GLOBAL LIFE CAMPAIGN™

Louisiana Constitution & Law v. U.S. Supreme Court (Part 5)

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The GLC Series this week, focusing on the *Sanctity of Human Life* and the United States, continues with Part 5 of the review of the recent U.S. Supreme Court case, *June Medical Services LLC* v. *Russo, Interim Secretary, Louisiana Department of Health and Hospitals*. Today we focus on Justice Neil Gorsuch's dissent. Clearly, he approached the case with honesty and integrity, respect for the rule of law and the authority of state legislatures to enact laws, and high respect for the proper and consistent application of rules of procedure and standards for judgments established by the Supreme Court. However, from this case, his view of abortion is unclear.

Justice Gorsuch wrote his own dissenting opinion, concluding with this observation: "it is a sign we have lost our way." Here are the opening paragraphs of his opinion, identifying serious errors in the Court decision, and exposing the evidence presented in the case that reveals the dirty abortion business and harm to women, including death. This is followed by selected key points (mostly from the balance of his opinion), followed by his quotes leaving in question his position on abortion.

> "The judicial power is constrained by an array of rules. . . . (C)ollectively, they help keep us in our constitutionally assigned lane, sure that we are in the business of saying what the law is, not what we wish it to be.
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> "Today's decision doesn't just overlook one of these rules. It overlooks one after another. . . . In truth, *Roe* v. *Wade*, 410 U. S. 113 (1973), is not even at issue here. The real question we face concerns our willingness to follow the traditional constraints of the judicial process when a case touching on abortion enters the courtroom.
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> "When confronting a constitutional challenge to a law, this Court ordinarily reviews the legislature's factual findings under a 'deferential' if not '[u]ncritical' standard. . . . When facing such a challenge, too, this Court usually accepts that 'the public interest has been declared in terms well-nigh conclusive' by the legislature's adoption of the law—so we may review the law only for its constitutionality, not its wisdom. . . . Today, however, the plurality declares that the law before us holds no benefits for the public and bears too many social costs. All while sharing virtually nothing about the facts that led the legislature to conclude otherwise. The law might as well have fallen from the sky.
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> "Of course, that's hardly the case. In Act 620, Louisiana's legislature found that requiring abortion providers to hold admitting privileges at a hospital within 30 miles of the clinic where they perform abortions would serve the public interest by protecting women's health and safety. Those in today's majority never bother to say so, but it turns out that Act 620's admitting privileges requirement for abortion providers tracks longstanding state laws governing physicians who perform relatively low-risk procedures like colonoscopies, Lasik eye surgeries, and steroid injections at ambulatory surgical centers. In fact, the Louisiana legislature passed Act 620 only

after extensive hearings at which experts detailed how the Act would promote safer abortion treatment—by providing 'a more thorough evaluation mechanism of physician competency,' promoting 'continuity of care' following abortion, enhancing inter-physician communication, and preventing patient abandonment.

"Testifying physicians explained, for example, that abortions carry inherent risks including uterine perforation, hemorrhage, cervical laceration, infection, retained fetal body parts, and missed ectopic pregnancy. Unsurprisingly, those risks are minimized when the physician providing the abortion is competent. Yet, unlike hospitals which undertake rigorous credentialing processes, Louisiana's abortion clinics historically have done little to ensure provider competence. Clinics have failed to perform background checks or to inquire into the training of doctors they brought on board. Clinics have even hired physicians whose specialties were unrelated to abortion—including a radiologist and an ophthalmologist. Requiring hospital admitting privileges, witnesses testified, would help ensure that clinics hire competent professionals and provide a mechanism for ongoing peer review of physician proficiency. Loss of admitting privileges, as well, might signal a problem meriting further investigation by state officials. At least one Louisiana abortion provider's loss of admitting privileges following a patient's death alerted the state licensing board to questions about his competence, and ultimately resulted in restrictions on his practice.

"The legislature also heard testimony that Louisiana's clinics and the physicians who work in them have racked up dozens of citations for safety and ethical violations in recent years. Violations have included failing to use sterile equipment, maintaining unsanitary conditions, failing to monitor patients' vital signs, permitting improper administration of medications by unauthorized persons, and neglecting to obtain informed consent from patients. Some clinics have failed to maintain supplies of emergency medications and medical equipment for treating surgical complications. One clinic used single-use hoses and tubes on multiple patients, and the solution needed to sterilize instruments was changed so infrequently that it often had pieces of tissue floating in it. Hospital credentialing processes, witnesses suggested, could help prevent such violations. In the course of the credentialing process, physicians' prior safety lapses, including criminal violations and medical malpractice suits, would be revealed and investigated, and incompetent doctors might be weeded out.

"The legislature heard, too, from affected women and emergency room physicians about clinic doctors' record of abandoning their patients. One woman testified that, while she was hemorrhaging, her abortion provider told her, 'You're on your own. Get out.' Eventually, the woman went to a hospital where an emergency room physician removed fetal body parts that the abortion provider had left in her body. Another patient who complained of severe pain following her abortion was told simply to go home and lie down. When she decided for herself to go to the emergency room, physicians discovered a tear in her uterus and a large hematoma containing a fetal head. The woman required an emergency hysterectomy. In another case, a clinic physician allowed a patient to bleed for three hours, yet a clinic employee testified that the physician would not let her call 911 because of possible media involvement. In the end, the employee called anyway and emergency room personnel discovered that the woman had a perforated uterus and a needed a hysterectomy. A different physician explained that she routinely treats abortion complications in the emergency room when the physician who performed the abortion lacks admitting privileges. In her experience, that situation 'puts a woman's health at an unnecessary,

unacceptable risk that results from a delay of care . . . and a lack of continuity of care.' Admitting privileges would mitigate these risks, she testified, because 'the physician who performed the procedure would be the one best equipped to evaluate and treat the patient.'" . . . (https://www.supremecourt.gov/opinions/19pdf/18-1323_c07d.pdf).

Selected key points and quotes of Justice Gorsuch:

- The Court should faithfully follow judicial rules in deciding cases, and not violate those rules.
- The Court should decide in accordance with prior Court decisions – *stare decisis* – but not misuse, misapply, or go beyond the rules or tests formulated in those decisions.
- The *Louisiana* case is not a challenge to *Roe* v. *Wade*.
- The Court is to defer to the State and may "review the (State) law only for its constitutionality, not its wisdom," but the majority on the Court in this case did the opposite.
- The *Louisiana* case is about:
    - The lawful authority and jurisdiction of a state legislature to enact laws to protect the people within their jurisdiction, and specifically, "protecting women's health and safety."
    - Applying the same medical standards to abortion clinics and physicians as to other medical facilities and physicians, particularly hospital admitting privileges: "Act 620's admitting privileges requirement for abortion providers tracks longstanding state laws governing physicians . . . (and) witnesses explained (that) the admitting privileges requirement in Act 620 for abortion clinic providers would parallel existing requirements for many physicians who work at ambulatory surgical centers."
    - Ample, even substantial, evidence was presented by the State and witnesses to the necessity and benefits of the Act 620 law, but this was ignored by the Court majority.
    - A conflict of interest between abortion clinics providers and their clients when it comes to laws and regulations protecting the life and health of pregnant women.
    - An unjust "facial challenge," that is, asking the Court to declare that this particular State "law cannot be constitutionally applied against *anyone* in *any* situation."
    - A corrupt use of the nebulous "undue burden" standard: "How is a judge supposed to balance, say, a few women's emergency hysterectomies against many women spending extra hours travelling to a clinic? . . . The benefits and burdens are incommensurable."
    - The absence of a legal standard: "Missing here is exactly what judges usually depend on when asked to make tough calls: an administrable legal rule to follow, a neutral principle, something outside themselves to guide their decision."
    - The Court's refusal to accept justifiable limits on abortion: "(U)nder the concurrence's test it seems possible that even the most compelling and narrowly tailored medical regulation would have to fail if it placed a substantial obstacle in the way of abortion access."

What is Justice Gorsuch's view on abortion? His position is unclear in this decision.

- "(T)he State has learned of additional safety violations at Louisiana clinics, including evidence of an abortion provider deviating from the standard of care in a way that can result in the live births of nonviable fetuses? [Does Gorsuch think that aborting previable babies is permissible?]
- "The plaintiffs before us are abortion providers. They do not claim a constitutional right to perform that procedure, and no one on the Court contends they hold such a right."

- "To justify injunctive relief . . . it can't be enough to show that the law would induce any particular doctor or clinic to stop providing abortions. Instead, the plaintiffs would have to show that a sufficient number of clinics would close (without enough new clinics opening) so that supply would no longer meet demand for abortion in the State."
- "There are hundreds of OB/GYNs with active admitting privileges in Louisiana who could lawfully perform abortions tomorrow." [Would Gorsuch object to "lawfully perform(ed) abortions?]
- "Not only questionable, the plurality's assumptions are already contradicted by emerging evidence. For example, a major hospital reacted to the law by developing a new type of admitting privileges expressly for an abortion provider seeking to comply with Act 620. . . . If nothing else, this development belies the prediction that hospitals statewide would stand idly by as thousands upon thousands of requests for abortions go unfulfilled."
- "If there is a silver lining, though, it may be here. This Court generally recognizes that facts can change over time—and that, when they do, legal conclusions based on them may have to change as well. Even so-called 'permanent injunctions' are actually provisional—open to modification 'to prevent the possibility that [they] may operate injuriously in the future.' . . . After all, when the facts change, the law cannot pretend nothing has happened. For that reason, we have instructed lower courts to reconsider injunctions 'when the party seeking relief . . . can show a significant change either in factual conditions or in law.' . . . And, given the fact-intensive nature of today's analysis, the relief directed might well need to be reconsidered below if, for example, hospitals start offering qualifying admitting privileges to abortion providers, a handful of abortion providers relocate from other States, or even a tiny fraction of Louisiana's existing OB/GYNs decide to begin performing abortions." [If compelling evidence was presented, would Gorsuch consider reversing the Court's position on abortion? Does he support all the measures he proposes?]
- "In the context of laws implicating only the State's interest in fetal life previability, the *Casey* plurality did describe its 'undue burden' test as asking whether the law in question poses a substantial obstacle to abortion access. . . . But when a State enacts a law 'to further the health or safety of a woman seeking an abortion,' the *Casey* plurality added a key qualification: Only '*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.'" [Does Gorsuch think that necessary health regulations that permit aborting previable babies are lawful?]

Next week I will summarize the positions of the justices, and Justice Kavanaugh's brief dissent.

SDG and for the sanctity of human life,

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"You shall not distort justice; you shall not be partial, and you shall not take a bribe, for a bribe blinds the eyes of the wise and perverts the words of the righteous. Justice, and only justice, you shall pursue, that you may live and possess the land which the LORD . . ." (Deuteronomy 16:19-20).