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John Roberts Hands a Victory to the Likes of Kermit Gosnell

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Four years after voting to uphold a modest state law regulating abortion clinics, John Roberts votes to strike down a nearly identical law.

In his *Hellerstedt* dissent, Justice Samuel Alito took care to explain why Texas had enacted the law in the first place: to protect women from the likes of Philadelphia abortionist Kermit Gosnell.

In 2013, Gosnell was convicted for the murders of three infants born alive as well as the manslaughter of Karnamaya Mongar, a woman seeking an abortion. "Gosnell had not been actively supervised by state or local authorities or by his peers, and the Philadelphia grand jury that investigated the case recommended that the Commonwealth adopt a law requiring abortion clinics to comply with the same regulations as [ambulatory surgical centers]. If Pennsylvania had had such a requirement in force, the Gosnell facility may have been shut down before his crimes," Alito wrote.

Indeed, the Gosnell grand jury found that the "abhorrent conditions and practices inside Gosnell's clinic [were] directly attributable to the Pennsylvania Health Department's refusal to treat abortion clinics as ambulatory surgical facilities."

According to the report, the Gosnell clinic's narrow hallways hampered efforts to help women injured there: "Ambulances were summoned to pick up the waiting patients, but (just as on the night Mrs. Mongar died three months earlier), no one, not even Gosnell, knew where the keys were to open the emergency exit. Emergency personnel had to use bolt cutters to remove the lock. They discovered they could not maneuver stretchers through the building's narrow hallways to reach the patients (just as emergency personnel had been obstructed from reaching Mrs. Mongar)."

Justice Clarence Thomas and Chief Justice John Roberts joined Alito's *Hellerstedt* dissent in 2016. But on Monday, Roberts handed a victory to would-be Kermit Gosnells in voting to strike down a 2014 Louisiana law almost identical to the Texas law at stake in *Hellerstedt*.

"I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman's Health* was right or wrong,

but whether to adhere to it in deciding the present case," Roberts writes in a separate concurrence, nonetheless siding with the high court's four liberal justices in *June Medical Services v. Russo*. "The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents."

But Roberts's ruling that he's bound to follow a bad decision handed down just four years ago doesn't make sense. His adherence to *stare decisis* appears to be quite selective.

Justice Clarence Thomas writes in his *June Medical Services* dissent: "*Stare decisis* is 'not an inexorable command,' . . . and this Court has recently overruled a number of poorly reasoned precedents that have proved themselves to be unworkable." Thomas then cites a number of cases in which *stare decisis* did not prevent Roberts from overturning precedent, including the 2018 case *Janus v. AFSCME* and a case from just last year, *Knick v. Township of Scott*.

Ilya Shapiro of the Cato Institute, who calls Roberts's application of *stare decisis* "capricious," points out that Roberts even voted in 2007 to uphold the federal partial-birth-abortion ban seven years after the court struck down Nebraska's partial-birth-abortion ban.

In Roberts's concurrence today, he dodges the deeper question about whether the Constitution establishes a right to abortion. "Louisiana and the providers agree that the undue burden standard announced in" the 1992 decision *Planned Parenthood v. Casey* "provides the appropriate framework to analyze Louisiana's law," Roberts writes. "Neither party has asked us to reassess the constitutional validity of that standard."

Justice Thomas suggests that Roberts's dodging that issue is a deeper problem than his capricious application of precedent. "When our prior decisions clearly conflict with the text of the Constitution . . . we are required to privilege [the] text over our own precedents,'" Thomas writes. The Supreme Court's abortion decisions "created the right to abortion out of whole cloth, without a shred of support from the Constitution's text. Our abortion precedents are grievously wrong and should be overruled."