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Guerrilla Warfare and the Constitution

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TEN MILES SQUARE

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"... such district (not exceeding ten miles square) ... [shall] become the seat of the government of the United States"
THE CONSTITUTION OF THE UNITED STATES

Ten Miles Square Blog

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By Sonja West

Earlier this week, the United States Supreme Court upheld, by a 5-4 vote, the states' ability to execute death row inmates with a three-drug lethal injection cocktail that critics argue causes excruciating pain. The Court reasoned that states should be allowed to use the drug in question, despite its involvement in several botched executions, in part because states can no longer attain more effective alternatives. In the majority opinion, the justices spin an erroneous tale about "anti-death-penalty advocates" pressuring pharmaceutical companies into refusing to supply other, more humane drugs to the states for use in capital punishment. This alleged radical activism on behalf of the "abolitionists" engendered great sympathy from the Court for the poor, blameless states who are just trying to execute people, but can't because of all the pseudo-"guerrilla warfare" (as Justice Samuel Alito referred to it at oral argument) against capital punishment.

This case thus raises the novel question of whether third parties should have the power to thwart—through behind-the-scenes maneuvering—a practice the Supreme Court has declared constitutional. And, more tellingly, whether the Court will show the same concern for others whose rights are also being obstructed by the stealth tactics of radical activists.

For years, states relied on a powerful sedative, sodium thiopental, as the first step in lethal injections. The purpose of the drug was to render the inmate unconscious before introducing other fatal drugs that paralyze him before stopping his heart. In a 2008 case, the Court held that sodium thiopental did not violate the Eighth Amendment's ban on cruel and unusual punishment. Shortly after, however, the pharmaceutical companies that make the drug, following European Union Human Rights laws, began refusing to supply it for use in executions. Some states then turned to another drug, which also quickly became unavailable. Running out of options, some states, like Oklahoma in this case, began using a more dubious alternative called midazolam, which the dissent described as so painful that it is the "chemical equivalent of burning alive."

Yet Justice Alito, writing for the Court, concluded this week that there is no problem with

this turn of events. He laid out a simple logical trail: Because the death penalty is constitutional, there must be some way for the states to impose it. And if, as he asserted, the anti-death penalty advocates are going to play games that stop the states from getting all the good drugs, then the Court should let states use whatever they can get their hands on. (The condemned inmates themselves, of course, as Justice Sonia Sotomayor pointed out in dissent, had nothing to do with creating the shortage of drugs.)

When this concept was first raised at oral argument for this case in April, Noah Feldman, writing at Bloomberg, thought Alito had a point. He agreed that constitutional and political debate should not take place in the shadows but in broad daylight as part of a national discussion. Radley Balko in the Washington Post, however, thought that the tactic of convincing private pharmaceutical companies to withhold their products was merely the free market at work. Even George Will rebuffed the idea that the justices should consider public backlash against the death penalty in their legal analysis.

If the justices are truly concerned about third-party, backdoor ploys burdening constitutional rights, however, they should take a closer look at a couple of other cases, sitting before them right now, involving the right to abortion.

The Supreme Court has yet to decide whether it will hear two cases challenging laws that place new requirements on abortion providers in Texas and Mississippi. (Late Monday, the Court issued a stay on enforcement of the Texas laws that would shutter most of the state's clinics). These new regulations include requiring abortion providers to secure hospital admitting privileges and requiring clinics to be outfitted as ambulatory surgical centers. If upheld, the laws would lead to the closure of the last remaining abortion clinic in Mississippi and leave Texas with a mere handful of clinics only in major urban areas. The closures would force women in rural Texas who wish to exercise their constitutional right to terminate a pregnancy to travel hundreds of miles to do so, while those in Mississippi would need to leave their state entirely.

These regulations are part of a wave of laws that single out abortion providers with onerous rules that do not apply to any other medical care providers. Often referred to as "TRAP" laws (short for targeted regulation of abortion providers), these laws seek to exploit a loophole in the Court's abortion jurisprudence that allows state regulation of abortion at all stage of pregnancy if the purpose is to protect the health of the women. The problem, as Linda Greenhouse and Reva Siegel explain in a forthcoming Yale Law Journal article, is that the purpose of many of these laws is almost certainly to prevent women from accessing abortions, not to protect their health.

Yet four of the same justices who were so alarmed about the thought of states being forced to slow down or stop their capital punishment machines supposedly because of the actions of anti-death penalty bullies do not appear bothered by the indirect meddling of third party "abolitionists" who are interfering with the rights of women to access abortion. Chief Justice John Roberts, Justice Antonin Scalia, Justice Clarence Thomas and Justice Alito all dissented from the Court's stay in the Texas case yesterday, objecting to even temporarily allowing some of the state's clinics to remain open while the Court considers whether to hear the case.

In the death penalty case, these four justices complained that if too many obstacles (even if entirely unrelated to actions of the defendant) were placed in the way of the states' ability to execute prisoners, the practical effect would be tantamount to eliminating capital punishment in those states altogether. (Other states still have a stockpile of the earlier approved drugs, so their executions can continue.) That outcome, they insisted, was simply unacceptable. Yet with abortion, it seems that as long as no one is explicitly advocating outlawing abortion in Mississippi or Texas, it does not matter that a series of disingenuous

efforts have achieved the same result.

There are, of course, differences between capital punishment and abortion—all of which make the abortion obstructionism far more problematic. The primary distinction being that only one involves an actual constitutional right.

The Supreme Court has said repeatedly that women have a constitutional right to terminate their pregnancies prior to viability of the fetus and, more recently, that the states cannot place an "undue burden" on this right. The states may seek to dissuade a woman from terminating her pregnancy through truthful, non-misleading information, but they may not obstruct her ability to access an abortion. Passing strict laws that have the effect (and likely the purpose) of closing most or all of the abortion clinics in a state clearly affects that right. And, moreover, it does so by falsely implying that these restrictions are necessary to protect women's health.

States, on the other hand, do not have a constitutional right to use a particular method to execute someone or, for that matter, to execute anyone at all. The Constitution, rather, only places limitations on states ability to engage in capital punishment such as prohibiting them from torturing inmates, whether intentionally or not, in the process of killing them. While it is true that the Court has held that the use of the hard-to-obtain sedative, sodium thiopental, did not violate the Eighth Amendment, that is not the same thing as ruling that states have an affirmative right of access to this drug or that they may substitute an inferior and inhumane one.

The actors involved in the two scenarios are also profoundly different. The abortion context involves powerful state actors working to squelch the rights of some of their most vulnerable citizens—poor, rural women. The power asymmetry is staggering. In the death penalty situation, however, the face-off is between the states, the bureau of prisons, the medical community, and large pharmaceutical companies. Except for the powerless death row inmates who are unwitting pawns in this game, all the other players have ample weaponry to bring to their fight.

Finally, Alito's analogy to guerrilla warfare suggests that an element of subterfuge in involved. Guerrilla warfare brings to mind small groups of fighters who often carry out their missions disguised as civilians. They bypass conventional methods and rely instead on sabotage, ambush, and treachery. The abortion cases exemplify this concern due to the disconnect between the stated purpose of the laws—protecting the health of women—and the actual purpose of the laws—preventing women from accessing abortions. In the Mississippi case, for example, the district court found the purpose of the regulation at issue was to make the state "abortion free."

Even accepting the "abolitionist" story as true, the lethal injection backlash involves no such duplicity. The objections are public and straightforward. And the method of attack is political speech and the free market. When members of the American Pharmacists Association approved a declaration last month opposing involvement in executions, for example, they did so with a clear statement that participating in executions was "fundamentally contrary" to their role as health-care providers. There is no subterfuge here.

The same justices who believe it their duty to step in to protect the states from activists and abolitionists in the death penalty fight might want to consider that activists and abolitionists have all but ended the right to abortion in some states. You can cast them as religious heroes or even gentle sidewalk counselors, but if their political activities are suspect in one context, they must be examined in both.

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She specializes in constitutional law, media law and the U.S. Supreme Court. She served as a judicial clerk for Justice John Paul Stevens of the United States Supreme Court and for Judge Dorothy W. Nelson of the Ninth Circuit Court of Appeals. West's work has been published in numerous law reviews and journals including the Harvard Law Review, the UCLA Law Review, the Michigan Law Review and the Washington University Law Review. She is a former reporter who practiced media law in Los Angeles for several years.