AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Personal Freedom and Public Morality/Abortion

**Whole Woman’s Health v. Jackson I, \_\_\_ U.S. \_\_\_** (2021)

*Whole Woman’s Health provides abortion services in Texas. The Texas state legislature in 2021 passed the Texas Heartbeat Act, otherwise known as S.B. 8. That measure permitted any private citizen to sue for damages aby person who performed or assisted an abortion where the unborn had a detectable heartbeat. The unborn (fetuses to pro-choice advocates, unborn children to pro-life advocates) have detectable heartbeats very early in pregnancies, long before they are viable outside the womb. The instant S.B. 8 became law, Whole Woman’s Health filed a lawsuit against Austin Jackson, a Texas state judge, Penny Clarkston, a state-court clerk, Ken Paxton, the attorney general of Texas, Stephen Carlton, the executive director of the Texas Medical Board, Mark Lee Dickson, a private person, and others. The suit asked courts for an injunction against S.B. 8 on the ground that the law violated the right to an abortion protected by the due process clause of the Fourteen Amendment, as interpreted by* Roe v. Wade *(1973) and* Planned Parenthood of Southeastern Pa. v. Casey *(1992). The district court issued a temporary injunction, barring implementation of S,B. 8, but that injunction was removed by the Court of Appeals for the Fifth Circuit. Whole Woman’s Health appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States by a 5-4 vote refused to remove the stay or otherwise issue injunctive relief. The unsigned majority opinion noted that determining who would win on the merits was impossible in light of the novelty of the Texas statutory scheme. All four dissenters wrote short opinions claiming that the Texas law was clearly unconstitutional. If* Roe v. Wade *was good law, does the Texas law present difficult constitutional issues? What are those issues? How would the various judges resolve those issues? Could New York pass a law authorizing private citizens to bring lawsuits against persons who carried guns in public consistent with the Supreme Court’s ruling in* New York State Rifle & Pistol, Inc. v. Bruen *(2022)?*

*Two months after handing down* Whole Woman’s Health v. Jackson I, *the Supreme Court in* Whole Woman’s Health v. Jackson II *(2021) held that persons could sue Texas health officials, but not state law clerks and the state attorney general. The Supreme Court in* Dobbs v. Jackson Women’s Health Organization *(2022) overruled* Roe v. Wade *(1973) when holding women had no constitutional right to an abortion. Might S.B. 1 nevertheless be unconstitutional even if women have no constitutional right to an abortion?*

The application for injunctive relief or, in the alternative, to vacate stays of the district court proceedings presented to Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570) and by him referred to the Court is denied. To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a “strong showing” that it is “likely to succeed on the merits,” that it will be “irreparably injured absent a stay,” that the balance of the equities favors it, and that a stay is consistent with the public interest.  The applicants now before us have raised serious questions regarding the constitutionality of the Texas law at issue. But their application also presents complex and novel antecedent procedural questions on which they have not carried their burden. For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves.  And it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention.  The State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly. Nor is it clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law. Finally, the sole private-citizen respondent before us has filed an affidavit stating that he has no present intention to enforce the law. In light of such issues, we cannot say the applicants have met their burden to prevail in an injunction or stay application. In reaching this conclusion, we stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit. In particular, this order is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts.

Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570) and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570) join, dissenting.

The statutory scheme before the Court is not only unusual, but unprecedented. The legislature has imposed a prohibition on abortions after roughly six weeks, and then essentially delegated enforcement of that prohibition to the populace at large. The desired consequence appears to be to insulate the State from responsibility for implementing and enforcing the regulatory regime.

The State defendants argue that they cannot be restrained from enforcing their rules because they do not enforce them in the first place. I would grant preliminary relief to preserve the status quo ante—before the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner. Defendants argue that existing doctrines preclude judicial intervention, and they may be correct. But the 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.

We are at this point asked to resolve these novel questions—at least preliminarily—in the first instance, in the course of two days, without the benefit of consideration by the District Court or Court of Appeals. We are also asked to do so without ordinary merits briefing and without oral argument. These questions are particularly difficult, including for example whether the exception to sovereign immunity recognized in *Ex parte Young* (1908), should extend to state court judges in circumstances such as these.

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Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570), with whom Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570) and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570) join, dissenting.

I agree with THE CHIEF JUSTICE, Justice SOTOMAYOR, and Justice KAGAN. Texas's law delegates to private individuals the power to prevent a woman from obtaining an abortion during the first stage of pregnancy. But a woman has a federal constitutional right to obtain an abortion during that first stage. And a “State cannot delegate ... a veto power [over the right to obtain an abortion] which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.”  Indeed, we have made clear that “since the State cannot regulate or proscribe abortion during the first stage ... the State cannot delegate authority to any particular person ... to prevent abortion during that same period.”  The applicants persuasively argue that Texas's law does precisely that.

The very bringing into effect of Texas's law may well threaten the applicants with imminent and serious harm. One of the clinic applicants has stated on its website that “[d]ue to Texas' SB 8 law,” it is “unable to provide abortion procedures at this time.” And the applicants, with supporting affidavits, claim that clinics will be unable to run the financial and other risks that come from waiting for a private person to sue them under the Texas law; they will simply close, depriving care to more than half the women seeking abortions in Texas clinics. We have permitted those whom a law threatens with constitutional harm to bring pre-enforcement challenges to the law where the harm is less serious and the threat of enforcement less certain than the harm (and the threat) here.

I recognize that Texas's law delegates the State's power to prevent abortions not to one person (such as a district attorney) or to a few persons (such as a group of government officials or private citizens) but to any person. But I do not see why that fact should make a critical legal difference. That delegation still threatens to invade a constitutional right, and the coming into effect of that delegation still threatens imminent harm. Normally, where a legal right is “ ‘invaded,’ ” the law provides “ ‘a legal remedy by suit or action at law.’ ”  It should prove possible to apply procedures adequate to that task here, perhaps by permitting lawsuits against a subset of delegatees (say, those particularly likely to exercise the delegated powers), or perhaps by permitting lawsuits against officials whose actions are necessary to implement the statute's enforcement powers. 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—an invasion that threatens immediate and serious injury.

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Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570) and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570) join, dissenting.

The Court's order is stunning. Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand. . . .

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The Act is clearly unconstitutional under existing precedents. The respondents do not even try to argue otherwise. Nor could they: No federal appellate court has upheld such a comprehensive prohibition on abortions before viability under current law.

The Texas Legislature was well aware of this binding precedent. To circumvent it, the Legislature took the extraordinary step of enlisting private citizens to do what the State could not. The Act authorizes any private citizen to file a lawsuit against any person who provides an abortion in violation of the Act, “aids or abets” such an abortion (including by paying for it) regardless of whether they know the abortion is prohibited under the Act, or even intends to engage in such conduct.. . *.* 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.

The Legislature fashioned this scheme because federal constitutional challenges to state laws ordinarily are brought against state officers who are in charge of enforcing the law. By prohibiting state officers from enforcing the Act directly and relying instead on citizen bounty hunters, the Legislature sought to make it more complicated for federal courts to enjoin the Act on a statewide basis.

Taken together, the Act is a breathtaking act of defiance—of the Constitution, of this Court's precedents, and of the rights of women seeking abortions throughout Texas. . . . Today, the Court finally tells the Nation that it declined to act because, in short, the State's gambit worked. The structure of the State's scheme, the Court reasons, raises “complex and novel antecedent procedural questions” that counsel against granting the application,  just as the State intended. This is untenable. It cannot be the case that a State can evade federal judicial scrutiny by outsourcing the enforcement of unconstitutional laws to its citizenry. At a minimum, this Court should have stayed implementation of the Act to allow the lower courts to evaluate these issues in the normal course.  Instead, the Court has rewarded the State's effort to delay federal review of a plainly unconstitutional statute, enacted in disregard of the Court's precedents, through procedural entanglements of the State's own creation.

The Court should not be so content to ignore its constitutional obligations to protect not only the rights of women, but also the sanctity of its precedents and of the rule of law.

Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570) and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)&analyticGuid=Ia83988ccbc9a11ebbea4f0dc9fb69570) join, dissenting.

Without full briefing or argument, and after less than 72 hours' thought, this Court greenlights the operation of Texas's patently unconstitutional law banning most abortions. The Court thus rewards Texas's scheme to insulate its law from judicial review by deputizing private parties to carry out unconstitutional restrictions on the State's behalf. As of last night, and because of this Court's ruling, Texas law prohibits abortions for the vast majority of women who seek them—in clear, and indeed undisputed, conflict with [*Roe v. Wade* (1973)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126316&pubNum=0000780&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default))and *Planned Parenthood of Southeastern Pennsylvania v.* [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=Ia83988ccbc9a11ebbea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=e6127a2597a742ffb9be5fba563e9851&contextData=(sc.Default)) (1992).

Today's ruling illustrates just how far the Court's “shadow-docket” decisions may depart from the usual principles of appellate process. That ruling, as everyone must agree, is of great consequence. Yet the majority has acted without any guidance from the Court of Appeals—which is right now considering the same issues. It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail. In all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend.