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Is the Right to Abortion Still Specially Protected?

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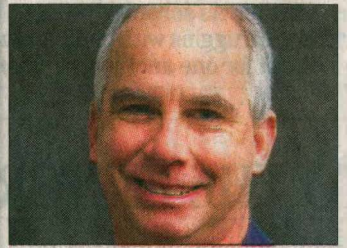

JOHN GREABE
Constitutional Connections

Last week, in *June Medical Services v. Russo*, the Supreme Court heard arguments in a case that once again raises questions about the extent to which the Constitution protects a woman's right to end a pregnancy. But the way in which the court resolves the case is likely to reveal more than just its views on abortion rights.

This column, the first in a series of three, describes the legal and historical path that led to *June Medical Services*. The next two will explore what the case suggests about, respectively, how the current court will treat constitutional precedent with which it disagrees, and how much deference it will give to laws enacted for deceptive reasons.

Laws that limit freedom are usually constitutional. Constitutional challenges to freedom-limiting laws fail if the legislature enacted the law for a legitimate purpose and sought to further that purpose in a rational manner.

Thus, for example, laws limiting the freedom to drive to persons 16 and older are constitutional. Imposing an age limit for driving advances a legitimate governmental purpose (road safety) and proceeds from the common-sense assumption that immature drivers would undermine that purpose.

Some freedoms, though, are special. These special freedoms may be limited only in extraordinary circumstances, and only if the government

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refrains from limiting them any more than is strictly necessary to address the extraordinary situation. Constitutional challenges to laws that limit special freedoms, known in constitutional law as "fundamental rights," usually succeed.

So, what rights are fundamental, and thus presumably free from governmental interference?

There is widespread agreement that the rights specifically mentioned in the Constitution – e.g., the speech, religion, association, and press rights listed in the First Amendment; the Fourth Amendment's right to be free from unreasonable searches and seizures; the Eighth Amendment's right to be free from cruel and unusual punishments – are fundamental.

More controversially, the court also recognizes certain rights *not* mentioned in the text of the Constitution as fundamental. Examples include rights to direct the upbringing and education of one's children, a right to marry, a right to be free from forced sterilization, and a general right of privacy that includes the right to use contraceptives.

The abortion right falls within this latter category of unenumerated fundamental rights. The right, which derives from the more general right of privacy, was first recognized in *Roe v. Wade* (1973), which held unconstitutional laws banning or discouraging abortion during the first two trimesters of pregnancy. Interestingly, *Roe* was a 7-2 decision featuring five Republican Supreme Court appointees in the majority and a Democratic appointee in the dissent.

Shortly after *Roe* was decided, however, our abortion politics underwent a radical transformation. President Ronald Reagan, elected in 1980, called for *Roe* to be overruled and promised to appoint judges who shared his views on abortion. President Reagan's successor, President George H.W. Bush, continued these efforts. Between 1981 and 1991, Presidents Reagan and Bush combined to appoint five new justices to the court.

Thus, by the end of President Bush's first term, it looked as though the court might be poised to overrule *Roe*. The case through which such an overruling was sought, *Planned Parenthood v. Casey* (1992), challenged the constitutionality of a number of Pennsylvania laws that, despite *Roe*, were enacted to discourage abortion during the first two trimesters of pregnancy.

But to the surprise of many, three of the five Reagan/Bush Court appointees – Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter – jointly authored an opinion holding that the right to an abortion was still specially protected as a constitutional matter.

To be sure, *Casey* significantly trimmed back *Roe*'s protections. It entirely eliminated *Roe*'s trimester framework. And it explicitly authorized legislatures to enact laws designed to "persuade the woman to choose childbirth over abortion" during the first two trimesters of her pregnancy. But *Casey* did not restore to legislatures the complete regulatory power that they held prior to *Roe*.

Emphasizing the importance of respecting constitutional precedent, *Casey* held that legislatures may not enact a law that imposes an "undue burden" on the abortion right. A law imposes an undue burden "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion" during the first two trimesters of pregnancy – that is, before the fetus becomes "viable" by having a realistic chance of surviving outside of the womb.

Since 1992, the court has been quite deferential to legislative judgments in enforcing *Casey*'s undue-burden standard. In *Casey* itself, the court upheld laws imposing waiting periods of at least 24 hours after the woman seeking the abortion is provided information about adoption, and requiring parental notification in most cases where a minor seeks an abortion. In 2007, the court also upheld a federal law prohibiting a form of second-trimester abortion called (by some) "partial-birth abortion."

But at the same time, the court has struck down some laws as imposing an undue burden, including (in *Casey*) a law conditioning abortion on prior notice to the pregnant woman's spouse.

Fast forward to the present. Recently, states with legislatures opposed to abortion rights have become far more aggressive in enacting laws designed to reduce or eliminate the availability of the procedure within their borders. Alabama has enacted a law that effectively bans nearly all abortions, and a number of other states have enacted laws outlawing abortions at or shortly after the point in time when a fetal heartbeat may be detected (a mere 6 six weeks into the pregnancy). Because these laws have the undeniable purpose of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion, lower courts have uniformly invoked *Casey* either to strike them down or to place them on hold pending appellate review.

The Louisiana law challenged in *June Medical Services*, which requires that physicians performing abortions have admitting privileges at a hospital within 30 miles of the facility where the procedure is performed, takes a different approach. It does not on its face express hostility to abortion rights. Indeed, it presents itself as a measure designed to safeguard maternal health by ensuring the availability of a nearby hospital bed should complications arise.

But abortion is a safe procedure that almost never requires hospitalization. Moreover, hospitals typically condition admitting privileges on the number of patients that a physician admits. The law thus creates a catch-22: Physicians who perform abortions must have admitting privileges, but they cannot obtain or maintain them because the need for hospitalization in connection with abortion is so rare. The legislative history shows that the authors of the law were well aware of this problem sought to exploit it to reduce the availability of abortion in Louisiana.

It would be understandable if you are experiencing deja vu. Fewer than four years ago, in *Whole Woman's Health v. Hellerstedt* (2016), the court applied *Casey* to strike down a nearly identical Texas law. But Justice Anthony Kennedy, one of the co-authors of *Casey*, also was one of the five justices who joined the majority opinion. And Justice Kennedy has since retired and been replaced by Justice Brett Kavanaugh.

Will this change in the court's composition spell the end of constitutional protections for abortion rights? Stay tuned. A decision in *June Medical Services* is expected by the end of June.

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