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Abortion Again Goes To The Supreme Court

More legal kabuki theater ahead.

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Abortion is again headed to the Supreme Court. At issue is a Texas law setting medical standards for abortionists. Clinics must maintain the standards of "ambulatory surgical centers" and doctors must have "admitting privileges" at local hospitals. The rules would close three-fourths of existing clinics, so abortion advocates filed suit. The case has national implications since six states mandate the former while ten impose the latter.

The public remains deeply divided. A recent Reuters/Ipsos poll found that 43 percent of Americans favor largely unregulated abortion while 41 percent believed it should be mostly prohibited. As for the Texas law, 41 percent believed it was about health while 35 percent opined that its purpose was to limit abortion.

Put me in the latter camp. Since the Supreme Court developed a "right" to abortion largely ex nihilo in 1973—subsequently modified to forbid the government imposing an ill-defined "undue burden"—states must find other justifications for attempting to restrict the procedure. Public health seems as good as any.

Flagrant hypocrisy afflicts virtually everyone involved in the debate. Pro-life conservatives, who tend to be skeptical of government mandates, wax eloquent about the importance of ensuring the safety of abortion patients. Pro-abortion liberals, normally enthralled when government substitutes its judgment for that of anyone and everyone else for most any purpose, suddenly reject measures that make abortion safer. It's a form of American Kabuki Theater, bound to entertain if not enlighten.

That is not the only contortion caused by Roe v. Wade, which is coming up on its 42nd anniversary. When the case essentially banned any interference with abortion within the first two trimesters, the Supreme Court imposed a policy that was far more radical than most everywhere else in the world. Again, the usual participants in America's political danceathon switched partners: conservative prolifers were appalled that America was out of sync globally while

liberal abortion advocates weren't interested in what progressive European social democracies were doing.

Roe remains one of the best examples of the high court acting as a mini-legislature, seeking to solve a political problem by pronouncing faux constitutional law. Indeed, Roe and its progeny almost read like legislative decisions, drawing distinctions—for instance, setting different rules per trimester—that are entirely arbitrary. Roe's flaw was not taking a decision away from the political branches. After all, that's what the Bill of Rights intended to do: popular majorities couldn't willy-nilly restrict an individual's right to speak, worship, own guns, forbid government searches, and otherwise live unmolested by obnoxious, invasive, inquisitive, self-righteous, paternalistic, and sanctimonious bureaucrats.

The problem was that this was not one of the decisions the Founders, as well as those who amended the Constitution (including the 14th Amendment), intended to so insulate. Indeed, they would have been shocked if told that future jurists would scurry about the penumbras and emanations of their work only to discover a well-nigh absolute rule that babies could be routinely killed, er, "aborted," without so much a say so of anyone else.

Of course, it's a difficult decision. No one who believes in liberty should feel comfortable with government getting involved in such a personal area. That's why the choices to have sex and create life are largely absolute and unreviewable, so long as the decisions are arrived at freely and knowledgeably (which obviously is not the case for rape, statutory rape, and incest).

However, while abortion is similarly personal, it is not individual. That is, by the time abortion becomes an issue someone else is involved. Whether "fetus" is more appropriate than "person" in the early stages of pregnancy may be left to philosophers who study angels dancing on pinheads. But most of us talk about a baby, not, say, an aggregation of cells with an eventual likelihood of turning into a child. It is the presence of this other entity, which at some point even abortion advocates admit will become a separate human being, that makes abortion so different from the usual victimless or self-victim crimes. And that's why the state can properly intervene to maintain some balance between the interests of both parties, that is, mother and (unborn) child.

Equally important, abortion usually arrives as an issue after deciding to have sex. Other than the important but thankfully rare case of rape, an "unwanted" pregnancy means one that wasn't desired, not one that was unexpected. If you choose sex, you choose to risk getting pregnant (or, for the guy, getting your partner pregnant). In which case you should be responsible for the consequences. One can argue about what those should be, and carrying to term should not be treated as an appropriate "punishment" for a fun night out. Yet it makes no sense to scream about one's rights when the real issue involves one's responsibilities after freely exercising one of one's rights.

This is precisely the sort of balance that traditionally belongs with the legislature. Politicians may not be particularly good at it—consider the hash that they make of most issues. But lawmakers are accountable to voters, know how to make deals, and look for compromises between positions that appear unbridgeable. Legislators also can easily adjust policy to reflect changing public attitudes. Judges are none of these things.

In the case of Roe, only one principle mattered. Succeeding case law has allowed consideration of other interests, but not, for the most part, the life of the unborn. And abortion advocates, fearful that judges might rethink their legal handiwork, have pushed to make Roe a "super precedent" exempt from scrutiny and change forevermore. One can imagine fans of the segregationist Plessy v. Ferguson making a similar argument, had they only had similar imagination, on the basis of preserving social stability.

In Whole Woman's Health v. Cole, the federal district court ruled that obviously the Texas legislature wrote the law to restrict abortion, but the appeals court rejected the trial judge's reliance on "anecdotal" evidence to "impugn the State's legitimate reasons for the Act." Of course the state was doing what the critics claimed precisely because the Supreme Court had prevented legislators from discussing the real issues. Instead of maintaining this sort of dishonesty, the high court should overturn Roe and return abortion to the political marketplace. The resulting debate would be messy. Abortion would still be available in many states. But we could have a genuine debate on rights and responsibilities, and debate abortion restrictions for their real purpose rather than as a health measure, or whatever else was thought most likely to survive judicial scrutiny.

Perhaps this is why the current abortion debate seems so sterile. Abortion advocates defend a dubious constitutional principle by shouting slogans rather than articulating the interests at stake, comparing their importance, and seeking to strike some kind of balance. Can one really look at the complexity of human lives and insist that everyone has a right to terminate any pregnancy at any moment for any reason?

What will the Supreme Court do in Whole Woman's Health? Experience suggests more legal Kabuki Theater. The "moderates," who really mean Justice Anthony Kennedy, appear unwilling to reverse the seemingly inflexible right to an abortion while being uncomfortable with its consequences, at least to the extent of allowing states to trim about the edges. If so, the Texas ruling will stand or fall depending upon Justice Kennedy's assessment of the size of the trim.

Sex is a fundamental right. Absent some unique and overwhelming circumstances, the state should have no say in whether one brings child into existence. But when people do so—voluntarily—they assume important responsibilities for the life thereby created. Was it not for the Supreme Court's decision in Roe to act like a supreme legislature, we would be debating responsibilities and liberties when discussing abortion, not sparring over health regulations.

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