AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Personal Freedom and Public Morality: Abortion

**Abortion:**

**Harris v. West Alabama Women’s Center and Gee v. Planned Parenthood of Gulf Coast, Inc.** (2019)

*The West Alabama Women’s Center provides abortion and other services for women. In 2016, Alabama passed a law declaring “it shall be unlawful for any individual to purposively perform or attempt to perform a dismemberment abortion and thereby kill an unborn child unless necessary to prevent serious health risk to the unborn child’s mother.” In less technical terms, the law forbade doctors from performing a dilation and evacuation abortion if there was a fetal heartbeat (which becomes detectable at about six weeks). Instead, doctors had to first stop the heartbeat (or kill the unborn child, depending on the appropriate vocabulary) and then perform the abortion. The West Alabama Women’s Center promptly asked for an injunction forbidding Alabama officials from implementing the law (when the case came before the Supreme Court, Scott Harris was the State Health Officer). The federal district court, after finding that there was no safe way of performing some abortions under Alabama law, declared the measure an unconstitutional undue burden on the right to terminate a pregnancy. That decision was sustained by the Court of Appeals for the Eleventh Circuit. Harris appealed to the Supreme Court of the United States.*

 *Planned Parenthood of Gulf Coast, Incorporated operates two clinics in Louisiana that do not perform abortions. In August 2015, Louisiana terminated the clinic’s Medicaid provider agreement, which enabled the clinic to provide various services to poor patients. Planned Parenthood filed a lawsuit against Rebekah Gee, the Secretary of the Louisiana Department of Health and Hospitals, claiming that the termination violated Medicaid’s free-choice of provider-requirement and the Constitution of the United States. The local district court refused to grant summary judgement to the state and granted Planned Parenthood’s motion for a preliminary injunction against termination. Those rulings were affirmed by the Court of Appeals for the Eleventh Circuit. Gee appealed to the Supreme Court of the United States.*

 *The Supreme Court denied certiorari in both cases. Justice Clarence Thomas issued a solo concurrence in* Harris *and a dissent in* Gee *joined by Justices Neil Gorsuch and Samuel Alito. The Harris concurrence called on the justices to overrule* Roe v. Wade *(1973),* Planned Parenthood of Southwest Pennsylvania *(1992) and other cases protecting abortion rights. Why did no other conservative justice join the concurrence? Were conservative justices biding their time, or was one or more of them reluctant to entirely overrule the abortion cases? Thomas claimed that* Gee *had nothing to do with abortion. Louisiana, however, terminated the contracts with Planned Parenthood because their clinics in other states were performing abortions. Was Louisiana trying to provide a roadmap to other states for getting rid of abortion clinics? Why didn’t more liberal justices respond to Thomas?*

Harris v. West Alabama Women’s Center, \_\_\_ U.S. \_\_\_ (2019)

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I2d65c6eb548811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I2d65c6eb548811e9adfea82903531a62), concurring.

. . . .

The notion that anything in the Constitution prevents States from passing laws prohibiting the dismembering of a living child is implausible. But under the “undue burden” standard adopted by this Court, a restriction on abortion—even one limited to prohibiting gruesome methods—is unconstitutional if “the ‘purpose or effect’ of the provision ‘is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’ ” *Whole Woman’s Health* v. *Hellerstedt* (2016). Here, abortion providers persuaded the District Court—despite mixed medical evidence—that other abortion methods were too risky, and the lower courts therefore held that Alabama’s law had the *effect* of burdening abortions even though it did not prevent them. Ordinarily, balancing moral concerns against the risks and costs of alternatives is a quintessentially legislative function. But as the Court of Appeals suggested, the undue-burden standard is an “aberration of constitutional law.”

This case serves as a stark reminder that our abortion jurisprudence has spiraled out of control. Earlier this Term, we were confronted with lower court decisions *requiring* States to allow abortions based solely on the race, sex, or disability of the child. Today, we are confronted with decisions *requiring* States to allow abortion via live dismemberment. Although this case does not present the opportunity to address our demonstrably erroneous “undue burden” standard, we cannot continue blinking the reality of what this Court has wrought.

Gee v. Planned Parenthood of Gulf Coast, Inc., \_\_\_ U.S. \_\_\_ (2018)

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I9459dc2efc8f11e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9459dc2efc8f11e89a6efc60af1b5d9c), with whom Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I9459dc2efc8f11e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9459dc2efc8f11e89a6efc60af1b5d9c) and Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I9459dc2efc8f11e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9459dc2efc8f11e89a6efc60af1b5d9c) join, dissenting from the denial of certiorari.

One of this Court's primary functions is to resolve “important matter[s]” on which the courts of appeals are “in conflict.” This case and *Andersen v. Planned Parenthood of Kan. and Mid–Missouri* present a conflict on a federal question with significant implications: whether Medicaid recipients have a private right of action to challenge a State's determination of “qualified” Medicaid providers under [federal law]/ Five Circuits have held that Medicaid recipients have such a right, and one Circuit has held that they do not. The last three Circuits to consider the question have themselves been divided.

This question is important and recurring. Around 70 million Americans are on Medicaid, and the question presented directly affects their rights. If the majority of the courts of appeals are correct, then Medicaid patients could sue when, for example, a State removes their doctor as a Medicaid provider or inadequately reimburses their provider. Because of this Court's inaction, patients in different States—even patients with the same providers—have different rights to challenge their State's provider decisions.

The question presented also affects the rights of the States. . . . Under the current majority rule, a State faces the threat of a federal lawsuit—and its attendant costs and fees—whenever it changes providers of medical products or services for its Medicaid recipients. . . . State officials are not even safe doing nothing, as the cause of action recognized by the majority rule may enable Medicaid recipients to challenge the *failure* to list particular providers, not just the removal of former providers. . . .

. . . .

So what explains the Court's refusal to do its job here? I suspect it has something to do with the fact that some respondents in these cases are named “Planned Parenthood.” That makes the Court's decision particularly troubling, as the question presented has nothing to do with abortion. It is true that these particular cases arose after several States alleged that Planned Parenthood affiliates had, among other things, engaged in “the illegal sale of fetal organs” and “fraudulent billing practices,” and thus removed Planned Parenthood as a state Medicaid provider. But these cases are not about abortion rights. They are about private rights of action under the Medicaid Act. Resolving the question presented here would not even affect Planned Parenthood's ability to challenge the States' decisions; it concerns only the rights of individual Medicaid patients to bring their own suits.

Some tenuous connection to a politically fraught issue does not justify abdicating our judicial duty. If anything, neutrally applying the law is all the more important when political issues are in the background. The Framers gave us lifetime tenure to promote “that independent spirit in the judges which must be essential to the faithful performance” of the courts' role as “bulwarks of a limited Constitution” unaffected by fleeting “mischiefs.” We are not “to consult popularity,” but instead to rely on “nothing ... but the Constitution and the laws.”