The Shadow of Abortion

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Melissa Murray, The Symbiosis of Abortion and Precedent, 134 **Harvard L. Rev.** 308 (2020).

In her insightful Comment on *June Medical Services L.L.C. v. Russo*[1] in the *Harvard Law Review*'s Supreme Court Issue, Professor Melissa Murray uncovers the "complicated and constitutive relationship between the Court's approach to stare decisis and its abortion-related jurisprudence." (P. 312.) She shows not only that stare decisis principles structure the Court's abortion jurisprudence, but also that conflict over the abortion right shapes the Court's approach to stare decisis. In this sense, Murray persuasively demonstrates how abortion casts a long shadow over other bodies of law, not least of which is the trans-substantive question of stare decisis.

Murray's perspective invites us to appreciate how the abortion conflict provides a template for other struggles, both inside and outside the courts. Without saying so explicitly, her analysis helps us to make sense of ongoing contestation over the meaning and reach of *Obergefell v. Hodges*,[2] the Supreme Court's 2015 landmark decision recognizing same-sex couples' constitutional right to marry. Even as same-sex couples exercise the right to marry nationwide, opponents of LGBTQ equality are seeking to narrow and limit the decision's reach—without asking the Court to expressly overrule it. They rely, often expressly, on the campaign against abortion rights as a model.

Murray analyzes how the Court's abortion decisions—including most prominently *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3]—constitute "precedent on precedent" (P. 329.) These decisions "shadow all of the Court's efforts to define and observe the requirements of stare decisis." (P. 312.) More importantly, they furnish "a blueprint for narrowing, limiting, and eventually overturning earlier precedents." (p. 330)—a dynamic she terms "transformation-through-preservation," in a play on Professor Reva Siegel's famous preservation-through-transformation concept.[4] (P. 335.)

Murray extensively documents this blueprint in action in a number of doctrinal areas, ranging from the Establishment Clause to the Sixth Amendment, from campaign finance reform to labor law. In the examples on which Murray focuses, abortion jurisprudence "provides a template for undermining—and overruling—precedent." (P. 337.) And yet, in the abortion context itself, *Roe v. Wade*[5] remains good law. That is, the very body of law that has supplied the interpretive tools to overturn precedent in other areas continues to withstand attempts at overruling. In this sense, abortion jurisprudence also provides a blueprint for limiting protected rights *without overruling precedent*. It is here that the abortion struggle supplies a template for conflict over the rights of same-sex couples.

The hollowing-out of *Roe* has been documented by countless scholars and commentators. In *Casey*, the Court affirmed *Roe* as precedent but also reformulated the standard of review in ways that weakened the abortion right. As Murray argues, "by authorizing states to legislate abortion rights out of existence, *Casey* overruled much of *Roe*'s substance, substantially curtailing access to abortion for most women." (P. 315.) In *Gonzales v. Carhart*,[6] the Court upheld the federal Partial Birth Abortion Act without expressly repudiating the precedential status of *Roe*, *Casey*, or *Stenberg v. Carhart*, an earlier decision striking down a similar state law.[7] As Justice Ginsburg observed in dissent, *Gonzales* paid lip service to principles of stare decisis as it "chip[ped] away at a right declared again and again by this Court."[8]

June Medical stands as the latest example in this long line of decisions. The Court struck down a Louisiana law effectively the same as the Texas law the Court had struck down just four years earlier in *Whole Woman's Health v. Hellerstedt*.[9] Of course, the Court's composition had changed in the intervening period. Chief Justice Roberts, who

had dissented in *Whole Woman's Health*, now provided the fifth vote to strike down the Louisiana law in *June Medical*. The four-justice plurality analyzed the law under the same standard articulated by the majority in *Whole Woman's Health*—weighing the law's purported health benefits against the burdens the law imposed on women seeking abortion. Concurring in the result based on principles of stare decisis, Chief Justice Roberts rejected the "balancing" approach adopted by the plurality and the *Whole Woman's Health* Court. As Murray contends, "Chief Justice Roberts took a dual-pronged approach—reaffirming *Whole Woman's Health* for the purpose of distinguishing it and, in the process, implicitly overruling it." (P. 325.) As importantly, while professing loyalty to *Casey*, he further restricted the meaning of that landmark decision.

This strategy is frightening not only for proponents of abortion rights but also for proponents of other rights relating to sexuality, reproduction, and the family. Will the abortion decisions provide a model for limiting the rights of same-sex couples without overruling *Obergefell*?

In the wake of *Obergefell*, Arkansas refused to issue birth certificates to married same-sex couples listing both women as parents of the child, even though the state listed both spouses as parents in married different-sex couples, regardless of whether the husband was the child's biological father. In 2017, the Court in *Pavan v. Smith* rejected Arkansas's narrow reading of *Obergefell*.[10] This was clearly the right result. *Obergefell* itself included "birth . . . certificates" as one of the critical "government benefits" that states "confer on all married couples." Yet, the *Pavan* decision was not unanimous. Justices Gorsuch, Alito, and Thomas dissented, expressing sympathy for the state's attempt not simply to narrow but contravene precedent, reasoning that "nothing in *Obergefell* indicates that a birth registration regime based on biology . . . offends the Constitution."

Those seeking to undermine *Obergefell* have not given up. In 2020, they raised the question again, this time by virtue of Indiana's refusal to issue birth certificates listing both women in a married same-sex couple as parents. The Court denied *cert*. in *Box v. Henderson*. But opponents of same-sex marriage will continue to raise questions of birth registration and parentage that implicate the meaning of *Obergefell*. Here, key abortion decisions provide a model, illustrating how to simultaneously profess loyalty to and undermine a landmark precedent.

Conflicts over religious exemptions from antidiscrimination mandates also invite judicial attempts to limit the reach of *Obergefell*. This term, in *Fulton v. City of Philadelphia*, the Court is considering whether a Catholic social services agency has a right to a city contract for child-placing services even though the agency refuses to abide by the city's nondiscrimination requirements. The agency contends that its religious view of marriage prohibits it from licensing same-sex couples as foster parents. This case, one of many of its kind, threatens to deprive married same-sex couples of rights that married different-sex couples take for granted.

Disputes over parentage and religious exemptions do not exhaust the cases seeking to limit *Obergefell*. Consider, for example, the years-long challenge to Houston's extension of benefits to the same-sex spouses of city employees. The marriage right secured by *Obergefell* would mean very little if the government could withhold benefits from same-sex spouses that it furnishes to different-sex spouses. And yet cases of this kind have persisted.

Up to this point, the Court has stopped short of restricting *Obergefell* in ways that mirror the abortion struggle. But opponents of LGBTQ equality continue to press their cause and do so with a seemingly more hospitable Court.

This strategy of limiting—neutering, in Murray's words (p. 317)—precedent without overruling appears more palatable to the Court when the substantive issue raised is one that has inspired longstanding, fierce, and ongoing society-wide debate. As Murray observes, "overruling [*Roe*] would invariably expose the Court to claims of partisanship and political opportunism. And this, in turn, helps explain why the abortion right has, over time, become increasingly narrow." (P. 349.)

From the perspective of the democratic legitimacy of our constitutional order, this seems upside down. What does the ordinary citizen think when a decision like *June Medical* comes down? "The Supreme Court Just Ruled 5-4 to Protect

Abortion Rights," a headline read at the time. Is there any indication that, as Murray explains, the Chief Justice's "selective approach to stare decisis transformed the meaning—and precedential value—of *Whole Woman's Health*, as well as the standards by which abortion restrictions will be judged going forward"? (P. 312.) As Reva Siegel puts it in a forthcoming article on *June Medical*, "It is one thing to reverse *Roe* and *Casey*; it is another to pursue that aim through forms of rational basis."[11]

The same fear exists in the LGBTQ context. While the increasingly conservative composition of the Court has led some to worry about *Obergefell*'s overruling, the more real concern is that the Court will chip away at *Obergefell*—limiting not only its precise protections (such as "the constellation of benefits that the States have linked to marriage") but also its loftier commitments to protect LGBTQ people from laws that "serve[] to disrespect and subordinate them." With abortion jurisprudence as a blueprint, it may do so without ever provoking headlines that alert citizens to the deprivation of rights at stake. In this sense, practices of stare decisis being forged by justices hostile to abortion rights pose a profound crisis—not only for the citizens who depend on the rights being adjudicated, but also for the legitimacy of constitutional adjudication in our democracy.

1. 140 S. Ct. 2103 (2020).
2. 576 U.S. 644 (2015).
3. 505 U.S. 833 (1992).
4. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 **Stan. L. Rev.** 1111 (1997).
5. 410 U.S. 113 (1973).
6. 550 U.S. 124 (2007).
7. 530 U.S. 914 (2000).
8. 550 U.S. at 191.
9. 136 S. Ct. 2292 (2016).
10. 137 S. Ct. 2075 (2017).
11. Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 **Sup. Ct. Rev.** (forthcoming 2021) (manuscript at *41).

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