THE PROBLEMS OF THE "REPRODUCTIVE FREEDOM" INITIATIVE

James S. Cole, Esq.

PART I: THE NEW SUPER-STRICT STANDARD OF SCRUTINY IN THE COURTS

In a recent edition of the St. Louis Post-Dispatch, the spokesperson of the "Reproductive Freedom" initiative is quoted as accusing the pro-life side of "spreading untruths" about the consequences of the "Reproductive Freedom" initiative.[1] This article is part of Missouri Right to Life's response.

The initiative proposes an amendment to the state constitution that will nullify all statutes and other principles of law that conflict with it. Adoption of the initiative will inevitably lead to lawsuits seeking court declarations that certain statutes have been so nullified. Therefore, we need to review the standard of scrutiny that will govern the courts' judgments about the constitutionality of existing pro-life statutes and regulations.

Challenged statutes will not survive unless they satisfy the applicable standard of scrutiny. In some cases involving individual rights, the courts often apply the highest current class of scrutiny, "strict scrutiny." In such cases, the State must prove that to the extent that a statute impinges on a constitutional right, the statute is (i) "narrowly tailored" in the circumstances of the case (ii) to serve a "compelling state interest." Many statutes fail to survive strict scrutiny.

Think of surviving strict scrutiny as kicking a field goal in football. Ordinary scrutiny is like kicking through ordinary goal posts. Strict scrutiny is like aiming at goal posts that have been narrowed and moved several yards further past the end line.

But the initiative imposes not just strict scrutiny, but what may be called "super-strict scrutiny." Subsection 3 requires the State to justify a regulation of reproductive freedom "by a compelling governmental interest achieved by the least restrictive means." Ordinary strict scrutiny does not require "the" least restrictive means, as the initiative requires, but only "a" narrowly tailored means. As to "compelling" governmental interests, under the usual strict scrutiny there could be a wide range of them. However, the initiative puts a straitjacket on what will count. It defines a governmental interest as "compelling" only if it satisfies three conditions:

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[1] In this article, the terms, "the proposed amendment" to the state constitution and "the initiative," are used interchangeably.

(1) The statute is "for the limited purpose and has the limited effect of improving or maintaining the health of the person seeking care, "

(2) The statute is "consistent with widely accepted clinical standards of practice and evidence-based medicine, and"

(3) It "does not infringe on that person's autonomous decision-making."

The "and" at the end of the second condition is important. If it was "or," then proving any one of the three conditions would suffice to show that the governmental interest was compelling. However, it is not "or," but "and." That means that all three conditions must be satisfied, not just one or two.

These provisions create an almost insurmountable obstacle to the survival of any statute that may be challenged under the initiative. Any regulations, including those for health, may narrow the choices available to a woman by affecting the cost, availability, or of method of abortion. It is obvious that any limitation of abortion that a woman would disagree with will, by the very fact of the woman's choice to have an abortion, "infringe" on her "autonomous decision-making." Thus, in the world of the initiative, <u>any</u> regulatory statute is subject to nullification because it infringes on a woman's autonomous decision-making.

Yet another new rule is contained in the initiative. When a statute is challenged as unconstitutional, the usual presumption is that it is valid until proven otherwise. However, another portion of subsection 3 turns that presumption on its head. The relevant language reads, "Any denial, interference, delay, or restriction of the right to reproductive freedom shall be presumed invalid." This is like turning upside-down the presumption of innocence in criminal cases into a presumption of guilt until proven innocent. A presumption of invalidity represents another new barrier to defending the validity of pro-life statutes in the courts.

Keep in mind that the proposed amendment, if approved by the voters, could not be changed by ordinary legislation, but only by a new amendment approved in a state-wide election. It could be decades, if ever, before any change in this initiative's proposed amendment is presented to the voters. During that lengthy time, the state legislature's hands would be tied up by the amendment, so it could not enact the protections that this initiative disregards.

The prospect of nullification of statutes under the super-strict scrutiny of subsection 3 will arise in almost every situation that the initiative might affect, including the subjects mentioned in the newspaper article. We now turn to certain of those issues.

PART II: ELIMINATION OF HEALTH & SAFETY REGULATIONS

Nowhere will the harmful effects of the "Reproductive Freedom" initiative be felt more than in the statutes and regulations for health and well-being of women in regard to abortion. If the initiative is adopted, these statutes and regulations will again become subjects of contention. Abortion supporters attacked them before the *Dobbs* decision and lost many challenges, but the initiative will give them a new legal basis for attacking them again. See Part I regarding the super-strict scrutiny that will be applied.

Still on the books from the *Roe v. Wade* days are many common-sense regulations for everyday operations of abortion ambulatory surgical centers including regulations for licensing, assuring safe and sterile facilities, record-keeping, regular health inspections, and enforcement procedures. (Revised Statutes of Missouri [RSMo.] secs. 197.200 & 197.215; 19 Code of State Regulations 30-30.050-070.)

Other standards have been enacted with a view toward the extraordinary impact of abortions on the lives of women, often with consequent mental and emotional burdens. These include requirements for provision of factual materials about the development of unborn babies throughout pregnancy and the opportunity to view a video sonogram of the child (RSMo. section 188.027.1(4)), a 72-hour reflection period to sort out all the considerations that are involved in the abortion decision (RSMo. section 188.027.1 & .8), and mandatory reporting of abuse of minors (RSMo section 188.023) that may be observed by health care professionals (as defined in RSMo. section 188.027.9.) Still other regulations have been enacted to ensure that at least one parent gives consent to an abortion to be performed on a pregnant minor child (RSMo. section 188.028) and to prohibit any assistance to a minor in obtaining an abortion without compliance with Missouri law (RSMo. section 188.250.)

Many more beneficial regulations could be cited, but the important point is that all such regulations, and more, would be subject to nullification under the provisions of the initiative. As explained above, subsection 3 of the initiative forbids any governmental action that "infringe[s] on that person's autonomous decision-making."

In view of the prospect of nullification of the health and safety standards statutes, voters should reject the initiative.

PART III: WHO COULD PERFORM OR PRESCRIBE ABORTIONS?

If the proposed state constitutional amendment is adopted, the current Missouri statute that limits doing or prescribing abortions to physicians will be endangered. The prospect of nullification arises from the presumption of invalidity and super-strict scrutiny that are created in subsection 3, as explained in Part I.

Pro-abortionists assert a shortage of physicians who are willing to perform abortions.[2] They will argue that limiting abortions to physicians may well be considered as creating a "delay" of, or "interference" with, the "right to reproductive freedom." That would make the existing physician-only statute null and void because it would conflict with the new constitutional amendment. Thus the proposed amendment represents a potent threat to the continued validity of the physician-only statute.

Subsection 3 puts the physician-only law[3] at risk without any description in the initiative on who else may do abortions. The broad term, "health care professionals," appears only in subsection 4, describing who will pass judgment on whether an abortion after "Fetal Viability" "is needed to protect the physical or mental health of the pregnant person." The initiative lacks any statement on what qualifications this person must have.

Physicians' assistants, advanced practice registered nurses,[4] and certified nurse-midwives[5] are likely to be first to seek a declaration by the courts that the physician-only statute is unconstitutional. To be licensed, the midwives must be certified to practice midwifery by an association approved by the State.[6] One of those associations has adopted a formal policy calling for certain types of abortions to be added to the scope of certified midwives' practice.[7] If the initiative is approved, certified nurse-midwives will probably invoke it to declare that the physician-only statutes are void as to them.

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[2] See, e.g., G. Henderson, "There's an Abortion Provider Shortage Across the U.S. Here's How We Address It," Nov. 18, 2021, accessed 4-17-2024 at www.elle.com/culture/career-politics/a38257180/abortion-provider-shortage-how-to-fix.

[3] RSMo secs. 188.020 and 334.245, among other statutes. All statutes prohibiting non-physicians from performing abortions will be referred to collectively "the physician-only" law.

[4] Physicians' assistants are defined in Missouri in RSMo. sec. 334.735.1, and advanced practice registered nurses are defined in sec. 335.016(2). Both are currently barred from performing or prescribing abortions by RSMo secs. 334.245 and 334.735.3.

[5] In Missouri, certified nurse-midwives constitute a specialty within the broader category of licensed advance practice registered nurses. RSMo. secs. 335.016(2) & (6). They also are barred from performing abortions by the current physician-only statute.

[6] RSMo. secs. 334.010 & 376.1753. See also *Missouri State Medical Ass'n v. State of Missouri,* Supreme Court of Missouri, 256 S.W.3d 85 (Mo. 2008).

[7] American College of Nurse-Midwives, Position Statement: Access to Comprehensive Sexual and Reproductive Health Care Services, April 12, 2017, accessed at www.midwife.org/default.aspx?bid=59&cat=3&button=Search. The other major certification body, the North American Registry of Midwives, does not appear to have either adopted or rejected such a policy.

Additional practitioners of medically-related professions may also seek legal sanction to perform or prescribe abortions. Already in Washington State a group is working to train pharmacists not just to provide, but to prescribe abortifacient drugs themselves, using a "protocol" (checklist) of factors to satisfy for each recipient.[8] No in-person physicals or visits to a physician will be required, and the proponent believes the cost of abortions should drop significantly.

The logic of the initiative proceeds further. Should clinical psychologists be allowed to prescribe abortions? What happens if a woman insists on having an unlicensed midwife perform an aspiration abortion? Or what if she insists on using old-time folk remedies prepared by a lay person to induce an abortion at home?[9]

We are assured by attorneys quoted in the recent newspaper article that the State would have a "compelling interest" in providing regulations that legitimately seek to protect the health of people receiving care. However, the article contained no mention about the three conditions of "compelling state interest" as defined in the initiative. The third condition, respecting a woman's autonomous choice, is one of the most important provisions in the initiative. It makes not interfering in a woman's choice apply just as much to the State's restricting her from using an unlicensed midwife or a purveyor of folk remedies as it does to the State's forbidding her to use physicians' assistants.

While the State may well be able to show that prohibiting the woman's choice of unlicensed practitioners will maintain her health and is consistent with clinical standards and evidence-based medicine, it will still fail the third condition for proving a "compelling interest" because it is infringing on her autonomous decision-making. Note that the language of the initiative does not require the woman to prove safety and consistency with clinical standards for her choice, as the State must do for its restrictions.

Ultimately, the initiative provides no assistance in answering that question of allowing unlicensed practitioners to perform or prescribe abortions. Under the language of the initiative, the best answer to the question, "Who else must be allowed to serve as an abortion health professional according to a woman's choice?" is, "Who knows?" It could be anyone.

In view of the prospect of nullification of the statute requiring that abortion be done only by physicians, voters should reject the initiative.

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[8] National Public Radio (St. Louis), “In Washington state, pharmacists are poised to start prescribing abortion drugs,” March 1, 2024, accessed at https://www.npr.org/sections/health-shots/2024/01/22/1225703970/pharmacists-prescribe-dispense-abortion-pill-mifepristone.

[9] See, e.g., K. Hiraishi, "Abortion care has a long history among Hawai'i's Indigenous people, Hawaii Public Radio, June 29, 2022, accessed at https://www.hawaiipublicradio.org/local-news/2022-06-29/native-hawaiian-traditions-and-perspectives-on-abortion-centers-health-care-womens-rights, and C. Alonso, Integrating the midwifery model of care into abortion services, Soc. & Reprod. Health Matters 2020, 28(1), pp. 66-68, accessed at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7888103/.

PART IV: WOULD PHYSICIANS AND OTHERS REMAIN SUBJECT TO MALPRACTICE LIABILITY IF THEY ARE NEGLIGENT?

In subsection 5 of the proposed amendment we find the following language: "Nor shall any person assisting a person in exercising their right to reproductive freedom with that person's consent be penalized, prosecuted, or otherwise subjected to adverse action for doing so." On its face, this language is quite clear: it is a broad, all-embracing grant of immunity from any "adverse action" for assisting a woman to obtain an abortion. That presents a huge problem for patients who may be wronged by negligence or reckless conduct of physicians and other health care professionals. And, the phrase "any person assisting a person in exercising their right to reproductive freedom" is so broad that it would include anyone taking the woman for an abortion, including an abuser, a human trafficker, anyone paying for the abortion and school counselors who help arrange appointments for students across Missouri borders, among others.

Does the phrase, "adverse action," include lawsuits for damages arising from malpractice? Almost every person who has been sued for damages will find it easy to answer "yes, of course." The filing of a lawsuit is obviously an action adverse to the defendant who is sued. In fact, malpractice suits may often constitute the most adverse of all civil actions because of the probable hit to a professional's reputation if word gets around that the lawsuit has been filed.

In the Post-Dispatch article, the spokesperson for the initiative's proponents claimed that the language, "adverse action," was only directed to preventing criminal charges or other penal sanctions to be filed against abortion providers. That simply does not accord with the actual language of subsection 5. If it covered only criminalization or being penalized for assisting an abortion, it would have used the terms, "penalized" and "prosecuted," and no more. But the subsection's language does not stop there; it adds to "penalized" and "prosecuted" the phrase, "or otherwise subjected to adverse action for doing so."

It is telling that two of the lawyers contacted by the Post-Dispatch, including a St. Louis attorney who defends against health care malpractice suits, stated that the language of subsection 5 is ambiguous. Their statements reflect that the language is indeed susceptible to the meaning that abortionists will be immunized if the proposed amendment is adopted.

And as mentioned before, if the initiative is approved, any errors in its language cannot be corrected by a statute enacted by the General Assembly. It takes another constitutional amendment to correct any error, and one of those may be decades in the making. If the initiative is put on the ballot, should the voters approve it when it contains a clause that could immunize abortionists from malpractice liability for decades to come?

In view of the prospect of women having no legal recourse if they are harmed during an abortion, voters should reject the initiative.

PART V: WOULD PARENTAL CONSENT LAWS SURVIVE UNDER THE PROPOSED AMENDMENT?

Because parental notice and consent requirements would face the same gauntlet of the presumption of invalidity and super-strict scrutiny as the other laws we have considered in Parts I-IV, Missouri's parental consent law[10] would be subject to nullification if voters approve the initiative.

A law professor was quoted in the Post-Dispatch article as assuring that parents have a "fundamental constitutional right to the care, custody, and control of their minor children." These parental rights proceed from the due process clause of the U.S. Constitution. Federal constitutional rights trump state laws.[11] Therefore, it is argued, the current Missouri statute would survive voter approval of the initiative.

Unfortunately, the interaction of federal rights and the proposed state constitutional amendment in this instance is not as simple as that.

While decisions of the U.S. Supreme Court outside the context of abortion have sometimes described the parents' right to the upbringing of children as a "fundamental right,"[12] in the context of abortion, parental rights have never been accorded that status. Three years after *Roe v. Wade*, the Court held in a case arising in Missouri that no parental rights could outweigh the right of a pregnant minor to have an abortion.[13] So much for parental "care, custody, and control."

A few years later, the Court allowed states to offer a "judicial bypass" to minors. If the state enacted satisfactory provisions in its consent statute under which a state judge would make the decision whether a minor's abortion would be allowed, that statute would satisfy federal due process requirements. When a parent would not consent to the abortion, or when notice to a parent would be dangerous to the minor, the minor could seek a judgment in expedited proceedings either that the minor was sufficiently mature to give her own consent to the abortion or that, if not so mature, that the abortion was in the minor's best interests.[14] The judge's decision about a proposed abortion was substituted for that of the parent(s) of the minor.

Clearly, parents' due process rights in the abortion context under the *Roe* regime were weak. Now that *Roe* has been reversed, have parents' rights become stronger? Probably not.

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[10] RSMo sec. 188.028.1.

[11] This is pursuant to the Supremacy Clause of the U. S. Constitution, Art.. VI, clause 2.

[12] For example, *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972).

[13] *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 75 (1976). All later Supreme Court cases before *Dobbs* were in accord. *See, e.g., Bellotti v. Baird II,* 443 U.S. 622, 643 (1979); *Hodgson v. Minnesota,* 497 U.S. 417, 452 (1990).

[14] *Bellotti* and *Hodgson, supra.*

Dobbs determined that cases involving abortion in the future would be decided under the normal due process standard of scrutiny, called "rational basis."[15] To satisfy the rational basis standard, the State needs to prove that the law's purpose was legitimate to pursue and that the provisions of the new law were rationally related to the purpose.

Pro-abortion supporters have always been opposed to parental consent requirements.[16] If Missouri voters adopt the proposed amendment, lawsuits attacking existing pro-life statutes, including the parental notice law, are bound to be filed.

The plaintiff in such an attack (e.g., ACLU) would assert, under state law, the inconsistency of the parents' notice statute with the new state constitutional amendment in that parental notice arguably causes delays and increases the costs of obtaining an abortion to the detriment of pregnant minors. But the State may respond with the defense that recognizing the nullification of the notice statute would violate the parents' federal due process rights by freezing parents out of the abortion decision.

Under *Dobbs,* both sides would invoke the rational basis standard. Both would claim a rational basis and the use of reasonable means of achieving it. In this standoff of rights, the court may well side with the plaintiff, who would argue that the burdens of pregnancy can be seen as more immediate and urgent than the parents' concerns for the physical and emotional health of their daughter and the burden of losing a grandchild.

Such a rationale is foreseeable, and such a decision would find the parental notice statute to be invalid under the initiative. Do the people really want to run the risk of establishing in the state constitution the principle of depriving the parents of a minor of all rights when it comes to their daughter's abortion?

In view of the prospect of nullification of the parental notice and consent statute, voters should reject the initiative.

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[15] *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, 300 (2022).

[16] See, e.g., American Civil Liberties Union, "Laws restricting teenagers' access to abortion, Apr. 1, 2001, accessed at www.aclu.org/documents/laws-restricting-teenagers-access-abortion; Center for Reproductive Rights, “Mandatory parental consent and notification laws,” Mar. 1, 2001, accessed at https://reproductiverights.org/mandatory-parental-consent-and-notification-laws/.

PART VI: ABORTIONS WOULD BE AVAILABLE ALL NINE MONTHS OF PREGNANCY

No one denies that subsection 4 of the proposed amendment would allow an abortion after "Fetal Viability" up to the time of birth if a "treating health care professional" expressed a judgment that an abortion "is needed to protect the life or physical or mental health of the pregnant person." Rather, the persons quoted all agreed that the exception exists but side-stepped its manifest implications. As one said, "These abortions are incredibly rare . . . Not many providers are skilled and trained to do them."

There are several problems with using fetal viability as a legal division point in assigning abortion rights. First, the categories of "physical health" and "mental health" cover so much ground that they swallow any attempt to ban abortions after viability. The concept of "health" was far broader than most lay people realized in the era of *Roe v. Wade*. In *Doe v. Bolton,*[17] the Supreme Court stated that a physician's judgment on whether an abortion is necessary ought to be made in light of all factors, "physical, emotional, psychological, familial, and the woman's age" relevant to her well-being. Such a list throws the doors wide open to abuse, as when a famous late-term abortionist, Warren Hern, announced in 1997, "I will certify that any pregnancy is a threat to a woman's life and could cause grievous injury to her physical health."[18]

Second, using viability as a demarcation of legal rights lacks any scientific basis. Planned Parenthood's lobbying arm has lambasted the use of viability as a relevant event in abortion law. "Viability is not a medical construct and has no relevance to clinical care. It is a political construct set under Roe v. Wade. We now know that the viability standard tried and failed to balance state and personal interests, and it did not work."[19]

Third, as an aside, the initiative fails to define the qualifications of the "treating health care professional" who is tasked with judging whether the life or physical health or mental health of the mother is at risk. If not many practitioners are skilled enough to perform these "incredibly rare" abortions, isn't there a need for some higher qualification for making the diagnosis than just any "treating health care professional"?

It is clear that the initiative permits abortions up through the time of birth. For this reason, voters should reject the initiative.

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[17] 410 U.S. 179, 192 (1973). While *Roe* and *Doe* are now overruled, the scope of "health" is again in play at the state level. Pro-abortionists will seek a similar breadth as in the definition of "health."

[18] Frank J. Murray, "Daschle Bill May Not Ban Anything; Abortionists Could Use Own Judgment," Washington Times, May 15, 1997.

[19] Advocates of Planned Parenthood of the St. Louis Region and Southwest Missouri, "Abortion restrictions under the guise of protections," Feb. 27, 2023, p.2, accessed at https://www.plannedparenthoodaction.org/planned-parenthood-of-the-st-louis-region-and-southwest-missouri/pressroom/interested-parties-memos/ipm022723.