Taking a Stand: How Federal Courts Can Reclaim Article III from State and Federal Legislatures

David M. Hopkins*

A puzzling problem has come to the forefront of the legal community in recent days, as the Texas state legislature's latest attempt to ban abortion took the form of a statute with a unique method of enforcement. Specifically, Texas S.B. 8,[1] the most recent Texas statute banning abortion after the detection of a fetal heartbeat (the "Heartbeat Bill") came into effect on September 1, 2021. That statute, unlike most previous efforts to ban abortion, bars enforcement by employees and officers of the state and delegates that power solely to the hands of the general public by establishing a private cause of action. The question that immediately formed in the minds of many practicing attorneys was simple: How does the general public have standing to sue here?

American law provides that plaintiffs must demonstrate that they have standing to bring a claim against the defendants they wish to sue. Both federal[2] and state[3] courts generally require plaintiffs to demonstrate a bare minimum of injury in fact, causation, and redressability in order to find that they have standing to sue.[4] The Supreme Court of the United States has found that injury in fact constitutes a concrete and particularized, actual or imminent invasion of a legally protected interest.[5] This nuance is important because the Case or Controversy Clause in Article III of the Constitution limits the kinds of cases that courts may hear. The Case or Controversy Clause, of course, provides that courts may hear cases or controversies arising under a number of categories and in effect prohibits courts from hearing cases that would result solely in advisory opinions. Standing has been recognized as a critical means of ensuring that the Case or Controversy Clause is appropriately enforced and preserved.[6]

The language of the Heartbeat Bill provides that any person other than an officer or employee of the state or local governments may bring a civil action against any person who performs, aids, or abets an abortion in the ways described in the Bill or intends to engage in this conduct.[7] This ostensibly ranges from the doctor performing the abortion to the taxi driver who drives the patient to the clinic, with minimum statutory damages of $10,000 accompanying each violation of the statute.[8] Setting aside the legal, policy, and political debates underpinning the Heartbeat Bill, this particular scheme poses a challenging problem with respect to the fundamental question of standing. This fancy feat of legislative footwork naturally raises the question of how a private individual who is completely disconnected from a woman seeking an abortion can file suit against individuals associated with that process. Simply put, we wonder how such a party can have standing to sue.

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*Litigation Associate, Benesch, Friedlander, Coplan & Aronoff LLP.

[1] To be codified at Tex. Health & Safety Code Ann. §§ 171.201(1), 171.204(a) (West 2021). Subsequent citations will use the codified section numbers.

[2] *See, e.g., TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

[3] *See, e.g., Moore v. Middletown*, 975 N.E.2d 977, 982 (Ohio 2012).

[4] There are very limited exceptions to this requirement for issues such as free speech and taxpayer standing that are not the subject of this article.

[5] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

[6] *Id.* at 560.

[7] Tex. Health & Safety Code Ann. § 171.208(a)(1)-(3).

[8] *See id.* § 171.208(b)(2).

The easy answer is that plaintiffs in this position have standing to sue because the Texas legislature says they do. This concept, often referred to as "statutory standing," confers standing without the need for that pesky constitutional inquiry regarding the nature of the plaintiff's claimed harm, as is generally required in other cases. I respectfully submit that the concept of statutory standing, particularly as it is analyzed in the courts, must change in order for the core Article III concept of standing to persevere in the face of efforts from legislatures that wish to circumvent it. Admittedly, state court standing tests such as those that have been utilized in Texas courts could serve as an obstacle to the implementation of laws such as the Heartbeat Bill to the extent that those state-level analyses are analogous to federal law on standing.[9] Specifically, Texas law utilizes a test for standing that is virtually identical to the federal test for standing. The Texas doctrine on standing requires that a plaintiff "must be personally injured," that the injury must be "fairly traceable to the defendant's conduct," and that the injury must "be likely to be redressed by the requested relief."[10] The Supreme Court of the United States, in *TransUnion*, found that Congress does not have the unrestricted ability to confer standing by statute and required injury-in-fact even in the face of a statutory violation.[11] As a result, Texas state courts may utilize similar reasoning to find that members of the general public do not have standing to sue despite the language of the Heartbeat Bill.

However, this uncertainty underscores the need to develop a predictable and consistent way to analyze standing that conforms with the classic Article III standing requirements. Incorporating the classic constitutional test for standing provides the optimal method to ensure the uniform application and preservation of Article III standing. The best way to achieve this outcome would be to incorporate the classic constitutional test into the judicial analysis of standing as conferred by statute. This would ideally take the form of a straightforward two-part test: First, does the plaintiff fit within the category of plaintiff covered by the statute? Second, does the plaintiff's alleged harm confer standing under the traditional constitutional analysis of Article III standing?

While this would be a significant addition to the current jurisprudence concerning standing, the idea of adding a constitutional lens to a threshold question of access to the courts is hardly a new one. Consider the issue of personal jurisdiction. While this thorny and nuanced concept has evolved significantly over time, courts now utilize both state long-arm statutes as well as federal limitations under the Due Process Clause when determining whether an exercise of personal jurisdiction over a defendant is warranted.[12] One might respond, "Well, that's all well and good in federal courts, but why should a state court interpreting standing under a state statute be bound by Article III standing considerations if the state statute already confers standing?" Personal jurisdiction provides a useful analogy for this situation, as well. Even when a dispute is limited to state courts and a state's long-arm statute is invoked to resolve the issue of personal jurisdiction, constitutional due process requirements must still be satisfied before personal jurisdiction may be exercised.[13] This is true even where, as in the State of Ohio for example, a state's long-arm statute is not coterminous with due process.[14]

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[9] *See, e.g.*, *Garcia v. City of Willis*, 593 S.W.3d 201 (Tex. 2019).
[10] *Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012) (internal quotation marks and citations omitted).
[11] 141 S. Ct. 2190, 2205 (2021).
[12] *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (considering the applicability of both the state's long-arm statute and federal due process concerns in analyzing personal jurisdiction).
[13] *See, e.g.*, *Kauffman Racing Equip., L.L.C. v. Roberts*, 930 N.E.2d 784, 790 (Ohio 2010).
[14] *Id.*

While it is important to ensure that state courts can apply state law in accordance with state precedent, it is equally important to ensure that state legislatures cannot confer standing in ways that fly in the face of Article III. Whatever one may think about the issues and politics bubbling at the surface of the Heartbeat Bill, it should strike any practicing attorney as odd that anyone may sue a person involved in the process of a woman obtaining an abortion simply because a state legislature has said as much. Adding a constitutional dimension to statutory standing analyses solves this problem in ways that recognize the importance of Article III in all cases, not just those that fall outside the unique creature that is statutory standing. Without this change, what is now an unprecedented legislative sleight of hand could easily become the norm as state legislatures increasingly encounter problems in passing laws that can survive constitutional muster. In short, the question of standing has always been left to judicial interpretation, not legislative fiat. It must stay that way if Article III is to continue to serve as a useful check on ambitious lawmakers.