STATE ABORTION BANS: THE FUTURE OF ROE V. WADE

Claire Sweetman

INTRODUCTION

This year has been peppered with both triumphs and setbacks for the pro-life and pro-choice movements alike. So far in 2019, nine different U.S. states have promulgated abortion regulations so severe in their timing restrictions that they are recognized by scholars and doctors as outright bans.¹ The laws vary slightly in their specific restrictions, some prohibiting abortion after eight weeks of pregnancy, and others as early as six weeks after the woman’s last menstrual period.² However, most scholars agree that legislatures have drafted these laws with the purpose of directly challenging the precedent set by the 1973 U.S. Supreme Court ruling, Roe v. Wade,³ which held that a woman has the right to seek an abortion up to the point of viability outside of the uterus.⁴ None of these laws are currently in effect because they either have enactment dates set in the future or because federal judges have enjoined them in response to lawsuits filed in opposition to the laws.⁵ Despite the fact that the Court has continuously reaffirmed Roe’s central holding⁶ that women have a constitutionally-protected right to an abortion up until the point of viability, the more conservative composition of the Court after the appointment of Justice Brett Kavanaugh in 2018 has created increasing uncertainty about the future of Roe.⁷

I. ROE V. WADE AND OTHER RELEVANT SUPREME COURT PRECEDENT

Recognized as the paramount U.S. Supreme Court case on abortion, Roe remains a practical starting point for a constitutional discussion on a woman’s right to choose. In 1970, Jane Roe, a single woman from Texas, initiated a federal lawsuit seeking a declaratory judgment that the Texas statutes criminalizing abortion were unconstitutional on their face.⁸ Roe was unmarried, pregnant, and wished to

⁴ Gordon, supra note 1. The Guttmacher Institute defines viability as the “point at which a fetus can sustain survival outside the womb. Determined based on the fetus’s developmental progress and may vary by pregnancy. A fetus generally reaches viability between 24 and 28 weeks” since a woman’s last menstrual period. Guttmacher Report, supra note 2.
⁵ Gordon, supra note 1.
⁷ Guttmacher Report, supra note 2.
⁸ Roe v. Wade, 410 U.S. at 120.
terminate her pregnancy via an abortion “performed by a competent, licensed physician, under safe, clinical conditions;” however, she was unable to obtain one in Texas because the state’s laws criminalized abortions but for the safety of the mother. The Court invalidated the Texas statutes, holding that a woman’s freedom to choose whether or not to terminate her pregnancy was protected under the “right of privacy” contained in the Fourteenth Amendment’s “concept of personal liberty and restrictions upon state action.” However, Justice Blackmun writing for the majority noted that although the right of privacy includes the right to an abortion, that right “is not unqualified and must be considered against important state interests in regulation.” Accordingly, the Court created what is now known as the “trimester framework,” which details the time periods in which a state’s interest in promoting the “potentiality of human life” may permit governmental restrictions on abortion access. From Roe’s trimester framework, a state may not regulate a woman’s access to abortion in the first trimester; may regulate in the interest of the health of the mother after the first trimester but preceding viability; and may outright prohibit abortion post-viability.

The trimester framework’s relevance faded after the Court announced its decision in Planned Parenthood v. Casey, another landmark case. In this case, the Court considered whether or not several provisions of Pennsylvania’s Abortion Control Act of 1982 unconstitutionally abridged a woman’s right to choose as paved in Roe. Although the Court upheld all but one of the challenged provisions, it reaffirmed the central holding in Roe that a woman has a constitutionally protected right rooted in the Due Process Clause of the Fourteenth Amendment to elect an abortion before the point of viability. However, in a deeply divided opinion, Justice O’Connor articulated a new standard to determine the validity of laws restricting access to abortion: the undue burden test. Essentially, before viability, the state’s interests in protecting potential life “are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.” Accordingly, the state may not impose an “undue burden,” defined as a “substantial obstacle in the path of a woman seeking an abortion” before viability.

Since its decision in Casey, the Court has used the undue burden test to determine the constitutionality of several state (and federal) restrictions on abortions. For example, in 1997, the Court upheld a Montana restriction on the performance of abortions to licensed physicians on the basis that it did not place a

9 Id.
10 Id. at 153.
11 Id. at 154.
12 Id. at 164–65.
13 Id. at 165.
15 Id. at 844–45.
16 Id. at 846.
17 Id.
18 Id.
19 Id.
“substantial obstacle” in a woman’s path to obtaining an abortion.20 Similarly, in 2007, the Court held in Gonzales v. Carhart that Congress’s ban on partial-birth abortions did not impose an undue burden on the right to an abortion, and the Court therefore upheld the law.21 Justice Kennedy, writing for the majority, argued that laws “need not give abortion doctors unfettered choice in the course of their medical practice.”22 Accordingly, the government may restrict various methods with which abortions are performed, so long as they do not impose an undue burden on the women seeking them.23 Each of these cases—Casey included—demonstrate the Court’s willingness to accept as constitutional various types of restrictions placed on the right to an abortion including: requiring that every abortion be performed by a licensed physician; prohibiting the partial-birth method of abortion; requiring twenty-four to seventy-two hour waiting periods after a consultation before performing an abortion; mandating an ultrasound image screen before an abortion; and many others. Restrictions may be constitutional so long as they have a less-than-tenuous relationship with the government’s “legitimate and substantial interest in preserving and promoting fetal life.”24

Although the Court has upheld numerous abortion restrictions, it has notably invalidated others. As recently as 2016, the Court struck down two provisions of a Texas bill for violating Casey’s undue burden standard in Whole Woman’s Health v. Hellerstedt.25 One of the provisions required admitting privileges to a hospital for all physicians performing abortions, and the other required that every abortion facility meet the minimum standards that Texas law has mandated for “ambulatory surgical centers.” The Court held that the state could not demonstrate persuasively that either requirement provided any actual health benefits for women, yet both requirements placed a substantial obstacle and undue burden in the path of women in Texas seeking abortions.26 With this case, the Court established that although the government may be able to demonstrate that some laws targeting abortion access may pass constitutional muster, others will be handedly struck down on the basis of Roe, Casey, and their undue burden progeny.

II. CURRENT STATE LEGISLATION

Although the Court continues to uphold Casey, following the recent appointments of two conservative associate justices, pro-life lobbyists and politicians have sensed the tides may be changing. Previously, states passed regulations known as “TRAP laws,” or Targeted Regulation of Abortion Providers, to push the boundaries of precedence and reduce the number of abortions that women may receive within their state lines.27 These TRAP laws are of the sort at issue in Gonzales and Hellersted: particular restrictions placed on abortion-

---

22 Id. at 163.
23 Id. at 168.
24 Id. at 145.
26 Id. at 2318.
27 Gordon, supra note 1.
providing doctors or health clinics that may or may not satisfy the undue burden test depending on the state’s evidence and the Court’s balancing test of the burden placed on women. These laws represent a way to circumvent Roe and Casey’s constitutional protections, yet still create meaningful hardships for women seeking abortions. Now, in contrast, states have started to pass outright bans on abortions as early as zero weeks from a woman’s last menstrual period with no exceptions for rape or incest.\(^{28}\) In 2019, Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Ohio, and Utah passed bans on abortions before viability.\(^{29}\) Each of these laws are in direct conflict with the Court’s precedent set in Roe and Casey.

Understandably, lawmakers have described these recent abortion laws as efforts to overturn Roe.\(^{30}\) Alabama’s Representative Terri Collins, sponsor of the most restrictive ban to date, has said that she “designed the bill to be as strict as possible, including no exceptions for rape or incest, so that it would serve as a prime challenge” to the Court’s most renowned abortion ruling.\(^{31}\) The drafters of the Missouri law, which bans abortions after eight weeks following the last menstrual period (before many women know they are pregnant), took a different approach.\(^{32}\) State Representative Nick Schroer has said that he designed the bill with the goal of “withstanding judicial challenges, not causing them.”\(^{33}\) Accordingly, the legislation has included a first-of-its-kind “ladder” approach, designed to take effect if the eight-week ban is struck down in court, banning abortion at fourteen, eighteen, or twenty weeks should each preceding time frame fail judicial review.\(^{34}\) Schroer claims that the ladder approach will “allow our goal of saving lives to remain intact if a portion of the legislation does not.”\(^{35}\) Unfortunately for supporters of Missouri’s bill, on August 27, 2019, Senior Judge Howard F. Sachs of the Federal District Court in Kansas City blocked the state from enforcing the ban.\(^{36}\) In his ruling, Judge Sachs “criticized lawmakers ‘hostility’ to Supreme Court precedent on abortion,” and noted that the “eight-week ban stood little chance of prevailing.”\(^{37}\) He also blocked the fourteen, eighteen, and twenty week bans, thereby refuting the supposed creativity of the ladder approach.\(^{38}\) However, the portions of the law banning abortions motivated by race, sex, or a diagnosis of Down syndrome were upheld.\(^{39}\) Lastly, Judge Sachs reinforced the Court’s precedent that “neither legislative or judicial limits on abortion can be measured by specific weeks . . . instead, ‘viability’ is the sole test for a State’s authority to

\(^{28}\) Id.
\(^{29}\) Id.
\(^{31}\) Id.
\(^{32}\) Id.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Id.
\(^{37}\) Id.
\(^{38}\) Id.
\(^{39}\) Id.
prohibit abortions where there is no maternal health issue.”

No doubt the state of Missouri will be seeking to appeal the decision in the upcoming weeks.

III. POTENTIAL EFFECT OF THE BANS

Despite the recent effort by state legislators, not a single abortion ban before twenty weeks is currently in effect in the United States. Still, a number of states are considering similar legislation in the future even as these laws are blocked by the federal courts. Eric Johnston, president of the Alabama Pro-Life Coalition, revealed to NPR in an interview: “We want to stop abortion of unborn children. And the only way we can do that is to go back and revisit the Roe decision.”

Interviews like these uncover the striking reality that state legislatures no longer wish to fashion restrictions, like TRAP laws, around the requirements set in Roe and Casey. Instead, they ask the Court to reconsider decades worth of precedent and hold that the decision of whether or not to have an abortion is no longer a constitutionally protected right. As these laws are enjoined by federal courts and the lengthy appeal process begins, the Guttmacher Institute reports: “The overall result is a patchwork of state limitations on abortion throughout pregnancy that leaves many women unable to receive the care they need.”

As this period of uncertainty continues, several states have started to progressively pass legislation in the other direction to preempt the possible scenario in which the Court overturns its precedent. New York, Vermont, and Illinois have passed laws this year that affirm the legal right to an abortion even if the Court should hold that states may ban the procedure prior to viability. A more gruesome reality faces the statistic that suggests an upward trend in women trying to self-induce abortions via purchasing a drug online. A Guttmacher report shows that in 2017, 18% of nonhospital facilities said they “treated at least one person for an attempted-self abortion,” an uptick from 12% in 2014. Although most doctors believe that women who self-manage an abortion are unlikely to face “serious medical concerns” so long as they have adequate information regarding the regimen, medical professionals do voice concerns regarding the unknown quality and labeling of online drugs. Another obvious concern is legal in nature: abortion-rights advocates worry that women who self-induce an abortion will face prosecution for violating the various restrictions and bans. Indeed, the only certain

40 North, supra note 30.
41 Gordon, supra note 1.
42 Id.
43 Id.
44 Guttmacher Report, supra note 2.
45 Gordon, supra note 1.
46 Id.
48 Id.
49 Id.
50 Id.
consensus that doctors, advocates, and attorneys have reached during this transition period is uncertainty.

CONCLUSION

Only time will tell what the future holds for these laws and the Court’s holdings in Roe and Casey. Anti-abortion as well as pro-choice camps both wait with bated breath as these outright bans make their way through the judicial system. If these laws are upheld, clinics are likely to close by the handful. In the event that the Court overturns Roe and Casey, the next phase of the battle over abortion rights will be “focused less on clinics and more on the patients who seek—or self-induce—abortions.” If the Court upholds their decades-long precedent, then the laws will be permanently enjoined and the more conservative states will be forced into their old habits: TRAP laws and finding ways to work around Casey’s undue burden test.

**Update**

Since the final drafting of this Article, the U.S. Supreme Court agreed to hear a challenge to a Louisiana abortion law during the upcoming term. The case, June Medical Services v. Gee, involves a law requiring that doctors performing abortions have admitting privileges at nearby hospitals. Challengers to the law argue that it would leave the entire state of Louisiana with only one doctor in one clinic with the ability to perform abortions. The law is nearly identical to the Texas statute at issue in Hellerstedt, a decision the Court rendered in just 2016. Because of the similarities, scholars argue that the “case is very likely to yield an unusually telling decision” and has the potential to completely reshape the constitutional principles governing abortion rights.

51 McCammon, supra note 47.
52 Id.
54 Id.
55 Id.
56 Id.