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Lawmakers Increasingly Undermining Roe v. Wade

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Like all of us, Roe v. Wade has changed significantly in 40 years. It once stood tall, along with other Supreme Court cases protecting privacy interests, particularly as they relate to marriage, family planning, raising children and other similar personal decisions. All of these interlinked interests, the court has said — and still maintains — are implicit in the very meaning of liberty which the Constitution protects: they relate to “certain fundamental decisions affecting [a person’s] destiny” and that “define the right of the person.”

But in the years since Roe, the Supreme Court, while continuing to strongly affirm the other family-related privacy rights, has progressively weakened a woman’s liberty to choose to terminate a pregnancy. Of particular importance was the 1992 decision in *Planned Parenthood v. Casey*,

where the court held that anti-abortion legislation would be permitted as long as it did not impose an “undue burden” on the pregnant woman.

The erosion of Roe has emboldened state and federal lawmakers to pass increasingly restrictive legislation. Especially over the past few years, a host of state laws have been put into place that severely burden the woman’s supposed constitutional right to make her own reproductive decisions. An incomplete list includes required waiting periods between requesting an abortion and having one, onerous licensing requirements for facilities that provide abortion services, required sonograms (and even the playing back of the fetal heartbeat), restrictions on physicians’ ability to counsel their patients and parental consent requirements. Some states have dictated what doctors say to a woman considering an abortion, which turns the principle of informed consent on its head by allowing the government to insert itself in the

doctor-patient relationship.

Congress also has gotten into the act. Soon after Roe was decided in 1973, federal lawmakers enacted the Hyde Amendment, which prohibits federal Medicaid funding for abortion, with narrow exceptions that can change depending on which political party is in power. Subsequent laws also prohibited women in the military from using their federally funded insurance to have abortions, except to save their lives (an exception for rape was added just a couple of weeks ago), and a woman serving overseas can’t end a pregnancy on a military base — even with her own funds.

In 2005, Congress passed the provocatively named “Partial Birth Abortion Act,” which prevents physicians from performing a certain type of medical procedure for late-term abortions, even where the health of the mother might be compromised by using a different procedure. The Supreme Court has rejected challenges to these laws, thereby creating a feedback loop between the

judicial and legislative branches that whittles away at the foundational liberty the justices championed in Roe.

These government-sanctioned erosions of Roe have supported the creation of other serious real-world obstacles placed before women who want to exercise their reproductive rights. Many clinics and hospitals have stopped providing abortion services, medical schools have diminished their training in this area, and doctors who provide abortion services are routinely targeted for harassment, or worse.

The cumulative effect has been that, for many women — especially many poor women — abortions are as a practical matter difficult or impossible to obtain.

In *Casey*, the Supreme Court directly addressed the question of whether Roe should be overruled, and decided against doing so. And still, each new judicial nominee gets questioned on his or her inclination to overturn Roe. Given the changes in the courts, in

the legislatures, and on the streets that have taken place in the last few decades, though, the important question is not what to do about Roe, but whether or not the Supreme Court will protect women’s reproductive rights as it protects other liberty rights.

Although the court’s membership has changed, the basic principles set forth in Roe have not. Two generations of women have grown up with the confidence that their ability to control their reproductive lives is so important, so personal, and yet so inextricably connected to their ability to “participate fully in the social and economic life of the nation,” as the court has said, that it should be protected and respected. But on the 40th anniversary of the Supreme Court’s decision in *Roe v. Wade*, that ability has been called into serious question.

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