
FEDERAL ABORTION RIGHTS UNDER A CONSERVATIVE UNITED STATES SUPREME COURT

*M. Akram Faizer**

TABLE OF CONTENTS

Table of Contents.....	101
I. Introduction.....	101
II. <i>Roe, Casey, and Whole Women’s Health</i>	102
III. Abortion Rights Under a More Conservative Court.....	106
IV. Conclusion.....	109

I. INTRODUCTION

In the 2019 decision *Box v. Planned Parenthood of Indiana*,¹ a conservative U.S. Supreme Court declined to review a provision of an Indiana abortion law, which was invalidated by a lower court and purported to bar the knowing provision of sex-selective, race-selective, or disability-selective abortions.² In the view of the Court’s clear conservative majority and the fact that only four of the nine justices were needed for review,³ the Court’s declination evidences at least two of the Court’s five conservatives deliberately avoided revisiting the abortion-rights issue.⁴ As set forth more fully below, this has to do with protecting both the Court’s institutional legitimacy and the conservative movement in today’s hyperpartisan political climate.

* Professor of Law, Lincoln Memorial University Duncan School of Law, Knoxville, Tennessee. Professor Faizer would very much like to thank Ann Walsh Long, LMU DSOL’s Head of Research and Digital Collections/Assistant Professor of Law and the Drake Law Review for preparing this piece for publication. He would also like to thank his wife, Melanie Faizer, for all her support and encouragement.

1. *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1781 (2019).

2. *Id.* at 1782.

3. Supreme Court custom provides four justices are needed to grant a writ of certiorari to hear an appeal. *Supreme Court Procedures*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/U7GX-YBJR>].

4. *See Box*, 139 S. Ct. at 1781.

II. ROE, CASEY, AND WHOLE WOMEN'S HEALTH

The U.S. Supreme Court established nationwide abortion rights in *Roe v. Wade*,⁵ a 7–2 decision issued in 1973 that broadly interpreted the Fourteenth Amendment's Due Process Clause to conclude all women have a right to an abortion.⁶ The decision implemented a trimester approach to evaluating abortion rights; no woman could be denied an abortion in her pregnancy's first trimester, with a maternal-life-and-health exception applying to states' abortion restrictions in the pregnancy's second and third trimesters.⁷ Though benevolently motivated to protect abortion doctors from inconsistent state abortion restrictions, *Roe* comprehensively and legislatively addressed abortion legality, which effectively foreclosed the ability of state legislatures to further address the abortion issue legislatively.⁸ Although there is a dispute as to whether there was a nationwide liberalizing trend in abortion restrictions at the time of *Roe*, the decision deprived U.S. voters and legislators the opportunity to arrive at consensus-based abortion laws and facilitated a partisan-motivated, politically monographic backlash against abortion rights that partly explains the departure of white, working-class individuals from the Democratic Party in the late 1970s.⁹ Indeed, polarization on the abortion issue facilitated the election of Republican Presidents who appointed seven consecutive Supreme Court justices after *Roe*, which means 11 consecutive Republican appointments between the years 1969 through 1992.¹⁰

5. *Roe v. Wade*, 410 U.S. 113 (1973).

6. *See id.* at 153.

7. *Id.* at 164–65.

8. *See id.*

9. *See* Lincoln Caplan, *Ginsburg's Roe v. Wade Blind Spot*, TAKING NOTE: THE EDITORIAL PAGE EDITOR'S BLOG (May 13, 2013, 2:58 PM), <http://takingnote.blogs.nytimes.com/2013/05/13/ginsburgs-roe-v-wade-blindspot>. Indeed, in the 1960s, conservative states such as Georgia, Mississippi, and Kansas passed laws legalizing abortion. David Brooks, *The Abortion Memo*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/opinion/abortion-democrats-compromise.html>. In 1971, the liberal U.S. Senator Ted Kennedy declared his opposition to abortion. *Id.*; *see also* Linda Greenhouse & Reva B. Siegel, *Before (And After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2047 (2011) (concluding the political backlash against abortion rights preceded *Roe* and was explained by political mobilization based on political realignment); Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, 71 WASH. & LEE L. REV. 969, 972–75 (2014).

10. Presidents Gerald Ford, Ronald Reagan, and George H.W. Bush appointed Supreme Court justices John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, William Rehnquist (as Chief Justice from Associate Justice), Anthony Kennedy, David

The political and legal cultures were therefore stunned, and conservatives greatly disappointed, by the Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹¹ which amended *Roe* by replacing the trimester approach governing abortion procedures with a more ambiguous fetal-viability framework.¹² *Casey*, moreover, replaced *Roe*'s strict scrutiny framework for evaluating abortion restrictions with a looser undue burden standard, allowing state governments to implement broad regulations on abortion providers, including waiting periods, informed-consent laws, and the disallowance of public funding.¹³ Rather than provide a forthright, jurisprudential defense of nationwide abortion rights, the *Casey* plurality opinion, coauthored by Justices O'Connor, Kennedy, and Souter, focused on stare decisis, or the principal of following established precedent, as its rationale for affirming *Roe*.¹⁴

Exploitation of *Casey*'s failure to return the abortion issue to the state legislative process facilitated continued political polarization of the abortion debate and, based on the laxity of the undue burden standard, undermined abortion access for poor women in conservative states by measures designed to make abortion more elusive but legal under the undue burden approach.¹⁵

This process of ratcheting up abortion restrictions at the state level

Souter, and Clarence Thomas. No Supreme Court vacancy arose during President Jimmy Carter's term in office. *See Members of the Supreme Court of the United States*, SUP. CT. U.S., <https://www.supremecourt.gov/about/members.aspx> [<https://perma.cc/KJZ9-EJ6U>].

11. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

12. *Casey* concluded all women have a previability right to an abortion that states cannot unduly burden, while *Roe* had concluded all women have first-trimester abortion rights that cannot be restricted. *Compare id.* at 846, *with Roe*, 410 U.S. at 163.

13. *Casey* concluded wait times and informed-consent laws are constitutional. *Casey*, 505 U.S. at 883, 886. Public funding, which is disallowed by the federal Hyde Amendment, was found constitutional in *Harris v. McRae*, 448 U.S. 297, 326 (1980).

14. *Casey*, 505 U.S. at 854–55.

15. Measures implemented by conservative state legislatures include parental-consent laws, longer waiting periods, intrusive informed-consent laws, the requirement of transvaginal ultrasounds, admitting-privileges requirements at public hospitals for abortion doctors, and the requirement that abortion clinics be turned into ambulatory surgical centers. *See* Anne Godlasky, Jim Sergent & Nicquel Terry Ellis, *Where Is Abortion Legal? Everywhere. But...*, USA TODAY (May 24, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/05/15/abortion-law-map-interactive-roe-v-wade-heartbeat-bills-pro-life-pro-choice-alabama-ohio-georgia/3678225002/>.

resulted in *Whole Women's Health v. Hellerstedt*,¹⁶ which involved a federal court's review of Texas House Bill (HB) 2, which required all OB-GYNs performing abortions at abortion clinics within the state to have admitting privileges at hospitals situated no further than 30 miles from the clinic in question; and required abortion clinics to include a fully equipped surgical center to ostensibly deal with complications that might arise during an abortion procedure.¹⁷

The Court concluded, in a 5–3 majority decision authored by Justice Stephen Breyer¹⁸ and joined by the conservative-leaning Justice Kennedy, that the two provisions at issue violated *Casey's* undue burden standard by placing a substantial obstacle to a woman's due-process-based abortion rights.¹⁹ The Court expanded *Casey's* definition of abortion rights by concluding the Fifth Circuit committed reversible error in subjecting abortion regulations to rational basis as opposed to heightened scrutiny review.²⁰

The Court also concluded the admitting-privileges requirement lacked any credentialing function and instead imposed an undue burden on abortion rights.²¹ This was supported by evidence that demonstrated the number of Texas clinics dropped in half from 40 to 20 since HB 2's passage²² largely because abortion doctors, who perform a relatively safe medical procedure, typically lack the ability to obtain admitting privileges at small community hospitals that condition these privileges based on annual patient admissions.²³

16. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

17. *See id.* at 2300.

18. Justice Scalia's sudden death in February 2016 created a court vacancy that the Republican majority in the U.S. Senate refused to fill before the November 2016 general election. *See* Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [<https://perma.cc/7E76-SBCJ>].

19. *Whole Woman's Health*, 136 S. Ct. at 2318.

20. *Id.* at 2309–10.

21. *Id.* at 2313.

22. *Id.* at 2312.

23. Brief of Amici Curiae Society of Hospital Medicine and Society of OB/GYN Hospitalists in Support of Petitioners at 9, *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), 2016 WL 74953, at * 9. I can only find the *number of annual patient admissions* language in the headnote, citing a Texas statute, V.T.C.A., § 171.0031, and that statute does not define *active admitting privileges*. The definition comes from

Texas law already imposes a host of health and safety requirements on abortion clinics,²⁴ and HB 2 added a new requirement that abortion facilities must meet the standards for an ambulatory surgical center under Texas law.²⁵ The Court invalidated this provision and noted the trial court's finding that the "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities"²⁶ because abortion complications seldom arise before the patient has left the facility.²⁷

Because abortion death rates tend to be very low²⁸ and Texas exempted other, more dangerous procedures such as colonoscopies and liposuctions from the surgical-center requirement, the Court concluded Texas's surgical-center requirement was not based on a legitimate concern to protect maternal health, but rather to impose a substantial obstacle on women seeking abortions by reducing the number of available abortion facilities.²⁹

The Court's decision in *Whole Woman's Health* effectively precluded state governments from exploiting rational basis review to enact laws of HB 2's type to implement obstacles to women seeking abortions.³⁰ It did this by

another case, *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbot*, 951 F. Supp. 2d 891, 900–01 (W.D. Tex. 2013), *rev'd in part*, 748 F. 3d 583 (5th Cir. 2014). "Each hospital's bylaws are unique, thereby causing variability in hospital-privilege application requirements, such as: physician residency, board certification, threshold number of surgical procedures, threshold numbers of annual hospital admissions, among others." *Id.*

24. *Whole Woman's Health*, 136 S. Ct. at 2314.

25. *Id.* The requirements include specifications on the size of the nursing staff, greater building dimensions and other building requirements, a full surgical suite with an operating room with a clear floor area of at least 240 square feet, a preoperative patient-holding room, a postoperative recovery suite, an advanced HVAC, particular piping, and extensive plumbing requirements. *Id.* at 2314–15.

26. *Id.* at 2315.

27. *Id.*

28. *Id.* The Court cited the fact that the total number of deaths from abortion in Texas was only five from the years 2001 to 2012—or about one every two years. *Id.* This, in turn, means the abortion death rate is only one per 120,000 to 144,000 abortions, which makes childbirth 14 times deadlier. *Id.*

29. *See id.* The evidence indicated colonoscopies and liposuctions have mortality rates that are 10 and 28 times higher, respectively, than abortions. *Id.*

30. *See id.* at 2309–10. The Court cited the trial court's conclusion that the surgical-center requirement places a substantial obstacle on women seeking abortions because it will reduce the number of available abortion facilities based on unrebutted trial-court testimony evidencing that existing clinics with surgical centers would have to quintuple

expanding *Casey* to conclude individual restrictions on abortion procedures must effectively satisfy heightened review under the undue burden standard first enunciated in *Casey*.³¹ The decision's 5–3 majority means it would remain in place regardless of who replaced Justice Scalia and, at the time, seemed to adumbrate stability in the area of abortion-rights jurisprudence because the broader political and legal culture expected former Secretary of State Hillary Clinton to defeat the then-likely Republican nominee, Donald Trump, and succeed President Barack Obama in the White House.

III. ABORTION RIGHTS UNDER A MORE CONSERVATIVE COURT

However, continued deep division on the issues of privacy and reproductive rights enabled U.S. Senate Majority Leader Mitch McConnell to deny the confirmation hearings of President Obama's Supreme Court nominee, Judge Merrick Garland, in advance of the 2016 general election and pave the way for President Trump's appointment of Justice Neil Gorsuch.³²

A dramatic opportunity to ideologically reshape the Court and revisit abortion rights was presented when Justice Kennedy, a Republican conservative and Reagan appointee who coauthored *Casey*, sided with the majority in *Whole Woman's Health*, and typically took a liberal position on social issues, resigned from the Court in June 2018.³³ President Trump's subsequent nomination of Kennedy's former law clerk, the conservative U.S. Court of Appeals Judge Brett Kavanaugh, threatened abortion-rights advocates by harkening an end to the Court's substantive due process jurisprudence.³⁴

Kavanaugh's appointment has definitively created a social-conservative majority on the Court, and abortion opponents have successfully lobbied state legislatures to enact intrusive abortion restrictions that are manifestly inconsistent with *Casey*'s undue burden standard, for the

their caseload to accommodate the demand for statewide abortions. *Id.*

31. *See id.*

32. *See* Brooks, *supra* note 9.

33. *See* Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html>.

34. *See* Corey Brettschneider, *Kavanaugh Must Answer the Abortion Question*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/opinion/abortion-kavanaugh-senate-hearing.html>.

purposes of forcing the Court to revisit the issue.³⁵ Examples include the following: Alabama's extreme and highly restrictive 2019 abortion law banning all abortions and criminalizing doctors who perform the procedure; Arkansas and Utah's enacted laws banning abortions 18 weeks into a pregnancy; and Georgia, Kentucky, Louisiana, Mississippi, Missouri, and Ohio's enacted fetal-heartbeat laws that effectively ban abortions from the moment a fetal heartbeat can be detected via ultrasound.³⁶ None of these laws have gone into effect because they either have delayed implementation dates or have been enjoined by lower federal courts.³⁷ At the same time, politicization of the issue has led many liberal-leaning blue states such as Illinois, Maine, Nevada, New York, Rhode Island, and Vermont to enact prophylactic measures making abortion rights fundamental under state law.³⁸

Both *Box*³⁹ and *June Medical Services, L.L.C. v. Gee*⁴⁰ resulted in denials of writs of certiorari to review provisions of Indiana and Louisiana's abortion laws, which were enjoined by lower federal courts and purported to implement more stringent abortion restrictions than countenanced by either *Casey* or *Whole Woman's Health*.⁴¹ In *Box*, the Court's refusal to review an enjoined Indiana abortion law that purported to bar the knowing provision of sex-selective, race-selective, or disability-selective abortions evidences at least two of the Court's five conservatives thought the case was not the proper moment to revisit the abortion issue.⁴² *June Medical*, which involved a hospital admitting-privileges requirement for abortion doctors similar to the Texas law invalidated in *Whole Woman's Health*, evidences for now, at least, the Court is unwilling to revisit *Whole Woman's Health*'s strict interpretation of *Casey*'s undue burden standard.⁴³

35. Susan Milligan, *A Guide to Abortion Laws by State*, U.S. NEWS (June 27, 2019), [usnews.com/news/best-states/articles/2019-06-27/a-guide-to-abortion-laws-by-state](https://perma.cc/R285-VEFC) [https://perma.cc/R285-VEFC].

36. *Id.*

37. *See id.*

38. *Id.*

39. *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780 (2019).

40. *June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 663 (2019) (mem.).

41. Compare *Box*, 139 S. Ct. at 1782, and *June Med. Servs., L.L.C.*, 139 S. Ct. at 663, with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

42. *Box*, 139 S. Ct. at 1782.

43. *June Med. Servs., L.L.C.*, 139 S. Ct. at 663–64.

For 46 years, the country has lived under an abortion-rights framework based on the U.S. Supreme Court's broad interpretation of due process.⁴⁴ The results have been mixed at best.⁴⁵ Although many women have legally availed themselves of abortions since *Roe*, Court-created abortion rights have, due to polarization, facilitated exploitation of the abortion-rights debate by partisans nationwide. This polarization has also created large swathes of antiabortion voters who not only have moved the nation's political culture to the right by voting monographically but have succeeded in making abortions altogether infeasible for women in the 21 red states that the Center for Reproductive Rights estimates would ban abortion should *Casey* be overturned.⁴⁶ Reversing *Roe*, *Casey*, and *Whole Woman's Health* would not only leave abortion legal in 20 or so reliably blue states but would potentially allow for European-style compromises in the remaining purple states and perhaps, over time, in the red states.⁴⁷

Public sentiment further complicates matters: 69 percent of Americans and 53 percent of Republicans oppose overturning *Casey* and *Roe* and leaving abortion rights to state legislatures.⁴⁸ Nullifying federal abortion rights would risk a broad backlash against both the Court and the Republican Party, which likely explains the refusals by the Court to hear the appeals in *Box* and *June Medical Services* and why the Court will look askance at revisiting abortion rights in the near term.⁴⁹ Apart from undermining the Court's institutional prestige, ending federal abortion rights could result in a stinging rebuke against Republican politicians nationwide and result in a dramatic setback for jurisprudential conservatives in a whole host of other areas, including the interpretation of federal legislative power, administrative law, federalism, voting rights, and justiciability doctrines that limit access to federal courts.⁵⁰ In short, a reversal

44. See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

45. See Milligan, *supra* note 36.

46. Brooks, *supra* note 9.

47. See K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html>.

48. Hannah Fingerhut, *About Seven-in-Ten Americans Oppose Overturning Roe v. Wade*, PEW RES. CTR. (Jan. 3, 2017), <https://www.pewresearch.org/fact-tank/2017/01/03/about-seven-in-ten-americans-oppose-overturning-roe-v-wade/> [<https://perma.cc/W7CU-A8SQ>].

49. See *id.*

50. See, e.g., Joel Mathis, *Why America's Strict New Anti-Abortion Laws Could Backfire*, WEEK (May 16, 2019), <https://theweek.com/articles/841763/why-americas->

of federal abortion could also, over time, affect the ideological composition of federal courts, including the U.S. Supreme Court.⁵¹

Republicans and the Court's majority are in a difficult situation. They have waited for nearly half a century to reverse what they perceive as an ill-conceived judicial adventure.⁵² They finally have the votes on the Court to dramatically change course, but they could end up sabotaging themselves if they proceed too hastily.⁵³ The dilemma was apparent in Tennessee when, after the state house enacted a strict, antiabortion fetal-heartbeat bill, state-senate Republicans effectively gutted the measure in committee because they felt it was too early and unwise to present a test case to the U.S. Supreme Court.⁵⁴

IV. CONCLUSION

A judicial reversal of nationwide abortion rights will not arise in the near term. Rather, anticipate continued political exploitation of the issue by both major parties, in conjunction with a trend toward making abortion a more elusive procedure for economically distressed women in red states.⁵⁵ A far better approach would be for the Court, should it deny a future petition for certiorari, to announce a certain date when it is prepared to revisit the abortion-rights issue.⁵⁶ If that is too direct an approach for some, an alternative that would also protect the Court's institutional prestige would be to signal to the broader political and legal culture that abortion will not be federally protected in the future without directly reversing *Whole Woman's Health*.⁵⁷ Either approach would effectively signal the end of

strict-new-antiabortion-laws-could-backfire.

51. See generally Fingerhut, *supra* note 49.

52. See generally *Roe v. Wade*, 410 U.S. 113, 153 (1973).

53. See Mathis, *supra* note 51.

54. See Natalie Allison, *Tennessee's Fetal Heartbeat Bill Sent to Senate Committee for Further Study*, TENNESSEAN (Apr. 9, 2019), <https://www.tennessean.com/story/news/politics/2019/04/09/tennessee-fetal-heartbeat-bill-fails-goes-senate-summer-study/3417452002/>.

55. See Milligan, *supra* note 36.

56. By this I mean something analogous to Justice O'Connor's majority opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which affirmed *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and upheld the constitutionality of racial affirmative action in higher education but, in dicta, wrote the Court should revisit the issue "25 years from now." *Grutter*, 539 U.S. at 343.

57. By this I mean how the Court has effectively gutted the precedential value of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and its test for determining a violation of the

federal abortion rights. Recognizing this might be problematic for poor women in red states, my hope is that it will depolarize the issue and potentially allow for bipartisan legislative compromise. My hope is that this will effectively “bridge” our partisan divide.

First Amendment’s Establishment Clause without ever explicitly reversing the case. *See, e.g.,* *McCreary Cty. v. ACLU*, 545 U.S. 844, 859 (2005); *Agostini v. Felton*, 521 U.S. 203, 218, 232 (1997).