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Guns, Abortions: What's at Stake at SCOTUS

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Guns, abortions: What's at stake at SCOTUS

Your Turn

Alan Garfield
Guest columnist

The Supreme Court's two blockbuster cases this term — one on abortion rights and one on gun rights — provide a litmus test for how the current crop of justices will use their power to declare laws unconstitutional. This power — known as “judicial review” — is not mentioned in the Constitution. Nevertheless, the justices laid claim to it back in 1803 in the landmark opinion, *Marbury v. Madison*.

Ever since *Marbury*, the justices have sparred over when it is appropriate to wield this power. The controversy exists because judicial review, as the late Yale law professor Alexander Bickel put it, is a “deviant institution in American democracy.” It allows a small number of unelected judges to overturn laws enacted by the people's elected representatives.

For example, when the Supreme Court declared that same-sex couples have a right to marry, the five justices in the majority used judicial review to overturn laws that defined marriage as a union between a man and a woman. The majority said its invalidation of these democratically enacted laws was necessary to protect the dignity and equality



Security barricades stand outside the U.S. Supreme Court on Nov. 1. DREW

ANGERER/GETTY IMAGES

of gays and lesbians. As Justice Anthony Kennedy explained, laws that deny same-sex couples the extensive benefits of marriage afforded to opposite-sex couples “disrespect and subordinate” same-sex couples and stigmatize their children.

The four dissenting justices painted a starkly different picture of the majority abusing judicial power to usurp the public's right to define marriage.

“Five lawyers,” Chief Justice John Roberts protested, “have closed the debate and enacted their own vision of marriage as a matter of constitutional law.”

Justice Antonin Scalia said the majority robbed the people of their most important liberty: “the freedom to govern themselves.”

This same debate — about when it is appropriate to use judicial review to override democratically elected laws — is at the heart of the abortion and guns rights cases currently before the Court. The conventional wisdom is that conservative justices want to use judicial review to expand gun rights while shrinking constitutional protection for abortion rights. Liberal justices want to do the opposite.

Which side has the better argument?

Let's start with the abortion case. Mississippi is asking the justices to overturn *Roe v. Wade* or at least permit states to ban abortions after 15 weeks into a pregnancy.

Whether *Roe* should be overturned depends upon whether that case properly restricted the government's ability to regulate a woman's decision to terminate a pregnancy. To answer that, ask yourself this question: Do you think legislators should be able to force a woman to carry even an early-stage pregnancy to term? If your answer is no, then the *Roe* justices got it right.

The second issue is more complicated. At what point in a pregnancy may the government intervene to protect the

fetus? *Roe* set this line at “viability” — when a fetus is viable outside the mother's womb, typically around 24 weeks. Mississippi wants to move the line to 15 weeks. There is no simple answer to this question, but the justices must be vigilant against attempts to move the line so early in a pregnancy as to negate a woman's right to choose. That is what Texas intended to do with Senate Bill 8, which moved the line up to six weeks.

The gun rights case raises the question of whether the Second Amendment gives people a right to carry weapons outside their homes. To date, the Court has said only that people have right to possess a handgun at home.

Certainly, the government has a responsibility to keep its citizens safe. Yet it is by no means clear whether allowing people to carry weapons in public will make citizens safer or less safe. The answer requires a complicated data analysis and risk assessment — a judgment more appropriately made by politically accountable representatives than by nine lawyers in robes. In this case, the justices should keep the big gun of judicial review in its holster.

The liberal justices have the better arguments. But the conservative justices outnumber the liberals.

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