

Texas Vs. Roe



By Paul Engel

- Texas SB8 is not the violation of a “constitutionally protected right established by Roe v. Wade” that you’ve been told.
- Texas SB8 is a unique law, apparently crafted specifically tailored to comply with the Roe v. Wade opinion.
- The Supreme Court did not “overturn Roe”, they simply refused to issue an injunction against the law because, by their own precedent, they couldn’t.

The recent Texas law SB8 has been described as an attack on the right to abortion. The case challenging the law, Whole Woman’s Health et al, v. Austin Reeve Jackson, Judge, et al, has become a lightning rod for abortion activists. Referring to the law as both extreme and a blatant violation of constitutional rights, President Biden has been one of the chief spokesmen opposing this law and the decision of the Supreme Court. By going to the original documents we can cut through the hype and understand the truth, not only about the law, but the court’s opinion as well.

Texas SB 8

Let’s start with the Texas law that’s at the heart of the current debate. There are three interesting provisions in this law.

Sec. 171.204. PROHIBITED ABORTION OF UNBORN CHILD WITH DETECTABLE FETAL HEARTBEAT; EFFECT.

(a) Except as provided by Section 171.205, a physician may not

knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.

[Texas SB 8](#)

The law prohibits abortion of an unborn child once a heartbeat is detected. Section 171.203 requires that “standard medical practices” be used to detect if a heartbeat is present. If one is found, then abortion is generally prohibited. There is, however, an exception.

Sec. 171.205. EXCEPTION FOR MEDICAL EMERGENCY; RECORDS.

(a) Sections 171.203 and 171.204 do not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter.

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If a physician believes there’s a medical emergency which prevents them from complying with the law, that’s considered an exception. Meaning, if while treating a medical emergency, a doctor induces an abortion, they do not violate this law. But the third section is the one I find most constitutionally interesting.

Sec. 171.208. CIVIL LIABILITY FOR VIOLATION OR AIDING OR ABETTING VIOLATION.

(a) Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who:

(1) performs or induces an abortion in violation of this subchapter;

(2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for

or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or

(3) intends to engage in the conduct described by Subdivision (1) or (2).

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So what's so interesting about this section of the law? Rather than making abortion a criminal offense, it makes it a civil one. In other words, rather than being sent to jail for performing an illegal abortion, a person pays damages. Also of interest, the person suing someone for performing illegal abortions cannot be a member of a state or local government. This means means that anyone other than a government official can sue someone for performing an abortion in violation of this law. I believe the reason for this is to comply with the Supreme Court's opinion in Roe v. Wade.

Roe v. Wade

A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

Roe v. Wade

When the Supreme Court opined in Roe, they found that a law making it a crime to perform an abortion except to save the life of the mother violated the Due Process Clause of the Fourteenth Amendment. In effect, the court said that such a limitation on abortion deprived the mother and/or the doctor of the liberty to perform abortions without due process of

law. Of course, the court did not appear to consider the question of depriving the child in the womb of their life without due process of law, but that's the problem with the Roe v. Wade precedent. The opinion goes on to say:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

[Roe v. Wade](#)

The court created this trimester scheme to determine when and how a state had an interest in regulating abortions. For the first trimester, the court believes the abortion decision is solely a medical one. After the first trimester, the court claimed that states only had an interest in promoting the health of the mother. So when is it about the child in the womb?

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

[Roe v. Wade](#)

The Roe court used the viability of the child to determine when the state has an interest in protecting, as the court put it, "potentiality of human life". And this is where I think the court really messed up. Understand, in 1972 when this case was argued and decided, medical imaging technology was not

nearly as sophisticated as it is today. Meaning, medical science in 1972 did not allow the level of detail we currently have when viewing inside the womb, neither did it provide the information regarding gestational development we have today. Still, the Declaration of Independence says:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. –That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,

Declaration of Independence

We were not created when we emerged from the womb, we were all created in the womb. So the question of when the state has an interest in protecting life should not be based on viability (the ability to survive outside the womb), but on detection of life. Which is what the Texas bill does. By basing protection of life based on life being detected, Texas fulfills its duty to protect the rights of everyone within their borders.

Criminal vs Civil

Since the Roe opinion specifically states that a criminal abortion statute based solely on the life of the mother violated the Due Process Clause of the Fourteenth Amendment, I believe the Texas Legislature created a civil statute to avoid this legal hurdle. I also think they may have opened up a couple of serious problems with their legislation.

The first potential problem I see is the scope of who can sue for committing illegal abortions. As I noted previously, the law allows, “Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action...” This law places the burden of “prosecution” solely in the hands of the people of Texas. In other words, the State of Texas expects the people to bring suit when the

law is violated, rather than the state itself.

This isn't necessarily a problem, except for the second potential problem. The law states anyone other than a state or local government official can sue under this law. No other limitations are noted. So does that mean that I, as a citizen of Tennessee, can sue a doctor in Texas for performing, or even intending to perform, an abortion on a child without checking for a heartbeat? Does it matter whether or not I have a direct grievance against the doctor, other than the fact that abortion of a living child is murder? I'm not a lawyer, but I believe it's standard practice for a court to consider a plaintiff's standing before proceeding with a civil case. Maybe the Texas Legislature expects the courts to weed out the activist cases from those where someone was directly harmed. Unfortunately, that unleashes a potential nightmare of people and organizations filing suits against abortion providers in an attempt to "sue them out of business". I don't find that just when the gun control activist do it, and neither would I find that just if pro-life activists do it. That's why I think this is one part of the law that needs to be fixed: To define what grievance can be used to justify a lawsuit under this statute.

The Courts

Much has been said about how the courts have reacted to this lawsuit and why people should prevent this Texas law from going into effect. Sadly, very little of that talk has been based on the truth and facts of the case.

What the Supreme Court was asked to do was to provide an injunction preventing the law from taking effect until the case had been decided by the courts. This in itself is an extremely dangerous request, since it effectively places the judiciary above the other branches of government. Which is why Justice Alito noted in his opinion:

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.

[Whole Woman’s Health v. Jackson Opinion on Application for Injunctive Relief](#)

Justice Alito went on to note that what the applicants are asking for is both novel and complex.

For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves. California v. Texas. 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.

[Whole Woman’s Health v. Jackson Opinion on Application for Injunctive Relief](#)

Precedent allows the court to enjoin people, not the law. Since the defendants named can seek to enforce the law, because the law prohibits state or local government officials from filing suit, how can the court enjoin them? Oddly, the power of precedent that the applicants are using to file this suit is the very same one that is preventing the courts from issuing the injunction. It seems that we will all have to wait until the actual case is heard before we know whether the courts will find this Texas law appropriate or not.

Lies, Darn Lies, and Politics

If there is one constant in politics today, it’s that politicians lie. So no one should be surprised when the pro-abortion politicians came rushing to the bulwarks to defend their understanding of Roe v. Wade and the “constitutional

right" to abortion.

Today, Texas law SB8 went into effect. This extreme Texas law blatantly violates the constitutional right established under Roe v. Wade and upheld as precedent for nearly half a century.

Statement by President Joe Biden on Texas Law SB8

Funny, how a law whose language appears to have been specifically tailored to not violate Roe v. Wade, is a supposed blatant violation of that opinion. Even worse though, is the constitutional lie President Biden is promoting.

The Supreme Court of the United States cannot establish a constitutional right. That's not a power delegated to the United States, and since it's not prohibited to the states, only the states can establish a constitutionally protected right. In fact, what the court found was that before someone can be deprived of the liberty to perform or receive an abortion, there must be due process. Furthermore, the Supreme Court does not have the legal authority to effectively create law by edict or opinion. The findings in the Roe v. Wade case legally impact only Roe and Wade. It is our judiciaries' slavish devotion to "precedent" that gives power to the Roe decision, not the law or the Constitution.

And, outrageously, it deputizes private citizens to bring lawsuits against anyone who they believe has helped another person get an abortion, which might even include family members, health care workers, front desk staff at a health care clinic, or strangers with no connection to the individual.

Statement by President Joe Biden on Texas Law SB8

To be fair, President Biden is correct in the potential scope of these lawsuits. As I've already noted, the fact that anyone other than government officials can sue anyone involved in an

abortion that violates this statute, it can easily spiral into a nightmare of frivolous lawsuits.

However, Joe Biden is far from the only person rising to combat this Texas law. He and Nancy Pelosi have promised to take up the "Women's Health Protection Act of 2021" when the House returns from recess. What is the purpose of this bill?

to permit health care providers to provide abortion services without limitations or requirements that single out the provision of abortion services for restrictions that are more burdensome than those restrictions imposed on medically comparable procedures, do not significantly advance reproductive health or the safety of abortion services, and make abortion services more difficult to access;

U.S. S 1975 – Women's Health Protection Act of 2021 – Purpose Clause

Lost to the view of the pro-abortionists is the fact that abortion involves the health of two people, not just one. This bill, and others like it, focus on the "health care" of the woman while ignoring the health of the child in the womb. This bill promotes the unlimited access to abortion while ignoring the consequences of that access. They want no more regulation on abortion than on "medically comparable procedures", yet ignore the fact that those procedures are prohibited from taking human life unless absolutely necessary. History has shown us that the pro-abortion activists are not interested in being regulated along with "medically comparable procedures"; they want as little regulation as possible and it seems many among these activists are ready to do almost anything to get their way.

Republicans promised to overturn Roe v Wade, and they have. Democrats can either abolish the filibuster and expand the court, or do nothing as millions of peoples' bodies, rights, and lives are sacrificed for far-right minority rule.

[Alexandria Ocasio-Cortez Tweet](#)

While many republican politicians have “promised” to overturn Roe, we all know how much we can trust politicians to keep their promises. Let’s face it, what the republicans claim is not so much that they will overturn Roe, but overturn what the Roe opinion has morphed into: An unrestricted right to abortion not supported by law. After decades of getting much of their agenda through the courts rather than the legislature, is it any wonder the more progressive of the Democratic Party are willing to overturn Senate rules (the filibuster), and take over the courts to get their way. Does anyone else find it ironic that a party who is named after a democratic process uses such undemocratic methods to advance their agenda?

Conclusion

There’s a lot to unpack here, both in this legislation and the reaction to it. When does the government’s duty to protect life begin? Is it when life is detected? When life is external, i.e., out of the womb? Or is it at some other arbitrary point? How should a state respond to an almost 50 year old opinion that is not supported by the facts or by science? And how should the American people treat the hyperbole on both sides of the argument? As I’ve said so many times, this is why it’s so important to go back to the original documents before we make up our minds on a subject.

As for the law itself, I can easily see the justification for the heartbeat of the child being the delineation for when life must be protected. However, I do have concerns over the scope of who can sue. As for the Roe opinion, I wish more people would recognize it for what it is: A flawed opinion based on outdated science that considers only one side of the issue. Roe v. Wade is not law. To my knowledge, Congress has never passed a law legalizing abortion across the country. Then again, such a law would be unconstitutional, since not only

has the Constitution not delegated such an authority to the United States, the very idea of unlimited abortion violates the Due Process Clause of the Fifth Amendment.

While I don't expect it from what passes for our judicial class today, I would hope a rational and reasonable look at the law would guide the courts. I fully expect that advocates on both sides will use the Texas law and the court's decision to demagogue, vilify, and yes, fundraise, for the foreseeable future. I only hope that this article has helped cut through some of the noise and misdirection to help you find the truth.

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[BIO: Paul Engel founded The Constitution Study in 2014 to help everyday Americans read and study the Constitution. Author and speaker, Paul has spent more than 20 years studying and teaching about both the Bible and the U.S. Constitution. Freely admitting that he “learned more about our Constitution from School House Rock than in 12 years of public school” he proves that anyone can be a constitutional scholar. You can find his books on Amazon and Apple Books. You can also find his books, classes and other products at the Constitution Study website (<https://constitutionstudy.com>). You can reach him at paul@constitutionstudy.com]