, 664–66 (1944).

38. *Terry*, 345 U.S. at 462–63.

39. *Id.*

40. *Id.* at 469.

41. *Id.*

issue decisions that inhibit a woman’s ability to seek a pre-viability abortion.⁴² This judicial intervention is state action under *Shelley*,⁴³ and preventing pre-viability abortions is clearly unconstitutional under existing precedent.⁴⁴ Second, to enforce this new law, the private-citizen plaintiff would have to “make extensive use of state procedures with the overt, significant assistance of state officials.”⁴⁵ Under *Edmonson*, this sort of tandem partnership between private litigants and the courts is more than sufficient to trigger the state action requirement.⁴⁶ Finally, under *Terry*, the state action rule is satisfied because the government has delegated a traditional governmental function (law enforcement) to private parties.⁴⁷ Texas’s “deputizing [of] private [citizens] to carry out unconstitutional restrictions”⁴⁸ is clever, but Texas has tried this before.⁴⁹ And the Court had little trouble finding that workarounds like this do not insulate the government from constitutional scrutiny.⁵⁰

The Supreme Court recently noted that Texas’s new anti-abortion law presents “complex and novel antecedent procedural questions.”⁵¹ When it comes to the state action question, I disagree.⁵² This question is not “novel.”⁵³ The government—and Texas in particular—has always tried to find new and creative ways to violate constitutional rights.⁵⁴ But, to date, the Court has been quick to

42. *Whole Woman’s Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *3 (U.S. Sep. 1, 2021) (Sotomayor, J., dissenting).

43. *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948).

44. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992); *Roe v. Wade*, 410 U.S. 113, 164 (1973).

45. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991) (internal quotation omitted).

46. *See id.* at 624.

47. *See Terry v. Adams*, 345 U.S. 461, 469 (1953) (finding that a private party engages in state action when it exercises a traditional governmental function with government approval).

48. *Whole Woman’s Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *5 (U.S. Sep. 1, 2021) (Kagan, J., dissenting).

49. *Terry*, 345 U.S. at 462–63.

50. *Id.* at 469.

51. *Jackson*, 2021 WL 3910722, at *1.

52. This article does not address the other antecedent procedural question that this law presents: whether the Court’s sovereign immunity exception announced in *Ex Parte Young*, 209 U.S. 123 (1908), applies to state court judges. *See Jackson*, 2021 WL 3910722, at *1 (taking note of the *Ex Parte Young* issue). But I don’t believe this is a difficult issue either. The Supreme Court tells state court judges what to do all the time. Whenever the Court issues a ruling, it is ordering all lower courts to conform to that ruling—and when the Court strikes down a state law, it is ordering that state’s judges to refrain from enforcing that law. And the same would be true if the Court were to *enjoin* judges from enforcing an unconstitutional state law. There is no meaningful difference between the Court striking down an unconstitutional state law and the Court enjoining judges from enforcing an unconstitutional state law. It’s the exact same thing, just with a different name. There is no principled reason to hold that *Ex Parte Young* does not apply to state-court judges.

53. *See id.*

54. *See, e.g., Norwood v. Harrison*, 413 U.S. 455, 457 (1973) (subsidizing racially segregated private schools with taxpayer dollars); *Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971) (heavily subsidizing parochial schools with taxpayer dollars in violation of the Establishment Clause); *Evans v. Newton*, 382 U.S. 296, 297–98 (1966) (gifting a once-public park to a racially discriminatory private entity); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716 (1961) (leasing space in a government building to a whites-only business); *Terry*, 345 U.S. at 462–63 (delegating the power to conduct elections to a private, racist organization); *Yick Wo v. Hopkins*, 118 U.S. 356, 368–70 (1886) (issuing what seemed to be a neutral health and safety code but then

say, “Nice try” and strike down these unconstitutional workarounds.⁵⁵ And this question is not “complex.”⁵⁶ As shown above, the Court has consistently found that private parties can be considered state actors, especially when they are working with the express approval of the government and when the courts are required to hand down rulings that seemingly infringe on well-settled constitutional protections.⁵⁷

These cases show that the private-citizen plaintiffs deputized under this new Texas law must be treated as state actors. Their abortion-preventing causes of action exist only because the state has sanctioned them, and the enforcement of these causes of action requires judicial approval.⁵⁸ These two facts make clear that these lawsuits amount to state action. And because the statute blatantly infringes a woman’s right to seek a pre-viability abortion, it violates the Constitution under *Roe* and *Casey*.

applying the code only to Chinese immigrants to shut down their businesses).

55. See, e.g., *Terry*, 345 U.S. at 469.

56. *Jackson*, 2021 WL 3910722, at *1.

57. E.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991); *Burton*, 365 U.S. at 723–24; *Terry*, 345 U.S. at 469; *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948); *Marsh v. Alabama*, 326 U.S. 501, 507–08 (1946) (finding that a privately owned company town was a state actor because it exercised all the functions that are traditionally left to the government).

58. See TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212.