Written by **C. Mitchell Shaw** on October 26, 2021

Texas Fetal Heartbeat Law Goes to SCOTUS. But Should It?

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The Texas "Heartbeat Law" — which bans most abortions after about six weeks of gestation — has been under fire since before it went into effect in September. Now it is headed to the U.S. Supreme Court, which will decide its fate. In the ongoing legal battles, opponents of the law have asked the Supreme Court to stay the law until a final decision is made, but the court sided with Texas in this most recent salvo and chose to allow the law to stay in place, for now. But the real question should not be, "What will the Supreme Court decide?" The real question should be, "Why does the Supreme Court (and almost everyone else) *pretend* that the Supreme Court has the unilateral authority to decide this in the first place?"

Texas officials called on the Supreme Court last Thursday to allow the Lone Star State's recently enacted fetal heartbeat law to stay in effect amidst pressure from the Biden administration for the court to block the law. That pressure dates back to the March 11 passage of the law. The Biden administration sought legal means to block the law from taking effect on September 1, but failed.

On September 2, Biden addressed the court's decision to allow the law to go into effect the previous day, saying, "The Supreme Court's ruling overnight is an unprecedented assault on constitutional rights under *Roe v. Wade*." He went on to promise the full weight of his administration would be bent to killing the law that prevents the killing of many babies, saying:

> I am launching a whole-of-government effort to respond to this decision — looking specifically to HHS and DOJ to see what steps the federal government can take to insulate those in Texas from this law and ensure access to safe and legal abortions as protected by Roe.

As the Biden administration has continued to apply pressure and lean on the court to block the law, Texas has pushed back, asking the court to leave the law in place. On Friday, the court decided on the most recent back-and-forth, allowing the law to stay in place while also allowing two separate legal challenges to move forward. As Catholic Vote reported:

> The two challenges come from the Biden administration and from private abortion groups respectively. In hearing the challenges, the high court will consider whether the United States Government would be within its rights to block enforcement of the law, and whether abortion groups can proceed with lawsuits against the State of Texas or its officials.

The Supreme Court will begin hearing oral arguments on the two challenges Monday, November 1. Given recent decisions by the court — such as allowing the fetal heartbeat law to remain in effect while waiting to make a final decision on the status of the law — there is a chance that the court could decide in favor of the law. But, the court *could* decide against the law. Remember how the court used the Defense of Marriage Act to change the definition of marriage?

And there is the rub.

The Founding Fathers never intended — and the Constitution is absent any language to the effect — that the Supreme Court should be the sole arbiter of what is and what is not constitutional. Even on its face, that idea fails the smell test. The Founding Fathers were proponents of the idea of separation of powers, and they enshrined that idea in the Constitution. To allow the Supreme Court (which is a branch of the federal government) to unilaterally decide the powers of the federal government would be the very antithesis of separation of powers.

It would be more than a little like having the umpire in a baseball game come from (and wear the uniform of) one of the teams playing in the game. And while this particular umpire is nine people instead of just one, the result is the same. Sure, the Supreme Court occasionally makes a call in favor of the states, but the steady progression is one of the increased expansion of federal powers at the expense of the states and of the people.

So, if the court is not the sole arbiter and interpreter of the contract between the states and the federal government, what other entity or entities also hold that power? Thomas Jefferson — from whose fertile mind sprung much of the philosophy that shaped the founding of this nation — addressed that very clearly in his 1798 Virginia and Kentucky Resolutions. He argued that the U.S. Constitution was a compact among the several states whereby the states delegated certain limited powers to the U.S. government, and that any power exercised by the U.S. government that is outside of that scope is null and void. He wrote, “Whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force,” and, “where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy.”

In short, the states have the authority to decide the boundaries of the federal government’s power. Those things outside that scope are simply none of the federal government’s business. And since the Constitution never addresses the “right” of a woman to murder her unborn child (much less making defending that “right” a power of the federal government), the states are free to ignore *Roe* as a usurpation of power.

While Texas deserves praise for passing and defending the fetal heartbeat law (which will certainly keep many unborn babies off the abortion chopping block), it is a mistake to continue propping up the false idea that the Supreme Court should decide the fate of the law. Texas — where *Roe* began — should be where *Roe* dies. And that death should be at the hands of the state legislatures and by the means of nullification.