The Gordian Knot of Abortion Jurisprudence

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Other Views:

• Steven Mazie & Melissa Murray, *How the Supreme Court could decimate reproductive rights without overruling Roe*, Washington Post, July 23, 2021, https://www.washingtonpost.com/opinions/2021/07/23/how-supreme-court-could-decimate-reproductive-rights-without-overruling-roe/.

• David French & Sarah Isgur, *Swinging for the Fences on Abortion*, Advisory Opinions Podcast, July 26, 2021, https://advisoryopinions.thedispatch.com/p/swinging-for-the-fences-on-abortion.

• Evan Gerstman, *No, The Supreme Court Is Not About To Overrule Roe v. Wade*, Forbes, May 18, 2021, https://www.forbes.com/sites/evangerstmann/2021/05/18/no-the-supreme-court-is-not-about-to-overrule-roe-v-wade/?sh=635b4a5d22b9.

• David Lat, *Notice And Comment: The Supreme Court's Abortion Showdown*, Original Jurisdiction, May 20, 2021, https://davidlat.substack.com/p/notice-and-comment-the-supreme-courts.

On December 1, the Supreme Court will hear argument in *Dobbs v. Jackson Women's Health Organization*. The Court originally granted certiorari on a relatively narrow question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." But Petitioners, Respondents, and the United States all argue in their merits briefs that the Court must either reaffirm or overturn *Roe* and *Casey*. As the abortion clinic stated, "There are no half-measures here."

The parties are right. The courts of appeals are widely fractured on several important issues around abortion regulations—a fracture caused by the Supreme Court's own internal disagreements. The current abortion regime (which is now in something like its third iteration) is dominated by two *minority* opinions: a three-Justice plurality opinion in *Planned Parenthood v. Casey*, and a one-Justice concurrence in *June Medical v. Russo*. And both minority opinions purported to interpret, but essentially discarded, prior majority decisions: *Casey* purported to reaffirm, but in fact replaced *Roe v. Wade*. And *June Medical* purported to apply, but in fact rejected *Whole Woman's Health v. Hellerstedt*.

Any "half measure" in *Dobbs* will both upset any existing jurisprudence it purports to save and create more circuit confusion going forward. And heaven help us all if it comes in the form of a plurality opinion.

I. The Past: An Evolving Standard

A. Roe v. Wade*: The Trimester System*

The Supreme Court nationalized and constitutionalized abortion regulations in 1973 in *Roe v. Wade*. *Roe* created a strict trimester-based regime: a state could not ban or regulate abortion in the first trimester; it could *not* ban but *could* regulate abortion in the second trimester (but only to advance maternal health); and it could ban or regulate abortion in the third trimester.[1]

B. Planned Parenthood v. Casey*: No Bans or "Undue Burdens" on Previability Abortions*

After 19 years of complex litigation, public outcry, and advancements in fetal medicine, the Supreme Court decided to revisit its controversial decision. In 1992, in a remarkable show of hubris, the Court announced that it was going to "resolve the sort of intensely divisive controversy reflected in *Roe*" and "call[] the contending sides of a national controversy to end their national division."[2] As we all well know by now, Court did nothing of the sort.

Casey ostensibly reaffirmed the "central premise" of *Roe*, but it replaced the rigid trimester scheme with a more flexible (and amorphous) viability standard. According to the plurality, a state cannot ban previability abortions. But a state may regulate previability abortion access as long as the regulation does not

1 410 U.S. 113, 164-65 (1973).

2 Planned Parenthood v. Casey, 505 U.S. 833, 866-67 (1992).

create an "undue burden"—that is, as long as the regulation (1) is rationally related to a legitimate state interest, and (2) does not have the "purpose or effect" of placing a "substantial obstacle" in front of a woman seeking a previability abortion.[3]

C. Whole Women's Health v. Hellerstedt*: No Restrictions on Previability Abortions Where the Burdens Outweigh the Benefits*

States largely took the Supreme Court at its word, enacting regulations to promote the health and safety of women obtaining abortions. One set of regulations reached the Supreme Court in 2016, in *Whole Women's Health v. Hellerstedt*. *Hellerstedt* claimed to apply *Casey*'s undue burden standard. But the Court announced what looked like a new test: when determining whether a state regulation creates an undue burden on abortion access, the Court must weigh the regulation's benefits against the burden it imposes.[4] After all, the concept of an *undue* burden implies the existence of a *due* burden. Under that test, a court can enjoin an abortion restriction if, in its view, the restriction provides few or no benefits, *even if* it does not create a substantial obstacle to abortion access. Applying that standard, the Court enjoined Texas laws requiring abortion providers to have admitting privileges at a nearby hospital, and abortion clinics to meet the health and safety standards of surgical centers.

D. June Medical v. Russo*: Perhaps* Casey*, Perhaps* Hellerstedt

Four years after *Hellerstedt*, a nearly identical set of Louisiana laws came to the Court. A four-Justice plurality reasoned that the laws should be enjoined under *Hellerstedt*.[5] But Chief Justice John Roberts concurred only in the judgment, in an opinion that simultaneously applied and rejected *Hellerstedt*.

In section I of his concurrence, the Chief Justice explained that stare decisis compelled him to enjoin Louisiana's laws because they were virtually identical to the laws enjoined in *Hellerstedt*.[6] But in section II, the Chief Justice vigorously disputed *Hellerstedt*'s interpretation of *Casey* (or perhaps the *June Medical* plurality's interpretation of *Hellerstedt*). In his view, *Casey* directed courts to evaluate only whether a law creates an undue *burden* on abortion access—that is, a court may invalidate *only* those restrictions that create a "substantial obstacle" to abortion access, regardless of whether the court thinks the restriction creates a benefit. An amorphous balancing test "would result in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'"[7] Any balancing of benefits and burdens should be done by the legislature, not the courts.[8]

Casey's undue burden test was contentious from the beginning, criticized by both Justice Harry Blackmun (the author of *Roe*) in concurrence and Justice Antonin Scalia (writing for four Justices) in dissent.[9] Both Justices predicted that the undue burden standard would be arbitrary, easily manipulated, and difficult for the Court to administer. Both proved prophetic.

II. The Present: A Circuit Fracture on How to Read and Apply *June Medical*

In the sixteen months since *June Medical* was decided, the courts of appeals have largely agreed on two points. First, that a "ban" on previability abortions is presumptively unconstitutional, but a "regulation" is not. Second, that the Chief Justice's concurrence in *June Medical* is the controlling opinion, setting the standard for how to evaluate previability regulations.

But the courts of appeals are split on how to apply those two principles. Several states prohibit performing an abortion by a particular method or for a particular reason. The courts of appeals disagree about whether these restrictions are bans or regulations under *June Medical*. And as the courts analyze these and other regulations, they split further over which section of the Chief Justice's *June Medical* concurrence should guide their analysis—section I's invocation of stare decisis (which means that *Hellerstedt* is actually controlling) or section II's reaffirmation of the undue burden test (which means that *Casey*—however courts choose to read it—is controlling).[10] The result is less of a circuit split, and more of a circuit complex fracture.

A. Section I Controls, and Restrictions Are Bans

The Seventh and Eleventh Circuits treat only section I of Chief Justice Roberts' *June Medical* concurrence—the invocation of stare decisis—as controlling.[11] So in those circuits, the benefits-and-burdens balancing test from *Hellerstedt* is the standard for evaluating abortion regulations.[12]

3 *Id.* at 876-77. The decision to abandon the trimester framework invalidated all of the Court's pre-*Casey* precedents. For example, before *Casey*, a state could require abortion clinics to meet the same health and safety standards required of surgical centers and require second trimester abortions to be performed in licensed clinics. Simopoulos v. Virginia, 462 U.S. 506 (1983). But after *Casey*, such requirements were unconstitutional because "the second trimester includes time that is both previability and postviability," so cases like *Simopoulos* were unworkable. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016). Any effort to modify *Casey*, *Hellerstedt*, or *June Medical* promises to create similar instability.

4 136 S. Ct. at 2309.

5 June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

6 *Id.* at 2133-35 (Roberts, C.J., concurring).

7 *Id.* at 2135-36 (quoting New Jersey v. T.L.O., 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)). One might pause here and ask whether phrases like "undue burden" and "substantial obstacle"—or anything else in *Casey* for that matter—are the antidote to "unanalyzed exercise[s] of judicial will." The *Casey* plurality essentially announced that the undue burden standard was an act of judicial will from the beginning. The opinion stated at the outset that its "reasoned judgment" was "not susceptible of expression as a simple rule," not "reduced to any formula," and "cannot be determined by reference to any code," but must instead be developed from living tradition. *Casey*, 505 U.S. at 849-50 (plurality opinion) (quoting Poe v. Ullman, 367 U.S. 497, 542 (Harlan, J., dissenting)).

8 *June Med.*, 140 S. Ct. at 2135-36.

9 *Casey*, 505 U.S. at 930 (Blackmun, J., concurring); *id.* at 993-94 (Scalia, J., dissenting).

10 Even panels within the same circuit are split over the controlling test. See *infra* note 28.

11 Reprod. Health Servs. v. Strange, 3 F.4th 1240, 1259 n.6 (11th Cir. 2021); Planned Parenthood of Indiana & Kentucky, Inc. v. Box, 991 F.3d 740, 752 (7th Cir. 2021).

12 The Ninth Circuit read *Casey* as requiring a benefits-and-burdens analysis even before *Hellerstedt*. Planned Parenthood Arizona, Inc. v. Humble,

1. Anti-Eugenics Laws

The Seventh Circuit was the first court of appeals to consider an anti-eugenics law. Indiana forbids performing abortions sought because of the race, sex, or Down-syndrome diagnosis of the baby.[13] In 2018, the Seventh Circuit enjoined the statutes as presumptively unconstitutional bans on previability abortions.[14]

2. Parental Notification Laws

The Seventh Circuit was also among the first courts of appeals to address parental consent or parental notification laws in the *Hellerstedt* era of abortion jurisprudence. Indiana requires parental consent, or a judicial bypass of parental consent, before a minor can have an abortion.[15] But if the minor chooses judicial bypass, her parents must be notified before she has the abortion. The Seventh Circuit enjoined the notice requirement in a 2019 decision, adopting the benefits-and-burdens standard of *Hellerstedt*.[16] In the court's view, Indiana's notice requirement unduly burdened abortion access without providing any benefits.[17]

Last term, the Supreme Court vacated that opinion and remanded for reconsideration in light of *June Medical*.[18] On remand, the Seventh Circuit largely re-issued its original decision, continuing to adhere to the benefits-and-burdens test it saw as reaffirmed in section I of Chief Justice Roberts' *June Medical* concurrence.[19]

The Eleventh Circuit followed a similar route earlier this year. Like Indiana, Alabama requires parental consent or a judicial bypass before a minor can obtain an abortion.[20] But the judicial bypass procedure includes an evidentiary hearing that involves the local district attorney and a guardian ad litem for the unborn child (and the minor's parents if they were already aware of the proceeding).[21] And any party has a right to appeal the bypass decision.[22] The Eleventh Circuit evaluated the statute under the benefits-and-burdens test of *Hellerstedt* and *June Medical* section I and, like the Seventh Circuit, concluded that the law imposed a significant burden without any appreciable benefit.[23] But the court *immediately* stayed the panel's mandate.[24] Alabama's petition for en banc rehearing is pending, and the court ordered the challengers to respond.

B. Section II Controls, and Restrictions Are Regulations

The Fifth and Sixth Circuits see things differently, instead treating section II of the *June Medical* concurrence as binding.[25] So those courts evaluate abortion regulations under *Casey*'s undue burden rubric without balancing their benefits and burdens.

1. Anti-Eugenics Laws

Like Indiana, Ohio forbids performing abortions sought because of a Down-syndrome diagnosis.[26] The Sixth Circuit held that a prohibition on performing an abortion for a particular *reason* is a restriction—not a ban—and therefore subject to undue burden analysis.[27] The court concluded that anti-eugenics laws do not unduly burden abortion access (under either section of the *June Medical* concurrence), so Ohio was free to enforce its statute.[28]

2. Dismemberment Restrictions

Texas prohibits performing live dismemberment abortions unless there is a medical emergency.[29] The Fifth Circuit concluded that Texas's law is a restriction subject to an undue burden analysis under section II of the *June Medical* concurrence.[30] And the court held that a prohibition on a particular *method* of abortion is not a "substantial obstacle" to obtaining an abortion in general, so Texas can prohibit dismemberment abortions.[31]

Alabama and Kentucky also forbid live dismemberment abortions.[32] The Sixth and Eleventh Circuits agreed that those statutes are restrictions, not bans, but they held that the restrictions unduly burden abortion access under *Casey*.[33]

753 F.3d 905 (9th Cir. 2014).

13 Ind. Code Ann. §§ 16-34-4-5, -6, -7, -8, -9.

14 Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health, 888 F.3d 300, 306-07 (7th Cir. 2018), *and cert. granted in part, judgment rev'd in part sub nom.* Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780 (2019).

15 Ind. Code Ann. § 16-34-2-4.

16 Planned Parenthood of Indiana & Kentucky, Inc. v. Adams, 937 F.3d 973, 981 (7th Cir. 2019).

17 *Id.* at 984-90.

18 *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 141 S. Ct. 187 (2020).

19 *Box*, 991 F.3d at 742.

20 Ala. Code § 26-21-3, -4.

21 *Id.*

22 *Id.*

23 *Reprod. Health Servs.*, 3 F.4th at 1261.

24 Reprod. Health Servs. v. Strange, No. 17-13561 (11th Cir. July 1, 2021) (order).

25 Whole Woman's Health v. Paxton, 10 F.4th 430, 440-441 (5th Cir. 2021) (en banc); Preterm-Cleveland v. McCloud, 994 F.3d 512, 525 (6th Cir. 2021) (en banc).

26 Ohio Rev. Code § 2919.10.

27 *Preterm-Cleveland*, 994 F.3d at 527-29.

28 A panel of the Sixth Circuit suggested that the *Preterm* rationale may not apply where the reason for the abortion is the race or sex of the baby, rather than a Down-syndrome diagnosis. Memphis Center for Reprod. Health v. Slatery, 14 F.4th 409, 435 (6th Cir. 2021). It is difficult to see how that could be true. Tennessee's petition for en banc rehearing is pending, and the court has directed the challengers to respond.

29 Tex. Health & Safety Code Ann. § 171.152.

30 *Paxton*, 10 F.4th at 453.

31 *Id.*

32 Ala. Code § 26-23G-2; Ky. Rev. Code § 311.787. States that ban *live* dismemberment abortions still permit dismemberment as long as the baby is first killed by some less gruesome, but equally fatal method.

33 W. Alabama Women's Ctr. v. Williamson, 900 F.3d 1310, 1324-28 (11th Cir. 2018); EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 960 F.3d 785, 797 (6th Cir. 2020). The district courts found that all of the two states' proposed methods for killing the baby were infeasible and unsafe: local abortionists evidently lacked the "great technical skill" required

C. Section II Controls, and Restrictions Are Bans

The Eighth Circuit landed in the middle. It agrees with the Fifth and Sixth Circuits that section II of the *June Medical* concurrence controls: previability abortion regulations are evaluated under the undue burden standard.[34]

Like Indiana, Arkansas and Missouri also forbid performing abortions sought because of a Down-syndrome diagnosis.[35] But the Eighth Circuit held in two cases that such reason-based restrictions amount to bans on previability abortions and are thus unconstitutional under *Casey*.[36] In *Little Rock Family Planning Services v. Rutledge*, Judges Bobby Shepherd and Ralph Erickson wrote separate concurrences arguing that the viability standard is not a workable rubric for evaluating antidiscrimination laws and urging the Supreme Court to reconsider it.[37]

The Eighth Circuit agreed to rehear the Missouri case en banc, but it has not disturbed *Rutledge*.

III. Pending Cert Petitions: What is the Test and When Does it Apply?

The Court's decision in *Dobbs* will likely be informed by two cert petitions on its docket, which ask the Court to resolve a nesting doll of circuit splits.

At the most basic level, the Court must resolve the split over whether a state may forbid performing an abortion sought because the baby's race, gender, or Down-syndrome diagnosis. The circuit split on that question pits the en banc Sixth Circuit against the Seventh and Eighth. Arkansas has asked the Supreme Court to resolve the split in *Rutledge v. Little Rock Family Planning*.[38] Supreme Court denied cert on this question in *Box v. Planned Parenthood* because, at the time, the Seventh Circuit was the only court of appeals to have addressed an anti-eugenics law.[39] That is no longer the case, so the issue is now ripe for Supreme Court review.

Within that basic split are two others on which petitioners are requesting the Court's review. The first is the split over which section of the Chief Justice's *June Medical* concurrence is the controlling law for previability abortion regulations. Arkansas' cert petition in *Rutledge* and Indiana's in *Box v. Planned Parenthood* both ask the Court to at least answer that question. The second split is over the types of laws to which *June Medical* applies in the first place, namely whether restrictions on methods or reasons for performing abortions are "regulations" subject to *June Medical* analysis or "bans" that are presumptively invalid—a split squarely presented in *Rutledge*.

IV. The Next Stage: Standing, Fractions, Dismemberment, and Cascades

A. Do Abortion Providers Have Third-Party Standing to Challenge Abortion Restrictions?

More circuit splits and major questions will come to the Court over the next three terms, beginning (as all cases do) with standing. Ordinarily, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[40] But the Supreme Court has allowed abortion providers to challenge abortion restrictions on behalf of (typically unknown) women who might seek abortions in the future. At least four Justices have signaled that the Court should reconsider third-party standing for abortionists.[41] If the Court leaves any of its abortion jurisprudence standing after *Dobbs*, it can expect that many states will add standing to their existing battery of arguments.

B. What Is the Burden of Proof for Facial Challenges to Abortion Restrictions?

Next on the horizon is the burden of proof for facial challenges to abortion restrictions. A litigant can challenge a law's constitutionality in two ways: 1) by arguing that the law is unconstitutional as applied to the litigant, but could be constitutional in other contexts (an "as-applied" challenge); 2) by arguing that the law is unconstitutional on its face (a "facial" challenge"). To prevail on a facial challenge, a litigant typically must show that "no set of circumstances exists under which [the law] would be valid."[42]

But the Supreme Court appears to have softened the requirements for facial challenges to abortion restrictions. Under *Casey*, an abortion statute is facially unconstitutional if it "will operate as a substantial obstacle to a woman's choice to undergo an abortion" in a "large fraction of the cases in which [it] is relevant."[43] Even if the law poses no burden in some cases. Here too, several Justices have expressed concern about—or outright

to deliver an injection to the unborn baby, the "training" and facilities required to read a sonogram to cut the umbilical cord, and apparently the incentive to solve either problem. *Williamson*, 900 F.3d at 1322-24. *Accord Friedlander*, 960 F.3d at 804-06.

The Sixth Circuit denied the Kentucky Attorney General's request to intervene in that case to seek en banc rehearing or certiorari. The Supreme Court granted certiorari as to whether the Attorney General could intervene and heard argument on that point on October 12. Cameron v. EMW Women's Surgical Ctr., P.S.C., 141 S. Ct. 1734 (2021).

34 Hopkins v. Jegley, 968 F.3d 912, 915-16 (8th Cir. 2020).

35 Ark. Code Ann. § 20-16-2103; Mo. Rev. Stat. § 188.038.

36 Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552 (8th Cir. 2021), *reh'g en banc granted, opinion vacated,* July 13, 2021; Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682 (8th Cir. 2021).

37 *Rutledge*, 984 F.3d at 692-93 (Shepherd, J., concurring); *id.* at 693-94 (Erickson, J., concurring).

38 No. 20-1434 (Apr. 13, 2021). The Supreme Court denied cert in *Schmitt v. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region*, No. 21-3, because the Eighth Circuit is reconsidering the case en banc.

39 *Box*, 139 S. Ct. at 1782. In concurrence, Justice Thomas documented the long history of eugenic abortions and the recent state laws forbidding intentionally eugenic abortions, and he noted that the Court has a duty to address the precise scope of the abortion right. *Id.* at 1783-93 (Thomas, J., concurring).

40 Warth v. Seldin, 422 U.S. 490, 499 (1975).

41 *June Medical*, 140 S. Ct. at 2142 (Thomas, J., dissenting); *id.* at 2153 (Alito, J., dissenting); *id.* at 2173 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

42 United States v. Salerno, 481 U.S. 739, 745 (1987).

43 *Casey*, 505 U.S. at 895.

hostility to—the unique test for abortion restrictions.[44] The most vexing part of the test is figuring out which group of women makes up the numerator and which makes up the denominator of the "fraction" made pivotal in *Casey*.[45] Indeed, the circuits are split over whether those groups are even different:

- The Sixth Circuit took the broadest approach to identifying the denominator. In *Planned Parenthood Southwest Ohio Region v. DeWine*, the court examined a ban on certain medication abortions, and because the ban by its terms applied to all women seeking an abortion, the court held that the relevant denominator was all Ohio women attempting to obtain an abortion.[46]
- The Eighth Circuit took a slightly narrower view. In *Planned Parenthood of Arkansas and Eastern Oklahoma v. Jegley*, the court considered an Arkansas statute that required any physician who provides medication abortions to 1) sign a contract with a physician who would agree to handle complications arising from that abortion, and 2) have active admitting privileges at a hospital that could handle any emergencies arising from that abortion.[47] The court held that the "relevant denominator" was "women seeking medication abortions in Arkansas."[48]
- The Seventh Circuit went narrower still—in a decision that all but guarantees that the numerator and denominator will always be the same. In *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, the court considered an Indiana law requiring women to undergo an ultrasound at least 18 hours prior to obtaining an abortion.[49] The court held that the denominator is "the group for whom the law is a restriction," specifically "women for whom an additional lengthy trip to a PPINK health center for their informed-consent appointment acts as an impediment to their access to abortion services."[50] Which is to say, the denominator of the "large fraction" is only those women for whom the law is in fact a substantial obstacle. Since the numerator is *also* the women for whom the law is a substantial obstacle, the fraction will always be 1/1—"which is pretty large as fractions go."[51]
- The Ninth Circuit adopted a similarly narrow approach. In *Planned Parenthood Arizona, Inc. v. Humble*, the court considered a ban on medication abortions similar to the one the Sixth Circuit examined in *DeWine*, and it explicitly disagreed with the Sixth Circuit on how to define the denominator.[52] The court defined the denominator as "women who, in the absence of the Arizona law, would receive medication abortions under the evidence-based regimen."[53] Which is to say, the denominator is only those women for whom the Arizona law was a substantial obstacle, making up another 1/1 fraction.

Suffice it to say, the Supreme Court will at some point have to clarify the large fraction test—if not eliminate it entirely.

C. Can States Ban Certain Methods of Performing Abortions?

Next, the Court will have to resolve a circuit split on whether a state may ban live dismemberment abortions. As explained in section II.C., the Fifth Circuit upheld Texas's ban on live dismemberment abortions, while the Sixth and Eleventh enjoined enforcement of similar bans in Kentucky and Alabama. On October 12, the Supreme Court heard oral argument in *EMW v. Cameron*, where the Kentucky Attorney General asked for leave to intervene specifically so that he may file a cert petition to ask the Court to resolve the existing split on this question. So while the Court will not reach the merits of live dismemberment bans in *Cameron*, if it grants the state attorney general leave to intervene in the Kentucky case, it will almost certainly be asked to do so next term.

D. At What Stage May a State Restrict or Ban Abortions?

The other questions may tie the Court up for a couple of terms, but they are ultimately second-order questions. If the Court does not throw out its abortion precedents in *Dobbs*, then it will have to decide at precisely what week a state may ban abortions. Several states have passed cascading bans on abortions. Courts of appeals have generally enjoined enforcement of those statutes as impermissible bans on previability abortions:

- Tennessee criminalizes performing an abortion after 6, 8, 10, 12, 15, 18, 20, 21, 22, 23, or 24 weeks gestation.[54] The statute has a severability clause, essentially declaring that the state will enforce whichever time limit the Supreme Court will permit.[55] The Sixth Circuit enjoined the statute in toto.[56]

44 *See June Medical*, 140 S. Ct. at 2175-76 (Gorsuch, J., dissenting); *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting).

45 For those (like the author) who attended law school with the hope of avoiding math, those are the top and bottom numbers, respectively, in a fraction.

46 696 F.3d 490, 515–16 (6th Cir. 2012).

47 864 F.3d 953, 956 (8th Cir. 2017).

48 *Id.* at 958-59.

49 896 F.3d 809, 812 (7th Cir. 2018).

50 *Id.* at 819.

51 *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting).

52 753 F.3d at 914.

53 *Id.*

54 Tenn. Code Ann. § 39-15-216(c).

55 *Id.* § 216(h).

56 *Slatery*, 14 F.4th at 413.

- Missouri criminalizes performing an abortion after 8, 14, 18, and 20 weeks gestation.[57] And each provision contains its own severability clause, announcing that the state will enforce whichever provision passes constitutional muster.[58] The Eighth Circuit enjoined the statutes in toto.[59]
- Arkansas bans abortions at 12, 18, and 20 weeks gestation.[60] The Eighth Circuit enjoined the 12- and 18-week bans.[61]

These are just a few of the many examples of previability abortion restrictions currently on the books and involved in pending litigation.

V. The Consequences of *Dobbs*

Just a few months ago, the conventional wisdom was that the Court would seek some middle ground in *Dobbs*. That was not a prediction based on any articulable legal principle, so much as a guess that some members of the Court would be shy about making a difficult decision. Aside from that being an unfairly dim view of the Justices, Professor Sherif Girgis capably explained why there is no middle path here.[62] And true to Professor Girgis's analysis, both sides in *Dobbs* agreed in their briefing that the Court must either reaffirm or reverse *Roe* and *Casey*.

The *Dobbs* litigants are right. *Casey* already demonstrated that stare decisis-with-modifications is an untenable path. In *Casey*, the Court set out to reaffirm "the essential holding of *Roe*" on stare decisis grounds.[63] But Justice Blackmun, the author of *Roe*, maintained that *Roe*'s trimester framework was "far more administrable, and far less manipulable" than the viability and undue burden framework of the *Casey* plurality.[64] And Justice Scalia (writing for four dissenters) professed not to know what the undue burden test meant—or even what had been saved from *Roe*, given that *Casey* upheld many of regulations that *Roe* invalidated.[65]

The complex circuit fracture outlined above in section II demonstrates that Justice Blackmun was right: the undue burden test created more confusion than it solved. And Justice Scalia proved prophetic as well: far from "reaffirming" the "unbroken commitment" of the pre-*Casey* precedents, the Court invalidated all of them.[66]

Suppose the Court hews closely to the question presented in *Dobbs* and declares only that not *all* previability prohibitions on elective abortions are unconstitutional. The Court will then have to manufacture a new test for when previability prohibitions are allowed, and thus invalidate all of the pre-*Dobbs* precedents it might profess to preserve.

More importantly, if the Court tries to avoid affirming or reversing *Roe* and *Casey* in *Dobbs*, it will have no choice but to do so later. Litigation over the cascade bans will eventually force the Court either to fully abandon the fifty-year game of micro-managing abortion regulations, *or* to come full circle to the basic rule of *Roe*: a clear-but-arbitrary rule that states may ban abortions after X weeks, and not before. That kind of fundamentally legislative decision-making from the Court ignited a firestorm after *Roe*; it is hard to imagine it will fare any better fifty years later.

The Court will have to make a clear decision: reverse *Roe* and its progeny, or return to it in full. That much is unavoidable. The only question in *Dobbs* is whether the Court wants to do so now, or after three more years of bitter, all-consuming litigation.

57 Mo. Ann. Stat. §§ 188.056, .057, .058, .375.

58 *Id.*

59 *Parson*, 1 F.4th at 559.

60 Ark. Code Ann. §§ 20-16-1304, 20-16-1405, 20-16-2004.

61 *Rutledge*, 984 F.3d at 688 (18 weeks); Edwards v. Beck, 786 F.3d 1113, 1117 (8th Cir. 2015) (12 weeks).

62 Sherif Girgis, *Two Obstacles to (Merely) Chipping Away at Roe in Dobbs*, SSRN, Aug. 19, 2021, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3907787.

63 *Casey*, 505 U.S. at 870.

64 *Id.* at 930 (Blackmun, J., concurring).

65 *Id.* at 993-94 (Scalia, J., dissenting).

66 *See supra* note 3.