Ginsburg's dissent may yet prevail

The justice argues that equality, not privacy, is crucial in the abortion right.
By Cass R. Sunstein, CASS R. SUNSTEIN teaches at the University of Chicago Law School.
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IN THE LONG RUN, the most important part of the Supreme Court's ruling on "partial-birth" abortions may not be Justice Anthony M. Kennedy's opinion for the majority. It might well be Justice Ruth Bader Ginsburg's dissent, which attempts, for the first time in the court's history, to justify the right to abortion squarely in terms of women's equality rather than privacy.

Roe vs. Wade, decided in 1973, was founded on the right of privacy in the medical domain, but the court's argument was exceedingly weak. The Constitution does not use the word "privacy" anywhere, and, in any case, the idea of privacy seems to describe a right of seclusion, not a right of patients and doctors to decide as they see fit.

And everyone knew, even in 1973, that the debate over abortion had a great deal to do with women's equality.

In 1985, Ginsburg, then a federal appeals court judge, argued in a law review article that the court should have emphasized "a woman's autonomous charge of her full life's course." Citing decisions on sex equality, she contended that Roe vs. Wade was "weakened ... by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."

In this week's case, Ginsburg, now the only woman on the court, attempted to re-conceive the foundations of the abortion right, basing it on well-established constitutional principles of equality. Borrowing from her 1985 argument, she said that legal challenges to restrictions on abortion procedures "do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."

For Ginsburg, this alternative understanding of the right to choose has concrete implications. It means that any restrictions on the abortion right must, at a minimum, protect a woman's health. It also means that no such restriction can be justified on the paternalistic ground that women might turn out to regret their choices or are too fragile to receive all relevant information about medical possibilities. In her view, such paternalistic arguments run afoul of the guarantee of sex equality because they reflect "ancient notions about women's place in the family and under the Constitution — ideas that have long since been discredited."

In supporting this claim, Ginsburg referred to the same equality cases, involving discrimination in Social Security and welfare programs, on which she relied in 1985.

For supporters of the right to choose, the sex equality argument has considerable advantages over the privacy argument. Much more than the right to privacy, the ban on sex discrimination is firmly entrenched in constitutional doctrines.

It defies social reality to approach the abortion issue as a mere matter of privacy, as if it could really be divorced from questions of sex equality. Some proposed restrictions on abortion, such as requiring the consent of the father of the fetus, are plainly an effort to revive discredited notions about women's proper place, and they violate equality principles for that reason.

True, men cannot become pregnant, and it is tempting to think that, for that reason, abortion restrictions cannot possibly create a problem of discrimination. But perhaps this argument has things backward. In our society, isn't there an equality problem if laws target only women's bodies and leave men's bodies alone?

Despite its advantages, the sex equality argument will not be convincing to committed opponents of the abortion right. If you believe that fetuses count as human beings, then you're going to believe the state has a right to protect them, even if the resulting laws undermine "a woman's autonomy to determine her life's course."
But Ginsburg has now offered the most powerful understanding of the foundations of the right to choose — and it is important to remember that today's dissenting opinion often becomes tomorrow's majority. The equality argument has the support of four members of the court (Ginsburg and justices John Paul Stevens, David H. Souter and Stephen G. Breyer). We should not be terribly surprised if, in the fullness of time, Ginsburg's view attracts a decisive fifth.