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Article

Civil Disobedience in the Face of Texas's Abortion Ban

Alexi Pfeffer-Gillett[†]

INTRODUCTION

Before 11:58PM Central Standard Time on September 1, 2021, few would have questioned that state laws cannot expressly ban access to constitutional rights, regardless of their mechanism for doing so.¹ But those expectations were upended when the Supreme Court issued a late-night shadow docket decision in *Whole Woman's Health v. Jackson* declining to halt a Texas law prohibiting abortions well before express Supreme Court precedent allows any state to do so.² Texas Senate Bill 8, or "SB8" as the law is commonly called,³ bans

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1. See *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (holding that a constitutional right declared by the Supreme Court "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes") (citing *Smith v. Texas*, 311 U.S. 128, 132 (1940)).

2. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021); see also *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (holding that the state cannot prohibit abortion before fetal viability). At subsequent oral argument concerning the Texas law, Justice Kagan confirmed the massive departure the law represented from settled understandings of the Constitution and federalism, explaining that upholding the Texas law would create "a very different world from the world we live in today" because, until Texas's law came along, "no state dreamed" of "try[ing] to nullify the law . . . that [the Supreme] Court has laid down as to the content of [constitutional] rights." Tr. of Oral Argument. at 65-66, *United States v. Texas*, No. 21-588, (U.S. Nov. 1, 2021).

3. See Ryan Lucas, *A U.S. Judge Blocks Enforcement of Texas' Controversial New Abortion Law*, NPR (Oct. 6, 2021, 10:50 PM), <https://www.npr.org/2021/10/06/1040221171/a-u-s-judge-blocks-enforcement-of-texas-controversial-new-abortion-law> [<https://perma.cc/6FK6-BNZZ>] ("Known as SB 8, the law bans almost all abortions in the state after about six weeks of pregnancy, even in cases of rape, sexual abuse and incest.").

abortions after detection of cardiac activity in an embryo, a point roughly six weeks into a pregnancy that is before most women have even realized that they are pregnant and months before fetal viability.⁴ The Court declined to intervene despite its decades-long recognition that “[b]efore [fetal] viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”⁵

The trick behind the Texas law, and the apparent basis for the Court’s preliminary stamp of approval, is that SB8 authorizes private plaintiffs rather than state officials to sue to prevent post-heartbeat abortions.⁶ Commentators have worried that this mechanism, seemingly taking enforcement out of the state government’s hands while still accomplishing the state’s goal of ending constitutionally protected abortions, has provided the Supreme Court’s conservative majority the loophole it was looking for to effectively overrule *Roe v. Wade* without explicitly doing so.⁷ Others, including Chief Justice John Roberts, have speculated that if private enforcement bans can be used to evade judicial review of abortion infringements, states could deploy such schemes to effectively ban almost any constitutional right.⁸

4. *Whole Woman’s Health*, 141 S. Ct. at 2498 (Sotomayor, J., dissenting). Embryonic cardiac activity is often referred to by anti-abortion activists as a “fetal heartbeat.” See Selena Simmons-Duffin, *The Texas Abortion Ban Hinges on ‘Fetal Heartbeat.’ Doctors Call That Misleading*, NPR (Sept. 3, 2021, 3:14 PM), <https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion> [<https://perma.cc/MR5H-DUSG>].

5. *Casey*, 505 U.S. at 846; see also *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (“[A] provision of law is constitutionally invalid[] if the ‘purpose or effect’ of the provision ‘is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’”) (quoting *Casey*, 505 U.S. at 878).

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

7. See, e.g., *Whole Woman’s Health*, 141 S. Ct. at 2498 (Sotomayor, J., dissenting) (accusing the majority of “bury[ing] their heads in the sand” by refusing to enjoin the “flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny”); Mary Ziegler, *The Sinister Genius of Texas Abortion Law*, CNN (Sept. 3, 2021, 10:28 AM), <https://www.cnn.com/2021/09/02/opinions/texas-abortion-law-supreme-court-dystopia-ziegler/index.html> [<https://perma.cc/5GPM-59KS>] (“It appears that Texas may have devised a genius way of avoiding constitutional challenges.”); Ross Ramsey, *Analysis: Texas Legislators, with an Assist from the U.S. Supreme Court, Open a Pandora’s Box*, TEX. TRIB. (Sept. 2, 2021), <https://www.texastribune.org/2021/09/02/texas-new-abortion-law> [<https://perma.cc/5AMN-C5HX>] (“The state of Texas has figured out, at least for now, how to do unconstitutional things in a way that doesn’t raise a majority of the eyebrows in the U.S. Supreme Court.”).

8. See *Whole Woman’s Health*, 141 S. Ct. at 2496 (Roberts, J., dissenting) (“[T]he

But the Supreme Court, in its late-night decision allowing the Texas ban to remain in effect, was incorrect that “neither [Texas] nor its executive employees possess the authority to *enforce* the Texas law either directly or indirectly.”⁹ Senate Bill 8 does in fact require direct state enforcement, but it does so most clearly at the end rather than the beginning of a lawsuit.¹⁰ Under the law, once a private plaintiff prevails, courts “shall award” injunctive relief “sufficient to prevent the defendant from violating” the abortion ban,¹¹ along with statutory damages of at least \$10,000 for each post-heartbeat abortion performed or induced.¹²

Although there are many legal grounds upon which to challenge Texas Senate Bill 8, the best strategy to overturn the law begins with providers disobeying it. Such civil disobedience is important not only for overturning the Texas abortion ban, but also for thwarting nascent and future efforts of states seeking to carry out other unconstitutional infringements through similar schemes deputizing private plaintiff enforcement.¹³

This Article uses Texas’s abortion ban to demonstrate why civil disobedience is the best strategy against such private-enforcement schemes. It proceeds in three parts. Part I demonstrates that Texas’s private enforcement scheme in fact directly implicates state court officials and potentially state police forces. It then explains why bringing about the involvement of state courts and police through civil

consequences of approving the state action, both in this particular case and as a model for action in other areas, counsel at least preliminary judicial consideration before the program devised by the State takes effect.”); David Mastio, *The Texas Abortion Law Provides a Blueprint for Bans on Speech, Guns*, USA TODAY (Sept. 8, 2021, 6:00 PM), <https://www.usatoday.com/story/opinion/2021/09/08/texas-abortion-law-supreme-court-unleashes-mischief/5712467001> [<https://perma.cc/A744-97GQ>] (speculating that states could use the private enforcement scheme to, for example, “outlaw[] criticism of the governor” or “outlaw firearms by deputizing any [citizen] to file million dollar lawsuits against gun owners in the state”); see also Jonathan F. Mitchell, *The Writ-Of-Erasure Fallacy*, 104 VA. L. REV. 933, 1000 (2018) (noting that a private enforcement scheme could be used for “a campaign-finance law, a gun-control measure, a civil-rights act, a child-labor law in the 1920s, an abortion regulation, a prohibition on virtual child pornography, or a state-law prohibition on sanctuary cities”).

9. *Whole Woman’s Health*, 141 S. Ct. at 2495 (emphasis added).

10. TEX. HEALTH & SAFETY CODE § 171.208(b).

11. *Id.* § 171.208(b)(1).

12. *Id.* § 171.208(b)(2).

13. Lindsay Whitehurst, *Could Texas Abortion Ban Strategy Be Double-Edged Sword?*, ASSOC. PRESS NEWS (Sept. 11, 2021), <https://apnews.com/article/health-texas-lawsuits-environment-laws-8770f1944849585d87f0fd0d6a39e1e4> [<https://perma.cc/J7VF-C3EB>] (detailing other private enforcement laws).

disobedience will put SB8 on constitutionally weaker ground. Part II details potential arguments against civil disobedience as a means of challenging private enforcement schemes. This Part also explains why relying on the federal government to challenge such laws will be insufficient. Part III then provides a timely snapshot of how pro-choice activists have responded to SB8, in Texas and beyond.

I. INVITING ENFORCEMENT THROUGH CIVIL DISOBEDIENCE

The best way to challenge a state private enforcement scheme like Texas's abortion ban is to make state courts enforce it. And the first step towards making courts enforce a ban is to disobey it. The Texas abortion ban provides an example of how and why this would work in practice.

In Texas, abortion providers wishing to challenge the ban would engage in civil disobedience by continuing to perform the now-banned abortions and then wait for (or even encourage) a private lawsuit under Senate Bill 8 that results in a court-ordered judgment. If a private plaintiff obtains a judgment against the provider, the Texas state court would then be required under Senate Bill 8 to order both a financial penalty and an injunction against the provider.¹⁴

Legal precedent suggests that if a provider triggered this kind of court enforcement, the Texas abortion ban would be more vulnerable to challenge as state action violating the Due Process right to pre-viability abortions established in *Roe v. Wade* and *Planned Parenthood v. Casey*.¹⁵ The Supreme Court in *Shelley v. Kraemer* recognized that otherwise privately enforced constitutional deprivations can become actionable once a court steps in.¹⁶ In *Shelley*, the Supreme Court considered whether state courts could enforce private residential agreements prohibiting African-Americans from owning or occupying homes.¹⁷ The question in *Shelley* was not whether the private agreements were unconstitutional standing alone; in fact, the Supreme Court had previously rejected a challenge to "the validity of the covenant agreements as such" on the grounds that there was no state

14. TEX. HEALTH & SAFETY CODE § 171.208(b).

15. *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

16. 334 U.S. 1, 19 (1948) ("The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.").

17. *Id.* at 4-7.

action present in the private agreements.¹⁸ But the constitutional analysis changed after state courts enjoined African-Americans from taking possession of newly purchased homes, pursuant to those purportedly “private” racist covenants.¹⁹ Once its courts enforced the racially restrictive private covenants, the state had made available to private home sellers “the full coercive power of government” and therefore had engaged in state action for the purposes of Fourteenth Amendment analysis.²⁰

Texas SB8 similarly creates disputes that, like the covenants in *Shelley*, are initially and superficially between private parties but ultimately require enforcement by the state. Just as the court orders in *Shelley* preventing African-Americans from owning homes pursuant to private covenants amounted to unconstitutional state action,²¹ so too would a Texas court order preventing medical providers from performing constitutionally protected abortions pursuant to “private” citizen lawsuits.

An abortion provider could go a step further than just inviting court enforcement of the Texas abortion ban. If the provider disobeyed the court’s injunction order, doing so would then invite police enforcement of the law. The Texas Rules of Civil Procedure provide that upon proof of a person’s disobedience of an injunction, “the court or judge *shall* cause to be issued an attachment for such person, directed to the sheriff or any constable of any county, and *requiring* such officer to arrest the person therein named if found within his county.”²² In other words, Texas law enforcement officials would have to arrest any provider subject to an injunction who continued performing constitutionally protected, post-heartbeat abortions. .

This kind of police-enforced deprivation of Fourteenth Amendment rights should set off constitutional alarm bells. Indeed, the Supreme Court held in *Adickes v. S. H. Kress & Co.* that a plaintiff “will have made out a violation of her Fourteenth Amendment rights . . . if she can prove that a [private citizen] and a [] policeman somehow reached an understanding” to deny access to a protected right or “to cause her subsequent arrest” because of her exercise of that right.²³ *Adickes* concerned a restaurant in Hattiesburg, Mississippi during the civil rights

18. *Id.* at 9.

19. *Id.* at 19–20.

20. *Id.*

21. *Id.*

22. TEX. R. CIV. P. 692 (emphasis added).

23. 398 U.S. 144, 152 (1970).

movement refusing to serve lunch to a white customer because she was “in the company of Negroes,” and the customer subsequently being arrested by the Hattiesburg police on seemingly arbitrary vagrancy charges.²⁴ The Court held that, although there was no explicit agreement between the restaurant and police to arrest the customer as retribution, a reasonable jury could find the police made the arrest to enforce the private business’ racially discriminatory denial of service.²⁵ The restaurant “refus[ing] . . . service because of a state-enforced custom of segregating the races in public restaurants,” the Court said, would constitute a violation by the state of the customer’s Fourteenth Amendment rights.²⁶

Like the racially motivated arrests in *Adickes*, a state police force making arrests on behalf of a private plaintiff under “a statutory provision or by a custom having the force of law” to prevent the provision of protected abortion services would suggest unconstitutional state action.²⁷ In fact, state action would arguably be even more overt in this scenario because, unlike in *Adickes*, there would be no need to infer a secret “meeting of the minds”²⁸ between private parties and police to effect the constitutional deprivation: the private plaintiff would have expressly requested and received police enforcement of the deprivation by filing a sworn affidavit to the court seeking enforcement of the injunction.²⁹ Such private action authorized by state law and

24. *Id.* at 147.

25. *Id.* at 158.

26. *Id.* at 171.

27. *Id.* The Court in *Adickes* focused on a voluntary “meeting of the minds” and mutual understanding between private party and police. *Id.* at 159–60. There was no suggestion that the state or the police had required the restaurant owner to refuse service to a multi-racial group of diners. *See id.* at 170 (“If a State had a law requiring a private person to refuse service because of race, it is clear beyond dispute that the law would violate the Fourteenth Amendment and could be declared invalid and enjoined from enforcement.”). Nonetheless, the private individual’s voluntary action carrying out the “state-enforced custom” of discrimination amounted to unconstitutional state action. *Id.* at 171. *Adickes* thus undercuts the *Whole Woman’s Health* respondents’ argument in opposing certiorari that “a litigant lacks standing to sue state officials who cannot enforce the challenged law or individuals who are authorized (but not required) to bring lawsuits against those who violate it.” Brief in Opposition to Petition for a Writ of Certiorari Before Judgment at 13, *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (Oct. 21, 2021) (No. 21-463) (emphasis added). The state’s authorization of the deprivation, whether by law (as with Texas SB8) or by custom (as in *Adickes*), is sufficient for state action purposes. *See Adickes*, 398 U.S. at 171. The fact that Texas does not affirmatively require private individuals to carry out the constitutional deprivation is no defense.

28. *Adickes*, 398 U.S. at 158.

29. TEX. R. CIV. P. 692. As outlined in *Adickes*, an individual mounting a post-

accompanied by police enforcement would thus be strong grounds for alleging a constitutional violation.³⁰

Because state action will be much more overt after a final judgment under SB8 and similar private enforcement schemes, post-enforcement challenges to such laws stand a better chance than pre-enforcement challenges. In *Shelley*, the Court held that a constitutional violation occurred only *after* courts actively enforced racially discriminatory private homeownership agreements.³¹ Here, the Supreme Court's initial ruling on Texas SB8 concerned only the private action portion of the statute—the provision empowering private citizens to bring suits and prohibiting state officials from doing so.³² If no Texas court ever awards financial and injunctive relief pursuant to the abortion ban, then the Supreme Court's holding in *Whole Woman's Health v. Jackson* may be the end of the matter. But if a state court eventually enforces the Texas abortion law, the issue will change. The State of Texas, through its courts and possibly its police forces, would not just be remaining on the sidelines as private individuals enforce abortion limits. Instead, as in *Shelley*, the state would be affirmatively providing private plaintiffs the “full coercive power of government” to prevent access to constitutionally protected rights.³³

II. LIMITATIONS OF CIVIL DISOBEDIENCE

There are several reasons why the strategy of engaging in civil

enforcement constitutional challenge against SB8 would name the private party who initiated the anti-abortion lawsuit as the defendant and allege state action through the state court's order awarding monetary and injunctive relief and the police enforcement of that order. *See Adickes*, 398 U.S. at 152 (holding that “[t]he involvement of a state official” with a private citizen in a conspiracy to cause a deprivation of protected rights “plainly provides the state action essential” to support a constitutional claim and that “a private party involved in such a conspiracy, even though not an official of the State, can be liable under [42 U.S.C. § 1983]” for deprivations of constitutional rights).

30. Although *Adickes* concerned police enforcement of a custom rather than of court-ordered injunctive relief, the *Adickes* Court in dicta noted that no state can “enforce such a law requiring discrimination through either convictions of proprietors who refuse to discriminate, or trespass prosecutions of patrons who, after being denied service pursuant to such a law, refuse to honor a request to leave the premises.” *Adickes*, 398 U.S. at 170 (emphasis added). Similarly, Texas has set up a law requiring providers and others to cease facilitation of abortion services and has, by requiring the remedy of injunctive relief, empowered police to arrest those who refuse to comply.

31. *See Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (“We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.”).

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

33. *Shelley*, 334 U.S. at 19.

disobedience to invite state action might fail. First, civil disobedience is risky, both legally and financially. Disobeying a private enforcement law like Texas's requires financial resources, given the potential liability under the law of "not less than \$10,000 for each abortion" for anyone and everyone who facilitates any abortion.³⁴ Such financial penalties serve to create a chilling effect that challengers to any private enforcement scheme would have to overcome.³⁵

Civil disobedience also requires significant risk tolerance, as demonstrated in particular with medical practitioners subject to Texas's abortion ban. Not only could a provider be subjected to financial penalties and arrest, but a doctor found liable of violating the Texas law could also see denials of licensure and insurance coverage as a result of breaking the Texas law, threatening her practice both within and outside of Texas.³⁶ Given the already scant abortion options in states neighboring Texas that have not for the time being instituted post-heartbeat abortion bans,³⁷ the risk of even one regional doctor shutting down abortion services is substantial. A well-resourced and risk-tolerant abortion provider, however, could invite a lawsuit with the specific intention of seeing it through to a final judgment.

From a constitutional law perspective, it must be acknowledged that engaging in civil disobedience and bringing a post-enforcement challenge to a private enforcement scheme is not guaranteed to work in court. *Shelley's* state action holding has not been widely relied upon

34. *Id.*

35. See Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 199 (2007) ("A self-enforcing tort statute is a tort law that imposes such a high risk of a severe penalty on constitutionally protected conduct that it freezes that conduct as effectively as a criminal or regulatory ban.").

36. Abigail Abrams, *Inside the Small Group of Doctors Who Risked Everything to Provide Abortions in Texas*, TIME (Oct. 14, 2021, 7:00 AM), <https://time.com/6106537/texas-doctors-performing-abortions-ban-halted> [<https://perma.cc/CR6F-5BBX>] (noting that "[e]ven if someone files a frivolous lawsuit against a physician, the doctor would have to declare that when applying for new hospital privileges or a license to practice in a different state in the future," and violating the ban would jeopardize doctors' insurance coverage because "[m]alpractice insurance does not typically cover breaking the law").

37. See Sarah Varney, *Long Drives, Costly Flights, and Wearying Waits: What Abortion Requires in the South*, NPR (Aug. 2, 2021, 5:00 AM), <https://www.npr.org/sections/health-shots/2021/08/02/1022860226/long-drives-costly-flights-and-wearying-waits-what-abortion-requires-in-the-south> [<https://perma.cc/HDD5-8BVL>] (describing the limited abortion options in Southern states).

or expanded by courts since the case was decided in 1948.³⁸ And the issue under *Shelley* was racial discrimination under the Fourteenth Amendment's Equal Protection clause,³⁹ whereas the constitutional protections impacted by Texas Senate Bill 8 fall under the Due Process clause.⁴⁰ But although the specific outcome in *Shelley* turned on the Equal Protection clause, the Court confirmed that state action considerations apply to alleged Due Process infringements as well: "The federal guaranty of *due process* extends to state action through its *judicial* as well as through its legislative, executive, or administrative branch of government."⁴¹

And just because courts have been hesitant to extend *Shelley* in the years since its passage does not mean the Supreme Court would be unwilling to do so in the face of the uniquely structured Texas abortion ban. The Court has not had occasion to consider laws with private-enforcement structures designed to deprive individuals of a constitutionally protected right because no laws comparable to SB8 have been put into effect.⁴² Indeed, the absence of Supreme Court precedent is exactly why the Texas legislature crafted the law in the way it did.⁴³ Nor has the Court been asked to consider a law whose own drafters brazenly acknowledge its dual purposes of both limiting a constitutionally protected right and evading constitutional review.⁴⁴

38. Manian, *supra* note 35, at 199 ("There are no courts that have allowed a challenge to a state statute to proceed against a state court judge on the ground that the judge, simply by adjudicating a case pursuant to that law at some future point, will 'enforce' the law and thereby 'cause' injury.").

39. *Shelley*, 334 U.S. at 23.

40. See *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.").

41. *Shelley*, 334 U.S. at 15 (quoting *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930)) (emphasis added); *id.* ("Although the Supreme Court has never overruled *Shelley*, it has rarely relied on it to find state action.").

42. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (noting that the challenge to Texas's private enforcement scheme "presents complex and novel antecedent procedural questions"); see also Transcript of Oral Argument at 6–7, *United States v. Texas*, No. 21-588, (U.S. Nov. 1, 2021) (counsel for the United States stating "I want to acknowledge at the outset that we can't point to a case that looks exactly like this one, and that's because there has never been a law exactly like this one").

43. See Ann E. Marimow, Matt Zaptosky, & Caroline Kitchener, *Abortion Opponents Watch for Violations of Texas Ban as Providers Weigh Legal Options*, WASH. POST (Sept. 2, 2021, 9:15 PM), https://www.washingtonpost.com/politics/courts_law/texas-abortion-ban-jonathan-mitchell/2021/09/02/ecbd1124-0c17-11ec-aea1-42a8138f132a_story.html [https://perma.cc/PNL6-GE5H].

44. See Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea*, WALL ST. J. (Sept. 4, 2021), <https://www.wsj.com/articles/behind>

There is, of course, no guarantee that the Supreme Court would apply *Shelley* or *Adickes* to court and police enforcement of Texas SB8. But the *Whole Woman's Health v. Jackson* majority at least hinted that it would be more receptive to a post-enforcement challenge: though five Justices on the Supreme Court accepted Texas's argument that empowering private citizens to bring pre-viability abortion lawsuits does not amount to state action, the majority expressly did so at a time when no suits had been filed or even threatened and noted that "the sole private-citizen respondent before us has filed an affidavit stating that he has no present intention to enforce the law."⁴⁵ The majority allowed that the Court's pre-enforcement decision "in no way limits other procedurally proper challenges to the Texas law," of which it said the abortion providers had raised "serious" constitutional questions.⁴⁶ If the Court's majority is taken at its word, then a provider engaging in civil disobedience and bringing a post-enforcement challenge to the Texas law would present a different and potentially more compelling procedural posture for renewed consideration of the ban's constitutionality.

Some may also reasonably question whether a Supreme Court majority seemingly hell-bent on ending all constitutional rights to abortion will be receptive to *any* challenge to a private enforcement scheme, like SB8, that get it one step closer to that goal. Indeed, the Supreme Court already has an opportunity to overturn fully *Roe v.*

-texas-abortion-law-an-attorneys-unusual-enforcement-idea-11630762683 [https://perma.cc/A62B-8P2Y] (quoting Texas State Senator Bryan Hughes, one of the bill's principal architects, as stating, "We were going to find a way to pass a heartbeat bill that was going to be upheld"); see also Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021), <https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html> [https://perma.cc/2EGK-SC5W] (reporting statement from one of the attorneys principally involved in drafting the bill that "there are ways to counter the judiciary's constitutional pronouncements, and Texas has shown that the states need not adopt a posture of learned helplessness in response to questionable or unconstitutional court rulings"); Mitchell, *supra* note 8, at 1000–03 (outlining the novel idea that legislatures "can also induce compliance with [judicially disapproved] statutes by providing for private enforcement through civil lawsuits"); Emma Green, *What Texas Abortion Foes Want Next*, ATLANTIC (Sept. 2, 2021), <https://www.theatlantic.com/politics/archive/2021/09/texas-abortion-ban-supreme-court/619953> [https://perma.cc/T7EP-82ND] (legislative director of Texas Right to Life, a principal supporter of the abortion ban, explaining that the law's approach reflected "that the pro-life movement is extremely frustrated with activist judges at the district level who are not doing their job to adjudicate conflicts between parties" and who are "blocking pro-life laws because they think they violate the Constitution or pose undue burdens").

45. *Whole Woman's Health*, 141 S. Ct. at 2495.

46. *Id.*

Wade after it hears argument in the coming term over the constitutionality of a Mississippi law directly banning abortions after the fifteenth week of pregnancy through overt state action.⁴⁷

But even if the Supreme Court declares Mississippi's post-fifteen-week law constitutional, it may remain silent as to bans on abortions before the fifteen-week mark, like Texas's Senate Bill 8. This approach of not outright overturning the Court's previous recognition of a Fourteenth Amendment right to abortion would be consistent with what scholars have called "a concerted effort to subject the right to abortion announced in *Roe v. Wade* and *Planned Parenthood v. Casey* to a death by a thousand cuts."⁴⁸ A holding that stops short of outright overturning all abortion protections would fit this "death by a thousand cuts" model, further curtailing but not completely ending constitutional protection for abortion.⁴⁹ And such a holding would still render Texas's abortion ban as to pre-fifteen-week abortions unconstitutional under existing Supreme Court precedent, assuming state action were present.

A post-enforcement challenge to the law would bolster the case that Texas is in fact engaging in state action. And the Supreme Court, in considering such a challenge, would at least be mindful of ramifications of holding otherwise. Indeed, opponents of the ban and its scheme have suggested that the structure of the law could easily be adapted to liberal causes, like gun control and COVID mask and vaccine mandates.⁵⁰ Even a conservative-majority Supreme Court might be wary of opening the door in this way to copycat laws at the other end of the ideological spectrum.⁵¹ Of course, nothing other than its

47. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (U.S. May 17, 2021) (No. 19-1392).

48. Reva Siegel, Kate Shaw, & Melissa Murray, *Toward an Expansive Conception of Reproductive Rights and Justice*, TAKE CARE (June 5, 2019), <https://takecareblog.com/blog/toward-an-expansive-conception-of-reproductive-rights-and-justice> [<https://perma.cc/XT4E-8NNT>].

49. *Id.*

50. Alice Miranda Ollstein & Josh Gerstein, *Texas Abortion Ban Spawns Look-Alike Laws but Could Be Short-Lived*, POLITICO (Sept. 2, 2021, 8:19 PM), <https://www.politico.com/news/2021/09/02/texas-abortion-law-private-right-to-sue-509244> [<https://perma.cc/W2KT-TA7L>].

51. Indeed, during the November 1 oral arguments on the statute's structure, Justice Kavanaugh expressly asked pointed questions about whether the same private enforcement structure could limit "free speech rights," "free exercise of religion rights," and "Second Amendment rights," with Texas's solicitor general confirming that the structure would be "across the board equally applicable" to constitutional rights beyond just the right to abortion. Transcript of Oral Argument at 72, 74, *Whole Woman's Health*, 141 S. Ct. 2494 (Nov. 1, 2021) (No. 21-463).

own reputational concerns would prevent the Court from simply upholding or striking down private action bans along partisan lines. If the Court did take this approach, at least a post-enforcement challenge would help reveal the conservative majority's hypocrisy.

Lastly, the U.S. Department of Justice's constitutional challenge to SB8 presents another reason why civil disobedience might arguably be unnecessary. The Justice Department's claim turns on pre-enforcement standing to sue.⁵² According to the Justice Department, the United States has standing to assert constitutional violations against Texas based on the federal government's "authority and responsibility to ensure that Texas cannot evade its obligations under the Constitution and deprive individuals of their constitutional rights" and because the ban "purport[s] to prohibit federal agencies [and nongovernmental partners] from carrying out their responsibilities under federal law related to abortion services."⁵³ A district court judge in Texas agreed and preliminarily enjoined Senate Bill 8,⁵⁴ only to see that injunction stayed two days later by the Fifth Circuit in a three-sentence *per curiam* decision.⁵⁵

Although the legal merits of the federal government's constitutional standing to sue Texas are beyond the scope of this Article, the Department of Justice's suit also raises practical questions about the necessity of civil disobedience by private parties. If the federal government itself can challenge the constitutionality of a state private enforcement scheme, then perhaps the onus need not be on private parties seeking to vindicate constitutional rights.

However, the Department of Justice is led by a political appointee, the U.S. Attorney General,⁵⁶ and therefore whether the Department of Justice even exercises whatever standing it has will likely turn on the political ideology of the current federal administration. Although the Justice Department under Biden-appointee Merrick Garland challenged the Texas Abortion Ban, it is hard to imagine a Republican-

52. Complaint at 2–3, *United States v. Texas*, No. 1:21-cv-796, 2021 WL 4099545 (W.D. Tex. Sept. 9, 2021).

53. *Id.*

54. *United States v. Texas*, 1:21-CV-796-RP, 2021 WL 4593319, at *19 (W.D. Tex. Oct. 6, 2021) (holding that the United States had standing because "[i]nterests of the United States—such as its interest in protecting federal agencies and programs from liability, and its sovereign interest in upholding the Constitution—have already been directly harmed by the State's implementation of S.B. 8").

55. *United States v. Texas*, 21-50949, 2021 WL 4706452, at *1 (5th Cir. Oct. 8, 2021).

56. 28 U.S.C. § 503.

appointed Attorney General doing the same. And even were the Texas law struck down because of the Justice Department's suit, there is little to stop Texas or any other state from enacting an identical law under the next anti-abortion administration, knowing the unlikelihood of the Department of Justice lodging another challenge at that time. Because of the uncertainties surrounding whether any given Justice Department will choose to challenge the constitutionality of any given private enforcement ban, relying on the federal government is no substitute for private constitutional challenges. Civil disobedience, though not without its own risks and legal uncertainties, presents the best means of succeeding in such challenges.

III. ABORTION PROVIDERS' POST-ENACTMENT RESPONSES TO THE BAN

Since the Texas ban went into effect, the law has largely had the intended chilling effect.⁵⁷ In her *Whole Woman's Health v. Jackson* dissent, Justice Sotomayor detailed packed medical offices immediately before the Texas law took effect and, after the law took effect, numerous abortion providers quickly announcing termination of care for any abortions more than six weeks from a woman's last menstrual cycle.⁵⁸ In the days and weeks after the law took effect, most clinics in Texas stopped providing post-heartbeat abortions.⁵⁹ This wait-and-see approach is certainly safer in terms of providers avoiding legal and professional liability, but it also potentially misses an opportunity to challenge the law as enforced, rather than just as enacted. It also means that in the interim period before the law could be fully and reassuringly struck down as it wends its way through the courts, women in Texas will be unable to obtain constitutionally protected abortion services.

Although most reports in Texas suggest that post-heartbeat

57. Jennifer Gerson, *'Treating Us Like Criminals': Texas Abortion Ban Creates Chilling Effect Across State*, GUARDIAN (Sept. 15, 2021, 6:00), <https://www.theguardian.com/us-news/2021/sep/15/no-one-wants-to-get-sued-some-abortion-providers-have-stopped-working-in-texas> [<https://perma.cc/K7FT-J6UF>].

58. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2499 n.1 (2021) (Sotomayor, J., dissenting).

59. See, e.g., *Abortion in Dallas, TX*, PLANNED PARENTHOOD, <https://plannedparenthood.org/health-center/texas/dallas/75237/south-dallas-abortion-services-center-4149-21342/abortion> [<https://perma.cc/J8YP-TRM4>] ("In-clinic abortion is offered up to 5 weeks and 6 days after the start of your last menstrual period."); Abrams, *supra* note 36 ("After weighing this considerable risk, the majority of the roughly two dozen abortion clinics in Texas decided they would not resume providing abortions past six weeks during the injunction.").

abortions all but ended in the state following the ban taking effect,⁶⁰ one Texas-based doctor, Alan Braid, quickly came forward and publicly admitted performing a post-heartbeat abortion in violation of the law.⁶¹ Tellingly, despite anti-abortion activists being presented with a direct means to hold Dr. Braid liable and stop him from performing any more post-heartbeat abortions, these activists did not rush to the courthouse to enforce Senate Bill 8. Instead, one prominent anti-abortion group's legislative director coyly said it was "looking into" Braid's admission, but the group was "dubious that this is just a legal stunt."⁶² A number of individuals did sue, but none appeared to do so on behalf of the anti-abortion cause, with one plaintiff explaining that "he believed in a woman's right not to have an unwanted child, and that because his lawsuit was a win-win for him," based on either furthering efforts to overturn SB8 or resulting in a financial windfall for himself, "he rushed to file it."⁶³ Anti-abortion groups' reluctance to sue may reflect a desire to rely solely on the ban's chilling effect on abortion instead of asking courts and police—potential state actors—to enforce the law, given that such state enforcement might put the ban in greater constitutional jeopardy.

60. Gerson, *supra* note 57; *see also* Petitioner's Brief at 16, *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (Oct. 27, 2021) (No. 21-463) (detailing that, outside of the two-day window in October when SB8 was enjoined, "only one known post-cardiac-activity abortion has occurred in Texas since September 1").

61. Alan Braid, *Opinion: Why I Violated Texas's Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021), <https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid> [<https://perma.cc/4C4F-JUE3>]. Several other doctors also briefly resumed providing abortions following a preliminary injunction of the law on October 6. Abrams, *supra* note 36. Unlike Dr. Braid, though, these doctors did not openly identify themselves. *Id.* These doctors once again ceased performing abortions when the Fifth Circuit stayed the district court's injunction. *Id.*

62. Ariane de Vogue & Devan Cole, *Texas Doctor Says He Violated the State's Strict New Abortion Law*, CNN (Sept. 19, 2021, 11:27 AM), <https://www.cnn.com/2021/09/19/politics/texas-doctor-violated-abortion-ban/index.html> [<https://perma.cc/JXX5-UNK3>]. In a separate interview, the legislative director was even more blunt about declining to file suit under SB8, noting that, "[w]e definitely lose if a lawsuit is filed imprudently [and] [t]hat's why you didn't see us jump out there." Laurel Calkins & Lydia Wheeler, *Texas Abortion Doctor Draws Friendly Lawsuits Seen as Duds*, BLOOMBERG L. (Sept. 22, 2021), <https://www.bloomberg.com/news/articles/2021-09-22/texas-abortion-doctor-lawsuits-filed-by-allies-may-go-nowhere> [<https://perma.cc/6CYN-JF78>].

63. J. David Goodman, *Lawsuits Are Filed Against a Texas Doctor Who Said He Performed an Abortion*, N.Y. TIMES (Oct. 8, 2021), <http://nytimes.com/2021/09/20/us/texas-abortion-lawsuit-alan-braid.html> [<https://perma.cc/MD97-AF5D>].

CONCLUSION

There is, unfortunately, no way to undo the damage inflicted by the Supreme Court's failure to halt the Texas abortion ban before it went into effect. As a result of the Court's inaction, many women have been and will be unable to access constitutionally protected abortions. And there is also no way for the Court's conservative majority to reverse the harm that its callous attitude toward precedent and its patent disregard for women's constitutional rights has done to the Supreme Court as an institution. But this past and ongoing harm does not mean that hope is lost for restoring constitutional protections in Texas and other states that might follow Texas's private enforcement model.

The state of Texas and anti-abortion activists have been engaged in a high-stakes standoff with abortion providers since SB8 took effect. Proponents of the law have shown no inclination to actually enforce it, lest such enforcement invite a stronger legal challenge. And, aside from Dr. Braid's admission in the *Washington Post*, providers have likewise shown no inclination to violate the law and risk its harsh penalties. Absent an intervening decision from the U.S. or Texas Supreme Courts striking down the law as enacted, the only hope for restoring abortion access in Texas—and for preventing other state legislatures from using the same private enforcement trick to take away additional constitutional rights—is to call Texas's bluff.

Texas Senate Bill 8 is just words unless it is enforced by Texas courts. If and when the law is enforced, the state of Texas will be unable to hide behind private plaintiffs and instead will be actively and directly infringing on the constitutional right to abortion. Providers and supporters' best hope to overturn the Texas private enforcement ban is therefore to disobey it and force Texas state officials to make the next move. Otherwise, such laws may quickly go from novelties to the norm.