How Roe destroyed privacy

The great deal of concern about abortion rights in many ways dominates our debate over Supreme Court nominees.

Unfortunately, the shadow dance about a nominee's view regarding the abortion issue blurs our focus on the real issues. Instead of wasting time and energy trying to figure out how to interpret the lines and form of the shadows, we should focus directly on the privacy question.

Using "privacy" as a code name for upholding the Roe v. Wade decision and abortion rights generally ignores the fact privacy advocates hold different views of the abortion question — and wrongly credits the Roe court for being pro-privacy.

The landmark Griswold v. Connecticut (1965) decision cited privacy rights in the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution in addition to its "penumbras" and other sources. Of course the common law established many privacy protections as did state constitutions, statutes and private contracts.

In Roe v. Wade in 1973, the court found a qualified right to abortion in the 14th Amendment's concept of personal privacy and eschewed the Ninth Amendment's reservation of rights to the people approach best explained in Justice Arthur Goldberg's concurrence in Griswold.

The Roe court's disregard for the Griswold approach harbingered a chilling curtailment of privacy rights in its subsequent decisions. Over the next few years in a couple of cases concerning the constitutionality of the then-new federal anti-money laundering law, the Bank Secrecy Act, the same Roe justices held that one had no "expectation of privacy" for information shared with a third party — even if the common law, state constitutions and private contracts required it — and that consumers have no standing to challenge the law.

In California Bankers Association v. Shultz (1974), the Roe court justices held the government was within its rights to require record-keeping by banks and that individuals could not pre-emptively challenge the law's constitutionality. Justice William O. Douglas dissented saying in part, "A mandatory recording of all telephone conversations would be better than the recording of checks under the Bank Secrecy Act, if Big Brother is to have his way. ... In a sense, a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the paper and magazines he reads, and so on ad infinitum."

In 1976, the Supreme Court held in Miller v. United States that depositors have "no legitimate 'expectation of privacy' " in their bank records since the information could be passed from the other person to the government. In effect, we could not challenge the law before it affects us nor after.

The importance abortion rights supporters place on stare decisis to uphold "privacy rights" and rein in future justices who might have decided the original Roe case differently is puzzling. In important privacy decisions, the Roe justices unanimously threw out nearly a century of precedent protecting our "private papers" since Boyd v. U.S. in 1886.

The greater discussion of privacy and government surveillance, including telephone records, remain very much unsettled and part of our current debate. The "expectation of privacy" of issue in fact goes to the heart of the current National Security Agency issue of warrantless monitoring calls of Americans in the United States. The Federal Bureau of Investigation argument one has no expectation of privacy on cellular telephone conversations has been dismissed in Texas and New York courts as creative and contrived legal theories.

"Expectation of privacy" is the crux of the issues involved. Pretty much the same court that found privacy rights in reproductive health cases found those questions premature on the first test of the then-new federal anti-money laundering law, the Bank Secrecy Act. In addition to finding bank customers have no standing to challenge the law, nor banks on our behalf, the court held we have no expectation of privacy of information shared with third parties. That argument raised serious questions suitable for a Supreme Court justice nominee.

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