

## NOTES

### THE THEORETIC AND DEMOCRATIC IMPLICATIONS OF ANTI-ABORTION TRIGGER LAWS

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#### INTRODUCTION

On January 22, 1973, in its opinion in *Roe v. Wade*, the Supreme Court established a woman's constitutional right to choose to have an abortion.<sup>1</sup> Over time, the opponents of *Roe* have undertaken gradual measures to erode reproductive freedom. Since 2001, over 2,500 state laws have been proposed to restrict abortion.<sup>2</sup> With the addition of Justices Roberts and Alito to the Supreme Court, the erosion of reproductive rights has become even more salient and imminent.<sup>3</sup> In a 1985 memo, Justice Alito set forth ways to limit the right to choose, ultimately suggesting overturning *Roe*.<sup>4</sup> The most recent and devastating attack on *Roe* is the Supreme Court's decision in *Gonzales v. Carhart*,<sup>5</sup> upholding a federal ban on a particular

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

2. NARAL PRO-CHOICE AMERICA, LIBERTY AT RISK: THE VULNERABILITY OF REPRODUCTIVE RIGHTS UNDER ALITO 10 (2005), <http://www.prochoiceamerica.org/assets/files/Courts-SCOTUS-Liberty-at-Risk-Report.pdf>.

3. Roberts was confirmed in September 2005 and Alito in February 2006. See Bill Mears, *Chief Justice Roberts Goes to Work*, CNN, Sept. 30, 2005, <http://www.cnn.com/2005/POLITICS/09/30/roberts.starts>; Bill Mears, *Alito Sworn in as Nation's 110th Supreme Court Justice*, CNN, Feb. 1, 2006, <http://www.cnn.com/2006/POLITICS/01/31/alito/index.html>.

4. Memorandum from Samuel A. Alito, Associate Justice, U.S. Supreme Court to Rex E. Lee, U.S. Solicitor Gen. (June 3, 1985), <http://www.archives.gov/news/samuel-alito/accession-060-89-216/Thornburgh-v-ACOG-1985-box20-memoFriedtoAlito-June3.pdf> (regarding *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Diamond v. Charles*, 476 U.S. 54 (1986)).

5. 127 S. Ct. 1610 (2007).

abortion procedure.<sup>6</sup> This is the first time in over thirty years where the Court upheld a restriction on abortion which did not include an exception for the health of the woman.<sup>7</sup> Demonstrating an ominous concern for *Roe*, the Court did not confirm prior precedent, but merely assumed that it controlled.<sup>8</sup> Justice Ginsburg, a dedicated women's rights advocate,<sup>9</sup> called the majority's decision "alarming."<sup>10</sup> The Court will continue to address reproductive freedoms, offering opportunities to reaffirm or overturn *Roe*.<sup>11</sup> An opinion overturning *Roe* could take on a number of forms, but essentially, it would hold that there is no "fundamental" right to an abortion.<sup>12</sup>

*Roe* continues to face resistance throughout the United States. Opponents of *Roe* have pursued incremental strategies to undermine it through parental notification laws, imposition of waiting periods and counseling before having an abortion, and targeted regulation of abortion providers.<sup>13</sup> More recently, opponent strategies have shifted away from incremental methods to, instead, going after abortion directly.<sup>14</sup> Indeed, a number of states have attempted to pass blanket bans on abortion or to pass laws to restrict abortion that intentionally violate precedent set by *Roe* and subsequent

6. *Id.* at 1627.

7. See ACLU, *Frequently Asked Questions: U.S. Supreme Court Upholds Federal Ban on Abortion Methods*, <http://www.aclu.org/reproductiverights/abortion/29845res20070523.html> (last visited Mar. 5, 2009).

8. *Gonzales*, 127 S. Ct. at 1650 (Ginsberg, J., dissenting); see Judith G. Waxman, *Privacy and Reproductive Rights: Where We've Been and Where We're Going*, 68 MONT. L. REV. 299, 316 (2007).

9. See ACLU, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, Mar. 7, 2006, <http://www.aclu.org/womensrights/gen/24412pub20060307.html>.

10. Waxman, *supra* note 8, at 316.

11. NARAL PRO-CHOICE AMERICA, *supra* note 2, at 1; see Stuart Taylor, Jr., *Depending on Who Wins the Presidency, The Supreme Court Could Turn Sharply to the Right or See Its First Crusading Liberal Justice in Many Years*, NATIONAL JOURNAL, July 26, 2008 (Magazine), [http://www.nationaljournal.com/njmagazine/cs\\_20080726\\_6164.php](http://www.nationaljournal.com/njmagazine/cs_20080726_6164.php) (discussing the current composition of the Supreme Court and analyzing potential presidential appointments).

12. See Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 625 (2007).

13. See Clarke D. Forsythe, *A Legal Strategy to Overturn Roe v. Wade After Webster: Some Lessons From Lincoln*, 1991 BYU L. REV. 519, 534; Sondra Goldschein, State Strategies Attorney, Reproductive Freedom Project, ACLU, *Countering Efforts to Scale Back Reproductive Rights at the Law Students for Reproductive Justice Regional Northeast Training* (Oct. 13, 2007) (discussing state abortion restrictions, abortion opponent strategies, and counter strategies for reproductive rights advocates).

14. See Goldschein, *supra* note 13.

decisions.<sup>15</sup> One intention of these laws<sup>16</sup> is to prompt challenges from pro-choice advocates, ultimately forcing the Supreme Court to revisit *Roe*.<sup>17</sup>

A number of states enacted abortion bans before *Roe* (pre-*Roe* bans).<sup>18</sup> Some of these laws were never enjoined by the courts nor expressly or impliedly repealed, enabling state officials to immediately prosecute abortion providers if the Court overturns *Roe*.<sup>19</sup> In other states, courts have blocked pre-*Roe* abortion bans.<sup>20</sup>

Five states have laws in place that would trigger bans on

15. See CENTER FOR REPRODUCTIVE RIGHTS, WHAT IF *ROE* FELL? 10 (2007), [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Roe\\_Publication\\_PF4a\\_0.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Roe_Publication_PF4a_0.pdf) [hereinafter CENTER FOR REPRODUCTIVE RIGHTS 2007].

16. Laws banning abortion are based solely on an illegal purpose to “impose an undue burden on a woman’s right to seek an abortion” and should be struck down entirely because the unconstitutional intent is to lay the groundwork to reverse *Roe*. See Caroline Burnett, Comment, *Symposium: The Domestic Response to Global Climate Change: Federal, State, and Litigation Initiatives: Dismantling Roe Brick by Brick - The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F.L. REV. 227, 231 (2007).

17. See CENTER FOR REPRODUCTIVE RIGHTS 2007, *supra* note 15, at 10. The most recent ban in South Dakota, enacted in 2006, was soon repealed when put to a referendum. See *id.* at 11-13. However, on November 4, 2008, South Dakota voters will vote again on a less restrictive version of the ban rejected in 2006. See Peter Slevin, S. Dakota Readies Again for Abortion Fight, WASH. POST, Sept. 21, 2008, at A03. Legislating unconstitutional bans on abortion among abortion opponents is a contentious strategy, which relies upon a specific composition of the Supreme Court and whether strategists anticipate that the Court will overturn or reaffirm *Roe*. Compare Memorandum from James Bopp, Jr. & Richard E. Coleson (Aug. 7, 2007) (on file with author) (suggesting that anti-abortion activists should not advocate state abortion bans because any challenge will result in reaffirming *Roe* and possibly creating greater protections if the Court justifies its decision under an equal protection analysis), with Memorandum from Samuel B. Casey, Law of Life Project & Harold J. Cassidy, Harold J. Cassidy & Associates to Members of the South Dakota Pro-Life Leadership Coalition (Oct. 10, 2007) (on file with author) (advocating passing state abortion bans as the best incremental approach to ban abortion and overturn *Roe*).

18. See CENTER FOR REPRODUCTIVE RIGHTS 2007, *supra* note 15, at 10.

19. See *id.* at 10-11. These states include: Alabama, Delaware, Massachusetts, and Wisconsin. *Id.* For example, Alabama’s pre-*Roe* statute reads:

Any person who willfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aids, abets or prescribes for the same, unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction be fined not less than \$100.00 nor more than \$1,000.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months.

ALA. CODE §13A-13-7 (2008).

20. See CENTER FOR REPRODUCTIVE RIGHTS 2007, *supra* note 15, at 11. These states include: Arizona, Arkansas, Colorado, Michigan, New Mexico, Oklahoma, Rhode Island, Utah, Vermont, West Virginia, and Puerto Rico. *Id.*

abortion if the Supreme Court overturns *Roe*,<sup>21</sup> eliminating the constitutional right to choose an abortion.<sup>22</sup> These laws have not attracted much attention because they would not go into effect unless *Roe* is overturned—resulting in potentially devastating consequences.<sup>23</sup> The legality of these laws is regarded as “highly suspect.”<sup>24</sup>

This Note deconstructs the premise of trigger laws and offers tools for reproductive rights advocates to defeat them. Part I of this Note examines state laws restricting or banning abortion and their potential effects. Part II scrutinizes trigger laws in relation to other forms of constitutionally acceptable and problematic legislation. Part III addresses trigger laws in the context of the American constitutional democracy. Part IV examines the particular constitutional provisions at issue, contending that trigger laws violate the nation’s guarantee of a republican form of government and other violations that warrant increased scrutiny and regulation. Part V sets out the current state protections and suggests strategies for reproductive rights advocates to mitigate the effect of laws regulating abortion and to ensure future access to abortion.

## I. STATE LAWS IMPLICATED IF *ROE* IS OVERTURNED

### A. *Pre-Roe Bans*

In a number of states, pre-*Roe* bans remain on the books and could be revived if the Supreme Court overturns *Roe*. Under *Roe*, pre-*Roe* bans are unconstitutional. If state legislatures do not repeal these laws and courts do not enjoin them, state officials could enforce

21. Trigger laws are also referred to as “bans-in-waiting” and “PRAs” (post-*Roe* activation laws). See CENTER FOR REPRODUCTIVE RIGHTS 2007, *supra* note 15, at 10; Dorinda C. Bordlee & Nikolas T. Nikas, *Eroding Roe*, NATIONAL REVIEW ONLINE, June 19, 2006, <http://article.nationalreview.com/?q=ZDM3OGUzNTE5OWU5N2Q4NTJlYzgwYzE4OTdhYmJkZmI=>.

22. See CENTER FOR REPRODUCTIVE RIGHTS 2007, *supra* note 15, at 13. These states include: Illinois, Louisiana, Mississippi, North Dakota, and South Dakota. *Id.* The Illinois trigger law differs from the other states’ laws in that it includes only a statutory provision setting a state policy to prohibit abortion in the event the Supreme Court overturns *Roe*. *Id.* at 48.

23. Trigger laws “are just as dangerous” as any other ban on abortion and “in many ways they are more insidious.” CENTER FOR REPRODUCTIVE RIGHTS 2007, *supra* note 15, at 10.

24. Teresa L. Scott, Note, *Burying the Dead: The Case Against Revival of Pre-Roe and Pre-Casey Abortion Statutes in a Post-Casey World*, 19 N.Y.U. REV. L. & SOC. CHANGE 355, 388 (1992). To demonstrate the egregiousness of these laws, consider the following homologous hypothetical state statute: In the event *Brown v. Board of Education*, 347 U.S. 483 (1954), is overturned or it is determined that segregation is constitutional, it is hereby the policy of the state to legalize segregation.

them as soon as the Court overturns *Roe*.<sup>25</sup>

Only four states have pre-*Roe* laws that have never been officially enjoined by courts, though attorney generals have issued opinions stating that the laws are unconstitutional and cannot be enforced.<sup>26</sup> However, these opinions are not binding, and therefore, state officials could enforce these pre-*Roe* bans upon overturning *Roe*.<sup>27</sup> One argument against enactment of pre-*Roe* bans is that they have been “repealed by implication” due to many laws regulating abortion that were enacted post-*Roe*.<sup>28</sup> In states where pre-*Roe* bans have been repealed, state officials can file actions to ask the court “to set aside the court orders preventing enforcement of the laws, so that the bans could go back into effect.”<sup>29</sup> However, some states, by law and/or constitutional provision, expressly forbid revival of once-repealed statutes.<sup>30</sup>

### B. Trigger Laws

Trigger laws are not immediate bans on abortion. Instead, they incorporate restrictions or bans on abortion that would “spring into effect the instant or soon after *Roe* is overturned.”<sup>31</sup> Five states have passed trigger laws.<sup>32</sup> For instance, South Dakota passed a trigger law in 2005.<sup>33</sup> This law prohibits abortion except where the woman’s

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25. CENTER FOR REPRODUCTIVE RIGHTS, WHAT IF *ROE* FELL?: THE STATE-BY-STATE CONSEQUENCES OF OVERTURNING *ROE* V. *WADE* 1 (2004), [http://www.crlp.org/pdf/bo\\_whatifroefell.pdf](http://www.crlp.org/pdf/bo_whatifroefell.pdf) [hereinafter CENTER FOR REPRODUCTIVE RIGHTS 2004]; see also Scott, *supra* note 24, at 364; discussion *infra* Part II.A.

26. See CENTER FOR REPRODUCTIVE RIGHTS 2007, *supra* note 15, at 10-11; CENTER FOR REPRODUCTIVE RIGHTS 2004, *supra* note 25, at 8.

27. CENTER FOR REPRODUCTIVE RIGHTS 2004, *supra* note 25, at 8.

28. *Id.* (citing examples of implied repeal in Tennessee and Texas, where the courts found that old laws containing abortion restrictions were repealed by implication when the enactment of new laws contradicted provisions of the older laws); see Paul Benjamin Linton, *The Legal Status of Abortion in the States if Roe v. Wade Is Overruled*, 23 ISSUES L. & MED. 3, 4 (2007).

29. CENTER FOR REPRODUCTIVE RIGHTS 2004, *supra* note 25, at 10.

30. See KAN. CONST. art. II, § 16; OKLA. CONST. art. V, § 54; DEL. CODE ANN. tit. 1, § 106 (2003); KAN. STAT. ANN. § 77-201 (2000); MASS. LAWS ANN. ch. 4, § 6 (LexisNexis 1999); OKLA. STAT. ANN. tit. 25, § 32 (West 2008); TEX. GOV'T CODE ANN. § 311.030 (Vernon 2007); WIS. STAT. ANN. § 990.03(1) (2007).

31. CENTER FOR REPRODUCTIVE RIGHTS 2007, *supra* note 15, at 10.

32. See *supra* note 22.

33. S.D. CODIFIED LAWS § 22-17-5.1 (2005). The South Dakota trigger law becomes “effective on the date that the states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy.” 2005 S.D. Sess. Laws § 1. It states that:

any person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable medical judgment that

health is at risk.<sup>34</sup> As enacted in South Dakota, "[t]his Act is effective on the date that the states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy."<sup>35</sup>

Louisiana passed a trigger law in 2006 known as the Human Life Protection Act.<sup>36</sup> The Human Life Protection Act prohibits abortion procedures without an exception for the women's health,

effective immediately upon . . . (1) Any decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade* . . . thereby, restoring to the state of Louisiana the authority to prohibit abortion. (2) Adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit abortion.<sup>37</sup>

Similarly, North Dakota passed a trigger law in January 2007, where abortion would be prohibited "on the date the legislative council approves by motion the recommendation of the attorney general to the legislative council that it is reasonably probable that this Act would be upheld as constitutional."<sup>38</sup> Most recently, in

performance of an abortion is necessary to preserve the life of the pregnant female, is guilty of a Class 6 felony.

§ 22-17-5.1.

34. *Id.*

35. *Id.*

36. LA. REV. STAT. ANN. § 40:1299.30 (2006). The Louisiana trigger law provides that:

A. The provisions of this Act shall become effective immediately upon, and to the extent permitted, by the occurrence of any of the following circumstances:

(1) Any decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade*, 410 U.S. 113 (1973), thereby, restoring to the state of Louisiana the authority to prohibit abortion.

(2) Adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit abortion.

....

C. No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.

*Id.*

37. *Id.* § 40:1299.30(A).

38. N.D. CENT. CODE § 12.1-31-12 (2007), amended by 2007 N.D. Laws ch. 132. The North Dakota trigger law provides:

Section 1. . . . 2. It is a class C felony for a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion.

....

Section 2. EFFECTIVE DATE. This Act becomes effective on the date the

March 2007, Mississippi passed a trigger law, which prohibits abortion, effective only upon a determination by the state attorney general that the Supreme Court has overruled the decision of *Roe*.<sup>39</sup>

The only trigger law challenged in court was the Illinois Abortion Act of 1975.<sup>40</sup> This law prohibits abortion except where the woman's health is at risk and, according to the medical judgment of a physician, the abortion is necessary.<sup>41</sup> Section 1 of the Act expresses the legislative intention that "if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the

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legislative council approves by motion the recommendation of the attorney general to the legislative council that it is reasonably probable that this Act would be upheld as constitutional.

*Id.*

39. MISS. CODE ANN. § 41-41-55 (West 1986), amended by 2007 Miss. Laws ch. 441. The Mississippi trigger law provides:

SECTION 2. . . . (2) No abortion shall be performed or induced in the State of Mississippi, except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape.

. . . .

SECTION 4. At such a time as the Attorney General of Mississippi determines that the United States Supreme Court has overruled the decision of *Roe v. Wade*, 410 U.S. 113 (1973), and that as a result, it is reasonably probable that Section 2 of this act would be upheld by the court as constitutional, the Attorney General shall publish his determination of that fact in the administrative bulletin published by the Secretary of State . . . .

SECTION 5. (1) If any provision of this act is found to be unconstitutional, the provision is severable; and the other provisions of this act remain effective, except as provided in other sections of this act.

(2) Nothing in this act may be construed to repeal, by implication or otherwise, any provision not explicitly repealed.

(3) If any provision of this act is ever declared unconstitutional or its enforcement temporarily or permanently restricted or enjoined by judicial order, the provisions of Sections 41-41-31 through 41-41-91, Mississippi Code of 1972, shall be enforced. However, if such temporary or permanent restraining order or injunction is subsequently stayed or dissolved or such declaration vacated or any similar court order otherwise ceases to have effect, all provision of this act that are not declared unconstitutional or whose enforcement is not restrained shall have full force and effect.

SECTION 6. [Effective date] . . . Section 2 of this act shall take effect and be in force from and after ten (10) days following the date of publication by the Attorney General of Mississippi in the administrative bulletin published by the Secretary of State . . . , that the Attorney General has determined that the United States Supreme Court has overruled the decision of *Roe v. Wade*, 410 U.S. 113 (1973), and that it is reasonably probable that Section 2 of this act would be upheld by the court as constitutional.

*Id.*

40. 720 ILL. COMP. STAT. ANN. 510 (West 2008); see *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978).

41. 720 ILL. COMP. STAT. ANN. 510/1.

former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated."<sup>42</sup> The Illinois Abortion Act of 1975 withheld a challenge in *Wynn v. Scott*.<sup>43</sup> There, pregnant women and physicians had standing to challenge the law.<sup>44</sup> The court, however, did not decide the constitutionality of section 1 of the Act, which expressed the intent of the legislature to prohibit abortion in the event *Roe* is overturned.<sup>45</sup> The court explained that section 1 currently had "no substantive effect" because there are no provisions in the statute that would have the effect of criminalizing abortion if *Roe* was overturned.<sup>46</sup> *Wynn* is the closest a court has come to deciding the constitutionality of an anti-abortion trigger clause.

## II. ANALOGY TO REVIVAL LAWS, SUNSET CLAUSES, AND LEGISLATIVE ENTRENCHMENT

The Supreme Court has not addressed a trigger law or, more generally, the issue of "enforceability of a statute passed prior to the announcement of the overruling decision."<sup>47</sup> First, there exists scholarly analysis and case law regarding statutes that were once invalidated by a court decision, but revived when the decision was

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42. *Id.* This section provides that the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

*Id.*

43. 449 F. Supp. 1302 (N.D. Ill. 1978); 720 ILL. COMP. STAT. ANN. 510/1.

44. See 449 F. Supp. at 1309. The court determined that the women had standing to challenge provisions of the statute that would affect their constitutional right to privacy and right to abortion. *Id.* The doctors had standing to challenge the provisions that would "impose obligations on them directly and affect either their own legal interests or the rights of their pregnant patients." *Id.*

45. See *id.* at 1308.

46. *Id.* Although the court found it unnecessary to review the constitutionality of section 1, the court suggests that the "constitutionality of the statute as a whole, rest[s] on the cumulative effect of the individual sections." *Id.* Therefore, a cumulative unconstitutional effect of the individual sections could render the entire statute invalid. See also Linton, *supra* note 28, at 16 n.95 (noting that the first section of the statute "would not, by its own terms, make abortion illegal" and that a statute must define criminal conduct to be punishable, but that "one General Assembly cannot bind another to enact legislation.").

47. William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1908 (1993).



overturned (revival statutes).<sup>48</sup> Second, there are many laws that include provisions that are triggered at a later date, called sunset laws.<sup>49</sup> Third, the validity of entrenching statutes sheds insight into whether it is appropriate for a legislature to enact statutes that bind subsequent legislatures from repealing new or existing laws.<sup>50</sup>

#### A. *Revival Laws*

For a number of reasons, state courts have addressed and allowed statutes once held unconstitutional that remain on the books to be reenacted if a court overturns the invalidating decision; however, the Supreme Court has yet to address this issue. Both revival and trigger laws cannot be enforced until a court overturns a decision.<sup>51</sup> Revival arises when a statute is held unconstitutional due to an invalidating court decision and remains on the books to be reenacted if the decision is later validated. Revival of old laws presents constitutional problems because it enables prosecutors to enforce criminal penalties without notice to potential defendants.<sup>52</sup> It is unlikely that resources will be spent on repealing old unconstitutional statutes because, as the Maryland Supreme Court in *Johnson v. State* explained, “an unconstitutional act is not a law for any purpose, cannot confer any right, cannot be relied upon as a manifestation of legislative intent, and ‘is, in legal contemplation, as inoperative as though it had never been passed.’”<sup>53</sup> In addition, minimal effort is spent on repeal because it is more difficult to repeal a statute than to enact one.<sup>54</sup>

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48. See discussion *infra* Part III.A. See generally Treanor & Sperling, *supra* note 47 (discussing the validity of the revival of statutes once unconstitutional under a rule by a court decision in the event that the decision is overturned).

49. BLACK'S LAW DICTIONARY 1478 (8th ed. 2004). “A statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed.” *Id.*

50. Compare John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773 (2003) (asserting that, as both constitutional and practical matters, legislatures should not be able to bind their successors), and Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003) (arguing against legislative entrenchment), with Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L. J. 1665 (2002) (finding no constitutional basis for proscribing entrenchment because it is no different from other legislative tools to bind future legislatures).

51. Although it is not the exclusive province of this Note, pre-*Roe* bans are a form of revival law and the arguments proceeding should also apply to these bans. See generally Scott, *supra* note 24; Treanor & Sperling, *supra* note 47.

52. Scott, *supra* note 24, at 357.

53. 315 A.2d 524, 528 (Md. 1974) (citing *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)); see Treanor & Sperling, *supra* note 47, at 1919.

54. See Scott, *supra* note 24, at 367 (citing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 6 (1982)).

Although the Supreme Court has not specifically addressed the issue of revival statutes, it has demonstrated a willingness to revive statutes that were previously unenforceable.<sup>55</sup> For instance, in 1870, the Court declared the Legal Tender Act of 1862 unconstitutional as applied to obligations before the Act was passed.<sup>56</sup> When the Court reversed its decision two years later—finding the Act constitutional as applied to all obligations (preceding and subsequent to passing the Act)—it treated the Act enforceable without Congressional reenactment, and yet the Court failed to address directly the revival issue.<sup>57</sup>

In contrast to the Supreme Court's avoidance of the revival issue, state case law directly addressing revival statutes supports the revival of prior unconstitutional statutes once a court overturns an invalidating decision.<sup>58</sup> The automatic revival of these statutes suggests the need for legislators to repeal pre-*Roe* bans to make certain that they cannot be revived if the Court overturns *Roe*.<sup>59</sup>

This raises a crucial question: Whether a trigger law with provisions that are currently unconstitutional under *Roe*, and therefore have no legal effect, can immediately go into effect if *Roe* is overturned without reenactment by the current legislature. Because the Supreme Court has yet to deal explicitly with the issue of revival or this type of trigger clause, the Court could either assume the laws'

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55. See Treanor & Sperling, *supra* note 47, at 1907. In *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), the Supreme Court held that a treaty, passed after both district and circuit courts decided, would govern on appeal. Since then, the Court has allowed the retroactive application of other laws. See, e.g., *Thorpe v. Housing Auth.*, 393 U.S. 268, 282 (1969); see also *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 280 (1994) (defining the Supreme Court's current framework for retroactivity issues). Although retroactivity of laws has been supported by the Court, the Court has failed to directly address the revival issue. In *Wilkerson v. Rahrer*, 140 U.S. 545 (1891), the Court did not resolve the issue of whether a once unconstitutional law needed to be re-passed to be enforced. In these cases the Court assumes the enforceability of a once unconstitutional law without directly addressing the question or considering the "arguments against revival and reject[ing] them." Treanor & Sperling, *supra* note 47, at 1912.

56. See *id.* at 1910-11; see also Fallon, *supra* note 12, at 615. The Legal Tender Act of 1862 allowed debtors to use paper money to pay their obligations. *Legal Tender Cases*, 79 U.S. (1 Wall.) 457 (1871).

57. See Treanor & Sperling, *supra* note 47, at 1910-11; see also Fallon, *supra* note 12, at 615.

58. Treanor & Sperling, *supra* note 47, at 1912-15; see *State ex rel. Badgett v. Lee*, 22 So. 2d 804, 806 (Fla. 1945) (holding that a once unconstitutional statute would be revived by an overruling decision and noting that even though a statute is declared unconstitutional, "it is not dead, only dormant."); *Pierce v. Pierce*, 46 Ind. 86, 95 (1874) (opining that a statute had "all the time been the law of the State" where a court had previously held it unconstitutional yet later validated it anew by overruling that decision).

59. See discussion *supra* Part I.A.

enforceability or set new precedent governing the issue.

Professors Treanor and Sperling argue that “given a statute that is sufficiently constitutionally problematic to have been at one time inconsistent with governing judicial interpretations of constitutional law—it is appropriate to force the legislature to reconsider its position on the statute itself.”<sup>60</sup> Allowing revival of a statute that was once pronounced unconstitutional defies the Court’s authority as the final arbiter.<sup>61</sup> By analogy, trigger laws, prior to the actual instigation of the trigger, contain a policy that is inconsistent with current “governing judicial interpretations of constitutional law”—the fundamental right to abortion held by *Roe*.<sup>62</sup> Applying Treanor and Sperling’s argument, if *Roe* is overturned, state officials should not automatically enforce trigger laws; the legislature must reaffirm them.<sup>63</sup> The mere possibility that trigger laws may not be supported by today’s voters suggests that these laws should be reconsidered through the legislative process.<sup>64</sup>

### B. Sunset Clauses

Congress certainly has the authority to enact laws containing sunset clauses (sunset laws).<sup>65</sup> Sunset laws enable the legislature to choose to enact legislation that “limit[s] the scope of *its* action temporally, [but does] not . . . restrict the power of any future legislature to act as it sees fit.”<sup>66</sup> Sunset laws are similar to trigger laws in that sunset laws include a provision in the statute that is triggered at some point in the future. Yet, the sunset clause *terminates* all or part of the statute after a specified period of time, whereas the trigger clause *activates* a provision within the statute.<sup>67</sup>

60. Treanor & Sperling, *supra* note 47, at 1917; see discussion *infra* Part III.A.

61. Scott, *supra* note 24, at 358 n.20.

62. Treanor & Sperling, *supra* note 47, at 1917.

63. See *id.* Treanor & Sperling’s argument may apply to North Dakota’s trigger law because it requires that the state’s legislative council “approve[] by motion the recommendation of the attorney general,” which could be an effective reaffirmation by the legislature. N.D. CENT. CODE § 12.1-31-12 (2007), *amended by* 2007 N.D. Laws ch. 132. Senior reproductive rights advocates have voiced concern about trigger laws and support for legislative reconsideration of trigger laws if *Roe* is overturned. See Scott, *supra* note 24, at 388 n.234 (citing a letter from a former senior staff attorney for the ACLU Reproductive Freedom Project to the State Civil Liberties Unions Directors on June 28, 1989).

64. See Scott, *supra* note 24, at 380-81.

65. See Posner & Vermeule, *supra* note 50, at 1676.

66. Roberts & Chemerinsky, *supra* note 50, at 1784; see BLACK’S LAW DICTIONARY 1478 (8th ed. 2004).

67. BLACK’S LAW DICTIONARY 1478 (8th ed. 2004); see Posner & Vermeule, *supra* note 50, at 1676. Examples of statutes that contain sunset clauses are the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272

Allowing the legislature to include a textually determinative clause causing the statute to lapse "frees future legislatures from being constrained even by the existence of a law."<sup>68</sup> Contrary to sunset laws, trigger laws do just the opposite by including a clause that defines no specified period, and if triggered, the clause actually imposes a new law.

Sunset laws effectively use a statute passed by a legislature to affect a future result, unlike trigger laws, which rely on the judiciary's consideration of the legitimacy of a certain constitutional principle to affect a future result. The latter enactment is outside of the legislature's control, which raises concerns under the doctrine of separation of powers.<sup>69</sup>

### C. *Legislative Entrenchment*

A well-established principle of U.S. constitutional thought is the rule against legislative entrenchment—the ability of a legislature to enact laws that bind future legislatures.<sup>70</sup> The rule is rooted in the most basic notions of democracy and the ability of a present majority to govern itself.<sup>71</sup>

Conceptually, trigger laws differ from entrenching legislation because trigger laws do not officially bind the future legislature's ability to repeal or amend the laws. Nonetheless, the trigger sets a state policy to prohibit abortion, which would be difficult for the present legislature to overcome. This argument is supported by the Supreme Court's invalidation of the Gramm-Rudman Act, even

(codified in scattered sections of the U.S.C.) (containing provisions set to expire on December 1, 2005) and the Violent Crime Control and Federal Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (including a ten-year ban on the sale of certain weapons to civilians). Another example is the eight-year presidential term limit. U.S. CONST. amend. XXII.

68. Roberts & Chemerinsky, *supra* note 50, at 1784-85.

69. See discussion *infra* Part IV.A.

70. See, e.g., *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1989) (declaring that a present legislature cannot impose its will on a subsequent legislature); *Newton v. Comm'rs*, 100 U.S. 548, 559 (1879) (stating that the future legislatures must have the same ability to repeal and modify statutes as did their predecessors); see also Roberts & Chemerinsky, *supra* note 50, at 1775-77.

71. Roberts & Chemerinsky, *supra* note 50, at 1775-76. Charles Black once referred to the principle that one legislature cannot bind a future one as being both "on the most familiar and fundamental principles, so obvious as rarely to be stated." Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191 (1972); cf. THOMAS HOBBES, *LEVIATHAN* 184 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) ("For having power to make, and repeale Lawes, [the Sovereign] may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new."). A legislature can only bind future legislatures through constitutional amendment. Roberts & Chemerinsky, *supra* note 50, at 1776.

though the Act did not officially bind future legislatures.<sup>72</sup> By creating limits on future Congress's spending power, the Gramm-Rudman Act regulated future acts by Congress.<sup>73</sup> Professor Eule, one of the first scholars to analyze legislative entrenchment, set out four categories of entrenchment: 1) "absolute entrenchment," enacting a statute that prohibits its repeal forever, 2) "procedural entrenchment," requiring a procedure to be met in order to repeal the law, 3) "transitory entrenchment," preventing changing the law for a temporary period of time, and 4) "preconditional entrenchment," prohibiting repeal until a specified event occurs.<sup>74</sup>

The Gramm-Rudman Act engenders a different entrenchment from Professor Eule's prescribed categories of entrenchment; this is because the Gramm-Rudman Act does not forestall a future Congress's ability to repeal the Act itself.<sup>75</sup> Professor Eule concludes that "[t]he concept of entrenchment may encompass laws that unduly burden future legislators as well as those that bind them."<sup>76</sup> Trigger laws are based in political motivations to set anti-abortion state policy, making it difficult for both the legislature to repeal or amend and for the judiciary to adjudge it unconstitutional.<sup>77</sup> Just as the uniqueness of the Gramm-Rudman Act led the Court to find that the Act violated the rule against entrenching legislation, so should the exceptional nature of anti-abortion trigger laws.<sup>78</sup>

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72. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038. This Act is known as the Gramm-Rudman Act. See Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 425 n.215 (1987). The Gramm-Rudman Act was struck down by the court in *Bowsher v. Synar* for unconstitutional delegation by the legislative authority to the Comptroller General, who could be removed only by Congress. 478 U.S. 714 (1986).

73. Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185, 190 (1986).

74. Eule, *supra* note 72, at 384-85. "Absolute entrenchment" is the most extreme form of entrenchment and rarely attempted. See *id.* at 384. "Procedural entrenchment" often requires a supermajority vote for repeal or amendment. See Roberts & Chemerinsky, *supra* note 50, at 1778. "Preconditional entrenchment" usually refers to a condition satisfied outside of the legislative branch. *Id.*

75. See Eule, *supra* note 72, at 425 n.215. Professor Eule notes that the Gramm-Rudman Act could be considered "procedural" or "preconditional entrenchment" because it "sets the form by which prior legislation can be altered." *Id.*

76. *Id.* at 426 n.215.

77. Setting state policy to prohibit abortion enables the legislature to pass laws with this purpose, without worrying that the court would strike it down because of an illegitimate purpose.

78. One should not be misled to think that anti-abortion trigger laws are identical to the Gramm-Rudman Act, because they are not. They differ in myriad ways. The point is that there are exceptional cases of legislation, such as the Gramm-Rudman Act, that do not necessarily have a binding effect, in the formal sense, but, nonetheless are considered entrenching statutes. The concerns raised by the Gramm-Rudman Act

## III. ARE TRIGGER LAWS LEGITIMATE IN A DEMOCRATIC SOCIETY?

Trigger laws embody competing obligations to the ideals of self-government and the rule of law, which seek to lay down commitments to be extended and followed in the future, and to the present will of the majority.<sup>79</sup>

A. *Questionable Reliance and Failed Notice*

Trigger laws present a unique fair notice concern by upsetting individuals' justifiable reliance on precedent. Past majorities may legitimately prescribe laws that affect future majorities because those future democratic majorities are empowered to repeal or modify the law. Inherent in this proposition is the requirement that a future majority needs to know that it is bound by a law through the fact of the law's previous and continuing operation, or at least the threat of its operation. If a court holds a statute unconstitutional (for example, pre-*Roe* bans) or "clearly unconstitutional under governing case law [so that it] will not be enforced,"<sup>80</sup> (for example, trigger laws) then reliance on precedent presupposes the law's future unenforceability.<sup>81</sup>

For instance, the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, expressed the importance of protecting reliance interests by proclaiming that "[t]he constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured neither can the certain cost of overruling *Roe* for the people who have ordered their thinking and living around that case be dismissed."<sup>82</sup> Indeed, the American doctrine of stare decisis

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are far too complex to discuss within the confines of this Note. For an in-depth analysis of the Gramm-Rudman Act, see generally Kahn, *supra* note 73.

79. See JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 96 (2005). Accepting the ideal of presentism (the will of the present and majority governance) suggests that "a law made a generation or more in the past plainly commands very little legitimate authority today . . . [and] none at all . . . if present democratic will runs against it." *Id.* at 139. It is true that laws are passed frequently that remain in force even after those who passed the law are gone. However, presentism focuses specifically on tension between the authority of past law and the current will of the governed. Rubinfeld rejects presentism and suggests that because "[g]overnance under law always presupposes the regulation of the future by the past," Americans need to view self-government in the lens of a "larger enterprise," rather than "merely trying to maximize satisfaction of our present preferences." *Id.* at 140-41.

80. Treanor & Sperling, *supra* note 47, at 1918.

81. *Id.*

82. 505 U.S. 833, 856 (1992). In emphasizing the importance of precedent, the Court declared that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.* at 854.

“promotes reliance on judicial decisions”; however, the Supreme Court has the power to overturn precedent.<sup>83</sup> Relying on precedent confounds the need to spend political capital on repealing pre-*Roe* laws or opposing new bans that are unconstitutional under current precedent.<sup>84</sup> However, the risk taken in not repealing pre-*Roe* laws or opposing abortion bans and relying on precedent—the reliance on the right to choose an abortion—could be detrimental if precedent is overturned, which could revive pre-*Roe* bans and trigger abortion restrictions.

As such, judicial invalidation plainly affects the political process. Rather than only affecting the allocation of political capital, invalidation also “tilt[s] the process towards the retention and passage of ‘unconstitutional’ statutes,” a notion inherently problematic in American constitutional democracy.<sup>85</sup> *Roe* opponents rely on judicial invalidation in passing trigger laws because the current unconstitutional provisions restricting abortion cannot be enforced until *Roe* is overturned. Anti-abortion trigger laws are problematic because they hold people responsible for knowing that if *Roe*’s central holding is reversed, abortion becomes illegal, and individuals who perform abortions (and, in some cases, the women themselves) will be subject to criminal prosecution. Further, they are not set to a certain date, but rather a judicial decision, which may or may not overturn a previous decision.<sup>86</sup> If the statute does not activate until an indefinite time in the future, there is an erosion of the notice required for the law to legitimately apply to future generations.

### B. Doctrine of Desuetude

Applying trigger laws, which currently have no legal force, to future majorities implicates the doctrine of desuetude.<sup>87</sup> Utilizing this doctrine allows courts to invalidate these laws by demonstrating that without continued use, trigger laws fail to maintain their

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83. Treanor & Sperling, *supra* note 47, at 1917. “The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.” *Hertz v. Woodman*, 218 U.S. 205, 212 (1910).

84. See Treanor & Sperling, *supra* note 47, at 1917.

85. *Id.* at 1924.

86. Triggering a trigger clause may depend upon the language used by the Supreme Court and subsequent interpretations. Query, whether an opinion expressly overturns *Roe* by using the following language: “*Roe* is overturned.” Or, can a more implicit “overturning” by limiting *Roe*’s fundamental right to abortion cause the trigger?

87. Desuetude is one way in which a court could invalidate a statute. See Scott, *supra* note 24, at 382.

democratic legitimacy. The doctrine of desuetude suggests "that judges should take judicial notice of the fact that a statute has fallen into desuetude" or disuse.<sup>88</sup> "The chief virtue of the doctrine is its ability to remove archaic and unrepresentative laws from the statute books."<sup>89</sup> The doctrine seeks to protect individuals from law enforcement officials selectively enforcing "long dormant statutes . . . as pretexts for harassing individuals."<sup>90</sup> When a statute lies dormant for a period of time and is not enforced, there is a failure to provide citizens with fair notice of its implications, which may constitute a violation of due process.<sup>91</sup> Although American courts have not decided any case based solely on the doctrine of desuetude, most courts endorse its premise.<sup>92</sup> Courts have enabled constitutionally-based claims, such as vagueness, equal protection, and due process to serve as a proxy for the doctrine of desuetude by essentially "achiev[ing] the same results as an expressly recognized doctrine of desuetude."<sup>93</sup> But, when constitutional precedent is not available to prove that a desuetudinal statute is unconstitutional, enabling the utilization of the doctrine of desuetude would serve as a protection to

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88. Erik Encarnación, Note, *Desuetude-Based Severability: A New Approach to Old Morals Legislation*, 39 COLUM. J.L. & SOC. PROBS. 149, 153 (2005). Under "[t]he doctrine of desuetude a statute may be void because of its lack of use." 82 C.J.S. STATUTES § 292.

89. Mark Peter Henriques, Note, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1075 (1990).

90. Encarnación, *supra* note 88, at 154; see Jonathan Finer, *Old Blue Laws Are Hitting Red Lights*, WASH. POST, Dec. 4, 2004, at A3 ("It's not just that [obsolete morals statutes] are no longer relevant, but some of these could be used for the purpose of targeting or embarrassing someone for political or other reasons . . . . The only time these things rear their head [sic] is when somebody has it out for somebody else."); see also Henriques, *supra* note 89, at 1084-85.

91. See Encarnación, *supra* note 88, at 154-55 (2005). The legislature could decide to enforce a desuetudinal statute, "provided that the legislature gives proper notice to its citizens and enforces the statute consistently and predictably." *Id.* at 180. "The doctrine of desuetude preserves procedural fairness . . . in the sense that it is primarily concerned with fair administration of the law rather than the content of the law itself." *Id.* at 156. A similar rationale creates the foundation for the void for vagueness doctrine. See discussion *infra* Part IV.B.

92. See Encarnación, *supra* note 88, at 156; Henriques, *supra* note 89, at 1070. The United States adopted the doctrine of desuetude in *Committee on Legal Ethics v. Printz*, 416 S.E.2d 720, 726 (W. Va. 1992). The Supreme Court of Appeals of West Virginia held that when officials allowed citizens to openly and notoriously violate certain laws over a long period of time, those laws were no longer binding. *Id.*

93. Encarnación, *supra* note 88, at 162; see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a long dormant statute barring sodomy by individuals of the same sex was unconstitutional because it violated the right to privacy under the Due Process Clause); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a long dormant statute banning contraceptives was unconstitutional because it violated the right to privacy under the Due Process Clause).



individuals.<sup>94</sup> The use of the doctrine would also “encourage direct judicial notice of the dangers posed by desuetudinal legislation.”<sup>95</sup>

Both the doctrine of desuetude and the second look doctrine urge the courts to reexamine trigger laws. Variations of the doctrine of desuetude, such as the second look doctrine, encourage the judiciary to reexamine statutes that are obsolete.<sup>96</sup> Advocates of the second look doctrine suggest that the court should nullify questionable laws, especially if the laws subject individuals to criminal punishment or concern fundamental rights.<sup>97</sup> The doctrine of desuetude recognizes the vulnerability of individuals when legislatures pass trigger laws because they lay dormant and cannot be enforced until the Court overturns *Roe*, and then can be enforced without any prior notice.<sup>98</sup>

Courts should employ a mechanism to provide protection from enforcement of dormant laws.<sup>99</sup> A number of legal scholars urge the courts to apply the doctrine of desuetude, even though the United States has never applied the doctrine of desuetude to repeal a statute.<sup>100</sup> “[S]ince the state might opt to enforce an obsolete statute at any time, threatened individuals should have the preemptive right to challenge the statute’s constitutionality through an action for declaratory judgment.”<sup>101</sup> In the case of trigger laws, a state official

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94. See Encarnación, *supra* note 88, at 163.

95. *Id.*

96. Scott, *supra* note 24, at 382-88.

97. See *id.* at 385. Scott endorses Calabresi’s second look proposal. *Id.* at 384-88.

98. Each trigger law has its own enactment procedures (or lack thereof). See *supra* notes 33-42. For example, a clear violation of notice may not be as egregious in relation to Mississippi’s trigger law that requires the State Attorney General to publish his/her determination that *Roe* has been reversed and that prohibition of abortion is constitutional in the “administrative bulletin published by the Secretary of State.” See *supra* note 39. However, the doctrine of desuetude is not without its faults. The doctrine of desuetude raises separation of powers issues by giving legislative power to the executive. See Henriques, *supra* note 89, at 1078. In addition, by allowing judges to render statutes obsolete, the doctrine presents uncertainties in the law. See *id.* at 1080.

99. See, Henriques, *supra* note 89, at 1059.

100. See, e.g., *id.* at 1059.

101. *Id.* at 1060. One argument is that without the court’s adoption of the doctrine of desuetude, plaintiffs should have standing to challenge a law if they plan to violate it and should only need to show that they have a legal right at issue. See *id.* at 1080. If a court does not adopt the doctrine of desuetude, holding that the failure to enforce a law does not bear on whether it is still valid, then the individual defending against a crime is always threatened by prosecution. In effect, the plaintiff satisfies the “threat of prosecution” requirement. *Id.* at 1077. In order to eliminate the need for the “threat of prosecution,” Professor Borchard proposed changes to standing requirements. *Id.* at 1081. He recommended that 1) the question in the case must be real, 2) the person must have real interest and 3) the person opposing must also have real interest. *Id.* Another scholar proposed eliminating the “threat of prosecution” required for standing in a declaratory judgment action against a desuetude statute. See *id.* at 1094-95.

can opt to enforce the trigger law whenever the official determines that the Supreme Court has allowed states to constitutionally prohibit abortion.<sup>102</sup>

Desuetude statutes may also serve an expressive function, which is perhaps one reason why it remains difficult to repeal them. Legal norms embodied by criminal statutes, in particular, carry expressive content; the purpose is to give a "collective feeling of revulsion toward certain acts, even when they are not very dangerous."<sup>103</sup> This suggests that criminal statutes are meaningful and, therefore, the legislature is less likely to repeal them; after all, if the legislature did repeal the law, it would be viewed "as endorsing the conduct it proscribes."<sup>104</sup> For instance, before the Court struck down the Texas anti-sodomy law in *Lawrence v. Texas*,<sup>105</sup> most Texans were not bothered that the anti-sodomy statute was rarely enforced.<sup>106</sup> However, they would have been upset if the statute were removed from the books because of its expressive value—disapproval of homosexual conduct.<sup>107</sup>

Trigger laws embody an expressive function similar to desuetude criminal statutes. Anti-abortion trigger laws not only serve as a meaningful expression of collective anti-abortion values, but also as an expression of disrespect for current constitutional law. Because the purpose behind criminal law is to provide punishment and deterrence, legislating criminal laws that serve only an expressive function (that is, a rule without punishment) aim to dictate constituent morality, and therefore are contrary to public policy.<sup>108</sup> Trigger laws, similar to desuetude criminal laws serving exclusively expressive and symbolic functions, should be struck down through

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However, bringing about a constitutional challenge without the standing requirement of the "threat of prosecution" may cause problems because, if the court does not find the statute unconstitutional, the prosecutor could then bring charges against the plaintiff. *Id.* at 1085.

102. See discussion *infra* Part IV.A.

103. Encarnación, *supra* note 88, at 169 (quoting Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1017 (1940)). A rule prescribing a legal norm through statute "still has expressive content regardless of whether it is enforceable through punishment. Such a rule would express discontent with that conduct, irrespective of whether the rule is supported by a corresponding punishment rule." *Id.* at 173.

104. *Id.* Opposition to repeal of desuetude laws is not because groups want to punish individuals that violate statutes, but rather because of the "symbolism underlying the definition of the offense." *Id.* at 184.

105. 539 U.S. 558 (2003).

106. See Encarnación, *supra* note 88, at 181.

107. See *id.* The expressive function of the law "may have expressed hateful intolerance towards persons of homosexual orientation [and] . . . may have attempted to stigmatize such persons." *Id.* at 173.

108. See *id.* at 181-82.

constitutional doctrine or by judicial adoption of the doctrine of desuetude.<sup>109</sup>

C. *The Principle of Non-Contemporaneous Ratification*

Another concept that sheds light upon the legitimacy of trigger laws, by analogy, is the rule barring non-contemporaneous ratification of constitutional amendments. In *Dillon v. Gloss*, the Supreme Court held that nothing in Article V “suggests that an amendment once proposed is to be open to ratification for all time.”<sup>110</sup> The Court stated that ratification “must be within some reasonable time after the proposal,” finding non-contemporaneous ratification to be untenable.<sup>111</sup> The proposal and ratification of amendments, similar to the proposal and passage of statutes, “are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time.”<sup>112</sup>

The purpose of these contemporaneous actions is to “reflect the will of the people in all sections at relatively the same period.”<sup>113</sup> Of course, ratification scattered over many years would accomplish this.<sup>114</sup> According to *Dillon*, if Congress does not ratify an amendment “early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.”<sup>115</sup>

Trigger laws are analogous to the concept of non-contemporaneous ratification of amendments disapproved of in *Dillon*. Similar to amendments proposed but not ratified soon after, trigger laws are proposed by legislation but not effectively ratified contemporaneously because they can only be activated at an unforeseen date in the future. The *Dillon* principle invalidates the premise of trigger laws—laws passed but not contemporaneously activated—because, according to *Dillon*, their ability to go into effect at an indefinite time does not “reflect the [current] will of the

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109. See *id.* at 184. Because a primary function of a statute is expressive, it does not immunize it from constitutional invalidation. *Id.* Consider the following two examples: 1) In the event that *Brown v. Board of Education*, 347 U.S. 483 (1954), is overruled, public schools shall be segregated according to race, 2) Whites are the superior race. A legislature cannot pass these laws because their expressive content of legal norms is “vitally important with respect to a statute’s validity under constitutional provisions like the Equal Protection Clause.” Encarnación, *supra* note 88, at 173.

110. 256 U.S. 368, 374-75 (1921).

111. *Id.* at 375.

112. *Id.* at 374-75.

113. *Id.* at 375.

114. *Id.*

115. *Id.*

people.”<sup>116</sup>

#### IV. CONSTITUTIONAL VIOLATIONS

Trigger laws cut against foundational American notions of present will and democratic governance. Accordingly, trigger laws violate the U.S. Constitution. In particular, trigger laws violate the separation of powers doctrine, individual liberties, and the republican form of government.

##### A. Separation of Powers

The doctrine of separation of powers<sup>117</sup> ensures the effective creation of procedures for implementing policies and prohibits the legislature from delegating policy-making power.<sup>118</sup> Specifically, “[t]he legislative branch cannot delegate or confer legislative power on the courts or impose legislative duties upon them, because such duties are not judicial in nature. An act of the legislature delegating legislative powers to courts is unconstitutional.”<sup>119</sup> In passing trigger laws, the legislature violates the doctrine of separation of powers by delegating to the Supreme Court the discretion to decide whether the provisions triggered by the statute ever become law.

Trigger laws violate state constitution separation of powers clauses for the same reasons that they violate the Federal Constitution’s implied doctrine of separation of powers. Many state constitutions explicitly declare separation of powers.<sup>120</sup> Moreover, some state courts have interpreted their state constitution separations of powers more stringently than the U.S. Constitution.<sup>121</sup>

Additionally, trigger laws raise a violation of separation of powers by enabling state officials to declare the statute in force based on their own reading of a Supreme Court decision that hypothetically overrules *Roe*. This theory finds support from the concept of

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116. *Id.*

117. “The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital,” bestowing a system of checks and balances. *O’Donoghue v. United States*, 289 U.S. 516, 530 (1933).

118. 16A AM. JUR. 2D *Constitutional Law* § 288 (1998).

119. *Id.* § 312.

120. See NORMAN J. SINGER, 1 SUTHERLAND STATUTORY CONSTRUCTION § 3:2 n.9 (6th ed. 2002). Excluding North Dakota, each state with a trigger law has a constitutional provision declaring separation of powers (Alabama, Illinois, Louisiana, Mississippi, and South Dakota). ALA. CONST. art. III, §§ 42, 43; ILL. CONST. art. II; LA. CONST. art. II, §§ 1, 2; MISS. CONST. art. I, §§ 1, 2; S.D. CONST. art. II.

121. See Scott, *supra* note 24, at 358 & n.18 (noting that the Louisiana Supreme Court has interpreted their state constitution separation of powers article stronger than the U.S. Constitution’s separation of powers doctrine).

nondelegation. Nondelegation is the principle that Congress retains all legislative authority and cannot delegate this authority to agencies.<sup>122</sup> Nondelegation proponents criticize the Court for upholding Congress's legislative delegations to administrative agencies because it gives political decision-making power to state officials without holding the legislature accountable.<sup>123</sup>

Much the same, administrative agencies raise separation of powers concerns because they "possess the legislative power to make rules, the executive power to enforce them, and the judicial power to adjudicate them."<sup>124</sup> Similarly, allowing state officials to enforce trigger laws at the state level gives legislative authority to officials to decide if, and when, the clause in question is triggered, and executive power to enact and enforce the statute, violating separation of powers.<sup>125</sup>

State officials receive both legislative authority and also judicial authority through their ability to determine whether a court would uphold a law as constitutional. For instance, the Mississippi trigger statute specifies that the provisions in the statute that prohibit abortion will take effect when "the Attorney General has determined the United States Supreme Court has overruled the decision of *Roe v. Wade* . . . and that it is reasonably probable that Section 2 of this act [prohibiting abortion] would be upheld by the court as constitutional."<sup>126</sup> In other states, such as Illinois, Louisiana, and South Dakota, trigger statutes do not contain language specifying the procedure of enactment of the triggered provisions. This ambiguity suggests that any state official with authority could make a determination that the Supreme Court has reversed *Roe*. The state official must decide that *Roe* is "reversed or modified" under Illinois law,<sup>127</sup> "reverse[d], in whole or in part" under Louisiana law,<sup>128</sup> or "states are recognized . . . to have the authority to prohibit abortion" under South Dakota law.<sup>129</sup>

North Dakota's trigger statute conflicts with the same principles. It violates separations of powers by delegating legislative and judicial authority to the state attorney general to determine if "it is reasonably probable that [the] Act" would pass constitutional muster

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122. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 327-38 (3d ed. 2006).

123. *Id.* at 331.

124. *Id.* at 327.

125. *See supra* note 86.

126. MISS. CODE ANN. § 41-41-55 (West 1986), amended by 2007 Miss. Laws ch. 441.

127. 720 ILL. COMP. STAT. ANN. 510/1 (West 2008) (triggering a state policy to prohibit abortions, not specifically criminalizing abortion).

128. LA. REV. STAT. ANN. § 40:1299.30 (2006).

129. 2005 S.D. Sess. Laws ch. 188 § 1.

based on a Supreme Court decision or constitutional amendment.<sup>130</sup> However, North Dakota's violation may be less egregious than the other state's trigger laws because the legislation provides a democratic safeguard that requires the state's legislative council to "approve[] by motion the recommendation of the attorney general . . . ."<sup>131</sup>

### B. Individual Liberties

Trigger laws violate individual rights protected by the Fourteenth Amendment by discriminating against an individual's ability to exercise a constitutional right.<sup>132</sup> Trigger laws employ an irrational means to an illegitimate end—that is, by triggering a prohibition on abortion, the legislation does not further a legitimate legislative purpose because it essentially contemplates a future violation of what is presently a right under the Constitution. It is irrational for a legislature to contemplate the use of a means, here, through provisions that currently violate one's constitutional right to choose an abortion.<sup>133</sup>

Trigger laws also violate the Constitution's due process requirement of "clear and consistent statutory enactments."<sup>134</sup> A statute is void for vagueness when a reasonable person "must necessarily guess at its meaning and differ as to its application . . . ."<sup>135</sup> The purpose of the vagueness doctrine is to give citizens fair notice before they can be punished by a statute that prohibits certain conduct.<sup>136</sup>

130. N.D. CENT. CODE § 12.1-31-12 (2007), *amended by* 2007 N.D. Laws ch. 132.

131. *Id.*

132. As analog to revival statutes and the arguments made for re-passing laws, scholars argue that "a statute that has once been unconstitutional under governing case law should not be revived if it constrains individual liberty . . . ." Treanor & Sperling, *supra* note 47, at 1906. Therefore, because under governing law, abortion restriction provisions in law could not be enacted because they violate a liberty interest, those provisions of the law should not be enacted because they were once unconstitutional under governing case law and should be repassed by the current majority to be enforced. *See* discussion *supra* Parts II.A. and III.A.

133. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding that a Connecticut law forbidding the use of contraceptives was a means that directly impacts privacy, an area of constitutionally protected freedom).

134. Scott, *supra* note 24, at 371.

135. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); *see also* CHEMERINSKY, *supra* note 122, at 941-43. In determining whether a law is void for vagueness, courts have imposed the following tests: "1) Does the statute in question give fair notice to those persons potentially subject to it? 2) Does it adequately guard against arbitrary and discriminatory enforcement? and 3) Does it provide sufficient breathing room for First Amendment rights?" WAYNE R. LAFAVE, CRIMINAL LAW § 2.3 (3d ed. 2000).

136. *See* CHEMERINSKY, *supra* note 122, at 942. "Vague laws also risk selective prosecution; under vague statutes and ordinances the government can choose who to

Trigger laws violate due process on vagueness grounds because the law prescribes conduct that will be illegal at an unspecified time. The trigger clause is vague because the statute's enactment is based upon a hypothetical determination made by the state attorney general, or in some cases, no procedure is specified by which the law will be enacted.<sup>137</sup>

### C. *The Guarantee of a Republican Form of Government*

Trigger laws violate the Constitution's guarantee of a republican form of government. In contrast to a monarchy, where "citizens do not get to choose their own rulers, power is fixed and inherited," a republican form of government focuses on the people's sovereignty and ability to choose their own representatives.<sup>138</sup> Other features include the "right to vote and the right to choose public officeholders," demonstrating the importance of citizen participation in the law-making process.<sup>139</sup> James Madison highlighted the importance of the republican form of government as a protection of the political minority from the majority.<sup>140</sup> He also stressed the importance of imposing limits on government officials' terms of service to limit their power and the importance of requiring officials to adhere to their successors' authority.<sup>141</sup> Other historical figures, such as Charles Sumner, focused on the other essential elements of a republican government, including "liberty, equality before the law, and the consent of the governed."<sup>142</sup>

Trigger laws are at odds with a republican form of government

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prosecute based on their views or politics." *Id.*; cf. Encarnación, *supra* note 88, at 149 (proposing to eradicate "arbitrary and capricious enforcement" of such laws by urging judges to "invalida[t]e the punishment-enabling provisions of moral legislation").

137. See discussion *infra* Part IV.A.

138. See Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 868 (1994). The republican form of government is not a fixed concept. The multitude of works describing and analyzing the historiography of our republic government is divisive and contentious. The basic premise of the republican government is set out in this section to better understand why trigger laws are inconsistent with the principles of our system of government and violate Article IV of the Constitution, the guarantee of a republic government.

139. *Id.* at 868-69.

140. See THE FEDERALIST NO. 51, at 282 (James Madison) (J.R. Pole ed., 2005) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part."); see also Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 WHITTIER L. REV. 143, 216 (2002).

141. See Eule, *supra* note 72, at 403 (citing THE FEDERALIST NO. 39, at 251, No. 53, at 361-62 (James Madison) (J. Cooke ed., 1961)).

142. Leib, *supra* note 140, at 218 (citing Edward L. Pierce, 4 MEMOIR AND LETTERS OF CHARLES SUMNER 258-59 (Arno Press 1969) (citing Letter from Charles Sumner to Francis Lieber (Oct. 3, 1865))).

because the goal of the laws is to set rules for future citizens that are currently illegitimate. By anticipating the invalidation of a precedential legal principle relied upon by the current majority, the legislature seeks to force their current desires on future citizens, therefore usurping the future majority's right to govern itself. If trigger laws violate the foundation of a republican government and individual liberties, reviving the Guarantee Clause of the Constitution<sup>143</sup> could provide a basis to challenge these statutes.<sup>144</sup> Professor Chemerinsky advocates that the Guarantee Clause of the Constitution, which ensures a republican government, is not only a restriction of federal encroachment on state sovereignty but should also be considered and utilized as a "protector of basic individual rights [and liberties]" and, because of this role, it is legitimate for judges to interpret and apply the provision.<sup>145</sup>

#### V. CURRENT PROTECTIONS AND PREVENTATIVE STRATEGIES TO ENSURE REPRODUCTIVE FREEDOM

If *Roe* is overturned, the right to an abortion can still be protected in two ways. First, access to abortion is protected through current laws that expressly do not allow the state to interfere with a woman's right to choose to have an abortion. For example, Hawaii

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143. U.S. CONST. art. IV, § 4.

144. See Chemerinsky, *supra* note 138, at 849-50. In the 1980s many scholars began to challenge the Supreme Court's interpretation of the Guarantee Clause as a nonjusticiable political question. *Id.* These scholars advocate that the Court adjudicate cases under the Guarantee Clause. See *id.* Chemerinsky refers to Justice O'Connor's opinion in *New York v. United States*, 505 U.S. 144 (1992), to demonstrate the Court's newfound willingness "to reject the view that cases under the Guarantee Clause should always be dismissed on political question grounds." Chemerinsky, *supra* note 138, at 851. This may be the first case in over eighty years where the Court addressed whether there was a violation of the Guarantee Clause. *Id.*

Furthermore, utilizing the Guarantee Clause is not barred by the political question doctrine. Where individual rights and liberties are concerned, the application of the political question doctrine to block a challenge to laws is inappropriate because the judiciary plays an utmost important role as the protector of individual rights and liberties. See *id.* at 864; accord Leib, *supra* note 140, at 180-81 (discussing a popular republican theory of judicial review, that it is the courts' duty to protect individual rights when the majority fails to do so).

145. See Chemerinsky, *supra* note 138, at 851-52, 868. The cost of ignoring constitutional provisions outweighs the risk of undermining the judiciary's credibility and legitimacy because even some of the most controversial decisions involving desegregation reaffirmed the Court's power. *Id.* at 861. Justice Harlan's famous dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), viewed the Guarantee Clause and Equal Protection Clause as similar protections of individual rights and the basis for desegregation. Chemerinsky, *supra* note 138, at 861. Chemerinsky pushes the comparison even further by stipulating that the "Court could just as easily have found the rule of 'one-person one-vote' under the Guarantee Clause as under equal protection." *Id.* at 871.



passed legislation in 2006 stating that “[t]he State shall not deny or interfere with a female’s right to choose or obtain an abortion . . . .”<sup>146</sup> If *Roe* is overturned, a woman’s right to an abortion is protected in Hawaii, unless the legislature repeals this law and passes new legislation to criminalize abortion. A number of other states have enacted legislation similar to Hawaii’s statute for the purpose of ensuring reproductive freedom.<sup>147</sup>

Second, state constitutions may provide protections. State constitutions can provide an immediate challenge to the constitutionality of trigger laws because many state courts recognize the right to abortion as a constitutional right. For example, in *Pro-Choice Mississippi v. Fordice*, the Mississippi Supreme Court interpreted the state constitution to imply a constitutional right to an abortion.<sup>148</sup> Therefore, if *Roe* is overturned, enforcement of Mississippi’s trigger law may conflict with the state’s constitution.<sup>149</sup> However, even these state court decisions that recognize the right to reproductive choice are vulnerable to attack in a post-*Roe* world because many of the state court decisions rely upon the federal Constitutional right as recognized in *Roe*.<sup>150</sup>

Reproductive rights advocates should use these current state laws and constitutions as models to propose new state laws and constitutional amendments to protect the fundamental right to abortion. In addition, as a preventative measure, advocates should work through grassroots efforts, legislation, and litigation to repeal pre-*Roe* bans and to oppose and challenge new abortion bans and restrictions.<sup>151</sup>

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146. HAW. REV. STAT. § 453-16(c) (2008).

147. Another example is California’s Reproductive Privacy Act that “declares that every individual possesses a fundamental right of privacy in respect to personal reproductive decisions” which the state may not interfere with. CAL. HEALTH & SAFETY CODE § 123462 (2008). Similarly, in *In re T.W.*, 551 So. 2d 1186, 1191-93 (Fla. 1989), the Florida Supreme Court interpreted article I, section 23 of the Florida Constitution to include the protection of a woman’s right to choose an abortion.

148. 716 So. 2d 645, 654 (Miss. 1998). The court found that the right to bodily integrity exists under the right to privacy as established by state case law and the right to abortion is implicit in the right to bodily integrity. *Id.* Therefore, “the state constitutional right to privacy includes an implied right to choose whether or not to have an abortion.” *Id.*

149. See Linton, *supra* note 28, at 23 & n.167 (stipulating that the Court’s decision will have the same debilitating effect on both pre-*Roe* laws that have not been repealed and trigger laws).

150. See, e.g., *Hope v. Perales*, 634 N.E.2d 183, 186 (N.Y. 1994) (“[A] fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right.”).

151. See CENTER FOR REPRODUCTIVE RIGHTS 2007, *supra* note 15, at 20-21. Advocates recommend challenging state abortion regulations under theories of “gender equality and personal autonomy” because they are “grounded more firmly in the text of

## CONCLUSION

Trigger laws violate our American constitutional democracy. Their premise raises violations of separation of powers, equal protection, due process, and the guarantee of a republican form of government. Under the current *Roe* regime, trigger laws are constitutionally problematic because their disposition contemplates a violation of a fundamental right. Should the Supreme Court ever eliminate a woman's federal constitutional right to choose an abortion by overturning *Roe*, trigger laws should not automatically be enacted. A law should only be enforced if it is endorsed by the will of the current legislature. People have a right to know of the laws that prescribe their conduct and a right to approve or disapprove laws through the democratic process. Courts should recognize the spiteful disregard of certain legislatures for the force of law by passing trigger laws. Never should they hesitate to adjudicate the law's constitutionality.

Demonstrating progress towards full recognition of women as equal citizens of this nation, the Supreme Court has recognized that a woman's ability to control her own reproductive life is integral to her "ability to realize [her] full potential."<sup>152</sup> Laws regulating abortion seek to erode and destroy a woman's right of control. Trigger laws, in their application, do just that—destroy a woman's right of control. Furthermore, their premise seeks to dismantle our future citizenry's right of control.

In 1992, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>153</sup> announced that "overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."<sup>154</sup> But, the new majority of the Supreme Court will not hesitate to depart from existing precedent. In her impassioned dissent in *Gonzales v. Carhart*, Justice Ginsburg exclaimed that "[t]hrough today's opinion

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various state constitutions than in the Federal Constitution." Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175, 179 (2008) (arguing that states should provide broader abortion rights than federal abortion protections). It is of utmost importance for reproductive rights advocates to strategize in their grassroots mobilization, legislative efforts, and litigation because opponents have spent years plotting how to erode both federal and state reproductive rights. See generally Burnett, *supra* note 16; Steven G. Calabresi, *How to Reverse Government Imposition of Immorality: A Strategy for Eroding Roe v. Wade*, 31 HARV. J.L. & PUB. POL'Y 85 (2008); Forsythe, *supra* note 13.

152. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting).

153. 505 U.S. 833 (1991).

154. *Id.* at 865.

does not go so far as to discard *Roe* or *Casey*, the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of ‘the rule of law’ and the ‘principles of *stare decisis*.’”<sup>155</sup>

If only one thing is clear from *Gonzales*, it is that we are suspended in an era of constitutional unknowns. To ensure reproductive freedom, we must be cognizant of and reactive to the tactful strategies employed by abortion opponents, thereby working to safeguard our own future control of our rights.

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155. *Gonzales*, 127 S. Ct. at 1652 (Ginsburg, J., dissenting).

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