Pacific Standard

The Future Of Abortion In America Is In Chief Justice John Roberts' Hands

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February 25, 2019

After a surprising vote to stay a Louisiana law, the future of women's constitutional right to abortion appears to hang on the judgment of a single man.

The Supreme Court's chief justice is no advocate for abortion rights. While serving as George W. Bush's deputy solicitor general in the 1990s, John G. Roberts, Jr. co-authored a brief stating that *Roe v. Wade*, the original ruling that established abortion as a constitutional right, was wrongly decided. A conservative appointed to the Supreme Court by Bush in 2005, Roberts voted to uphold Congress' partial birth abortion ban in the 2007 case *Gonzales v. Carhart*, and dissented in the pivotal 2016 *Whole Woman's Health v. Hellerstedt* decision, which struck down a series of Texas laws targeting abortion providers for creating an undue burden on women's choice.

But on February 7th, Roberts joined the court's liberal justices to stay a Louisiana admitting privileges law that would have likely left the state with a single practicing abortion doctor, and the court is now deciding whether to hear the case, *June Medical Services v. Gee*. His vote shocked many, as did his vote late last year *not* to hear two cases that might have stripped Planned Parenthood of Medicaid funding in some states. It also affirmed what had been speculated since the retirement of Justice Anthony Kennedy and the appointment of Justice Brett Kavanaugh: that Roberts has been pushed to the ideological middle of the bench, a powerful position previously held by Kennedy, and one that makes him the target for arguments before the court, the key justice to convince.

As a result, abortion advocates have found themselves with nowhere better to place their hope than in this unlikely figure. If the court takes the Louisiana case, the conservative majority will have the chance to weaken every decision affirming the right to abortion since *Roe*—and potentially even overturn *Roe* itself. The question is: What will Roberts do?

The answer likely lies somewhere between what are widely seen as the chief justice's twin goals: the preservation of the court's legitimacy, and advancing his conservative view of the law.

"He's hard to pin down," says Josh Blackman, an associate professor of law at the South Texas College of Law in Houston. Blackman, who is closely associated with the powerful conservative legal group the Federalist Society and an adjunct scholar at the libertarian think-tank the Cato Institute, is critical of what he describes as Roberts' balancing act. Charged with "leading the court through an ideological minefield at a time of intense political partisanship," as a recent *New York Times* profile put it, Roberts is both deeply conservative and a man concerned with the court's image. "But those are ends that very often are at odds," Blackman says.

"He seems to be very aware of how the court is perceived and seems to care a lot about that, and seems to think it reflects on him," notes Daniel Epps, an associate professor of law at Washington University in St. Louis. Last fall, Roberts publicly reprimanded President Donald Trump for attacking the independence of the judiciary. He has also spoken about the doctrine of *stare decisis*—the adherence to precedent—more than the other justices, Epps says (while also voting at times to overturn precedents, as in one case dealing with unions and another on voting rights).

Adhering to precedent—rather than changing decisions based on the make-up of the court at any given time—is a key requirement for those concerned about protecting the court as an institution separate from day-to-day partisanship.

"The reason people afford legitimacy is they see the court making decisions in a way that's different from politicians," says Sara Benesh, an associate professor of political science at the University of Wisconsin–Milwaukee, where she studies Supreme Court decision-making. Despite Roberts' claim that there are no "Barack Obama," "Bush," or "Trump" judges, "people know the justices have attitudes, you'd have to be blind to not see that," Benesh says, but they still tend to consider the judiciary to be more "principled."

Roberts' decision to stay the Louisiana law, which was modeled on a Texas law struck down in *Whole Woman's Health*, could indicate that he considers Louisiana's law to be bound by the precedent set in *Whole Woman's Health*. That is certainly the argument put forward by lawyers fighting the case on behalf of Louisiana's abortion providers. Roberts might be further swayed in that direction by reminders of the need to defend the independence of the court against the idea that it's too politicized, Epps suggests. (Given Trump's campaign promises to appoint judges who will overturn *Roe*, a vote to overturn *Whole Woman's Health* could underline the idea of a "Trump" court, never mind "Trump" judges.)

Last week, Roberts gave some conservatives more reason to worry when he again joined liberal justices to reverse an appeals court ruling that found a Texas man—who his lawyers argue is intellectually disabled—is eligible for the death penalty. Writing in the conservative *National Review*, Ed Whelan, a right-wing legal activist infamous for a Twitter thread suggesting someone other than Kavanaugh assaulted Christine Blasey Ford, worried the decision might signal Roberts' new high regard even for precedents from which he himself has dissented.

In considering the perception of the court, Roberts is engaged in a "confused role," Blackman says. "He's placed appeasing public sentiment at the centerpiece of his jurisprudence, even above following where the law leads." And in fearing the politicization of the court, he argues, Roberts is being driven by politics. But Blackman isn't "ready to give up on Roberts altogether." The court may decide to hear the Louisiana case, and Roberts might rule to uphold the law. He might also vote against the law, and cite *Whole Woman's Health* as precedent—"a defensible position," Blackman says.

But Epps considers that a long shot. Instead, he expects Roberts will take incremental steps to diminish abortion rights. "I don't have any doubt he would never have voted for *Roe* in the first place, and not that much doubt he would overturn *Roe*," Epps says. He even suspects Roberts is keen to see the ruling overturned on his watch. "The stakes are high, and the decision is seen as so wrong that he would not shy away from that," he says. "But he may prefer a strategy of chipping away for a long time before you overturn it."

Chipping away, after all, has been *Roe*'s true legacy. Not the enduring, expansive original view of abortion rights, but a slow reining in. The Louisiana case provides a chance for Roberts to uphold *Whole Women's Health* in principle, while diminishing the right to abortion in practice.

The state of Louisiana has laid out just such a road map in its arguments thus far, as did the Fifth Circuit Court of Appeals when it ruled in September to uphold the state's admitting privileges law. A two-to-one panel found Louisiana's law valid by agreeing with the state that the facts on the ground varied from those in Texas and did not amount to an "undue burden"—the framework for evaluating abortion laws set out in the 1992 *Planned Parenthood v. Casey* decision and applied in *Whole Woman's Health*. In effect, the court found that Louisiana can keep its law *and* the Supreme Court can keep its precedent, however dramatically weakened.

Abortion advocates view the Fifth Circuit ruling as a gross misapplication of *Whole Woman's Health* and *Casey*—they believe laws with little medical benefit and the impact of restricting access, such as Louisiana's, as exactly the kind those precedents prohibit, most explicitly *Whole Woman's Health*.

But such is the uncertainty of the chief justice's views that Epps wonders if the court's four liberal justices even want to hear the case. Relying on a justice with Roberts' record "underscores how much progressives stand to lose with the new court and how low our standards for victory have become," Leah Litman, an assistant professor of law at the University of California–Irvine, noted in a *Washington Post* op-ed.

Republican lawmakers certainly plan on seizing their moment: Laws that not only restrict abortion but ban it altogether have been proposed in a handful of states, and the hunger to see *Roe* overturned in pro-life states is palpable. It's up to the chief justice whether, or perhaps how much, to appease that hunger.