The Pro-Life Movement at (Almost) Fifty: Where Do We Go From Here?*

Paul Benjamin Linton, Esq.[**]

ABSTRACT: This article explores where the pro-live movement is almost fifty years after the Supreme Court decided *Roe v. Wade* (1973), and considers what legal strategies should be pursued to overrule *Roe*. At the outset, the article explains that there is very little evidence that the Supreme Court, as presently constituted, would be willing to overrule *Roe*. The article next observes that the multiple state challenges to *Roe* that have been brought over the past few years have been largely ineffective, both in limiting when or why abortions may be performed and in obtaining Supreme Court review. The article explains why a "test case" involving a statute that clearly conflicts with *Roe* is not necessary for the Court to reconsider *Roe*. Finally, the article addresses the importance of state constitutions as they may affect the legal status of abortion in the event the Supreme Court overrules *Roe* and returns the issue of abortion to the States.

IN 1973, THE U.S. SUPREME COURT decided *Roe v. Wade,*[1] holding that a pregnant woman may choose an abortion for any reason before viability, and for virtually any reason thereafter. Nineteen years later, in 1992, the Supreme Court, in *Planned Parenthood v. Casey*,[2] while rejecting the "trimester framework" of *Roe*, reaffirmed what it called the "essential" or "central" holding of *Roe*, that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the

* An earlier version of this article was presented at the 2019 University Faculty for Life Conference. The final version of the article is reprinted by permission from *Ave Maria Law Review* 18/1 (2020): 15-34.

** *Paul Benjamin Linton* is an attorney in private practice who specializes in constitutional and appellate law, legislative drafting and legal writing. He has been professionally engaged in the pro-life movement for more than thirty years and has published almost two dozen law review articles on a wide variety of subjects, including abortion law, as well as the first and only comprehensive analysis of abortion as a state constitutional right, *Abortion under State Constitutions: A State-by-State Analysis* (Durham NC: Carolina Academic Press, 2020 [2008]). Mr. Linton received his undergraduate and law degrees from Loyola University of Chicago.

[1] 410 U.S. 113, 163-65 (1973).

[2] 505 U.S. 833 (1973).

ultimate decision to terminate her pregnancy before viability."[3]

Almost fifty years after *Roe* was decided, where does the pro-life movement go from here? The answer to that question, in turn, depends on the answers to five other questions. First, is the Supreme Court, as presently constituted, likely to reconsider *Roe v. Wade*? Second, what is the "lay of the land" on pending direct challenges to *Roe*? Third, are direct challenges to *Roe* necessary to obtain an overruling decision? Fourth, what alternatives might be considered to direct challenges to *Roe*? Fifth, how does the interpretation of state constitutions affect the legal status of abortion?

Is the Supreme Court Likely to Reconsider Roe?

There is very little evidence that the Supreme Court, as presently constituted, would be willing to reconsider (and overrule) *Roe v. Wade*, and much evidence that it is *not* prepared to do so. Only one of the Justices currently on the Court – Justice Thomas – has expressed the view that *Roe* should be overruled.[4] Although Justice Alito dissented in *Whole Woman's Health v. Hellerstedt*[5] – the Supreme Court's decision in 2016 striking down the Texas statutes requiring physicians performing abortions to have admitting privileges at nearby hospitals and abortion clinics to comply with regulations generally applicable to outpatient surgical facilities – he did *not* express any view on whether *Roe* should be overruled, nor, for that matter, did Chief Justice Roberts, who, along with Justice Thomas, joined his dissent (Justice Scalia had died several months before *Hellerstedt* was decided).

In December 2018, the Court refused to review two cases in which the Fifth Circuit and the Tenth Circuit affirmed preliminary injunctions against the attempts of Louisiana and Kansas to defund Planned Parenthood.[6] Justice

[3] Ibid. at 846. 853, 879. Whether the States have any meaningful authority to limit post-viability abortions has never been addressed by the Court. See infra n77 and accompanying text.

[4] Justice Thomas has authored or joined multiple opinions calling for *Roe* to be overruled. See *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2321-30 (2016) (Thomas, J., dissenting); *Gonzales v. Carhart*, 550 U.S. 124, 168-69 (2007) (Thomas, J., concurring); *Stenberg v. Carhart*, 530 U.S. 914, 980-1020 (2000) (Thomas, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 944-79 (1992) (Rehnquist, C.J., with whom White, Scalia and Thomas, JJ., join, concurring in the judgment in part and dissenting in part), ibid at. 979-1002 (Scalia, J., with whom Rehnquist, C.J., and White and Thomas, JJ., join, concurring in the judgment in part and dissenting in part).

[5] 136 S.Ct. 2292, 2330-53 (2016) (Alito, J., dissenting).

[6] See *Planned Parenthood of Kansas* and *Mid-Missouri v. Andersen*, 882 F.3d

Thomas, joined by Justice Alito and Justice Gorsuch, dissented from the denial of review.[7] The Court's denial of review is disturbing. If there is not a majority on the Court to uphold a State's effort to defund Planned Parenthood, why would anyone assume that there is a majority prepared to overrule *Roe*? It is possible, of course, that the Court may have denied review because of the procedural posture of the cases (seeking review of preliminary injunctions), but that is somewhat implausible because the threshold issue in both cases was whether the "choice-of-provider" language in the Medicaid Act authorizes a private right of action that may be brought under the Civil Rights Act, an issue that would not seem to require further development in the district court in order to be addressed by the Supreme Court. In any event, the Court may have another opportunity to revisit this issue once final judgments have been entered in those cases.

Another "warning sign" regarding Chief Justice Roberts was his decision to join the four liberal justices on the Court in granting a stay of the Fifth Circuit's judgment upholding Louisiana's physician admitting privileges statute.[8] Agreeing to a stay does not necessarily reflect the Chief Justice's views on the merits, but it remains a concern, nevertheless. Justice Kavnaugh wrote a very circumspect dissent from the issuance of the stay, joined by Justices Thomas, Alito and Gorsuch.[9] The Court's opinion in *June Medical Services* should tell us much about Chief Justice Roberts and Justice Kavanaugh. Will the Court overrule *Hellerstedt*? Will the Court limit *Hellerstedt* to its facts? Will it distinguish *Hellerstedt*? Will it apply *Hellerstedt*? Or, alternatively, will the Court dispose of the case on standing grounds (whether the abortion clinics and physicians have third-party standing to represent the interests of their patients)?

And then there are two more recent indications that the Court is not

---

1205 (10th Cir. 2018), *cert. denied*, 139 S.Ct. 638 (2019); *Planned Parenthood of the Gulf Coast, Inc., v. Gee*, 862 F.3d 445 (5th Cir. 2017), *cert. denied*, 139 S.Ct. 408 (2018).

[7] See *Andersen*, 139 S.Ct. at 638 (Thomas, J., with whom Alito and Gorsuch, JJ., join, dissenting). Under the Court's "Rule of 4," had either Chief Justice Roberts or Justice Kavanaugh joined Justices Thomas, Alito and Gorsuch in voting for certiorari, the Court would have granted review. The denial of review may suggest that a majority of justices would not have been willing to reverse the lower courts' judgments.

[8] See *June Med. Services., L.L.C. v. Gee*, 139 S.Ct. 663 (2019), *cert. granted*, 140 S.Ct. 35 (2019).

[9] Ibid. at 663-65 (Kavanaugh, J., dissenting).

prepared to revisit *Roe v. Wade*. On May 28, 2019, the Court refused to review a decision of the Seventh Circuit striking down Indiana's law prohibiting discriminatory abortions (abortions sought because of the race, gender or disability of the unborn child).[10] No one dissented from the denial of certio-rari, and no other Justice joined Justice Thomas's opinion concurring in the denial of certiorari in which he clearly telegraphed his own opinion regarding the constitutionality of the Indiana law.[11] If the Court will not review modest restrictions on the reasons for which abortions may be performed (restrictions that, in any event, could easily be circumvented in practice), why would anyone think that the Court would consider, much less uphold, a ban on all or most abortions throughout pregnancy?

Exactly one month after the Court refused to review the Indiana case, the Court also refused to review a decision of the Eleventh Circuit striking down Alabama's law prohibiting the performance of D&E (dilation and evacuation) abortions on live, unborn children.[12] As in *Box*, no one dissented from the denial of certiorari, and no other Justice joined Justice Thomas's opinion concurring in the denial of review in which, as in *Box*, he clearly expressed his view of the constitutionality of the Alabama law.[13] Once again, the question must be asked, if the Court will not review this law, which would affect only second-trimester abortions, why would anyone think the Court would consider, much less uphold, a ban on all or most abortions throughout pregnancy?

At the same time the Court denied Indiana's petition with respect the ban on discriminatory abortions, the Court granted Indiana's petition with respect to the Indiana statute governing the disposal of fetal remains and summarily reversed the Seventh Circuit's judgment striking down that statute.[14] The significance of that action must be tempered, however, by the fact that Justices Breyer and Kagan joined that extremely brief opinion, which was careful to note that the plaintiffs in the case challenged the statute under the rational basis standard, not the more demanding "undue burden" standard generally applicable to abortion regulations.[15] It is doubtful that this "victory" provides

---

[10] *Box v. Planned Parenthood of Indiana & Kentucky, Inc*., 139 S.Ct. 1780, 1781-82 (2019) (per curiam).

[11] Ibid. at 1782-93 (Thomas, J., concurring in the denial of certiorari).

[12] *Harris v. West Alabama Women's Ctr*., 139 S.Ct. 2606 (2019).

[13] Ibid. at 2606-07 (Thomas, J., concurring).

[14] *Box*, 139 S.Ct. at 1781-82 (per curiam).

[15] Ibid. at 1781.

any insight into how the Court might approach a challenge to *Roe* itself.

Justice Alito, based on his judicial philosophy and his writings, is likely to vote to overrule *Roe* in a case in which the issue is properly presented. It may be hoped that Justice Gorsuch would do so also. Justice Kavanaugh, however, gives one pause. In his confirmation hearings, then Judge Kavanaugh said, mistakenly, that *Roe* had been reaffirmed "many, many times,"[16] when in reality, it has been reaffirmed only three times,[17] and the third time it was reaffirmed (in *Casey*), it was substantially modified.[18]

Justice Kavanaugh's testimony that the doctrine of *stare decisis* is rooted in the judiciary article of the federal constitution (Art. III),[19] is deeply concerning, because it places precedent on the same level as "getting it right" in interpreting the Constitution.[20] In support of this view of *stare decisis*, Judge

---

[16] The transcript of the Judiciary Committee's hearing has not yet been posted on the Committee's website, but Judge Kavanaugh reiterated his statement that *Roe* had been reaffirmed "many" times in an answer to a written question asked by Senator Diane Feinstein. S. Comm. on the Judiciary, 115th Cong., Nomination of Brett Kavanaugh to be Associate Justice of the Supreme Court, Questions for the Record 1 (Sept. 10, 2018) (Responses to questions from Senator Feinstein), https://www. judiciary.senate. gov/dowload//kavanaugh-responses-to-questions-for-the-record

[17] See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-46, 853, 869, 871, 878-79 (1992); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-20 (1983); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986).

[18] See *Casey*, 505 U.S. at 869-79 (rejecting the trimester framework for evaluating abortion regulations).

[19] As noted above, the transcript of the Judiciary Committee's hearing has not yet been posted on the Committee's website. In an answer to a written question asked by Senator Feinstein regarding the role of precedent, Judge Kavanaugh said, "As discussed at the hearing, 'the judicial power clause of Article III' and 'Federalist 78' make clear that respect for precedent is 'part of the proper mode of constitutional interpretation.' If confirmed, I would respect the law of precedent[,] given its centrality to stability, predictability, impartiality, and public confidence in the rule of law." Senate Committee on the Judiciary, *supra* n16.

[20] See *Gamble v. United States*, 139 S.Ct. 1960, 1981 (2019) (Thomas, J., concurring): "[T]he Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions – meaning, decisions outside the realm of permissible interpretations – over the text of the Constitution and other duly enacted federal law...." See also Michael Stokes Paulsen, "Does the Supreme Court's Current Doctrine of *Stare Decisis* Require Adherence to the Supreme Court's Current Doctrine of *Stare Decisis*?," 86 *North Carolina Law Review* 1165, 1169 (2008): "[T]he doctrine of stare decisis is not constitutionally required, in any sense, and has never been so understood.

Kavanaugh cited Federalist 78, authored by Alexander Hamilton. Federalist 78 is devoted to explaining and defending the judiciary article in the proposed Constitution and the section of the paper which Kavanaugh presumably had in mind was Hamilton's discussion of why conferring lifetime tenure upon federal judges poses no danger to the country. Hamilton wrote, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point our their duty in every particular case that comes before them...."[21]

Now, several things must be said about this. First, Hamilton may have been referring only to the obligation of *lower* courts to follow the precedents of *higher* courts (what is often referred to as "vertical *stare decisis*"), an entirely unobjectionable principle, not the obligation of a court to follow its own precedents ("horizontal stare *decisis*").[22] Second, nothing in art. III itself, by express language or necessary implication, embodies the doctrine of *stare decisis* (with respect to the Court's own precedents), which the Court has repeatedly characterized as a *policy* preference,[23] *not* a rule rooted in the Constitution itself. Third, Hamilton's discussion of the role of "precedents" cannot be divorced from English and American common law, under which courts have developed the law in the light of prior precedents, not bound by a written constitution, but one always subject to the control of, in England, Parliament, and, in America, state legislatures.[24] Courts, however, *are* bound

---

Nothing in Article III of the Constitution (or in any other provision of the Constitution) mandates a practice of adherence to precedent, nothing in Article III specifies any rule or set of criteria for when a court should must, or may follow a prior decision."

[21] *The Federalist* No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[22] It is clear that, in the context of his oral testimony and answers to written questions propounded by members of the Judiciary Committee, Judge Kavanaugh was referring to horizontal *stare decisis*. See Senate Committee on the Judiciary, *supra* nn 16 & 19. This is confirmed by an examination of Justice Kavanaugh's concurring opinion in *Ramos v. Louisiana*, No. 18-5924 (Apr. 20, 2020), holding that the Sixth Amendment requires unanimity in state criminal prosecutions. See *Ramos*, slip op. at 1-10, 10 n. 5 (Kavanaugh, J., concurring) (discussing both horizontal and vertical *stare decisis*).

[23] See *Citizens United v. Federal Election Commission*, 558 U.S. 310, 363 (2010) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)) ("principle of policy"); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) ("policy judgment").

[24] This point is developed at greater length in Part I of Justice Thomas's concurring opinion in *Gamble*, 139 S.Ct. at 1980-86.

by the Constitution, and Supreme Court interpretations of the Constitution "can be altered only by constitutional amendment or by overruling our prior decisions,"[25] *not* by legislation.[26] Accordingly, *stare decisis* "is at its weakest when we interpret the Constitution...."[27] Fourth, even assuming that the doctrine of "*stare decisis*" (again, referring to the Court's own precedents) is rooted in art. III of the Constitution, the doctrine itself provides no principled basis, much less any criteria, for determining when it is appropriate to depart from precedent. No justice, including Justice Kavanaugh, has ever taken the position that *no* precedent can be overruled.[28] So, in a sense, Justice Kavanaugh's belief that art. III embodies the principle of *stare decisis* may not mean much of anything. And, of course, Justice Kavanaugh has joined opinions in which earlier Supreme Court precedents *were* overruled.[29] Nevertheless, his view of precedent remains a concern. And that is true even more so of Chief Justice Roberts.

The Chief Justice appears to have an exaggerated respect for precedent,[30]

---

[25] *Agostini*, 521 U.S. at 235.

[26] See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down Congressional statute purporting to overrule *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that a general law of neutral application may not be challenged on free exercise grounds); *Dickerson v. United States*, 530 U.S. 428 (2000) (striking down provision in Congressional statute purporting to abrogate the rules set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), for determining the admission in a criminal prosecution of a defendant's confession).

[27] *Janus v. American Federation of State, County & Municipal Employees*, 138 S.Ct. 2448, 2478 (2019) (quoting *Agostini*, 521 U.S. at 235).

[28] See *Citizens United*, 558 U.S. at 408 (Stevens, J., dissenting): "I am not an absolutist when it comes to *stare decisis*.... No one is."

[29] See, e.g., *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (The U.S. Constitution does not permit a State to be sued by a private party without its consent in the courts of another State, overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) (property owner need not seek just compensation under state law before bringing a federal "takings" claim under 42 U.S.C. § 1983, overruling *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)).

[30] See *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080, 2101-05 (2018) (Roberts, C.J., dissenting). In *Wayfair*, the Court overruled *National Bellas Hess*, *Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967)), and *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), thereby allowing States to require sellers with no physical presence within their borders to collect tax on sales to residents. *Wayfair*, 138 S. Ct. at 2099. Chief Justice Roberts dissented, notwithstanding his belief that *National Bellas Hess* was wrongly decided. Ibid. at 2101. Even when the Chief Justice votes to

although, like Justice Kavanaugh, he too has joined (or written) opinions overruling prior precedents.[31] His opinion upholding the Affordable Care Act (ACA), when he converted an unconstitutional penalty into a constitutional tax in order to uphold the health insurance mandate,[32] may also suggest that he is more concerned about how the Court is regarded than he is about strict constitutional analysis.[33] The Chief Justice will have another opportunity to weigh in on the ACA following the the Court's orders granting review of the petitions for certiorari to review the Fifth Circuit's judgment invalidating a key provision of the Act and remanding the cause for further proceedings on the issue of severability.[34]

What Challenges to Roe are Now Pending?

In the last few years, many state legislatures have enact laws that directly challenge *Roe v. Wade*. These would include laws that prohibit abortion after the unborn child has a detectable heartbeat, laws that ban abortion at various specific gestational ages, laws that ban abortion throughout pregnancy, laws

---

overrule a prior precedent, he prefers to do so on the narrowest possible grounds. See, e.g., *Shelby Count v. Holder*, 570 U.S. 529 (2013) (striking down § 4 of the Voting Rights Act, which established a formula for determining which States and political subdivisions thereof were required under § 5 of the Act to obtain "preclearance" from a three-judge federal court or the Attorney General of any change in voting procedures, but declining to reach the constitutionality of § 5); see also *Knick*, 139 S.Ct. at 2177-79.

[31] See, e.g., *Hyatt*, 139 S.Ct. 1485; *Janus*, 138 S.Ct. 1448 (provision of state law forcing public employees to subsidize a union, even if they chose not to join and strongly objected to the positions the union took in collective bargaining and related activities, violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern, overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1997)); *Citizens United*, 558 U.S. at 340, 365 (statutory ban on corporate independent political campaign expenditures violated the First Amendment because the Government may not suppress political speech on the basis of the speaker's identity as a nonprofit or for-profit corporation, overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and overruling in part *McConnell v. FEC*, 540 U.S. 93 (2003), which had upheld ban).

[32] See *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 561-74 (2012) (Op. of Roberts, C.J.).

[33] For the reasons set forth in the dissenting opinion of Justice Scalia, ibid. at 661-69 (Scalia, J., dissenting), it is hard to take seriously the Chief Justice's opinion upholding the mandate as a "tax."

[34] *Texas v. United States*, 945 F.3d 355, 403 (5th Cir. 2019), *cert. granted sub nom*. *Texas v. California*, No. 19-1019, 2020 WL 981805 (U.S. Mar. 2, 2020), and *cert. granted sub nom. California v. Texas*, No. 19-840, 2020 WL 981804 (Mar. 2, 2020).

that ban abortion after twenty weeks (so-called "pain" bills), laws that ban certain reasons for abortion and laws that ban dismemberment (D&E) abortions on live, unborn children.

Nine States have enacted "heartbeat" bans, none of which has been upheld. The Arkansas ban (actually, a twelve-week ban) and the North Dakota ban were struck down by the federal district courts, their judgments were affirmed by the Eighth Circuit and, in January 2016, the Supreme Court denied review in both cases without a single recorded dissent from any of the conservative justices, including Chief Justice Roberts and Justices Scalia, Thomas and Alito.[35] More recently, the Iowa "heartbeat" ban was struck down, on state constitutional grounds,[36] by a state trial court whose decision the Governor chose not to appeal. The Georgia, Kentucky, Mississippi, Missouri and Ohio bans have all been enjoined.[37] The Louisiana "heartbeat' bill has an interesting feature, it will not go into effect unless and until there is a final judgment of the Fifth Circuit upholding the Mississippi "heartbeat" ban (which is currently being litigated).[38]

---

[35] See *Edwards v. Beck*, 8 F.Supp. 3d 1091 (E.D. Ark. 2014), *aff'd*, 786 F.3d 1113 (8th Cir. 2015), *cert. denied*, 136 S.Ct. 895 (2016); *MKB Management, Inc. v. Burdick*, 16 F.Supp. 3d 1059 (D. N.D. 2014), *aff'd sub nom. MKB Management v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015), *cert. denied*, 136 S.Ct. 981 (2016).

[36] *Planned Parenthood of the Heartland, Inc. v. Reynolds*, Case No. EQCE 83074 (District Court for Polk County, Iowa), Ruling on Motion for Summary Judgment (Jan. 22, 2019).

[37] *Georgia*: *Sistersong Women of Color Reproductive Justice Collective v. Kemp*, 410 F. Supp.3d 1327, 1350 (N.D. Ga. 2019) (Order Granting Plaintiffs' Motion for Preliminary Injunction)**;** *Kentucky*: *EMW Women's Surgical Center, P.S.C. v. Beshear*, No. 3:19-cv-178-DJH (W.D. Ky.), 2019 WL 1233575 at * 1 (W.D. Ky. Mar. 15, 2019) (issuing a Temporary Restraining Order restraining enforcement of S.B. 9, 2019 Gen. Assemb., Reg. Sess. (Ky. 2019), which was extended by agreement of the parties through date of final ruling, Memorandum of Conference and Order, No. 3:19-cv-178-DJH (Mar. 27, 2019); *Mississippi*: *Jackson Women's Health Organization v. Dobbs*, 379 F. Supp. 549, 553 (S.D. Miss. 2019) (granting preliminary injunction against S.B. 2116, 2019 General Assembly, Regular Session (Miss. 2019), codified at Miss. Code § 41-41-34.1 (2019), *aff'd*, No. 19-60455, 2020 U.S. App. LEXIS 5226 (5th Cir.); *Missouri*: *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 389 F. Supp. 631, 636-37 (W.D. Mo. 2019) (statute banning abortions at eight weeks gestational age is the equivalent of a heartbeat ban), *appeal docketed*, No. 19-2882 (8th Cir.) (consolidated with No. 3134); *Ohio*: *Pre-Term Cleveland v. Yost*, 394 F. Supp. 796, 798-803 (W.D. Ohio 2019) (granting Plaintiffs' Motion for Preliminary Injunction).

[38] Louisiana Stat. Ann. § 40:1061.1.3 (2019). As previously noted, *supra* note 37,

Several States have enacted laws that ban abortion at various stages of gestation—the Arkansas twelve-week ban (discussed above), Mississippi's fifteen-week ban,[39] which has been declared unconstitutional and permanently enjoined,[40] Louisiana's fifteen-week ban,[41] which is a "trigger" law,[42] Utah's eighteen-week ban,[43] which has been preliminarily enjoined on consent of the parties pending resolution of the merits,[44] Arkansas's eighteen-week ban,[45] which has been enjoined,[46] and Missouri's unusual law that bans abortion at successive stages of pregnancy – eight weeks, fourteen weeks and eighteen weeks – in the hope that at least one of them ultimately will be upheld,[47] which also has been enjoined.[48]

Alabama enacted a ban on abortion throughout pregnancy, the "Alabama

---

the Fifth Circuit has affirmed the district court's order preliminarily enjoining enforcement of the Mississippi heartbeat ban. Jackson Women's Health Org. No. 19-60455, 2020 U.S. App. LEXIS 5226.

[39] Gestational Age Act, Miss. Code Ann. § 41-41-191 (2018).

[40] *Jackson Women's Health Organization v. Currier*, 349 F.Supp. 3d 536 (S.D. Miss. 2018), *aff'd*, No. 18-60868 (Dec. 13, 2019) (Fifth Circuit).

[41] La. Stat. Ann. § 14:87(D) (2018).

[42] The law would take effect only if *Roe v. Wade* is overruled or the Constitution is amended to allow the States to prohibit elective abortion, La. Stat. Ann. § 14:87(G), or if a final decision of the Fifth Circuit upholds Mississippi's fifteen week ban, *id*. § 14:87(F). As previously noted,, *supra* note 40, the Fifth Circuit has affirmed the district court's judgment striking down Mississippi's fifteen-week ban and permanently enjoining its enforcement.

[43] H.B. 136, 63rd Gen. Sess. (Utah 2019) (codified at Utah Code Ann. § 76-7-302.5 (LexisNexis 2019)).

[44] Joint Motion for Stipulated Preliminary Injunction as to State Defendants, *Planned Parenthood Association of Utah v. Miner*, No. 2:19-cv-00238 (D. Utah Apr. 18, 2019).

[45] Ark. Code Ann. § 20-16-2001 (2019) (codified from H.B. 493, § 1, 92nd General Assembly, Regular Session (Ark. 2019), creating the "Cherish Act").

[46] *Little Rock Family Planning Services v. Rutledge*, Case No. 4:19-cv-449-BRW (E.D. Ark.), Preliminary Injunction (Aug. 6, 2019), *appeal pending*, No. 19-2690 (8th Cir.).

[47] Missouri Stands for the Unborn Act, H.R. 126, 100th General Assembly, 1st Regular Session (Mo. 2019) (to be codified at Mo. Ann. Stat. §§ 188.056, 188.057, 188.058). The same bill enacted a twenty-week abortion ban, which is discussed below. *See infra* notes 57-58, and accompanying text.

[48] *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 389 F. Supp.3d 631, 640 (W.D. Mo. 2019) (Corrected Memorandum and Order), *appeal pending*, No. 19-2882 (8th Cir.) (consolidated with No. 19-3134).

Human Life Protection Act," which is to take effect on November 15, 2019.[49] The ban has already been challenged[50] and has been enjoined.[51] What has largely gone unnoticed about the Alabama law is that it includes an exception for suicidal ideation.[52] As a result, the law, even if were allowed to go into effect, would have no effect. It will always be possible to find a psychiatrist who will express the opinion that a pregnant woman will kill herself if she is denied an abortion.[53]

Twenty-one States have enacted laws banning abortion (subject to very limited exceptions) at twenty-weeks gestational age.[54] For the most part, these

---

[49] Alabama Human Life Protection Act, H.B. 314, 189th Leg., Reg. Sess. (Ala. 2019).

[50] Verified Complaint for Declaratory and Injunctive Relief, *Robinson v. Marshall*, No. 2:19-cv-00365-MHT-SMD (M.D. Ala. May 24, 2019).

[51] *Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1059-60 (M.D. Ala. 2019) (Order Granting Plaintiffs' Motion for Preliminary Injunction).

[52] H.B. 314, § 3(6) (defining "serious health risk to the unborn child's mother" to include a psychiatric opinion that, because of a "diagnosed mental illness..., there is reasonable medical judgment that [the pregnant woman] will engage in conduct that could result in her death or the death of her unborn child"), § 4(b) (making exception for "serious health risk to the unborn child's mother").

[53] The inherent manipulability of a mental health exception is evident from the pre-*Roe* experience with California's Therapeutic Abortion Act of 1967. According to data referenced by the California Supreme Court, more than 60,000 abortions were authorized and performed in 1970 for alleged "mental health" reasons, even though the standard for invoking the exception was the same as the standard for civil commitment, to wit, the pregnant woman had to pose a danger to herself or to others or to the property of others. *People v. Barksdale*, 503 P.2d 257, 265 (Cal. 1972). It is absurd to believe that more than 60,000 women met the standard for civil commitment merely because they were pregnant.

[54] Sixteen of these laws were based on model legislation developed by the National Right to Life Committee, the "Pain-Capable Unborn Child Protection Act," and prohibited abortion at twenty weeks post-fertilization (which is twenty-two weeks from the first date of the woman's last menstrual period – LMP – as pregnancy is usually measured). The citations for all but one of these statutes (South Carolina) may be found at the following website for the National Right to Life Committee website. *Pain-Capable Unborn Child Protection Act*, Nat'l Right to Life Committee (Jan. 9, 2017), http://www.nrlc.org/uploads/stateleg/PCUCPAfactsheet.pdf. The South Carolina statute is codified at S.C. Code Ann. § 44-41-410 *et seq*. (2018). The Arizona and Mississippi laws were based on model legislation developed by Americans United for Life, and prohibit abortion at twenty weeks LMP. See Am.ericans United for Life, Women's Health Defense Act, Model Legislation & Policy Guide (2011), https://ia903005.us.archive.org/ 27/items/405572-womens-health-defense-act/405572-

laws have not been challenged, usually because they have been enacted in States where few or no abortions were being performed at that stage of pregnancy.[55] Over time, the laws do appear to have substantially reduced, if not eliminated, post twenty-week abortions, in Louisiana and Texas, however.[56] One explanation for why most of these laws have not been challenged is that twenty-weeks post-fertilization (twenty-two weeks LMP) is now within the "gray zone" for viability. It is possible that physicians who perform late-term abortions do not want to challenge laws that ban post-viability abortions, and it is increasingly difficult to structure a challenge to a twenty-week ban that would be aimed at only pre-viable applications of the ban.

Interestingly, in every case where a twenty-week ban has been challenged to date – Arizona, Idaho, Missouri and North Carolina, in federal court, and

---

womens-health-defense-act.pdf. Three other States have banned abortion at twenty weeks, two of them on the basis of the pain rationale. *Indiana*: Indiana Code Ann. §§ 16-34-1-9(a)(1), 16-34-2-1(a)(3) (LexisNexis 2018); *Missouri*: Late-Term Pain-Capable Unborn Child Protection Act, H.R. 126, 100th General Assembly, 1st Regular Session (Mo. 2019) (codified at Mo. Ann. Stat. § 188.375 (2019)); *North Carolina*: North Carolina General Statutes § 14-45.1 (2018), construed together with §§ 14-44 and 14-45. One other statute must be mentioned. Following the Supreme Court's decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), Utah enacted a statute that prohibited abortion throughout pregnancy, subject to certain exceptions. See Utah Code Ann. § 76-7-302 (LexisNexis 1995). Five exceptions applied to abortions performed before twenty weeks, but only three with respect to abortions performed after twenty weeks – "the abortion [was] necessary to save the pregnant woman's life;" "to prevent grave damage to the pregnant woman's medical health;" or "to prevent the birth of a child that would be born with grave defects." *Id*. §§ 76-302(2)(a), (d), (e), 76-7-302(3). Following the Court's decision in *Casey*, the State conceded the unconstitutionality of the pre twenty-week abortion ban, but continued to defend the post twenty-week ban. *Jane L. v. Bangerter*, 809 F. Supp.2d 865, 870 (D. Utah 1992). Ultimately, the Tenth Circuit struck down the post twenty-week ban on the basis that it included within its scope both pre- and post-viability abortions. See *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996). The Tenth Circuit did not address the plaintiffs' argument that the scope of the health exception set forth in § 76-302(2)(d) was unconstitutional, even with respect to post-viability abortions performed after twenty weeks, but clearly intimated that it was. Ibid. at 1118 n. 7. The Supreme Court thereafter denied review. 520 U.S. 1274 (1997).

[55] A critique of this legislation may found in the author's article, "Twenty-Week Abortion Bans: Ineffective, Unconstitutional and Unwise," 30 *Brigham Young University Journal of Public Law* 83 (2015).

[56] Ibid. at 94-95, 99-100 (discussing early experience with Louisiana and Texas statutes).

Georgia, in state court – the plaintiffs emphasized that they were challenging *only* the *pre*-viability applications of the laws and *not* the *post*-viability applications.[57] All four of the laws challenged in federal court were struck down and/or have been enjoined pending litigation.[58] The Supreme Court denied review of the Arizona case, and no review was sought in the Idaho case. The Missouri case is pending in the federal district court. The North Carolina case is now on appeal to the Fourth Circuit.[59] The state court case in Georgia was dismissed on procedural grounds and was never refiled.[60]

A number of States have prohibited abortions sought because of the sex, race or disability of the unborn child. The statutes prohibiting only sex-selective abortions[61] have not been challenged, very likely because, as a practical matter, they are unenforceable. Seven States prohibit abortions because of the disability of the unborn child,[62] and all seven have been

---

[57] Complaint at ¶¶3, 40, *Isaacson v. Horne*, No. 2:12-CV-01501, 2012 WL 2865995, (D. Ariz. July 12, 2012); Amended Complaint in Intervention at Introductory Paragraph, ¶83, Prayer for Relief ¶A, *McCormack v. Hiedeman*, No. 4:11-cv-00433-BLW, 2012 WL 4506600 (D. Idaho June 11, 2012); Complaint for Injunctive and Declaratory Relief at ¶¶9, 10, 15, 22, 23, 39, 53, 71, 78, Request for Relief ¶¶A., B., *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, No. 2:19-cv-4155, 2019 WL 3430536 (W.D. Mo. July 30, 2019); Complaint for Injunctive and Declaratory Relief at ¶¶1-3, 7-11, 21, 31, 46, 49, 54, Request for Relief, at ¶¶55, 56, Bryant v. Woodall, No. 1:16-cv-01368-WO-LPA (M.D.N.C. Nov. 30, 2016); Verified Complaint at ¶¶1, 2, 4, 26, 43, 49, 51, and Prayer for Relief, *Lathrop v. Deal*, No. 2012-CV-224423, 2012 WL 6216894 (Ga. Super. Nov. 8, 2012).

[58] See *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127 (2014); *McCormack v. Hiedeman*, 900 F.Supp. 2d 1128 (D. Idaho 2013), *aff'd sub nom. McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015); *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 389 F. Supp.3d 631 (W.D. Mo. 2019), *appeal pending*, No. 19-2882 (8th Cir.) (consolidated with No. 19-3134); *Bryant v. Woodall*, 363 F.Supp. 3d 611 (M.D. N.C. 2019); *Bryant v. Woodall*, 363 F. Supp.3d 611 (M.D.N.C. 2019), *judgment entered following stay of enforcement*, No. 1:16-cv-01368-WO-LPA (M.D.N.C. May 24, 2019).

[59] *Bryant v. Woodall*, 363 F. Supp.3d 611 (M.D.N.C. 2019), *appeal pending*, No. 19-1685 (4th Cir.).

[60] *Lathrop v. Deal,* 801 S.E.2d 867 (Ga. 2017) (affirming dismissal of complaint on sovereign immunity grounds).

[61] Ark. Code Ann. § 20-16-1904 (2019); Kan. Stat. Ann. § 65-6726 (2019); N.C. Gen. Stat. § 90-21.121 (2018); Okla. Stat. tit. 63, § 1-731.2(B) (2019); 18 Pa. Cons. Stat. § 3204(c) (2019); S.D. Codified Laws § 34-23A-64 (2019).

[62] Down Syndrome Discrimination by Abortion Prohibition Act, 2019 Ark. Acts 619 (2019) (to be codified at Ark. Code Ann. § 20-16-2001 *et seq*.; Ind. Code § 16-34-

challenged. In five of those challenges, the statutes were enjoined and/or declared unconstitutional;[63] the sixth case was dismissed by the plaintiff,[64] and, in the seventh case, the challenge was dismissed on standing grounds.[65] One State prohibits abortion because of the sex or race of the unborn child.[66] A challenge to the race-based component of the prohibition was dismissed on

4-1 *et seq*. (2019); 2019 Ky. Acts ch. 37 (codified at Ky. Rev. Stat. Ann. § 311.731 (2019)) (prohibiting abortion because of "the sex of the unborn child," "the color or national origin of the unborn child," or because of "the diagnosis, or potential diagnosis, of Down syndrome or any other disability"); La. Stat. Ann. § 40:1061.1.2 (2019) (prohibiting abortions twenty or more weeks post fertilization because of the unborn child's disability); H. 126, 100th General Assembly, Regular Session (Mo. 2019) (codified at Mo. Ann. Stat. § 188.038 (West 2019) (prohibiting abortion sought solely "because of a prenatal diagnosis, test, or screening indicating Down Syndrome or the potential of Down Syndrome in an unborn child" or "because of the sex or race of the unborn child"); North Dakota Cent. Code § 14-02.1-04.1 (2019) (prohibiting both sex-selective abortions and abortions because of genetic abnormality); Ohio Rev. Code §2919.10 (LexisNexis 2018) (prohibiting abortions sought because of a diagnosis of Down syndrome).

[63] *See Little Rock Family Planning Services v. Rutledge*, 397 F. Supp.3d 1213 (E.D. Ark. 2019), *appeal pending*, No. 19-2690 (8th Cir.); *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, 265 F.Supp. 3d 859 (S.D. Ind. 2017), *aff'd*, 888 F.3d 300 (7th Cir 2018), *cert. denied in part, judgment rev'd in part sub nom*. *Box v. Planned Parenthood of Indiana & Kentucky, Inc*., 139 S. Ct. 1780 (2019); *EMW Women's Surgical Center, P.S.C. v. Beshear*, Civil Action No. 3:19-cv-178-DJH (W.D. Ky.), Temporary Restraining Order (March 20, 2019), extended by agreement of the parties through date of final ruling, Memorandum of Conference and Order (March 27, 2019); *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, Case No. 2:19-cv-04155-HFS (W.D. Mo. Sep. 27, 2019) (Supplemental Order Regarding Down Syndrome), *appeal pending*, No. 19-3134 (8th Cir.) (consolidated with No. 19-2882); *Preterm-Cleveland v. Himes,* 294 F.Supp. 3d 746 (S.D. Ohio 2018), *aff'd*, No. 18-3329 (Sixth Circuit) (Oct. 11, 2019), *op. vacated, pet. for reh'g en banc granted*, 944 F.3d 630 6th Cir. 2019).

[64] *MKB Management Corporation v. Burdick*, No. 1:13-cv-00071, 2013 U.S. Dist. LEXIS 191752 (D. N.D. Sept. 9, 2013).

[65] In *June Medical Services, L.L.C. v. Gee*, 280 F.Supp. 3d 849 (M.D. La. 2017), the district court held that the plaintiff did not have standing to challenge the prohibition set forth in La. Stat. Ann. § 40:1061.1.2, because, subject to very limited exceptions, Louisiana law already prohibits all abortions at that point in pregnancy, and plaintiff did not challenge that statute. *June Medical Services*, 280 F.Supp. 3d at 863-64 (citing La. Stat. Ann. § 40:1061.1(E)(1) (2018)).

[66] Ariz. Rev. Stat. Ann. § 13-3603.02 (2019).

standing grounds.[67]

Finally, we come to the dismemberment bans. Twelve States have enacted such bans. All of these have been challenged and either enjoined or not in force during the pending litigation per agreement of the parties, except in Mississippi, North Dakota and West Virginia.[68] The North Dakota dismemberment ban would take effect only upon the overruling of *Roe v. Wade*, adoption of a constitutional amendment allowed the States to prohibit abortion or the issuance of a judgment of the Supreme Court or the Eighth Circuit Court of Appeals that would allow enforcement of the statute.[69] Apparently, few or no D&E abortions are performed in West Virginia, which may explain why no lawsuit has been filed there. Also, the West Virginia ban contains no civil or criminal penalties, only disciplinary sanctions against physicians who perform abortions in violation of the law.[70] The Mississippi statute – the "Mississippi Unborn Child Protection from Dismemberment Abortion Act"[71] – is, as a practical matter, unenforceable.

The D&E ban in Mississippi authorizes injunctive relief, a civil cause of action and criminal prosecution, in that order.[72] Curiously, under the statute, no criminal prosecution may be brought against a physician for performing a D&E abortion in violation of the law unless, prior to that prosecution being commenced, he was unsuccessfully sued in an action for injunctive relief or damages.[73] In other words, in what would seem to be an obvious violation of the separation of powers principle, a prosecutor could not initiate criminal prosecution against a physician unless and until a civil action (for an injunction

---

[67] See *NAACP v. Horne*, No. CV 13-01079-PHX-DGC, 2013 WL 5519514 at 1*(D. Ariz. Oct. 3, 2013), *aff'd,* 626 Fed. App'x 200 (9th Cir. 2015).

[68] See *Bernard v. Individual Members of Indiana Medical Licensing Board*, 392 F.Supp. 935, 964 (S.D. Ind. 2019) (enjoining Indiana's dismemberment bill); Tulsa *Women's Reproductive Clinic, L.L.C. v. Hunter* , No. 118,292 (Okla. No.v 4, 2019) (Order on Appellant's Emergency Motion for a Temporary Injunction Pending Appeal to Preserve the Status Quo) (temporarily enjoining enforcement of H.B. 1721, 2015 Okla. Sess. Laws, ch. 59, during appeal); see also Dismemberment Abortion Bans, Nationall Right to Life Committee (July 17, 2019), http://www.nrlc.org/uploads/stateleg/State LawsDismembermentBans.pdf (listing the statutory and case citations).

[69] H.R. 1546, 66th Legislative Assembly, Regular Session (N.D. 2019), to be codified as a new section to N.D. Cent. Code ch. 14-02.1.

[70] W.Va. Code § 16-20-1(c)(1) (2019).

[71] Miss. Code Ann. § 41-41-151 *et seq*. (2019).

[72] Ibid. § 41-41-157(1).

[73] Ibid. § 41-41-163.

or for damages) had been brought against the physician and had failed. Of course, the standard of proof in a civil action is mere preponderance, while in a criminal prosecution it is proof beyond a reasonable doubt. It is (or should be) obvious that a criminal prosecution under the more demanding standard of proof could never succeed where a civil action under the preponderance standard had failed.

Direct challenges to *Roe* will not succeed with the present Court. Moreover, they pose a danger that the Court might actually take one of these cases and reaffirm *Roe* for a fourth time, forcing one or more of the justices who oppose *Roe* to tip their hand before there is a majority to overrule *Roe*. That would be most unfortunate. At the same time, however, it is fairly unlikely that the Court would agree to review one of these cases (assuming that all of these laws are ultimately struck down by the courts of appeals). The conservatives on the Court would not vote for certiorari because they could not be sure of how Chief Justice Roberts might vote, and the liberals would not vote for certiorari, either, for the same reason. Also, with respect to the liberal justices, would they really want a 5-4 decision upholding a fifty-year-old precedent (*Roe*)? A reaffirmation by that close a vote hardly suggests that the issue is "settled."

So, if a *direct* challenge to *Roe* is not a good strategy, we can move on to the next question, "Is a 'Test Case' Needed to Overrule *Roe*?

Is a "Test Case" Needed to Overrule Roe?

There is a perception among many in the pro-life movement that the Supreme Court could not reconsider and overrule *Roe v. Wade* in the absence of a statute that directly conflicts with *Roe*. That perception is mistaken.

In each of the three cases in which *Roe* was reaffirmed, both the defendants and the United States asked that *Roe* be overruled, even though none of the challenged ordinances and statutes directly conflicted with *Roe* and all of them could have been upheld without affecting *Roe's* holding as to when nontherapeutic abortions may be prohibited.[74] On the other hand, in the challenge to Missouri's requirement that fetal viability testing be undertaken at twenty weeks gestation, three justices expressed their willingness to modify

[74] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844, 878-79 (1992); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1983); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20, 426-31 (1983).

Roe, even though the testing requirement itself did not conflict with *Roe* (under a provision of Missouri law *not* challenged in the case, an abortion could not be performed after the unborn child was determined to be viable unless the procedure was necessary to preserve the pregnant woman's life or health).[75] And, indeed, in a long line of cases, one or more Justices on the Court have urged that *Roe* be overruled even though none of the statutes under review in those cases conflicted with what the Court in *Casey* repeatedly described as the "central" or "essential" holding of *Roe*, that the States may not prohibit abortion before viability.[76]

In any case challenging a regulation of abortion, the threshold issue is determining the appropriate standard of review. Is it the "strict scrutiny" standard of *Roe*? Or the "undue burden"standard of *Casey*? Or the "rational basis" standard, under which virtually all regulations of abortion (including prohibitions) could be upheld? In any such case, the Court could overrule *Roe* and return the issue of abortion to the States, if a majority to overrule exists. Thus, a *direct* challenge to *Roe* is not needed to overrule *Roe*. Nor is such a challenge prudent. If a majority of the Court wants to overrule *Roe*, it can do so in any case in which an abortion regulation has been challenged, whether or not the regulation conflicts with *Roe*. If a majority is not willing to overrule, but the challenged regulation does not conflict with *Roe*, the Court could uphold the regulation without having to reaffirm *Roe*. That is not an option with a direct challenge. If the votes are not there to overrule, the Court will reaffirm *Roe*, yet again. A fourth reaffirmation of *Roe* is not in the interest of the pro-life movement.

---

[75] *Webster v. Reproductive Health Services,* 492 U.S. 490, 513-21 (1989) (Op. of Rehnquist, C.J., joined by White and Kennedy, JJ.).

[76] See ibid. at 532-37 (Scalia, J., concurring in part and concurring in the judgment); see also *Whole Women's Health, Inc. v. Hellerstedt*, 136 S.Ct. 2292, 2324-30 (2016) (Thomas, J. dissenting); *Gonzales v. Carhart*, 550 U.S. 124, 168-69 (Thomas, J., with whom Scalia, J., joins, concurring); *Stenberg v. Carhart*, 530 U.S. 914, 980-82 (2000) (Thomas, J., with whom Rehnquist, C.J., and Scalia, J., join, dissenting); *Casey*, 505 U.S. at 944-79 (Rehnquist, C.J., with whom White, Scalia and Thomas, JJ., join, concurring in the judgment in part and dissenting in part), ibid. at 979-1001 (Scalia, J., with whom Rehnquist, C.J., and White and Thomas, JJ., join, concurring in the judgment in part and dissenting in part); *Hodgson v. Minnesota*, 497 U.S. 417, 479-80 (1990) (Scalia, J., concurring in the judgment in part and dissenting in part); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520-21 (1990) (Scalia, J., concurring); *Thornburgh*, 476 U.S. at 785-814 (White, J., with whom Rehnquist, J., joins, dissenting).

What Alternatives are There to Direct Challenges to Roe?

The Supreme Court, as previously noted, has agreed to review the Fifth Circuit's judgment upholding Louisiana's statute requiring physicians performing abortions in outpatient clinics to have admitting privileges at local hospitals. By the end of the Court's Term in June, we should know whether the Court will overrule *Hellerstedt,* limit it to its facts, distinguish it or apply it to invalidate the requirement.

There are abortion issues on which the Court has not expressed an opinion. One is whether the States may restrict post-viability abortions to serious physical health reasons and exclude abortions for mental health reasons. The Court has never determined whether the very open-ended language of *Doe v. Bolton* applies to post-viability abortions (and the Court has declined to grant review in cases in which it could have clarified the scope of the post-viability health exception mandated by *Roe*[77]). Another is whether the States may enact one-parent notice statutes *without* a judicial bypass mechanism, an issue the Court has expressly not addressed.[78]

There are also issues on which the Court *has* expressed an opinion, but challenging the Court's jurisprudence on those issues would not directly challenge *Roe*. For example, may States require parental consent or two-parent notice without a judicial bypass mechanism?[79] Would the Court be willing to overrule a prior precedent applying *Roe*, but which does not involve a prohibition of abortion, as such? This might be a "low-cost" way of finding out whether the Court would even consider revisiting *Roe.*

How Does the Interpretation of State Constitutions Affect the Legal Status of Abortion?

Finally, it would be a serious mistake for the pro-life movement to

---

[77] See, e.g., *Voinovich v. Women's Medical Professionals Corporation*, 523 U.S. 1036 (1998). *Leavitt v. Jane L.,* 520 U.S. 1274 (1997); *Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992).

[78] *Akron Center for Reproductive Health*, 497 U.S. at 522 (1990) (Stevens, J., concurring in part and concurring in the judgment) ("we have not decided the specific question whether a judicial bypass procedure is necessary in order to save the constitutionality of a one-parent notice statute").

[79] See *Hodgson*, 497 U.S. at 450-55 (striking down two-parent notice requirement without a judicial bypass mechanism); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 72-75 (1976) (striking down parental consent requirement without a judicial bypass mechanism).

overlook the significance of state constitutions in the abortion debate.[80] Twelve state supreme courts have already recognized (or clearly implied) that their state constitution protects a right to abortion that is separate from, and independent of, the federal constitutional right to abortion – Alaska, California, Florida, Iowa, Kansas, Massachusetts, Minnesota, Mississippi, Montana, New Jersey, New York and Tennessee.[81] Most commonly, the state supreme courts have derived a state right to abortion from a right of privacy, either express (as in the case of Alaska, California, Florida and Montana) or implied (in the case of Massachusetts, Minnesota, Mississippi, New Jersey, Tennessee and, arguably, New York). A thirteenth state supreme court – New Mexico – has struck down a restriction on abortion funding on grounds (the State's equal rights provision) that strongly suggests that the court would recognize a state right to abortion.[82] And a fourteenth state supreme court – Vermont – in a pre-*Roe* decision, struck down the State's prohibition of abortion on grounds that are not entirely clear, but could have been based on the state constitution.[83] The Tennessee decision was overturned in November 2014 by a state constitutional amendment;[84] the others remain in place.

These decisions, it must be emphasized, would *not* be affected by a

---

[80] This subject is thoroughly explored in the author's book, *Abortion under State Constitutions A State-by-State Analysis* (3rd ed. 2020) (Carolina Academic Press).

[81] See *State v. Planned Parenthood of Alaska*, 35 P.3d 30 (Alaska 2001); *State v. Planned Parenthood of Alaska, Inc*., 28 P.3d 904 (Alaska 2001); *Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *In re* T.W., 551 So.2d 1186 (Fla. 1989); *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206 (Iowa 2018); *Hodes & Nauser, MDS*, *P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019); *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998); *Armstrong v. State*, 989 P.2d 364 (Mont. 1999); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Hope v. Perales*, 634 N.E.2d 183 (N.Y. 1994); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000).

[82] *New Mexico Right to Choose/NARAL v. Johnson,* 975 P.2d 841 (N.M. 1998).

[83] *Beacham v. Leahy*, 287 A.2d 836 (Vt. 1972).

[84] Tenn. Const. art. I, § 36 (Supp. 2015): "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother."

decision overruling *Roe v. Wade.* It would be impossible to prohibit abortion in these States, at least before viability, unless these decisions are overruled, which is unlikely, or overturned by state constitutional amendment. These decisions often make it extremely difficult even to regulate abortion within current federal constitutional limits.

The Iowa and Kansas decisions are fairly recent. It is reasonable to expect that serious efforts will be undertaken to propose state constitutional amendments to overturn both of those decisions. Indeed, a state constitutional amendment has already been introduced in Iowa and passed the state Senate.[85] And the Kansas legislature also has considered a state constitutional amendment.[86] Although a state constitutional amendment would not be politically possible at this time in most of the remaining States with adverse state supreme court decisions, they should be considered in Alaska and Mississippi, and, possibly, Montana, as well.

In November 2018, Alabama and West Virginia approved state constitutional amendments (the West Virginia amendment overturned an abortion funding decision and neutralized the state constitution as an

[85] Senate Joint Resolution 2001 would add a new section (§ 26) to the Iowa Bill of Rights (art. I), which would state: "To defend the dignity of all human life, and to protect mothers and their unborn children from efforts to expand abortion even to the date of birth, we the people of Iowa declare that this Constitution shall not be construed to recognize, grant, or secure a right to abortion or to require the public funding of abortion." S.J. Res. 2001, 2020 General Assembly § 1 (Iowa 2020) (passed by the Senate on Feb. 13, 2020, S. Journal, 2nd Sess. At 297 (Iowa 2020)) Under the Iowa Constitution, proposed amendments to the state constitution must be approved in two legislative session before being submitted to the voters.

[86] On January 29, 2020, the Kansas Senate approved, by the required two-thirds majority, a new section (§ 22) to the Kansas Bill of Rights, which would state: "Because Kansans value both women and children, the constitution of the state of Kansas does not require government funding of abortion and does not create or secure a right to abortion. To the extent permitted by the Constitution of the United States, the people, through their elected state representatives and state senators, may pass laws regarding abortion, including, but not limited to, in circumstances of pregnancy resulting from rape or incest, or when necessary to save the life of the mother." S. Con. R. 1613, 2020 Reg. Sess. (Kan. 2020). On February 7, 2020, the Kansas House failed to approve the proposed amendment by the required two-thirds majority. *SCR 1613*, Kan. Leg., http://www.kslegislature.org/li/b2019_20/measures/scr1613/ (last modified Apr. 11, 2020). Nevertheless, further efforts to amend the state constitution may be expected to be introduced.

independent source of abortion rights),[87] and Louisiana will vote on an abortion neutrality amendment on November 3, 2020.[88] In addition to Alabama, West Virginia and Tennessee, four other States have some form of either pro-life or abortion neutrality language in their state constitutions – Arkansas (pro-life language along with an abortion funding ban),[89] Colorado (prohibiting public funding of abortion),[90] Florida (authorizing parental notice)[91] and Rhode Island (abortion neutrality and prohibiting funding).[92] No State has (yet) added

[87] "(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life. (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate. (c) Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion." Alabama Constitution, art. I, § 36.06 (approved in the Nov. 6, 2018, general election); West Virginia Constitution, art. VI, § 57 (approved in the Nov. 6, 2018 general election) ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.").

[88] H.R. 425 would add a new section (§ 20.1) to art. I of the Louisiana Constitution. Section 20.1 states: "To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion." H.R. 425, 2019 Leg. Reg. Sess. (La. 2019).

[89] "1. No public funds will be used to pay for any abortion, except to save the mother's life. 2. The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution. 3. This amendment will not affect contraceptives or require anappropriation of public funds." Arkansas Constitution, Amendment 68, §§ 1-3.

[90] "No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion, provided, however, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each." Colorado Constitution, art. V, § 50.

[91] "The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial wavier of the notification." Florida Constitution, art. X, § 22.

[92] "All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall

language to its constitution protecting or recognizing a right to abortion.[93]

Conclusion

The Supreme Court, as presently constituted, would not likely overrule *Roe v. Wade*. and, therefore, it is unlikely that the Court will accept for review any of the cases currently in the judicial pipeline that challenge *Roe* – cases involving challenges to statutes that prohibit some or all abortions before viability or effectively prohibit the most commonly used second-trimester abortion procedure (dismemberment abortions). In light of that reality, it would not be prudent for the pro-life movement to support legislation that directly challenges *Roe*, which, in a worst case scenario, could lead to a fourth reaffirmation of *Roe*. Instead, incremental legislation that chips away at the foundations of *Roe* should be pursued. This could include carefully drafted post-viability prohibitions, one-parent notice statutes without judicial bypass and, depending upon the Supreme Court's resolution of the *June Medical Services* case, statutes requiring physicians who perform abortions to have admitting privileges at local hospitals. These are just three examples of the type of legislation that could be considered.[94] Some States may want to consider pushing the envelope further, by enacting statutes that conflict with the Court's post-*Roe* precedents, but not *Roe* itself, *e.g*., parental consent or two-parent notice statutes without a judicial bypass mechanism and statutes similar to that struck down in *Hellerstedt* regulating abortion clinics. And if a majority on the Court wishes to overrule *Roe*, it could do so in any case in which the standard

---

be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. *Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof*." Rhode Island Constitution, art. I, § 2 (emphasis added).

[93] That may change in two years. The Vermont legislature has proposed an amendment to the state constitution (Proposal 5) which, if approved by the next legislature (meeting in 2021) would appear on the general election ballot in November 2022. The amendment would add a new article (art. 22) to chapter I of the Vermont Constitution. Article 22 states: "That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means." S. Prop. 5, 2019 General Assembly (Vt. 2019).

[94] Americans United for Life has a wide range of legislative models that could be considered to promote the incremental strategy.

of review for evaluating abortion regulation is at issue.

Finally, in order to prevent the overruling of *Roe* from turning into a Pyrrhic Victory, the pro-life movement must work diligently to prevent state supreme courts from recognizing abortion as a state constitutional right and, wherever possible, to overturn, by state constitutional amendment, state supreme court decisions that have done so. This work must not ignore how state supreme court judges are selected or elected.

Almost fifty years after *Roe v. Wade* was decided, the pro-life movement is alive and well, and we may hope that in the not too distant future, *Roe* will be overruled and, once again, the law will be able to protect all innocent human life, including unborn children.