Is the Right to Abortion Still Specially Protected?

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Is the right to abortion still specially protected?

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...
Constitutional Connections: Abortion rights and the Supreme Court

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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, especially in constitutional law as "fundamental rights," usually succeed.

So, what rights are fundamental, and how are they likely to be free from governmental interference?

There is widespread agreement that the rights specifically mentioned in the Constitution -- e.g., speech, religion, association, and press -- are likely 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. These protection include rights to direct the upbringing and education of one's children, a right to marry, a right of privacy that includes the right to use contraceptives. These rights have become far more fundamental. Examples include the right to direct the upbringing and education of one's children, a right to marry, a right to privacy that includes the right to use contraceptives.

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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 Republic­ans Supreme Court justices 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 overturned and promised to appoint judges who shared his views on abortion. President Rea­gan's successor, President George W. Bush, carried out 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 properly 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 providing 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 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 Women'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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The landmine menace

LANDMINES FROM D1

ance (UXO) are not life-al­tering threats inside the United States, so many a­ccidents dwindle into the back reaches of our consciousness. This is not the case in many countries, which often have predominately agrarian economies and where large population segments live scattered throughout the countryside. Also scattered throughout the countryside are latent indiscriminate ex­plosives from prior wars.

These merciless devices are usually hidden beneath the soil or in thick vegetation. They've been found in several European, Asian and African countries. UXO from more re­cent wars litter the ground in South America, Afghanistan, Iraq, Bosnia­Herzegovina, Cambodia, Laos and Vietnam.

It's realistically too much to expect that the global community will agree to cease production, store and destroy the weaponry. Signing on to the antipersonnel mines ban, rather than upending it, is a reasonable step toward a more humane world. Shrapnel and limb loss still hurt far more than Trump's bone spurs and last for a life­time.

(Paul Nichols lives in Concord. He is a former UXO blast victim. His life story is expected to be published in a near­future book. jnichols@jonathansheild.com.)

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