The U.S. Supreme Court's 2016 Abortion Case

by Christopher B. Hopkins

The U.S. Supreme Court granted cert in *Whole Women's Health v. Cole*. This 900-word essay braves to explain *Cole*, abortion law precedent, and how Justice Kennedy stands to decide the issue. A recent Seventh Circuit opinion by Judge Posner (*Planned Parenthood of Wisc. v. Schimel)* may also play a role. Abortion cases are perhaps the best example of how the advancement of technology challenges our notions of privacy and complicates the application of *stare decisis.*

Let's begin with broad, risky predictions: the Court will not resolve the abortion debate nor will it overturn *Roe v. Wade*. What will happen? Several justices will write that the constitutional issues should not be reached due to lesser legal issues which stand in the way. Conservative justices will re-affirm their position that *Roe* was bad law and that *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883 (1992) was a failed, incomplete departure. But, since it granted cert in *Cole*, the Court is expected to reach the issue of whether a Texas law is an "undue burden" on the right to abortion. The Court will presumably split into equal teams of conservative and liberal justices, leaving Kennedy thrust into a judicial version of capture the flag.

Cole arises from a 2013 Texas law which requires doctors who perform abortions to have admitting privileges at a local hospital and that the outpatient center where the abortion is performed must meet ambulatory surgical center standards. While this sounds simple, medical complications during abortions are rare, the need for surgical sterility is misplaced, and there are non-medical (business) impediments to obtaining hospital privileges. In effect, the law forces 75% of abortion clinics in Texas to close. In *Cole*, the Supreme Court may clarify what is an "undue burden" and determine whether the judiciary must accept, on face value, a legislature's articulation of a valid state interest or whether the courts may examine if new restrictions actually further a valid interest.

The Supreme Court accepts abortion cases not to resolve the abortion debate but to remind the general population that there is, indeed, a relevant third branch of government which, like the other two, is fully capable of annoying the hell out of the people which it serves (paraphrasing Justice Scalia). Perhaps the Court's more sinister purpose is to test aging lawyers' memories with the elements of the rational-basis, intermediate, and strict scrutiny tests and to remind lawyers and scholars alike that reaching an intended outcome is often the sole criteria for determining which test applies.

The 1973 case of *Roe v. Wade* held that women have a fundamental right to abortion before viability and that a rigid trimester framework governs. Twenty years later, the Court made a massive shift towards emphasizing states' interest and the wide discretion granted to legislatures. In 1992, *Casey* confirmed the so-called "unbroken commitment by this Court to the essential holding of *Roe*" but then went on, after pages on *stare decisis*, to dismantle the trimester standard and to downshift from a strict scrutiny to a revised rational basis test. *Casey* states that, "*Roe* did not declare an unqualified constitutional right to abortion [but rather] protects the woman from unduly burdensome interference." It is this "undue burden" standard which may control the outcome of *Cole*.

The Supreme Court has since applied *Casey* three times. In 1997, the Court held that a law requiring that only doctors perform abortions was not a "substantial obstacle to a woman seeking an abortion." Three years later, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court held that a ban on "D&X" procedures was unconstitutional because there was no exception for the preservation of the health of the mother. In 2007, the Court in *Gonzalez v. Carhart*, 550 U.S. 124 (2007) considered an improved version of the *Stenberg* law and upheld it. In both *Stenberg* and *Carhart*, the Court considered medical evidence. *Carhart* specifically held that courts have, "an independent constitutional duty to review [a legislature's] factual findings…" That analysis of evidence may be important in deciding *Cole*.

In *Cole*, Texas claimed that it was protecting women's health by requiring admitting-privileges and requiring clinics to be equipped as surgical suites. Detractors, however, assert that there is no supporting medical evidence and that the outcome is an undue burden. The Fifth Circuit held that legislative bodies have wide discretion and that courts should not re-weigh evidence where there is scientific uncertainty. Just like climate change and gun control, advocates on both sides can always come forward with "evidence." In his November 2015 opinion, Judge Posner concluded that the claimed "uncertainty" about abortion procedures was overstated, if not biased, and that "an abortion-restricting statute sought to be justified on medical grounds requires… medical grounds [which] are valid…"

The shift in analysis from *Roe* to *Casey* was predicated, in part, on technological developments. In the post-*Casey* era, many courts are called upon to weigh medical evidence which is constantly advancing and, as some justices have pointed out, makes "viability" a difficult standard to fix. We will see how the Court rules this summer.

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