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A Practical Companion to the Constitution: The Cumulative Supplement 2nd Series 2008-2017

Jethro K. Lieberman
New York Law School, jethro.lieberman@nyls.edu

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A PRACTICAL COMPANION TO THE CONSTITUTION

HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING

Jethro K. Lieberman

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About this Book

First published in 1992, *The Evolving Constitution* (Random House), the predecessor volume to *A Practical Companion to the Constitution,* covered the constitutional cases in the United States Supreme Court through the 1991–1992 term. The original hardcover edition was supplemented in three volumes through the 1995–1996 term.

Cases from the three supplements and the Court's later terms were incorporated in *A Practical Companion to the Constitution: How the Supreme Court Has Ruled on Issues from Abortion to Zoning* (University of California Press, 1999), which is current through the 1997–1998 term.

Ten non-cumulative annual supplements, covering ten Court terms beginning with the 1998 Term, were published by Dialogue Press, and these were accumulated, rearranged, and edited for continuity (with minor errors corrected) in a single volume, *The Decennial Supplement*, in January, 2009. *The Decennial Supplement* covers in more than 200 topical essays the 390 constitutional cases decided by the Supreme Court after the publication of the revised main volume, from October 1998 through June 2008.

This is the ninth supplement of the second (cumulative) series, covering the 308 constitutional and quasi-constitutional cases of the Court's terms, from the 2008–2009 term through the 2016–2017 term, and noting the retirements of Associate Justices David H. Souter and John Paul Stevens, the death of Justice Antonin Scalia, and the appointments of Associate Justices Sonia Sotomayor, Elena Kagan, and Neal M. Gorsuch. For production reasons this year, decisions of the Court during its 2016-2017 term are discussed in a separate section following the topical discussion of cases decided from October 2008 through June 2016.

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For further information, contact me at jethro.lieberman@nyls.edu.

Jethro K. Lieberman
Labor Day, 2017

Topics 2008–2016

This section contains all topics arising from cases decided through the 2015-2016 term. For topics arising from cases decided during the 2016-2017 term, see the section beginning at p. 205.

ABORTION In 2016, in its first decision in nearly a quarter century to confront the core of abortion rights, the Court held 5–3 in *Whole Woman's Health v. Hellerstedt* that Texas imposed unconstitutionally undue burdens on the exercise of the right to abortion when it subjected abortion clinics and doctors to two regulations that would have forced many clinics throughout the state to close. The first regulation, the "admitting-privileges requirement," mandated physicians have admissions privileges at a hospital within 30 miles of any clinic in which he or she performs abortions. The second, or "surgical-center requirement," directed every abortion clinic to meet the minimum standards for ambulatory surgical centers. In a suit to enjoin enforcement of the admitting privileges requirement at two clinics and to bar enforcement of the surgical-center requirement statewide, a federal district court found that the requirements, taken together, would lead to "the closing of almost all abortion clinics in Texas." Among its findings: the number of clinics, 40 before the Texas law was enacted, dropped statewide by nearly half "in the wake of enforcement of the admitting-privileges requirement." More would close should the surgical-center requirement take effect, leaving the entire state with no more than eight clinics, and probably only seven. They would be located in only four metropolitan areas—Houston, Austin, San Antonio, and Dallas-Fort Worth—and would leave "a particularly high barrier for poor, rural, or disadvantaged women"; more than two million women of reproductive age would live more than 50 miles from a clinic and some 750,000 would live more than 200 miles away. The intended purpose of the regulations—to make women safer—was a fiction: the data showed that the women had better medical outcomes in the pre-enactment clinics "than many common medical procedures not subject to such intense regulation," and, tellingly, 336 of the 443 licensed ambulatory surgical centers, but not abortion clinics, had received waivers against surgical-center requirements. Moreover, the clinics' cost of compliance would be "significant," in the range of $1 million to $1.5 million each. The district court struck down the laws as creating a constitutionally "impermissible obstacle" to obtaining an abortion. The Fifth Circuit court of appeals reversed, holding among other things that the two Texas requirements "were rationally related to a legitimate state interest": "rais[ing] the standard and quality of care for women seeking abortions and . . . protect[ig] the health and welfare of women seeking abortions"; and that the district court impermissibly substituted its judgment about the legislation's effects for that of the Texas legislature.

Speaking for the majority, Justice Stephen Breyer reversed. Under the principal precedent, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), courts must consider both the benefits and burdens of the abortion law in question and must review under a much stricter standard than "rational basis": they must consider whether a burden is "undue." Nor should courts defer to legislatures on the meaning and weight of the evidence. Judges must sift the evi-

dence and weigh "the asserted benefits against the burdens." On inspection, said Justice Breyer, the first requirement, admitting privileges, was said to benefit women by ensuring that they "have easy access to a hospital should complications arise." But in fact "it brought about no such health-related benefit." Rather, "there was no significant health-related problem that the new law helped to cure." Studies showed that the complication rate in first-trimester abortions is less than one-quarter of one percent, and even these "rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic." Most abortion patients who develop complications do so days after surgery, not while they are in the clinic. "When asked directly at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case." Not only would the new requirement not help, it would place a "substantial obstacle in the path of a woman's choice." Half the Texas facilities offering abortions closed in the months before the admitting-privileges requirement took effect. Nineteen abortion clinics closed by the effective date of the regulation. Moreover, admitting privileges are not necessarily (or not at all) based on skill of the doctor; "hospitals often condition admitting privileges on" the patients they bring in. But abortion physicians did not bring in patients: in the previous decade in the El Paso area, for example, of the 17,000 abortions performed, not a single patient needed to be transferred to a hospital for emergency treatment. One doctor, who had delivered 15,000 babies over his 38-year career, "was unable to get admitting privileges at any of the seven hospitals within 30 miles of his clinic," for reasons having nothing to do with his competence. As Justice Breyer summed up: "The admitting-privileges requirement does not serve any relevant credentialing function."

The surgical-center requirement fared no better. For one thing, requiring clinics and other facilities to "upgrade" to various spatial, plumbing, heating, and nursing standards would not likely benefit patients because complications for most patients, such as those on medications, come after their discharge from the facility. The evidence suggested "that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirement." For example, "nationwide, childbirth is 14 times more likely than abortion to result in death, but Texas law allows a midwife to oversee child-birth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion." Moreover, the surgical-center requirement does not even apply to about two-thirds of the state's surgical centers: Texas waives the requirement for them but not for any abortion facilities. Like its companion regulation, the surgical-center requirement would force more clinics to close. "In the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered."

In summary, the two Texas requirements were both constitutionally overinclusive and underinclusive: overinclusive because they would provide no additional health benefits while reducing the women's access to abortion facilities; underinclusive because they did not apply to medical facilities and situations in which they might provide a benefit but were imposed instead only on abortion facilities in which they were not needed. The Court struck down both regulations on their face.

Texas argued that under the law's severability clause a court's invalidation of any one application of the requirements ought not invalidate any other possible application, and hence the law itself bars a ruling that the law is facially invalid. Justice Breyer rejected the argument; a severability clause so interpreted would force courts to perform legislative work, picking and choosing the rules that would apply to any particular conduct. Doing so "would inflict enormous costs on both courts and litigants, who would be required to proceed in this manner whenever a single application of a law might be

valid." If a law with such a severability clause said (this is not Justice Breyer's example) "it shall be unlawful to act wrongfully," the Texas argument would preclude striking it down as facially invalid and would require the courts, instead, to examine each use, reversing a conviction for singing too cheerfully on the sidewalk and upholding it (perhaps) when applied to murder. The Court declined "Texas' invitation to pave the way for legislatures to immunize their statutes from facial review."

ABSTENTION DOCTRINE In *Skinner v. Switzer*, the Court denied a state's claim that the Rooker-Feldman doctrine bars a criminal defendant from seeking access through a postconviction federal §1983 suit to DNA evidence in the hands of prosecutors or police. In earlier proceedings state courts turned down the defendant's request in postconviction appeals. The state asserted that the Rooker-Feldman doctrine barred the §1983 suit because it was a way of asking a federal district court to relitigate a question already decided by the state courts. The Supreme Court disagreed. Rooker-Feldman "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers . . . inviting district court review and rejection of [the state court's] judgments." But here the criminal defendant asserts an independent federal claim, namely, that the state's refusal to turn over the evidence denies due process. The target in the suit is not the "adverse [state] court decisions themselves; instead, [the defendant] targets as unconstitutional the [state] statute that [the state courts] authoritatively construed. . . . A state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action."

The Court unanimously rejected the claim in *Sprint Communications v. Jacobs* that a federal court should abstain under *Younger v. Harris* from hearing a rate case involving a local telecommunications carrier, when the same question was being presented in a state proceeding. *Younger* requires abstention when a parallel state criminal case is pending, when a parallel state civil proceeding is akin to a criminal prosecution, or when the state proceeding implicates "a state's interest in enforcing the orders and judgments of its courts." But in this case a local carrier sought to impose "intrastate access charges for telephone calls transported via the Internet" on a national carrier. None of the circumstances of this case fit within the "exceptional circumstances" of *Younger* noted above. Those three circumstances "define *Younger's* scope," the Court said.

See also: DISCOVERY IN CRIMINAL PROCEEDINGS.

ADEQUATE STATE GROUNDS In *Florida v. Powell*, the Court adhered to the presumption it announced in *Michigan v. Long* (1983) that when a state court decision "appears to rest primarily on federal law, or to be interwoven with the federal law," unless it is "clear from the face of the opinion" that it rests on an adequate and independent state ground, the Court will assume that the state court decided as it did "because it believed that federal law required it to do so." In raising the question of whether the *Miranda* rules must be expressed in particular language, the state supreme court "trained on what *Miranda* demands, rather than on what [state] law independently requires." Said Justice Ruth Bader Ginsburg, "We therefore cannot identify, 'from the face of the opinion,' a clear statement that the decision rested on a state ground separate from *Miranda*." She noted that the state supreme court remains free to impose "any additional protections against coerced confessions it deems appropriate" under the state constitution, but because its decision did not indicate "clearly and expressly" that it "was based on bona fide separate, adequate, and independent [state] grounds," the Court has jurisdiction to decide the question. [For details, see SELF-INCRIMINATION.]

In *Cone v. Bell*, a murder defendant's third appeal to the Supreme Court (for the earlier cases, see *Bell v. Cone* (2002) and (2005)), the Court held that a defendant is not procedurally barred from raising a federal claim in a federal habeas appeal merely because a state court asserts that a procedural rule bars it from considering the claim. Federal courts may go behind the state's conclusion to determine whether the state's reliance on a procedural default rule is genuine. In this case, the state courts insisted that the defendant had either twice presented (or, contradictorily, waived) a claim that he had been denied *Brady* material that might tend to exculpate him. In fact,