Will Roe Reach 50?

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Roe v. Wade

Political machinations in the guise of Constitutional Analysis

- The district court in Roe declared that the Texas abortion statute was unconstitutionally vague and violated the Ninth Amendment of the federal constitution. Notwithstanding that decision, the court declined to enjoin enforcement of the law based on the federal doctrine of abstention, which was understood at the time to be limited to cases involving violation of First Amendment rights.
- Appellate procedure rules at the time did not allow direct appeals to the Supreme Court from the grant or denial of declaratory relief alone. Therefore the question presented to the Supreme Court by Jane Roe, and intervening Texas doctor, James Hallford, was whether the trial court erred by denying injunctive relief based on Supreme Court rulings defining the perimeters of the abstention doctrine).

Roe v. Wade
Procedural irregularity

- The Court provided some clarification of the law regarding abstention by federal courts on February 23, 1971, with its opinion in *Younger v. Harris*. Based on that ruling and prior opinions defining the scope of direct review, the Court could have (and Texas argued should have) declined Roe's appeal at this point and awaited resolution of the merits by the Fifth Circuit.
- Instead on April 22, 1971, the Justices voted to hear both *Roe* and *Doe v. Bolton*. The procedural peculiarity is acknowledge and dismissed by the majority in *Roe* in the first few pages of the opinion.
- Many scholars attribute the decision to disregard the appellate rules to the desire of Justices Brennan, Douglas, Marshall, and Stewart to legalize abortion. Their ability to do so was facilitated by the unexpected retirements of Justices Harlan and Black, resulting in a unique 15- week period between September 1971 and January 1972, when the Court was short-handed because of two vacancies, and a 4-3 block of Justices – Justices Douglas, Brennan, Stewart, and Marshall- pushed to eliminate state abortion prohibitions.

Planned Parenthood v. Casey
Kennedy switches sides

"Once, before Justice Kennedy joined the Court, he had called *Roe* the "*Dred Scott* of our time," a reference to the infamous 1857 ruling that sanctioned slavery and helped spark the Civil War. . . . Kennedy thought there was nobility in judging; saving *Roe* would show the world that the justices were something more than mere pols. A statesmanlike compromise suited both Kennedy's politics and his conception of the role of the judge.

So Kennedy signed on with Souter and O'Connor. His was the most dramatic switch of the three, because it had been only three years since he voted with Rehnquist in Webster, an opinion that advocated overruling Roe. Even more dramatically, Kennedy had clearly supported Rehnquist at the conference in *Casey*."

[At the conclusion of the initial conference on the case, Rehnquist believing he had he support of Justices White, Scalia, Thomas, and Kennedy "assigned *Casey* to himself, intending to write an opinion that allowed states almost a free hand in regulating abortion. As a practical matter, Roe would be overturned, but not in so many words."]

Judicial Appointments Matter

- Of the three most recently appointed Supreme Court Justices, two have been subjected to religious bigotry and unproven and incendiary sexual accusations during the confirmations hearings.

Efforts to Overturn *Roe*

Prolife or Anti-Roe Constitutional Amendments & Efforts

- After *Roe* and *Doe* were decided in January 1973, more than 330 constitutional amendments have been introduced in Congress to overturn the decisions, including 37 US House Resolutions sponsored by members of the Minnesota Congressional delegations between 1973 and 1999.
- The amendments that have been proposed have been classified into six types:
  - (1) **Life Protective Amendments** provide explicit protection for "unborn persons."
  - (2) **Paramount Amendments** declare the right to life for "each human being from the moment of fertilization" is the paramount constitutional right in the Constitution.
  - (3) **Prohibition Amendments** directly prohibit the performance of abortions in the US.

- (4) **Personhood Restoration Amendments** declare that every human being shall be deemed, from the moment of fertilization, a person under the Constitution.
- (5) **Reversal (or Abortion Neutrality) Amendments** simply state "A right to abortion is not secured by this Constitution.
- (6) **State Legislative Amendments** recognize a constitutional right of states to legislate on the topic of abortion including its prohibition, regulation, or support.

- For the first ten years after *Roe*, Congress actively considered many of these amendments, but only one made it to a floor vote.
- On June 28, 1983, after two days of debate, the U.S. Senate failed to pass the Hatch-Eagleton HLFA (S. J. Res. 3). The proposal was an abortion neutrality amendment. It failed to pass by a vote of 49 - yes, 50 - no 1 – present. A two- thirds vote of those present was required for passage.

Presidential and Congressional Briefs

- Between 1983 to 1992, the US Solicitor, on behalf of the President of the United States, asked the Supreme Court to overturn Roe four times and was rejected in *Thornburgh v. ACOG* (1986), *Webster v. Reprod. Health Services*(1989), *Hodgson v. Minnesota* (1990) and *Planned Parenthood v. Casey* (1992).
- In the most recent US Supreme Court case on abortion, *June Medical v. Russo* (2020), 207 members of Congress filed an amicus brief requesting that the Court uphold the Louisiana statute at issue and "take up the issue of whether Roe and Casey should be reconsidered, and if appropriate, overruled."

Statement of President Biden and the Vice-President on the 48th Anniversary of *Roe v. Wade*

"In the past four years, reproductive health, including the right to choose, has been under relentless and extreme attack. We are deeply committed to making sure everyone has access to care – including reproductive health care – regardless of income, race, zip code, health insurance status, or immigration status. The Biden-Harris Administration is committed to codifying Roe v. Wade and appointing judges that respect foundational precedents like Roe."

- https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/22/statement-from-president-biden-and-vice-president-harris-on-the-48th-anniversary-of-roe-v-wade/

Vehicles to Overturn Roe

- Anytime the issue of abortion is before the Court, that case could be used as a vehicle to evaluate the legitimacy of *Roe* and *Casey's* legal analysis.
- Several commentators have identified various cases or state laws that could be used to overrule Roe. In October immediately before the 2020 Presidential Election, the Kaiser Family Foundation, a long-time proponent of abortion rights, published *"Abortion at SCOTUS: A Review of Potential Cases this Term and Possible Rulings."* It identified two cases as potential occasions for review.

Vehicles to Overturn Roe

- *FDA v. ACOG*, currently before the U.S. Court of Appeal for the 4th Circuit, involves a challenged to the FDA's requirement of in-person dispensation requirements for the drug mifepristone used to induce a medical abortion during the pendency of the public health emergency. See SCOTUSBLOG.COM for updates and court filings.
- *Dobbs v. Jackson Women's Health Organization*, involves an abortion provider's challenge to Mississippi's 15-week abortion ban, similar to the gestational limit of 14 weeks or earlier that France, Italy, Germany, Spain, Norway, Switzerland, and lots of other European countries have. A petition for certiorari is before the Supreme Court since June 15, 2020 and has been distributed for conference review 8 times, most recently for the Feb. 22, 2021 conference. See SCOTUSBLOG.COM for updates.

Federal Legislation to Codify & Expand *Roe*

The Equality Act & the Women's Health Protection Act

The "Equality Act"

- The followings bill provisions are relevant.
  - 1. Public accommodations. The Equality Act (H.R. 5) forbids discrimination based on "sex," including "sexual orientation and gender identity," in places of "public accommodation." H.R. 5, § 3(a)(1). The bill defines "public accommodation" to include "any establishment that provides … health care … services." Id. § 3(a)(4). The term "establishment" is not limited to physical facilities and places. Id. § 3(c). The term "sex" includes "pregnancy, childbirth, or a related medical condition." Id. § 9(2). The bill also states that "pregnancy, childbirth, or a related medical condition shall not receive less favorable treatment than other physical conditions." Id.
  - 2. Federally-funded programs and activities. The bill also forbids discrimination based on "sex," including "sexual orientation and gender identity," in any program or activity receiving federal financial assistance. Id. § 6. The term "sex" is again defined to include "pregnancy, childbirth, or a related medical condition," and the listed items "shall not receive less favorable treatment than other physical conditions." Id. § 9(2).

Absence of abortion neutrality language

- The United States Conference of Catholic Bishops provides the following analysis of the Equality Act:
  - For years it has been an accepted predicate in federal bill drafting that laws forbidding discrimination based on "sex" must have abortion-neutral language to blunt any inference that nondiscrimination requires the provision or coverage of abortion. Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, are illustrative. Both titles forbid discrimination based on sex, and both titles have abortion neutral amendments to mitigate or foreclose the claim that this prohibition requires a covered entity to provide or cover abortion.
    - 1 The fact that abortion-neutral language appears in Title VII and Title IX shows that Congress knows how to exclude abortion when it wants to. The failure to include an abortion-neutral amendment in the Equality Act therefore suggests a legislative intent to require the provision of abortion . . .
  - The same reasoning—and the same conclusion—applies to the bill's non-discrimination provisions as applicable to federally-funded programs and activities. Indeed, abortion advocates themselves are currently reading the federal funding provisions of the bill to permit women to successfully challenge the denial of abortion.
- https://www.usccb.org/equality-act#tab--backgrounders

H.R. 2975 Women's Health Protection Act of 2019

The Congressional Research Service summarized the bill (and its Senate companion) in this way:

This bill prohibits state or local governments from imposing certain restrictions on access to abortion services. Specifically, state or local government may not require

- unnecessary tests or procedures in connection with the provision of abortion services [e.g. ultrasound requirements or physical exams before prescribing abortion medication (see *Food and Drug Administration v. American College of Obstetricians and Gynecologists*, 592 U.S. ___ 2021 granting stay to lower court order enjoining laws requiring physical exams)],
- the same health care provider who provides abortion services to perform such tests or procedures,
- providers to offer medically inaccurate information to patients before or during abortion services [e.g. abortion reversal, see AMA v. Stenehjem, 412 F. Supp. 3d 1134 (D.N.D. 2019) (on appeal)].
- providers to refrain from prescribing certain drugs,
- certain hospital facility transfer agreements,
- one or more medically unnecessary in-person visits, or
- patients to disclose the reason for seeking abortion services.

H.R. 2975 Women's Health Protection Act of 2019

- The Congressional Research Service continues:
  - This bill prohibits state or local governments from imposing certain restrictions on access to abortion The bill also prohibits limitations or requirements that both single out and impede access to abortion services based on a number of factors (e.g., restrictions that are reasonably likely to decrease the availability of abortion services in a state). A state or local government also may not prohibit abortions prior to fetal viability nor prohibit abortions after fetal viability in cases where the health care provider determines that continuing the pregnancy poses a risk to the patient's life or health.

  - Additionally, the Department of Justice, individuals, or health care providers may bring a lawsuit to **prospectively** enjoin a limitation or restriction that is prohibited by this bill. **The bill further requires the government defending such a limitation or restriction to show that (1) it significantly advances the safety of abortion services or patient health, and (2) such advancement cannot be met by a less-restrictive measure.**

Ratification of 1972 Equal Rights Amendment

Proposed by Congress in 1972 the operative provisions of the ERA state:

"SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"SEC. 3. This amendment shall take effect two years after the date of ratification.

Time for ratification

The preamble of the Joint Resolution provided

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress . . .

This language required ratification by three-quarters of the states on or before until March 22, 1979.

Abortion & Ratification of ERA

- When the ERA was reintroduced into the U.S. House of Representatives in 1983, it followed word for word the text of the losing 1972 ERA.
- During the House hearing, Congressman James Sensenbrenner (R-WI) cited the legal analysis from the Library of Congress' American Law Division on the impact of the proposed ERA on the legality of abortion: "… the conclusion indicated that sex is a suspect classification and the Hyde amendment would be overturned under strict scrutiny by the United States Supreme Court," Sensenbrenner said.

Abortion & Ratification of ERA

- **Accordingly, Rep. Sensenbrenner offered an amendment to the ERA to make it "abortion neutral." ERA advocates voted no and the Sensenbrenner amendment lost.**
- On the other side of the Capitol, Senator Orrin Hatch (R-UT) asked Sen. Paul Tsongas (D-MA) what he thought would be the effect on the legality of abortion and the tax funding of abortion (Hyde Amendment) of his identical, reintroduced ERA. Sen. Tsongas answered that federal courts would make those decisions.

Judicial Interpretation of State ERAs

- State and federal courts have concluded that state ERAs or similar equal treatment provisions of state constitutions require tax-paid abortions in Connecticut, Alaska, Arizona, Indiana, Minnesota, New Jersey, New Mexico, and Colorado.

S.J.Res.1 — 117th Congress (2021-2022)

- Introduced by Sen. Benjamin Cardin (D-MD) on January 22, 2021. Read twice and referred to the Committee on the Judiciary.
- The text provides: Removing the deadline for the ratification of the equal rights amendment.

  That notwithstanding any time limit contained in House Joint Resolution 208, 92nd Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the Constitution whenever ratified by the legislatures of three-fourths of the several States.

House Joint Resolution 17 (H.J. Res. 17)

- Lead sponsor: Rep. Jackie Speier (D-CA)
  Introduced January 21, 2021 by Rep. Jackie Speier (D_CA).
  Referred to the House Committee on the Judiciary.
- The text provides:

  Removing the deadline for the ratification of the equal rights amendment.

  That notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the United States Constitution whenever ratified by the legislatures of three-fourths of the several States

Questions?