One Supreme Court case could change the whole way the courts handle abortion cases

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Perhaps the best outcome of the case *June Medical Services LLC vs. Gee*, which the Supreme Court will hear this term, will be for the nine justices to abandon the "undue burden" test and get the Supreme Court out of the role of "abortion referee" for all 50 states.

This is long past due.

The Supreme Court has been deciding abortion policy since 1973's *Roe v. Wade*, when seven unelected jurists — "old white men" in the parlance of today — ruled the child in the womb is not a person and can therefore be killed for any reason through all nine months of pregnancy.

But at the same time, the Supreme Court has always acknowledged (to varying degrees, depending on their subsequent decisions) that the individual states do have legitimate interests to pursue as they pass laws regulating and even in some cases, prohibiting abortion. Those interests include, among others, the health of the mother and the life of the child within her.

In 1992, in *Planned Parenthood vs. Casey*, the court again ruled in favor of baby-killing but created a new standard for the court to use in evaluating state laws regarding abortion: the "undue burden" standard. In other words, if the purpose or effect of a law regarding abortion is to create an undue burden to the woman seeking the procedure, the law cannot stand.

After the ruling in *Casey*, a reliable pattern emerged: A state would pass a law (parental consent, 24-hour waiting period, ultrasound, etc.) and the abortion lobby would challenge it in federal district court. That ruling would then be appealed, first by whichever side lost to the Circuit Court of Appeals, and then finally, to the Supreme Court, which would then, if it decided to review the case, judge if the state had gone too far.

The problem is that "undue burden" is not defined. Hence, practically every time a state acts to advance its interests in the arena of abortion, the court is asked to exercise a role it has claimed for no other medical procedure: to act, as the late Justice Antonin Scalia had complained, as the National Abortion Control Board. In the absence of a clear definition or any constitutional basis, this means it will end up applying the same "raw judicial power" that characterizes *Roe* itself.

Imagine if it didn't have to be that way. Imagine if these nine justices, or at least five of them, decide it is not the job of the Supreme Court to function, as in the words of retired Justice Sandra Day O'Connor, an "ad hoc nullification" machine.

In a dissent to an abortion case decided in 1986, *Thornburgh vs. American College of Obstetricians and Gynecologists*, Justice Sandra Day O'Connor wrote:

> "This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but — except when it comes to abortion — the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it."

What O'Connor recognized more than 30 years ago is that abortion is in a league of its own when it comes to jurisprudence. Things got even worse in the Supreme Court's decision in 2016's *Whole Woman's Health vs. Hellerstedt*. That case concerned two portions of a Texas abortion law: one calling for abortion facilities to meet the same health standards as other ambulatory surgery centers, and the other requiring abortion doctors to have admitting privileges at nearby hospitals.

The Supreme Court, which had just eight justices following the death of Scalia, ruled 5-3 that because too many abortion businesses in Texas were unable to meet the standards and because abortionists could not get admitting privileges, too many abortion clinics would have to close and thus, those portions of the law were unconstitutional.

Putting aside the ruling for a moment, consider what the case itself says about the abortion industry. If facilities can't live up to the basic standards required by other facilities, why should they be considered legitimate providers of healthcare? Why should people think women's health is being protected if abortionists can't get admitting privileges?

These practitioners are often the losers and washouts of medicine, who instead go to work in an unregulated, corrupt, sub-standard malpractice-littered industry. Shockingly, the highest court in the land is protecting them.

The Louisiana case is almost identical to *Hellerstedt* but there are two important differences, one in the case itself and one incidental to it.

Like Hellerstedt, *June Medical Services vs. Gee* concerns a law calling for abortion businesses to meet the same standards as every other ambulatory surgery facility in the state. But when the Fifth Circuit Court of Appeals upheld the law, it found that the law's benefits outweighed its burdens.

Judge Jerry Smith wrote the majority opinion, finding that, "the admitting privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the well-being of women seeking abortion."

The second big difference between now and when *Hellerstedt* was decided is the makeup of the Supreme Court. President Trump's two confirmed Supreme Court justices, Neil Gorsuch and Brett Kavanaugh, tilt the ideological makeup of the court in favor of originalists, who interpret law according to their understanding of what the law's authors intended. Certainly no one can argue that the Founding Fathers were concerned about abortion access.

I believe it's possible that we will not only get a ruling in favor of protecting women from the abortion industry's worst practices, but one that could provoke a change in the way the Supreme Court approaches abortion law.

Perhaps a majority of the justices will decide it is no longer up to them to micromanage and oversee how elected legislators in the individual states represent the will of their constituents where it comes to abortion.

If that's the case, we will get one step closer to the day when the Supreme Court, recognizing its overreach in *Roe v. Wade*, will reverse that tragic, unjust, and erroneous decision.

Father Frank Pavone (@frfrankpavone) is a contributor to the Washington Examiner's Beltway Confidential blog. He is the national director of Priests for Life.