NATIONAL REVIEW

Two Takes on June Medical

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Like everyone around these parts, I'm disappointed that John Roberts cast the deciding vote to strike down an abortion law, continuing to apply a precedent he himself thinks was wrongly decided. Here I just wanted to note two interesting takes I've seen elsewhere.

First, at the Cato Institute's blog, Ilya Shapiro notes that Roberts has not always been so deferential to precedent:

After all, *stare decisis* didn't stop him from overturning precedent in *Citizens United v. FEC* (2010), *Janus v. AFSCME* (2018), and *Knick v. Township of Scott* (2019), cases in which the precedent was much older and more entrenched, but a very recent close decision *in which he dissented* apparently carries more weight. There are probably other examples, but those three come immediately to mind.

Mind you, I think Roberts was correct in all those earlier cases, and his concurring exposition of *stare decisis* in *Citizens United* was well done. But that doesn't jibe with what he wrote today or, for that matter, with his vote in *Gonzales v. Carhart* (2007), which upheld the federal ban on partial-birth abortion a mere seven years after the Court invalidated a similar Nebraska ban in *Stenberg v. Carhart* (2000).

Meanwhile, at the Take Care Blog, Leah Litman has an optimistic (for conservatives) take. As she reads Roberts, he's doing what the Court did in 1992's *Casey*: Laying out a new framework for evaluating abortion restrictions. She writes:

The Chief said that he would respect the result of the Court's prior decisions striking down abortion restrictions. Thus, states cannot enact restrictions that the Court has previously invalidated. But the Chief Justice also made clear that he would narrowly read the reasoning in those prior decisions in ways that gave states license to enact abortion restrictions that the Court has not previously invalidated.

The Chief Justice announced that he would weaken the legal standard governing abortion restrictions in at least two significant respects. One is that he will not examine whether a law offers any health or safety benefit to women seeking abortions. The Chief Justice explained that in his view, the proper legal standard governing abortion restrictions requires only that courts examine the burdens that legal restrictions impose, and not whether the restrictions offer any benefits. . . .

The Chief Justice also rejected other elements of the Court's prior decisions that limited states' ability to enact restrictions on abortion. The Chief wrote that "[n]othing … suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." That is not what the Court said when it invalidated the Texas admitting privileges requirement four years ago. In that case, the Court wrote that courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer" and specifically "weigh[] the asserted benefits against the burdens." Here too, if courts allow states to enact laws that offer no medical benefits compared to their burdens, that gives states license to chip away at abortion through restrictive laws.

I have no idea if this is the correct reading of the tea leaves, but let's start chipping and find out.