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The Supreme Court and constitutional stare decisis

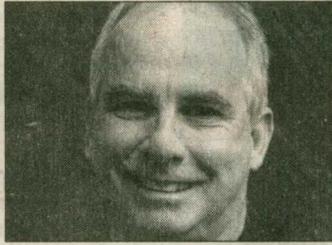
This column is the second in a series of three considering some potential implications of *June Medical Services v. Russo*, a case involving a constitutional challenge to a Louisiana law regulating access to abortion services. The United States Supreme Court heard arguments in the case on March 4, 2020. A decision is expected by the end of June. More on the case below.

The first column sought to place *June Medical Services* in context by describing the history of constitutional abortion-rights litigation at the Supreme Court. This piece explains what the case is likely to tell us about the respect the court will show to prior constitutional rulings with which it disagrees. The final installment will use the case to highlight the constitutional difficulties presented by laws enacted for disingenuous or deceptive reasons.

Let's start by defining terms. The Latin phrase *stare decisis* (literally, "to stand by what's been decided") describes a foundational principle of the American legal system: that courts ordinarily follow prior, on-point decisions issued by appeals courts within their jurisdictions.

The doctrine has two branches: vertical *stare decisis* and horizontal *stare decisis*. Vertical *stare decisis* is the term used to describe the requirement that lower courts follow the rulings of higher courts of the same jurisdiction. Vertical *stare decisis* is a mandatory doctrine.

Thus, for example, New



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Hampshire state trial courts must follow the decisions of the New Hampshire Supreme Court on issues of New Hampshire law. On the federal side, the U.S. District Court for the District of New Hampshire must follow the decisions of the U.S. Court of Appeals for the First Circuit on issues of federal law. And all of these courts must follow the decisions of the United States Supreme Court on issues of federal law.

Horizontal *stare decisis*, in contrast, is a discretionary doctrine. It is the term used to describe the usual practice of high courts to treat their own prior rulings as binding.

Thus, for example, in the vast majority of cases, the New Hampshire Supreme Court will apply its own prior decisions on issues of New Hampshire law. And the United States Supreme Court will do the same on matters of federal law.

But because these courts are empowered to have the final say about the meaning of law within their jurisdictions, the doctrine of horizontal *stare decisis* does not require them to follow their own prior

rulings. On rare occasions, these courts will overrule their precedents and establish new law.

Appellate courts apply the doctrine of horizontal *stare decisis* for both theoretical and practical reasons. Theoretically, the doctrine promotes legal stability and continuity over time, and reinforces the ideal that the law is more than just the opinions of the individuals holding judicial office at any given point in time. Practically, the doctrine is necessary for courts to function. Imagine if courts were obliged to decide each and every legal issue afresh in every case. The judicial system would grind to a halt.

Courts considering whether to overrule a precedent tend to base their decision on four factors. First, has the rule adopted in the prior case proved to be unworkable for courts or as it applies in real life? Second, would changing the rule cause harm to those who have relied on it in ordering their affairs or damage the stability of the society governed by it? Third, has the law's growth in the intervening years led society to discount the rule? Fourth, has new knowledge emerged that calls into question the rule's factual underpinnings?

These factors make courts very reluctant to overrule precedents in the fields of contract and property law. Courts recognize that, in entering into contracts and making arrangements to dispose of property, organizations and individuals rely heavily on the stability of the legal regimes

within which they act. Consider, for example, the chaos that would ensue if the New Hampshire Supreme Court changed a fundamental principle of property law in a way that would require many New Hampshire residents to rewrite their wills in order to make them effective.

But what of constitutional law? How strongly should these horizontal *stare decisis* factors argue for caution in overruling constitutional precedents?

As with much else in constitutional law, judges strongly disagree about the answer to this question.

On the one hand, some judges think that these factors should drive the analysis with respect to constitutional precedents in much the same way as in other areas of law.

In *Planned Parenthood v. Casey* (1992), the court invoked the horizontal *stare decisis* factors to explain why it would not overturn the core ruling in *Roe v. Wade* (1973), which held that women have a fundamental right to terminate a pregnancy during its first two trimesters. *Casey* said that *Roe*'s core ruling provides a workable precedent that is neither obsolete nor built from dubious factual premises.

In addition, women have to come to rely on the promise of reproductive freedom and autonomy that *Roe*'s core holding assures. And perhaps most importantly, overruling *Roe* in response to the intense opposition it has generated would reinforce the misperception that the court is less a

legal institution than just another arena in which partisan politics play out.

But on the other hand, some judges do not believe that horizontal *stare decisis* has a strong role to play in constitutional law. *Casey* was a 5-4 decision in which the court was bitterly divided. The dissenting justices, led by Justice Antonin Scalia, rejected the majority's *stare decisis* reasoning and insisted that correctly interpreting the constitution is almost always more important than following wrongly decided precedent.

This is a perspective Justices Scalia and Clarence Thomas (who joined Justice Scalia's *Casey* dissent) shared frequently, in a number of cases and extra-judicial writings. And it is not a position held only by judicial conservatives. A number of very prominent liberal constitutional theorists also hold this view.

So back to *June Medical Services v. Russo* (2020) and what it may foreshadow. As explained in my previous column, the Louisiana law challenged in the case requires that physicians performing abortions hold admitting privileges at a hospital within 30 miles of the abortion facility. But abortion is a safe procedure that rarely requires hospitalization. And hospitals usually condition admitting privileges on the number of patients that a physician admits.

The law thus creates a catch-22. Physicians who perform abortions now must

have admitting privileges at a nearby hospital. Yet they cannot obtain or maintain such privileges because the need to hospitalize abortion patients arises so rarely. That is why, in *Whole Woman's Health v. Hellerstedt* (2016), the Supreme Court struck down a nearly identical Texas law by a 5-3 vote. (Justice Scalia's seat was then open because of his recent death.)

Of course, things have changed in the four years since the court decided *Whole Woman's Health*. Justice Neil Gorsuch has filled Justice Scalia's seat. And Justice Anthony Kennedy, one of the five justices who joined the majority opinion, has retired and been replaced by Justice Brett Kavanaugh. Time will tell, but both justices almost certainly disagree with the view that the right to abortion should receive special constitutional protection.

Will the newly constituted court overrule *Whole Woman's Health*, a precedent that is a mere four years old? The answer to this question will tell us much about the role the current court sees for the doctrine of horizontal *stare decisis* in the area of constitutional law.

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