Introduction

Reason for framing the discussion in terms of when Roe is overruled, not if it is overruled.

I. When will Roe be overruled and how will it be overruled?

where does the Court stand on Roe v. Wade?

evaluation of the present justices
prospects for further changes

what kind of case would be necessary to result in an overruling decision?

comparison of prohibitions vs. regulations

prior reaffirmations of Roe (is Roe a “super, duper precedent”?)

City of Akron v. Akron Center for Reproductive Rights (1983)
Thornburgh v. ACOG (1986)
Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

dangers in a premature challenge to Roe

fourth reaffirmation of Roe
further politicization of confirmation hearings
risk of turning a dissent into a concurrence

Justice Stevens, Danforth (1976), Bellotti (1979)

II. What did Roe v. Wade hold and how was it changed by Planned Parenthood v. Casey?

unborn child not a “person” as that term is used in § 1 of the Fourteenth Amendment
pregnant woman has a fundamental right to obtain an abortion (privacy theory)
(strict scrutiny standard of review)
woman’s right is not absolute, but must be balanced against countervailing state interests in maternal health and the “potential life” of the unborn child

trimester scheme adopted to balance the woman’s right against state interests

no state interference in first trimester (other than prohibiting non-physicians from performing abortion)
regulations in the interest of maternal health allowed after first trimester regulations, and even prohibitions, allowed in the interest of “potential life” of unborn child after second trimester when child is “viable,” except if abortion necessary to preserve woman’s life or health
modification of Roe in Casey
abortion no longer referred to as a “fundamental” right
standard of review changed from “strict scrutiny” to “undue burden”
statute is unconstitutional if its purpose or effect is to impose
a “substantial obstacle” to women seeking pre-viability abortions
(giving States greater authority to regulate abortion, e.g., detailed
informed consent, short waiting periods for adults, as well as minors)
abandonment of the trimester scheme
reaffirmation of the viability rule, regardless of the reason for an abortion,
States may not prohibit abortion before viability

III. What are the legal implications of a decision overruling Roe?

pre-Roe abortion statutes fell into five categories

abortion legal only to save the life of the mother (thirty States):

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abortion legal to preserve the mother’s life, physical or mental health, in cases where
pregnancy resulted from act of rape or (except in Maryland) incest, and (except in California)
where child would likely be born with a grave physical or mental defect (precise wording of
permissible reasons for performing abortions differed from State to State) (thirteen States):

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abortion legal for any reason, at least until late in pregnancy (“abortion-on-demand”)
four States:

Alaska (up to viability)
Hawaii (up to viability, and possibly after viability as well)
New York (twenty-four weeks)
Washington (up to four lunar months)
abortion legal for undefined reasons of health or for physical or mental health (two States):

Alabama (by statute) Massachusetts (by court interpretation)*

abortion legal to save the life of the mother or to end a pregnancy resulting from an act of rape (one State):

Mississippi

Roe v. Wade effectively overturned the abortion laws of all fifty States and made abortion legal for any reason before viability and, arguably, for virtually any reason after viability, although the Court has not yet decided how broad or narrow is the scope of the authority of the States to prohibit post-viability abortions. Because Roe made abortion legal throughout the country, it is natural to believe that a decision overruling Roe would make abortion illegal throughout the country. But, of course, that is not the case. The Supreme Court does not decide what conduct is illegal, only what conduct can be made illegal.

More than two-thirds of the States (thirty-six States) have repealed their pre-Roe statutes, which would not be revived or reinstated by a decision overruling Roe v. Wade:

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Four of those States, however, have enacted post-Roe statutes that would make most abortions illegal upon the overruling of Roe:

Louisiana (“trigger” statute)
North Dakota (“trigger” statute)
Rhode Island (post-Roe prohibition)
South Dakota (“trigger” statute)

* The pre-Roe Massachusetts abortion statute, which has not been repealed, prohibited “unlawful” abortion, without defining what abortions were “lawful.” In a series of pre-Roe decisions, the statute was interpreted to allow an abortion if, in the good faith judgment of the physician, the procedure was necessary to preserve the pregnant woman’s life or her physical or mental health. See Kudish v. Board of Registration in Medicine, 248 N.E.2d 264, 265 (Mass. 1969); Commonwealth v. Brunelle, 171 N.E.2d 850, 851-52 (Mass. 1961); Commonwealth v. Wheeler, 53 N.E.2d 4, 5 (1944).
slightly less than one-third of the States have not repealed their pre-\textit{Roe} statutes (fourteen States):

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the statutes in seven of these States would not affect the legality of most abortions:

- Model Penal Code States (life-of-the-mother, physical or mental health, rape, incest, severe physical or mental disability of unborn child (two States):
  - Delaware
  - New Mexico (probably unenforceable on state constitutional grounds, as well)

- abortion legal for any reason, at least until late in pregnancy (two States):
  - Hawaii (any time)
  - New York (twenty-four weeks)

- abortion legal for undefined reasons of health or for physical or mental health (two States):
  - Alabama (by statute)
  - Massachusetts (by court interpretation)

- pre-\textit{Roe} statute and “trigger” statute prohibiting abortion except to save the life of the mother or to end a pregnancy resulting from rape (one State):
  - Mississippi (unenforceable on state constitutional grounds)

seven States with unrepealed pre-\textit{Roe} statutes that prohibit all abortions (Arkansas) or all abortions except those necessary to save the life of the mother:

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in sum, no more than eleven States would have enforceable laws on the books prohibiting most or all abortions upon the overruling of \textit{Roe} – the seven States just named, along with the four discussed earlier – Louisiana, North Dakota, Rhode Island and South Dakota. Those eleven States account for only 20% of the population of the United States. In the other thirty-nine States, where 80% of the population lives, abortion would be legal for most or all reasons throughout pregnancy. Even in those eleven States, however, there may be some doubt as to whether all those statutes would be enforceable.
implied repeal, explanation of doctrine and its disfavored status in the law

already rejected in Michigan and Wisconsin

State v. Black, 526 N.W.2d 132, 135, n. 2 (Wis. 1994)

applied (but erroneously) by Fifth Circuit Court of Appeals to Texas statutes

McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004)

not addressed so far in Arizona, Arkansas, Oklahoma and West Virginia

state constitutional challenges

state constitutions made be interpreted in ways that are independent of the federal constitution and provide broader rights

state supreme courts recognizing a state right to abortion that is separate from, and independent of, the federal right to abortion (nine state supreme courts)


Florida: In re T.W., 531 So.2d 1186 (Fla. 1989); North Florida Women’s Health & Counseling Services, Inc. v. State of Florida, 866 So.3d 612 (Fla. 2003)


Minnesota: Women of the State of Minnesota v. Gomez, 542 N.W.2d 17 (Minn, 1995)

Mississippi: Pro Choice Mississippi v. Fordice, 716 So.3d 645 (Miss. 1998)


New Jersey: Right to Choose v. Byrne, 450 A.3d 925 (N.J. 1982)

a tenth State has a pre-\textit{Roe} decision state supreme court decision that appears to recognize a right to abortion, but it is unclear whether the decision rests on state or federal law (or both):

\textbf{Vermont:} \textit{Beacham v. Leahy}, 287 A.2d 836 (Vt. 1972)

a state supreme court in an eleventh State has struck down restrictions on public funding of abortion on the basis of the state Equal Rights Amendment, but without deciding whether there is a state right to abortion; decision, however, would likely require invalidation of any meaningful abortion restriction the state legislature might enact

\textbf{New Mexico:} \textit{New Mexico Right to Choose/NARAL v. Johnson}, 975 P.2d 841 (N.M. 1998)

ongoing state constitutional challenges to abortion regulation (two States):

\begin{itemize}
  \item Georgia
  \item Kansas
  \item Oklahoma
\end{itemize}

express repeal

States that might consider enacting prohibitions when \textit{Roe} is overruled:

\begin{itemize}
  \item Idaho
  \item Kansas
  \item Nebraska
  \item Pennsylvania
  \item Utah
  \item Indiana
  \item Kentucky
  \item North Carolina
  \item South Carolina
  \item Wyoming
  \item Iowa
  \item Missouri
  \item Ohio
  \item Tennessee
\end{itemize}

IV. Regulatory Alternatives to Prohibitions

regulatory measures, \textit{e.g.}, parental consent or notice without a judicial bypass option; spousal consent or notice; more detailed informed consent (or counseling by third party entities not associated with abortion clinic); longer waiting periods; procedure bans

\textit{Conclusion}

It is hard to say when \textit{Roe v. Wade} will be overruled, but it easy to say that the overruling of \textit{Roe} will not have the draconian consequences that advocates of legal abortion claim that it would. Abortion would remain legal throughout most of the country throughout most of pregnancy. Even in States that have prohibitions on the books, such prohibitions would be challenged on the basis that they have been repealed by implication with the enactment of statutes regulating abortion, that their enforcement is precluded on state constitutional grounds and, failing either of those gambits, that they should be expressly repealed.