



Written by [Bob Adelman](#) on September 10, 2021

Biden Administration Sues Texas Over “Heartbeat Law”

U.S. Attorney General Merrick Garland [filed a lawsuit on Thursday](#) challenging the legality and constitutionality of Texas Law S.B. 8, known as the Texas Heartbeat Law. His claim rests on the idea that somewhere, somehow, deep inside the Constitution of the United States there resides a right for a woman to kill her unborn child.

No such right exists. But Garland claims it does, through precedent. In announcing the lawsuit, he said:

The [Texas] act is clearly unconstitutional under longstanding Supreme Court precedent.... In the words of *Planned Parenthood v. Casey*, “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”



AP Images
Attorney General Merrick Garland

Repeating a lie doesn’t turn it into truth. Nevertheless, the lawsuit filed in the U.S. District Court for the Western District of Texas, Austin Division, claims it does:

It is settled constitutional law that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” But Texas has done just that. It has enacted a statute banning nearly all abortions in the State after six weeks.

This statement, all by itself, shows the flimsy nature of the complaint. First, laws are made by Congress, not by the Executive nor by the Judicial branches of the government. Second, rulings in *Roe v. Wade* and *Casey* are rulings — opinions — relating to the particular cases and are not law.

But the suit ignores these facts, declaring that

Texas enacted S.B.8 in open defiance of the Constitution ... [it] clearly violates the Constitution....

Instead of relying on the State’s executive branch to enforce the law, as is the norm in Texas and elsewhere, the State has deputized ordinary citizens to serve as bounty hunters.

The lawsuit claims that the Texas law is unconstitutional because it violates the “Supremacy Clause of the U.S. Constitution [which] mandates that ‘the Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Law of any State to the Contrary notwithstanding.’”



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But *Roe* didn't uncover a right of a woman to kill her unborn child. The court created the right out of whole cloth — and political ideology. As Ryan T. Anderson, McCormick Professor of Jurisprudence and director of the James Madison Program in American Ideals at Princeton University, wrote:

No such right can be found in the text of the Constitution, or in its structure, logic, or original understanding.

In referring to the Mississippi case pending before the Supreme Court, *Dobbs v. Jackson Women's Health Organization*, Anderson noted:

Roe and *Casey* confected a "constitutional right" to abortion out of thin air. The majorities in those cases did not actually find such a right; they simply imposed their own moral-political opinions about the desirability of legal abortion.

The federal lawsuit ignored the conclusion of former Dean of Stanford Law School John Hart Ely, who declared that *Roe* was "bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."

It also ignored the words of liberal, pro-abortion legal scholar Laurence Tribe, who said, "One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."

It ignored the dissent of Kennedy-nominated Supreme Court Justice Byron White, who concluded that *Roe* wasn't about interpreting the Constitution, its text, or its history, but was instead "an exercise in raw judicial power."

The lawsuit also claims the Texas law violates the 14th Amendment. That amendment guarantees the right to every person equal protection under the law. But history has made plain that, at the time the amendment was ratified, unborn persons were considered to be covered as well. As Ryan Anderson explained, "The best originalist reading of the 14th Amendment, we are convinced, would include unborn persons within the scope of the provision stating that no state may 'deny to any person within its jurisdiction the equal protection of the laws.'"

There is a substantial risk of the lawsuit blowing up in the faces of Garland, Biden, and the entire pro-abortion culture: The high court just might use this lawsuit to address the underlying issues herein discussed, and rule that 50 years ago the court made a ghastly mistake that has cost the lives of millions.

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