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Ending Abortion in America

AP Images

"The Court's order is stunning."

Included in the dissenting opinion of liberal U.S. Supreme Court Justice Sonia Sotomayor, this sentiment underscores the significance in the advancement of pro-life legislation passed in Texas and recently upheld by the U.S. Supreme Court. The brainchild of attorney John F. Mitchell, Senate Bill 8, known as the Texas Heartbeat Act, restricts abortion in such a way as to require a radical reversal of a century of "settled law" to thwart this new law. This past year has seen its share of bad news, but perhaps 2021 will be remembered best for being the beginning of the end of abortion — an end to an era of genocide of the innocent.

On May 19, 2021, Texas enacted Senate Bill 8, which took effect on September 1. S.B. 8 is like many "heartbeat" bills that have been passed in a dozen states around the nation by making a voluntary abortion illegal after a heartbeat can be detected. However, it is unique in its enforcement: Instead of implementation by criminal or administrative penalties, the new Texas law is exclusively enforced by a private right of action. Here is how it works:

• If anyone is involved in an abortion after about six weeks post conception, even if they were just paying for the abortion, all involved can be sued by any private citizen.

• Texas has set statutory damages in the amount of $10,000 to be recovered by any plaintiff.

• All persons involved in the abortion are further subject to an injunction for any future attempts to perform an illegal abortion.

Pursuant to existing Supreme Court case law in *Roe v. Wade* and *Planned Parenthood v. Casey*, courts have declared "pre-viability" bans on abortion (bans prior to about 26 weeks gestation) to be unconstitutional. However, the U.S. Supreme Court has allowed the Texas Heartbeat Act to go into effect because, rather than relying on the government to enforce the law, S.B. 8 relies on private citizens to bring civil lawsuits against those who perform an abortion procedure or aid or abet one.

In all other pro-life measures passed post *Roe*, enforcement would be performed by the state either as a criminal measure or in an administrative process by revoking a medical license, etc. It is the private right of action as the exclusive enforcement mechanism that is novel in this instance. All government agents are prohibited from any form of involvement in the enforcement of the law. Because enforcement does not take the form of "state action," it technically does not run afoul of past Supreme Court decisions.

That is not to say that there has been no legal opposition to the new law. In the case of *Whole Woman's*

Health v. Jackson, an abortion mill in Austin, Texas, sued Austin Reeve Jackson — a judge who had been endorsed by pro-life groups — to prevent him from presiding over any case that might be brought under the Texas law. The abortion mill also sued a county clerk to prevent her from accepting any filings of any such lawsuit, Texas Attorney General Ken Paxton, and a pro-life activist named Mark Lee Dickson to prevent him from being a plaintiff in any such case.

The U.S. Supreme Court reviewed S.B. 8 in a preliminary decision on an application for injunctive relief. Injunctive relief is a legal mechanism that allows a court to issue an emergency order preventing someone or something from doing a specific act. While normally cases take years to reach the Supreme Court, limited preliminary issues such as a petition for an injunction are much more fast-paced.

The abortion provider wanted the court to use the injunction process to issue an order against these individuals that would apply to all judges, all court clerks, and all citizens, prohibiting any application of the new law. As the law had not yet taken effect at the time this lawsuit was brought, Judge Jackson did not have any case before him dealing with the heartbeat law, the clerk had not been presented with any case to file, and, of course, Dickson had not filed any enforcement action.

On September 1, Justice Samuel Alito, joined by Clarence Thomas, Brett Kavanaugh, Amy Coney Barrett, and Neil Gorsuch, rendered an opinion that concluded:

> 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.

While this language may seem convoluted to most Americans, the opinion nevertheless denied the abortionists' petition and, in the process, saved countless thousands of innocent lives.

Following the Supreme Court decision, the Texas pro-life law has had additional legal challenges involving various pro-abortion activists and organizations filing new lawsuits in sufficient numbers to get a judge they knew to be on their side. Once a case is filed, plaintiffs get a randomly assigned judge. If they know the judge they want, they can simply file multiple cases until a judge they want gets assigned. Once the right judge is assigned, the other suits can be dismissed and the litigation can go forward with an expectation of a favorable outcome.

Will he be born? The womb was once a safe haven for human life — and the Texas heartbeat approach, if adopted by states throughout the land, would help mightily in making it a safe haven once again. Though it does not end all abortions, it is a huge step in that direction and will save many lives until the day comes when all pre-born babies are protected by law. *(Photo credit: SciePro/iStock/GettyImagesPlus)*

In this instance, the judge that the plaintiffs wanted was a far-left, openly homosexual Obama appointee named Robert Pitman. Judge Pitman's disdain for the pro-life community was open and obvious, and he wasted no time in ruling that S.B. 8 was unconstitutional. Thus, in this rather odd turn of events, after the Supreme Court temporarily upheld the law on September 1, a district court (the lowest court in the federal system) ignored the Supreme Court and struck down the law on October 6. Judge Pitman's order lasted for about 48 hours before it was overturned by the Federal Court of Appeals. The appeals court is superior to a district court, but inferior to the Supreme Court.

On October 22, the U.S. Supreme Court decided to grant the Texas law a full review and briefing, and an oral argument was heard on November 1. The questioning was not particularly revealing as to how the key "swing vote" justices would rule, but some questions did highlight the unusual nature of this law. For example, while the pro-abortion lawyers were asking the court to issue an injunction against "the law itself," it was mentioned that injunctions can only be issued against officials. A decision from the Supreme Court can be expected by June of 2022, if not sooner. While that decision is pending, abortions in instances where a heartbeat can be detected are halted in Texas.*

"Jurisdiction" Is Key

At the heart of the legal argument in support of the Texas pro-life law is the issue of jurisdiction. If a federal court lacks subject-matter jurisdiction to consider a constitutional challenge to a statute, then it does not matter whether the disputed statute is unconstitutional, and it does not matter how unconstitutional the statute may seem to a litigant or a judge.

Further, the 11th Amendment to the U.S. Constitution forbids courts to assert jurisdiction over claims brought against non-consenting state officers sued in their official capacity, unless the claim fits within a specific exception to sovereign immunity. But the exception does not apply to prevent a state's judicial officers from adjudicating and deciding cases brought before them.

A good way to understand this jurisdictional argument starts with understanding exactly how a court "strikes down" a law. The best description of this process was provided by the aforementioned John F. Mitchell, the brilliant lawyer who came up with the concept behind S.B. 8 and published his idea in a 2018 article in the *Virginia Law Review*.

Mitchell stated:

> The power of judicial review is all too often regarded as something akin to an executive veto. When a court declares a statute unconstitutional or enjoins its enforcement, the disapproved law is described as having been "struck down" or rendered "void" — as if the judiciary holds a veto-like power to cancel or revoke a duly enacted statute. And the political branches carry on as though the court's decision has erased the statute from the law books. But the federal judiciary has no authority to alter or annul a statute.

Mitchell further explained,

> When judges or elected officials mistakenly assume that a court decision has canceled or revoked a duly enacted statute, they commit the "writ-of-erasure fallacy" — the fallacy that equates judicial review with a veto-like power to "strike down" legislation or delay its effective start date.
>
> The power of judicial review is more limited: It allows a court to decline to enforce a statute, and to enjoin the executive from enforcing that statute. But the judicially disapproved statute continues to exist as a law until it is repealed by the legislature that enacted it, even as it goes unenforced by the judiciary or the executive. And it is always possible that a future court might overrule the decision that declared the statute unconstitutional, thereby liberating the executive to resume enforcing the statute against anyone who has violated it. Judicial review is not a power to suspend or "strike down" legislation; it is a judicially imposed non-enforcement policy that lasts only as long as the courts adhere to the constitutional objections that persuaded them to thwart the statute's enforcement.

Over the course of 70 pages of legal analysis, Mitchell went on to explain the limitations of judicial review in the context of the case of *Marbury v. Madison* and provide fascinating insight into the use of federal court procedure and past court decisions to insulate the pro-life measure. While this legal maneuver has been first used in the context of abortion law, it is not exclusive to that purpose.

Practical Implementation of the Idea

What would become S.B. 8 began as a local ordinance to prevent an out-of-state abortion mill from opening a clinic in a small community in Texas, led by grassroots activist Mark Lee Dickson. Dickson understood that the ordinance could lead to significant legal costs to this municipality, so the unique and as-yet-untested concepts of attorney Mitchell seemed to have promise.

Together, Dickson and Mitchell began a revolution in abortion law in Texas. Resolutions calling for "Sanctuary Cities for the Unborn" passed in 37 municipalities. The notoriety and success of these municipal measures created pressure on politicians at the state level, which then led to Texas passing

what is known today as the Texas Heartbeat Act.

The implementation of this law should be examined carefully, as it can be applied to several other pro-liberty concepts. In his seminal work *The Art of War*, Chinese philosopher Sun Tzu promotes the concept that "success begets success." As applied above, Dickson started with a good idea. He then got it passed at a very local level, where a small group of people could expect to have success. He then built on that success to grow his team and pass the measure in municipalities all over the state. As the movement grew, he was able to get traction at the State House level.

Grassroots patriots do well to consider this methodology. For example, bills that prevent government overreach on COVID issues, bills that nullify federal firearms laws, bills that prohibit "transgender" men from participating in women's sports, or legislation that prohibits the teaching of Critical Race Theory in public schools could start at a local level and build toward action in the state legislature. All it takes is a small group of people with vision and drive.

Chief Justice Roberts Exposed

When Chief Justice John Roberts upheld ObamaCare, he did so claiming that the will of the legislature should not be easily overturned. Yet in his dissent on the *Whole Woman's Health* case, he was ready and eager to overturn the will of the Texas legislature.

Pro-Second Amendment justices have had to turn away new opportunities to expand on the precedent set in *D.C. v. Hel-ler*, the landmark gun case that established the Second Amendment as conferring an individual right to possess and carry a firearm, because Roberts has let it be known that he would side with the liberals who want to overturn that case. With regard to the Texas S.B. 8, he sided with the Left on the basis that *Roe v. Wade* was "settled law" and should not be overruled.

Chief Justice Roberts is no friend of the Constitution. His judicial logic bends to the whims of leftist agitation. His appointment is yet another black mark on the failed presidency of George W. Bush, the same president who lied to bring the United States into a war in Iraq and ushered in a police-state mentality with the passage of the PATRIOT Act.

The Democrats never fail in their ability to appoint far-left radical judicial activists. Considering the Supreme Court appointments of Presidents Johnson (Fortas, Marshall), Clinton (Ginsburg, Breyer), and Obama (Sotomayor, Kagen), one can see a reliable list of radical socialists with little regard for the original intent of the U.S. Constitution.

It's the law! Governor Greg Abbott signs the Texas Heartbeat Act, surrounded by pro-life supporters. *(Photo credit: house.texas.gov)*

Establishment Republicans, on the other hand, have been far less reliable in appointing conservative justices to the bench. The author of the *Roe v. Wade* opinion, Harry Blackmun, was an appointee of Richard Nixon. Chief Justice Earl Warren, perhaps the most destructive radical leftist Supreme Court justice in the history of our Republic, was an appointee of Republican Dwight D. Eisenhower.

At each presidential election, pro-life activists are told that they must hold their noses and vote for the Republican nominee, as promises are made that said nominee would be sure to appoint a pro-life Supreme Court justice, but it rarely happens.

What the Pro-life Movement Should Do Next

The ability to end abortion in America is perhaps closer to reality today than at any point since 1973. In that time frame, more than 63 million unborn children have been put to death. That river of blood can now come to an end on a state-by-state basis. Will there be holdouts in leftist states? Of course. But eventually the wickedness of abortion, like the wickedness of slavery, will be so evident that abolition will be assured.

The year 2022 could be the year patriots take their country back. There is a lot of hard work to do. In our view, a version of S.B. 8 needs to be passed in as many states as possible. The lives of innocent children will be saved the moment those laws are passed. But that said, keep in mind that the few and defined powers delegated to the national government by the Constitution do not include abortion, and *Roe v. Wade* is unconstitutional — *not* the law of the land. The approach described in this article is being recommended because it can be a game-changer in bringing the abortion holocaust to an end. States possess the power to — and should — end unconstitutional overreach by the federal government at their state borders via nullification, declaring the abuses null and void. Enacting state laws throughout the land modeled after the Texas heartbeat law would end most abortions in America — but not all. Thus, enacting such laws should not be viewed as the end goal, but as an effective way to save hundreds of thousands, if not millions, of lives while pro-life activists continue to work to protect the right to life from conception of all unborn babies.

Hopefully, as the understanding about our form of government and the division of powers grows, the

use of nullification by the states will also grow and will be applied to nullify *Roe v. Wade*. But in the meantime, adopting a form of the Texas heartbeat bill in various states will save many lives.

Patriotic Americans need to take responsibility for reclaiming their freedom on medical issues, on gun rights, and on election integrity. They need to show the current leadership in Congress the door in the mid-term elections. All of these things can be accomplished, but those on the side of liberty and limited government are going to need to work as a team. For our part, that team is called The John Birch Society (the parent company of this magazine). Please go to JBS.org to learn what can be done and how you can help.

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