The Pro-Life Self-Defeating Legal Trap: Be careful what you wish for

What happens if the US Supreme Court overturns the half-century of precedent on abortion? I discussed that in some detail three years ago ("News Analysis: What Happens if Roe v. Wade is Overturned?", by Michael Bilow, Feb 20, 2019), and that article was updated when the Reproductive Privacy Act took effect on June 19, 2019, writing into RI state law the current federal standards under *Roe v. Wade* (and its lesser-known companion *Doe v. Bolton* decided on the same day) in 1973 and *Planned Parenthood v. Casey* in 1992, in case the Supreme Court should overturn or weaken those.

Although a reversal of *Roe* would have little direct effect in RI because of this statutory protection, it would have drastic consequences in other states, many of which have "trigger" statutes that would ban abortion automatically if *Roe* were overturned. But the reasoning used to reverse *Roe*, if the Supreme Court does that, could threaten many other fundamental rights that have been assumed safely protected under American law until now.

With a strongly conservative Supreme Court reinforced by three members appointed by Donald Trump, it is widely expected that a case awaiting decision will significantly curtail or even completely eliminate the constitutional right to abortion prior to "viability," usually considered to be 24 weeks into an ordinary 39-week pregnancy, recognized under *Casey*. In *Dobbs v. Jackson Women's Health Organization*, the State of Mississippi enacted a law clearly violating the *Casey* standard, intending to raise exactly the kind of litigation test that would offer an opportunity to reverse it. *Dobbs* received two hours of oral argument before the Supreme Court on December 1, 2021, after which most analysts concluded that federal protection of abortion rights is likely doomed by the time a ruling is due by June 2022.

The often-criticized aspect of *Roe* and *Casey* on a legal basis is that, undeniably, the text of the Constitution and Bill of Rights are silent on abortion, and indeed on any aspect of childbirth and reproduction. Unlike freedom of speech or press, free exercise of religion and right to trial by jury, this simply did not seem to enter into the mindset of the Colonial-era Framers, despite their finding time to explicitly prohibit quartering of soldiers in private homes.

The emergence of childbirth and reproduction as areas of life where individuals have constitutional rights against government interference first arose in a 1965 ruling, *Griswold v. Connecticut*, that invalidated a Connecticut state law that denied access to contraception even for married couples, finding a right of privacy in the "penumbra" (shadow) of the Bill of Rights. The court ruled: "We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred… Yet it is an association for as noble a purpose as any involved in our prior decisions." In a 1972 case from Massachusetts that reaffirmed *Griswold* the year before *Roe* was decided, *Eisenstadt v. Baird*, the constitutional right of access to contraceptives was extended to unmarried people.

Over time, and especially in *Casey*, the right of privacy applicable to childbirth and reproduction came to be seen as grounded in the Due Process Clauses of the Fifth and Fourteenth Amendment: "…nor shall any State deprive any person of life, liberty, or property, without due process of law." Most of the time, courts are concerned with "procedural due process," which provides protections such as requiring notice of charges and fair trials before locking up someone and thereby depriving them of their liberty. However, there is another prong that courts have come to call "substantive due process" that prevents the government from doing certain things regardless of the procedures used. No one really likes the idea of substantive due process, because in practice it allows judges and courts to decide on the basis of their own opinions what topics are off-limits for legislatures and the political process. At the same time, no one has found any other good way to stop legislatures and politicians from enacting, for example, what Justice Potter Stewart in his *Griswold* dissent called "an uncommonly silly law" that since 1879 banned contraceptives in Connecticut.

Since the 1960s, only cranks and crackpots have been seriously concerned about whether states can ban contraceptives, and *Griswold* and *Eisenstadt* would be almost forgotten today if that was the limit of their significance, but they have become landmark cases because they laid the precedential groundwork for a series of rulings touching sensitive and controversial issues, well beyond abortion in *Roe* and *Casey*.

In 1967, the Supreme Court held in *Loving v. Virginia* that state law prohibiting inter-racial marriage was unconstitutional, violating both substantive due process and equal protection.

Until the 2003 ruling in *Lawrence v. Texas*, states were allowed to criminalize homosexual conduct between consenting adults, a practice upheld by a 1986 ruling in *Bowers v. Hardwick*. Even as recently as 1986, the decision by the Supreme Court that there was no constitutionally recognized "fundamental right to engage in homosexual sodomy," as the majority opinion phrased it, shocked most observers who expected the ruling to go the other way. After decades of criticism, *Bowers* was outright overruled by *Lawrence*, bringing private consensual sexual conduct within the scope of substantive due process protection. By 2015, the court, on the basis of both substantive due process and equal protection, ruled in *Obergefell v. Hodges* that same-sex marriage was a constitutional right, citing the *Loving* precedent.

The Supreme Court withdrawing substantive due process protection from abortion, as could happen in *Dobbs*, would be the first time in US history where protection of a fundamental constitutional right was taken away after being recognized. In theory, it would open the door to a similar reversal on same-sex marriage or even allow reinstating criminal penalties for being gay. While this seems unlikely given current political realities – and it's not clear what happens if people who have been married are suddenly declared unmarried – there is a dangerous slippery slope here. In theory, states might again be free to outlaw inter-racial marriage.

But there's yet one more aspect social conservatives do not seem to have considered in fighting to return abortion as a political question to state legislatures: what kind of power would they then entrust to political vagaries? Between 1980 and 2015, China had what has come to be known as the "one-child policy," imposing severe civil disabilities and ostracism for parents who chose to have more than a single child. In the face of widespread popular resistance and even non-compliance, China gradually backed off their population-control policy, allowing exceptions for rural farmers, in 2015 allowing a maximum of two children for everyone and finally ending the program only in 2021. But while China maintained its population-control policy in some form for over 40 years, there were horrific consequences ranging from forced contraception and forced sterilization to forced abortion; in the most extreme cases, cultural preference for sons rather than daughters encouraged female infanticide.

China is a one-party communist dictatorship where dissent is not tolerated, but what would happen if something like their one-child policy were adopted by a state legislature in the US? Under what legal theory could such a draconian policy be challenged? What, to put it bluntly, prevents a state government from mandating unwanted sterilizations and abortions? Shockingly, the Supreme Court in a 1927 case, *Buck v. Bell*, upheld the power of states then in the grip of the pseudo-scientific eugenics movement to forcibly sterilize people "for the protection and health of the state." While hardly anyone thinks *Buck* would be followed by the courts now, it has never been explicitly overruled and remains, technically, valid law.

It turns out, as one of my philosophy professors often said, "What's sauce for the goose is sauce for the gander." It's pretty clear whose goose is about to be cooked. The legal principle that extends substantive due process protection to your right to have an abortion when the government tries to stop you is exactly the same legal principle that prevents the government from forcing you to have an abortion. One of the key factors distinguishing US freedom from Chinese-style dictatorship is rule of law: If the Supreme Court deteriorates to one more partisan rubber stamp in a hopelessly polarized political stalemate, we move inexorably closer to Chinese-style dictatorship. As the plurality warned in their opinion in *Casey*: "The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make."