

Roe or No Roe, Right to Abortion Seen Eroding Under Newly Constituted Supreme Court

The U.S. Supreme Court is virtually certain to list rightward, including on abortion rights, now that John G. Roberts Jr. and Samuel A. Alito Jr. have joined the bench and Sandra Day O'Connor has retired. Whether the newly constituted Court eventually will overturn *Roe v. Wade* has dominated the national debate. Already, however, a subtle incursion appears to have begun that could lay the groundwork for a transformed national landscape affecting the right to abortion in practice.

On January 18, in her final opinion before retiring, O'Connor delivered the Court's first ever unanimous decision relating to abortion. In *Ayotte v. Planned Parenthood of Northern New England*, the Court held that a New Hampshire parental notification law is unconstitutional because it does not allow physicians to waive the notice requirement in situations where teenagers need an immediate abortion for medical reasons. However, the Court also held that the lower court may have overreached in striking down the entire law, rather than simply blocking the law's enforcement in those few cases where medical emergencies might exist.

The justices sent the case back to the lower court to reconsider the appropriate remedy. "We try to limit the solution to the problem," O'Connor wrote. At the same time, she stressed, the solution must be consistent with what the legislature

intended. The challenge now facing the lower court is to determine whether by crafting the law as it did, the state legislature meant that it would prefer to have no law rather than one with a medical emergency exception. Depending on the answer, the court should either invalidate the whole law or leave it intact except as it would apply in those emergency situations.

Because New Hampshire's underlying parental notification requirement was not in dispute, and there appears to be consensus—for now—on the necessity of at least some form of a health exception, the popular media largely described the *Ayotte* decision as a nonevent. Yet, the move toward considering only an abortion law's potentially unconstitutional applications, rather than its unconstitutional provisions, represents a distinct new direction in abortion jurisprudence. Up to now, the courts have enjoined laws restricting access to abortion in their entirety if they contain any provisions that are unconstitutional on their face. The ruling in *Ayotte* could be seen as an open invitation to antiabortion legislators to enact ever more novel restrictions, relying on the courts to tailor those aspects of the law they might find unconstitutional as applied in certain circumstances. The impact could be considerable. Whereas in most areas of law legislators try to take into account the constitutional implications of the statutes they are considering, antiabortion legislators are deliberately promoting

increasingly far reaching laws for the express purpose of pushing the constitutional envelope ever further toward eviscerating *Roe*.

Although O'Connor asserted in her *Ayotte* opinion that "we do not revisit our abortion precedents today," within a month of her departure the Court announced that it will revisit its abortion precedents this fall. In *Gonzales v. Carhart*, the Supreme Court will consider the constitutionality of the federal Partial-Birth Abortion Ban Act, which will give the Court an opportunity to revisit at least two of its most important past precedents: that abortions must always be available when necessary to protect a woman's health and that determinations regarding health are to be made not by lawmakers but by individual doctors assessing the needs of specific women. Under these precedents, three different federal appeals courts have ruled that the law—which contains no health exception, based on a "finding" by Congress that the banned procedure is never necessary to protect a woman's health—is unconstitutional. Congress defied those precedents in the apparent expectation that by the time its law was finally adjudicated, the Supreme Court's membership would be different and the new lineup would yield a different result. The betting was right on the former; the signs are ominous for the latter.

—Susan A. Cohen

The Other Shoe Drops: Federal Abstinence Education Program Becomes More Restrictive

In 2004, the Bush administration announced that it was transferring administration of its pet abstinence-only education program from the Department of Health and Human Services' (DHHS) Health Resources and Services Administration to its more ideologically driven Administration for Children, Youth and Families. Many observers noted at the time that programmatic changes were likely to follow, and a January 2006 notice of grant availability seems to confirm that the day of reckoning for the Community-Based Abstinence Education (CBAE) program has finally come. In expanding CBAE's long-standing eight-point definition of what constitutes a fundable abstinence program to 13 "themes," and then expounding at length on recommended curricula content, the announcement lays bare as never before the administration's hardened approach to premarital abstinence promotion and the denigration of contraception, as well as their putative relationship to "healthy" marriage.

Defining abstinence. For the first time, the grant announcement defines the meaning of abstinence and sexual activity: "Abstinence means voluntarily choosing not to engage in sexual activity until marriage. Sexual activity refers to any type of genital contact or sexual stimulation between two persons including, but not limited to, sexual intercourse." While this expansive definition may have been intended in part to respond to research suggesting that abstinence education, and virginity pledges in particular, may be causing some youth to engage in anal or oral sex in

order to preserve their virginity, it is so broad as to include even kissing.

Contraception. Since CBAE's inception, the federal government has interpreted the requirement within its statutory, eight-point definition that funded programs have as their "exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity" to preclude any positive discussion of contraception. That interpretation, however, never appeared in writing—until now. Indeed, the January announcement clarifies with great precision and detail the role of contraception in CBAE-funded curricula. A funded program, according to the announcement, "must not promote contraception and/or condom use (as opposed to risk elimination)" or "promote or encourage the use of any type of contraceptives outside of marriage." At the same time, the announcement encourages programs to teach that "contraception may fail to prevent teen pregnancy and that sexually active teens using contraception may become pregnant"; "the published failure rates associated with contraceptives relative to pregnancy prevention, including 'real use' versus trial or 'laboratory use,' human error, product defect, teen use and possible side effects of contraceptives"; and "the limitations of contraception to consistently prevent STDs."

Marriage. The announcement is clear that an important goal of the CBAE program is to prepare young people for marriage—which it defines as "only a legal union between one man

and one woman as a husband and wife." Accordingly, programs must emphasize "that the best life outcomes are more likely obtained if an individual abstains until marriage"; "that non-marital sex can undermine the capacity for healthy marriage, love and commitment"; and "that abstinence is beneficial in preparation for successful marriage and significantly increases the probability of a happy, healthy marriage." The announcement also encourages funded curricula to promote the moral value of abstinence, including that "abstinence reflects qualities of personal integrity and is honorable."

Medical accuracy. Apparently responding to charges that CBAE curricula are rife with medical and scientific inaccuracies, the program announcement explicitly states that curricula must contain references for factual information provided about contraceptive failure rates and side effects, as well as the harms associated with STDs. In sharp contrast, similar references are not required to support statements regarding the benefits of abstinence—or statements about its purported 100% effectiveness in preventing pregnancy and disease. Indeed, the announcement flatly prohibits programs from even referring to abstinence "as a form of contraception," presumably to shield it from the programmatic requirement that failure rates be discussed for all contraceptive methods.

In a February 16 letter to DHHS Secretary Michael Leavitt, Rep. Henry Waxman (D-CA), ranking minority member of the House Committee on

Government Reform, called for the entire grant announcement's retraction. "The new guidelines eliminate the requirement that federally funded abstinence-only education programs have health-based goals," he said, and if that omission is allowed to stand, "funding for abstinence education will be awarded based on ideology, not the effectiveness of programs in reducing teen sexual activity, teen pregnancy, and teen sexually transmitted disease rates." Waxman called this "a dangerous

development, especially since the amount of federal funding for abstinence-only education is increasing rapidly."

As, indeed, it is. As Waxman's letter notes, funding for CBAE—currently at \$113 million—has risen 465% since the program's inception just five years ago. For FY 2007, the administration has requested an additional \$28 million for this most restrictive of the three federal abstinence programs, which bypasses state govern-

ments and makes grants directly to local abstinence-only organizations, including faith-based organizations. The administration, moreover, has promised to increase total funding for abstinence-only education from its FY 2007 request of \$204 million to \$270 million by FY 2009—with all future increases likely to go to CBAE, as they have ever since President Bush took office. —*Cynthia Dailard*