

LIFE AFTER ROE v. WADE: ACHIEVING AN ABORTION-FREE AMERICA IN THE POST-DOBBS ERA

Thomas A. Glessner, J.D.
President, NIFLA

- I. Review: The Key Provisions of *Roe v. Wade*, 410 U.S. 113 {1973}
 - A. States may not prohibit or restrict abortion even into the third trimester of pregnancy if the abortion is necessary to preserve the "health" of the mother. "For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."
 - B. Companion case of *Doe v. Bolton*, 410 U.S. 179 {1973} defines "health" so broadly that virtually any stress upon a mother during her pregnancy justifies abortion for "health" reasons.

"The medical judgment may be exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient. All these factors may relate to health."
 - C. The Court drew a line at viability when restrictions and prohibitions on abortion could happen (unless "health" reasons intervene) because that is when the unborn child (referred to as "potential life") has the "capability of meaningful life outside the womb." Viability, according to the Court, occurs between **24-28** weeks of pregnancy.
 - D. The unborn child, i.e., "potential life" is not a person under the Fourteenth Amendment to the U.S. Constitution. The Court said that there was no precedent in the law establishing personhood prenatally.
 1. The Court ignored Blackstone's *Commentaries on the Common law of England*, and the famous AMA report of 1857, which set conception as the objective medically measurement of when human life begins.

2. The issue was not the humanity of the unborn child, i.e., "potential life", rather the legal recognition of personhood.
(Quote the Court)

E. The Court stated that the right to an abortion was "fundamental" because it came from a previously recognized right of privacy. Hence, strict scrutiny became the legal standard to apply when reviewing any abortion restrictions.

III. Results of *Roe*:

- A. A legal system which protects some human beings and not others.
- B. A legal system which grants constitutional rights to some nonhumans, i.e., corporations, but not to other human beings, i.e., the unborn.
- C. Over 63 million abortions have been performed and over 900,000 annually.

IV. *Planned Parenthood v. Casey, 505 U.S. 893 {1992}*:

- A. Upheld by a 5-4 vote the "central premise" of *Roe* that recognizes a constitutional right to abortion.
- B. Revised the standard of review from strict scrutiny to intermediate scrutiny - a lesser standard that does not require a compelling interest to uphold an abortion regulation, but rather requires that the regulation simply not be "unduly burdensome."
- C. The unduly burdensome standard, theoretically, allows for more restrictions, but is subjective and gives no real guidelines for states and courts to determine what is and what is not an "unduly burdensome" unconstitutional regulation of abortion.

V. *Dobbs v. Jackson Women's Health Center, 597 U.S. (2022)*:

- A. There is no constitutional right to abortion. The decision to regulate abortion is left up to the "elected officials" of the people.
- B. The decision is in line with the operations of a true Republic.

- C. Federally elected officials have a role to play under Section Five of the Fourteenth Amendment, which says: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article,"
 - 1. The declarations of non-personhood by the *Roe* decision are no longer valid.
 - 2. Hence, the issue of personhood is to be determined by the elected representatives of the people - including the Congress.

VI. The Vision: ACHIEVING AN ABORTION-FREE AMERICA -- POST-*DOBBS*

- A. An abortion-free America is a nation where abortion is neither promoted or accepted across the country as an acceptable solution to an unwanted pregnancy. It is a nation where a culture of life permeates across the land, and every child is welcomed as valuable members of each community. It is a nation where the support for a mother in an unwanted pregnancy is so compelling that very few women choose abortion.

VII. Three elements that must come together to achieve an abortion-free America.

- A. Legal Protection for mothers and their unborn children.
 - 1. Political strategies will differ depending upon each state.
 - 2. Red states are more promising than blue states, but all states must work to save lives.
Think of football strategy - a hail Mary pass virtually never works. Rather a winning strategy continues to push the ball down field until the goal is crossed.
- B. Compelling alternative to abortion services in every community, which mean that very few mothers will choose abortion.
 - 1. Expanded access to alternative to abortion services.
 - 2. Chemical abortion must be effectively addressed and APR services implemented.
 - 3. STI Testing and Treatment should be utilized.
- C. A culture of life arises in every community in the nation.
 - 1. Abortion must be seen as unthinkable and every child, no matter the circumstances of pregnancy and conception, will be welcomed into every community across the land.

2. Churches are responsible. When the spiritual leaders lead the people will follow.
3. Abortion in the church must be addressed.
4. Abortion by spiritual leaders must be dealt with.

VIII. The Year in Review

A. Illinois – SB1909

1. **Based on a false premise** - limited services pregnancy center use any deception, fraud, false pretense, false promise, or misrepresentation in advertising, soliciting, or otherwise offering pregnancy-related services; or in **conducting, providing, or performing pregnancy-related services.**
2. **Penalty – Includes a preliminary or permanent injunction and a civil penalty not to exceed \$50,000. Allows any party aggrieved by a violation of the Act to bring an action against any limited services pregnancy center that has committed such a violation, in which the court may award actual damages and any other relief the court deems proper. Effective immediately.**
3. Rule 65 Preliminary Injunction Order
 - a. “Justice Scalia once said that he wished all federal judges were given a stamp that read ‘stupid but constitutional.’” *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 714 (7th Cir. 2016). SB 1909 is both stupid and very likely unconstitutional. It is stupid because its own supporter admitted it was unneeded and was unsupported by evidence when challenged. It is likely unconstitutional because it is a blatant example of government taking the side of whose speech is sanctionable and whose speech is immunized. SB 1909 is likely classic content and viewpoint discrimination prohibited by the First Amendment.
 - b. When seeking a preliminary injunction, it is the plaintiff’s burden to demonstrate standing, by showing (1) an injury in fact; (2) that the challenged conduct caused the injury; and (3) some likelihood that the court’s decision will remedy the injury. *Id.* An injury must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992).

B. Vermont – SB37

1. Suit filed by pro-life pregnancy services centers and their membership organization to a state law that unconstitutionally restricts the centers' speech and provision of services.
2. That law impedes the ability of pro-life pregnancy centers to continue providing help and support to Vermont women and families in two ways:
 - a. First, it censors the centers' ability to advertise their free services (Advertising Prohibition). Prohibition, 9 V.S.A. § 2493(a), regulates Plaintiffs' non-commercial speech.
 - b. Second, it precludes centers from offering non-medical services, information, and counseling unless provided by a licensed health care provider. The provider restriction does not define "health care services." However, the term is defined elsewhere in SB 37 as "services for the diagnosis, prevention, treatment, cure, or relief of a physical or mental health condition, including procedures, products, devices, and medications." 3 V.S.A. § 129a(f)(2)(B); 26 V.S.A. § 1354(d)(2)(B).

- C. Ohio is likely to pass an initiative in November removing restrictions around the procedure until the point of fetal viability.