

In New Court, Roe May Stand, So Foes Look to Limit Its Scope

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In 2003, abortion opponents took a calculated gamble and pushed through the Partial Birth Abortion Ban Act, a federal law very similar to a state law ruled unconstitutional just three years before. Critics asserted they were defying the court and doomed to fail in any legal challenge.

Strategists for the anti-abortion movement were betting that the Supreme Court would soon be different: more conservative, and more open to an array of new abortion restrictions. With the retirement of Justice Sandra Day O'Connor, part of the court's majority for abortion rights, that gamble may soon begin to pay off.

The basic right to abortion, declared in *Roe v. Wade* in 1973, will survive regardless of who replaces Justice O'Connor, given that the current majority for *Roe* is 6 to 3, many experts agree. Chief Justice William H. Rehnquist was one of the two original dissenters from the *Roe* decision; if he retires, as has been widely speculated, President Bush would presumably replace him with a similar conservative, so that would not change the balance on *Roe*.

But a number of cases that are likely to reach the court in the next few years, including the latest versions of the ban on the procedure that critics call partial-birth abortion, may give a new set of justices the opportunity to restrict abortion in significant ways.

In short, even without overturning *Roe*, the new court could seriously limit the decision's reach and change the way abortions are regulated around the country, experts say. This means that Mr. Bush's nominees will be intensely scrutinized, by all sides, on their records, past rulings and general philosophy on abortion.

In the term beginning this fall, the court will review its first major abortion case in five years, involving a parental notification law from New Hampshire. Not far behind, perhaps, will be the 2003 "partial birth" law. On Friday, the United States Court of Appeals for the Eighth Circuit, in St. Louis, upheld a lower court's decision to strike down the law as unconstitutional, a case that could also end up before the Supreme Court. Those cases could give the court a chance to revisit one of the most bitterly disputed areas of abortion law: whether an abortion statute must include an explicit exception to allow the procedure, if necessary, to preserve the woman's health

Abortion opponents assert that such health exceptions give doctors who perform abortions too much discretion to circumvent restrictions by invoking the woman's health, even if it involves emotional and nonphysical issues. Essentially, they say, "health" is so broadly interpreted that it renders many laws meaningless.

The anti-abortion movement has been waiting for a new court for a long time. For years, abortion opponents have focused on passing step-by-step abortion restrictions in state legislatures and the Congress, only to have them challenged in federal court and sometimes thrown out. Justice O'Connor, in their view, was an obstacle in the way of restrictions that had broad political and popular support, notably the "partial birth" ban. "She was an extremist on abortion," asserted James Bopp Jr., general counsel for the National Right to Life Committee.

For abortion rights advocates, it is a moment of growing peril. In their view, Justice O'Connor was perhaps the last protection against a Congress, a president and a sizable number of state legislatures intent on chipping away at the rights established in *Roe*. "There's enormous concern," said Nancy Northup, head of the Center for Reproductive Rights.

While *Roe* may stand, some advocates and analysts assert, the right to obtain an abortion could become so restricted in parts of the country that it becomes largely meaningless. "One prospect is that *Roe* gets progressively eviscerated without being formally overruled," said Reva Siegel, a law professor at Yale.

Justice O'Connor was crucial in developing the court's consensus on abortion over the past 15 years, including the basic legal standard used to evaluate the constitutionality of state and federal abortion laws. In *Planned Parenthood v. Casey*, the 1992 decision co-written by Justice O'Connor, the court said states could enact restrictions on abortion, as long as those restrictions did not impose "an undue burden" on women.

The court said that term was "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

For example, the court ruled that 24-hour waiting periods and many parental notification provisions were constitutional, but a requirement that a married woman tell her husband of her intent to have an abortion was not.

But the contours of the undue burden standard are not well defined. Kathleen M. Sullivan, a law professor at Stanford, said the standard was typical of Justice O'Connor's pragmatic approach to the law. "Undue burden is 'permit, but discourage,'" said Professor Sullivan, alluding to the author Roger Rosenblatt's description for the American public's attitude toward abortion. "It tracks the polls as of 1992 and probably today." But she added that the standard was

amorphous, and that short of an outright ban, it was not clear what a majority of a new court would consider an undue burden.

Douglas W. Kmiec, a law professor at Pepperdine University, said a more conservative post-O'Connor court could mean "a greater receptivity to regulatory choices made by the state in terms of spousal notice, in terms of clinical practice in clinics and hospitals, and in terms of outlawing the partial birth-type procedure."

The so-called partial birth ban has been, for many years, at the center of the struggle over what is, and is not, a constitutionally permissible abortion restriction. The law involves a relatively rare procedure used to terminate pregnancies in the second and third trimesters, a procedure known medically as intact dilation and extraction. Abortion opponents contend the procedure typically involves delivering the lower part of the fetus's body, collapsing the skull while it is still inside the woman's body, and then delivering a dead but largely intact fetus.

Abortion opponents have cited this practice for years as an example of how unbridled, in their view, the right to abortion has become. (Indeed, regardless of the legal outcome, this legislation has become a powerful organizing tool for the anti-abortion movement.) Surely, abortion opponents argued, the states and the federal government could outlaw the procedure. They succeeded in passing bans in dozens of states, but in 2000, in *Stenberg v. Carhart*, a 5-to-4 decision with Justice O'Connor in the majority, the court invalidated those laws when they struck down a Nebraska ban on two grounds.

The court held that the procedure, while rare, might be safer for some women in some circumstances; therefore, the court said, the law must have an exception allowing its use to preserve the woman's health. The court also held that the procedure being outlawed was so vaguely defined that it could be viewed as applying to other, more common abortion procedures - and thus amounted to an undue burden on women.

Abortion opponents were furious. In his dissent, Justice Clarence Thomas wrote, "A health exception requirement eviscerates Casey's undue burden standard and imposes unfettered abortion-on-demand. The exception entirely swallows the rule."

Within months of the ruling, after the 2000 and 2002 elections, abortion opponents found themselves with allies in control of the White House, the House and the Senate; they decided to try again. In their new federal law, eventually passed in 2003, they tried to address the court's objections on "vagueness" by defining the procedure in greater detail. But while they included an exception to allow the procedure if the woman's life is in danger, they did not include an exception to allow its use to preserve her health.

Abortion rights advocates in Congress said opponents were not even trying to pass constitutional muster but simply positioning themselves for a more sympathetic court. "I understand what the other side wants to do," Senator Hillary Rodham Clinton, Democrat of New York, said at the time. "They are hoping to get somebody new on the Supreme Court and to turn the clock back completely, to overrule *Roe v. Wade*."

Douglas Johnson, legislative director for the National Right to Life Committee, acknowledged that abortion opponents were in part playing a waiting game. "We hope that by the time this ban reaches the Supreme Court, at least five justices will be willing to reject such extremism," Mr. Johnson said.

The new law was almost immediately challenged by abortion rights groups. In the past year, it has been held unconstitutional by federal district courts in California, New York and Nebraska, and the Nebraska ruling was affirmed by the Eighth Circuit on Friday, meaning it is probably on the way to the Supreme Court soon.

The Eighth Circuit struck down the law on health exception grounds, ruling that "the constitutional requirement of a health exception applies to all abortion statutes, without regard to precisely how the statute regulates abortion." But, the appeals court went on, a single doctor's opinion does not suffice. "When 'substantial medical authority' supports the medical necessity of a procedure in some instances," the court ruled, "a health exception is constitutionally required."

A case involving a similar law passed by the State of Virginia was struck down by the United States Court of Appeals for the Fourth Circuit, in Richmond, Va., last month, also because it did not have a health exception.

If a case concerning this procedure does reach the Supreme Court, some analysts say, almost any justice appointed by Mr. Bush to replace Justice O'Connor can be expected to vote to reverse the 2000 decision. The only constraint, Professor Sullivan said, is the force of precedent.

"They usually wait a decent 10 years or so before overruling a case," she said. Abortion rights advocates say such laws could have profoundly chilling effects on many doctors' willingness to perform second-trimester abortions. David J. Garrow, a scholar of abortion rights, agreed. "The real effect of anything like the partial-birth abortion act being upheld is the extent to which it intimidates doctors."

Abortion opponents say it is a reasonable line for a civilized society to draw. More immediately, the court will hear arguments in its next term on *Ayotte v. Planned Parenthood*, concerning the New Hampshire parental-notification law. The case presents two important legal questions: the first is whether such laws must also contain an exception for pregnant minors whose health is at risk.

The second issue is what standard courts must use in evaluating challenges to abortion laws that have not yet taken effect. In ordinary cases, plaintiffs pursuing such challenges must prove that there is "no set of circumstances" under which the law would be valid.

In at least some abortion settings, the court has offered a different calculation: that a law may be struck down if even "a large fraction" of women directly affected would suffer an "undue burden" in obtaining an abortion. The state of New Hampshire is challenging that approach.

Abortion rights groups warn that, in the end, the combination of a more conservative court and the anti-abortion movement's piecemeal approach to new abortion restrictions means that *Roe* could be overturned piece by piece. "They don't want Americans to see what they're up to," said Nancy Keenan, president of Nara Pro-Choice America. "They want this to be by stealth."

Anti-abortion leaders say they are simply trusting in democracy, noting that laws on parental notification and "partial-birth" abortion are quite popular. "Do we respect the judgment of the American people?" Mr. Bopp asked. "That's what is fundamentally at stake here."