



2020 Dems Want National Abortion Rights Laws

Charles Fain Lehman

May 21, 2019

Fearing the potential overturning of *Roe v. Wade*, multiple Democratic candidates for president have called for a federal law to enshrine abortion rights nationwide.

However, such a law would run afoul of the constitutional limits of federal lawmaking, two experts told the *Washington Free Beacon*, and likely not pass muster with a Supreme Court that had previously decided to dump *Roe*.

Since 1971, American women have been guaranteed the right to abort their unborn child nationwide. That right is not a product of a constitutional amendment or congressional action. Instead, it emerges from Supreme Court identification of a right to privacy in medical decisions located in the "penumbras" and "emanations" of the 14th Amendment's guarantee of due process. Although the contours and limits of that right have changed over time, the basic idea has remained the same.

The result has been an estimated 60 million abortions since 1973, and a nationwide constitutional limitation on states' ability to regulate abortion. Now, however, the tides may be shifting: The confirmation of Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court creates a reliable conservative majority for the first time in decades, one that even Justice Stephen Breyer thinks may be preparing to knock down *Roe*.

Conservative state legislatures seem to agree, with a number passing laws restricting or altogether outlawing abortion. Their presumed goal is to take the laws all the way to the Court, giving the five justices a chance to strike down *Roe*, *Casey*, and the judicially created right to abortion.

If the Court's conservatives succeeded, America would be left without a nationwide abortion regime for the first time in half a century. Democratic candidates for the 2020 presidential nomination, who are substantially to the left of even their own party on the issue of abortion, have unsurprisingly begun promising to take action to forestall this reality if elected.

Although front-runner Joe Biden has remained mostly silent on the issue, his competitors have not. In a Medium post, Sen. Elizabeth Warren called for "federal statutory rights" to invalidate restrictions on abortion even if *Roe* is overturned. Sen. Cory Booker told BuzzFeed News that he also supports legislation codifying *Roe* as a federal law. And Sen. Kirsten Gillibrand said at a rally last week that if elected, she would act to ensure that states could not pass laws restricting abortion.

Absent the constitutional guarantee defined by *Roe*, would the federal government actually have the power to control state law in such a way? Prior to 1971, abortion was regulated at the state level, and the Tenth Amendment reserves powers not explicitly delegated to the federal government to the states. Is legislating on abortion something Congress can really do?

Warren, the only candidate to offer an explicit constitutional justification, thinks yes.

"Under the Supremacy Clause of our Constitution, federal law preempts state law. For this reason, the establishment of these federal statutory rights would invalidate contradictory state laws, such as the Alabama, Georgia, and Ohio bans," she wrote. "And because these federal protections would be valid on a variety of constitutional grounds—including equal protection and the commerce clause—they would ensure that choice would remain the law of the land even if the Supreme Court overturns *Roe*."

Warren is right that the Supremacy Clause causes federal law to preempt state law. But in order to do so, a law would have to be within the power of Congress to enact. Warren claims this power on the basis of Congress's right to enact legislation either governing interstate commerce or securing equal protection of the laws under the 5th or 14th Amendment.

An abortion right based on equal protection would deviate from the current foundation in due process, and therefore require a test in front of a likely unsympathetic Supreme Court. As for interstate commerce, Ilya Shapiro, the director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, thinks there's no connection.

"I don't see federal power to legislate regarding abortion one way or another, because abortion isn't interstate commerce," Shapiro told the *Free Beacon*. "That is, just as in a post-*Roe* world, Republicans couldn't ban abortion federally, Democrats couldn't require states to allow it."

Rather, Shapiro said, "regulation would be left to states," adding that he expects "a wide range of rules." Indeed, as the *Washington Post* recently documented, red and blue states alike are already enshrining their abortion preferences into law, preparing for a post-*Roe* future.

Far from being justified, then, congressional abortion regulation would constitute a substantial overstepping of limits on federal authority. Thomas Jipping, Senior Legal Fellow at the Heritage Foundation, called it "shocking that members of Congress would be so ignorant of basic civics."

"The idea that government power must be limited, especially by separating it into branches and dividing it between the federal and state levels, is the very heart of our entire system of government," Jipping told the *Free Beacon*. "Congress, therefore, does not have constitutional authority to ban whatever it opposes or to require whatever it supports. Congress does not have authority to fashion abortion policy for the nation. Authority to address issues like abortion belongs to the states."

This, Jipping said, is because he also sees no basis for concluding that regulating abortion is one of the enumerated powers of Congress.

"The Tenth Amendment clearly states that the federal government may exercise only 'delegated' powers," he explained. "In 1803, the Supreme Court said that these powers are 'defined and limited' and just last year, the Court repeated that the Constitution 'confers on Congress ... only certain enumerated powers.'"

In point of fact, the right to abortion as it exists under *Roe* derives from the 14th Amendment: which puts constraints on the laws created by the states, not by the federal government.

Constitutional arguments aside, it is unlikely that any federal abortion law would make it through a court that strikes down *Roe*. This may be why Gillibrand, Booker, and even Sen. Bernie Sanders have explicitly pledged to nominate pro-abortion judges if elected. This stance mirrors that of President Donald Trump, who swept into the White House partially on the basis of his promise to appoint only pro-life judges if elected.