THE WALL STREET JOURNAL.

https://www.wsj.com/articles/the-smart-way-to-overturn-roe-v-wade-11563739004

OPINION | COMMENTARY

The Smart Way to Overturn Roe v. Wade

The strongest limits on abortion are likely to be struck down and never reach the Supreme Court.

By Clarke D. Forsythe
July 21, 2019 3:56 pm ET

The March for Life in front of the Supreme Court, Jan. 18. PHOTO: JOSHUA ROBERTS/REUTERS

The Supreme Court completed its term in June with no major changes to its longstanding holding on abortion. Instead, changes to abortion law this year have taken place in states, and that's how it should be.

The 2019 state legislative sessions have shown that federalism is as important as ever to our republic. Blue states moved to legalize abortion on demand throughout (and even after) pregnancy, while red states moved to adopt strong limits on abortion, all in the expectation that the Supreme Court may soon overturn *Roe v. Wade*. So much for the claim that *Roe* is "settled."

But will any of the pro-life laws enacted this year create a decisive test case that will overturn *Roe,* as some legislative sponsors hope? State legislators need to keep three legal factors in mind:

• *The states can't force the court to hear a case.* The justices have virtually absolute discretion as to which cases they hear, on what time frame, and whether they ever hear some issues. They can be very selective. Since December the justices have refused to hear four abortion cases: Medicaid-funding cases from Kansas and Louisiana, a prohibition on abortion for discriminatory reasons from Indiana, and a prohibition on dismemberment abortion in the second trimester from Alabama.

• *The court will have numerous opportunities to hear abortion cases in coming years.* There are more than 40 abortion cases in the lower federal courts, involving many different types of regulations and partial prohibitions, and the court will have the opportunity to hear many of those in the next few years. Legislators should carefully consider the goals of their bill and whether they can be effectively achieved.

• *The court does not need an outright abortion prohibition to re-examine Roe v. Wade.* The justices could re-examine *Roe* with any abortion law that arguably conflicts with *Roe*. That could include parental notice or consent, ultrasound, informed consent or health and safety regulations. The court re-examined *Roe* in *Webster v. Reproductive Health Services* (1989) and *Planned Parenthood v. Casey* (1992), neither of which involved an abortion prohibition.

The justices might be more inclined to address *Roe* in a case with an abortion limit that is supported by a local majority, rather than a strict prohibition on early abortions. The court's decisions upholding state laws are typically mischaracterized in the media as "approval," as though the justices have endorsed the law. Yet the real question is whether the laws are constitutional, not whether the justices agree with the state policy. The justices may not wish to be so mischaracterized, and they can avoid that scenario by selecting cases carefully.

With the current court majority, the risk for the pro-life cause is not that the court might take a case with an abortion prohibition and reaffirm *Roe*, but that the court will simply refuse to take up the issue. That would leave in place court injunctions against state laws. The laws would be

unenforceable, and the states might have to pay $500,000 or more in tax dollars to Planned Parenthood and its attorneys.

State legislators need to consider carefully the implications of the court's refusal to review the Alabama dismemberment abortion case *(Harris v. West Alabama Women's Center)* in June. Since the court does not need a case with an outright prohibition to reconsider and reverse *Roe,* and has shown that it can readily refuse to hear such a case, states need to assess the goals and likelihood of success of an outright prohibition at this stage. They need to consider the impact on their own state, on the judicial process, and on national public opinion.

The pro-life movement may be witnessing the most promising convergence in 46 years of political, judicial and legislative factors, but the moment still requires careful discernment in the face of enormous obstacles and a ferocious opposition. That is the prudent way forward, and therefore the best.

The final element in the convergence of events is electoral victories. Overturning *Roe* would be likelier with the backing of public opinion, and the strength of opposition to abortion can be demonstrated clearly by the results of presidential and senatorial elections.

The abortion cases heading to the court will go on for years, and that means the 2020 elections will send positive or negative signals to the justices about public support for overturning *Roe.* Electoral losses by pro-life candidates in 2020 might well short-circuit the current test cases and send the wrong signal to the court.

Tremendous resources, a relentless effort, and a careful nurturing of all of these factors will be needed to overturn *Roe v. Wade,* which would decentralize the abortion issue and return it to the states. That would be good for the court and all of American politics.

Mr. Forsythe is senior counsel of Americans United for Life.