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Constitutional Connections: Abortion rights and the Kavanaugh nomination

By JOHN GREABE
Monitor columnist

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Last week, President Trump nominated federal appeals court judge Brett Kavanaugh to fill the Supreme Court seat opened by the retirement of Justice Anthony Kennedy. Immediately, coverage of the nomination focused on abortion and whether Judge Kavanaugh's confirmation would spell the end of the constitutional right recognized in *Roe v. Wade*. Let's explore why.

In 1973, the Supreme Court issued *Roe*. My students are often surprised to learn that the decision was 7-2, and not one of the bitterly divided 5-4 blockbusters that have become common in recent decades. And they are even more surprised to discover that five of the seven justices in the *Roe* majority were appointed by Republican presidents, while one of the two dissenting justices was appointed by a Democrat. Clearly, abortion politics have undergone radical change since the 1970s.

Roe adopted a test that clearly spelled out whether, when and how states could limit access to abortion. Under *Roe*, a woman possessed an unqualified right to an abortion during the first trimester of her pregnancy. During the second trimester, a state could regulate, but only to protect the mother's health. In the third trimester, when (as *Roe* put it) "the fetus presumably has the capability of meaningful life outside the mother's womb," state limitations or even bans on abortion were permissible except when necessary to preserve the life or health of the mother.

The Constitution makes no mention of a right to abortion. But *Roe* said that it is a component of "privacy" that is one of the unlisted fundamental "liberties" protected by the due process clause of the 14th Amendment. *Roe* connected the abortion right to other rights not spelled out in the text of the Constitution but nonetheless recognized as fundamental in prior court decisions. Among these are rights to marriage, contraception, family autonomy, child rearing and education.

Roe has always faced strong criticism. Some critics focused on the trimester framework, arguing that it was more an act of judicial legislation than an interpretation of the Constitution. Others said that non-textual rights such as the one *Roe* recognized either should not be treated as fundamental or should only be so recognized when deeply rooted in the nation's history and traditions (which, they said, the abortion right is not). Still others, proceeding from the premise that human life begins at conception, saw *Roe* as nothing less than an endorsement of homicide.

In 1980, Ronald Reagan campaigned for the presidency on a promise that he would appoint Supreme Court justices who would overrule *Roe*. Between 1980 and 1992, six of the seven justices in the *Roe* majority retired, and all of their replacements were named by President Reagan or his successor, the first President Bush. Meanwhile, Justices William Rehnquist and Byron White, the two *Roe* dissenters, remained on the court. Then, in 1989, in *Webster v. Reproductive Health Services*, four of the court's nine justices wrote or joined opinions that either strongly criticized *Roe* or explicitly called for it to be overruled. *Roe* appeared to be hanging by a thread.

In 1992, not long after conservative Justice Clarence Thomas had replaced liberal Justice Thurgood Marshall, the court decided *Planned Parenthood v. Casey*. *Casey* involved a challenge to the constitutionality of a Pennsylvania state law that placed a number of restrictions on access to abortion. Many thought that the court would use *Casey* to overrule *Roe*. But surprisingly, three justices appointed by Presidents Reagan and Bush – Justices Sandra Day O'Connor, Anthony Kennedy and David Souter – co-authored an unusual joint opinion that served to retain qualified constitutional protection for abortion rights by the narrowest of margins.

Casey retreated from *Roe* by replacing its trimester framework with a test that asked simply whether a law limiting access to abortion placed an "undue burden" on the abortion right. As a consequence, a number of the provisions of the Pennsylvania law that would have been unconstitutional under *Roe* – provisions imposing a 24-hour waiting period, requiring that a woman seeking an abortion be provided with information about adoption and requiring that a minor obtain the informed consent of a parent unless certain exceptions applied – were upheld because a majority of the justices did not believe them to be unduly burdensome.

But while suggesting that *Roe* was unsound in a number of ways, the joint opinion said that grave institutional damage would be done if the court were to completely give in to the long political campaign against it. It would be wrong, according to Justices O'Connor, Kennedy and Souter, to abandon such an important precedent in circumstances where its central holding had not been shown to be unworkable, its overruling would upset women's expectations about the availability of reproductive autonomy in planning their lives, and its legal and factual premises had not been shown to be obsolete. Doing so would make the court appear less a law court than an extension of the political branches.

So, since 1992, the Constitution has been understood to contain a right to abortion that protects against laws that are unduly burdensome. But an increasingly conservative court has interpreted its undue-burden standard quite strictly.

In 2007, for example, the court in *Gonzales v. Carhart* upheld by a 5-4 vote the constitutionality of a federal statute banning a procedure known by opponents as “partial-birth abortion.” In doing so, the majority used language that many observers saw as reflecting a serious hostility to the abortion right. Also, *Gonzales* was the first case approving a regulation of abortion that did not contain an exception for the health of the mother.

Then, in 2016, in *Whole Women’s Health v. Hellerstedt*, Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito declined on highly technical grounds to join a majority (5-3) opinion striking down a Texas statute that imposed burdensome and unnecessary regulatory requirements on facilities that perform abortion. The effect of the law, had it been upheld, would have been to reduce from 40 to 7 the number of such facilities in the state. The legislative history of the law made clear that it was based on opposition to abortion and not on a good-faith desire to make the procedure safer. Justice Kennedy provided the fifth vote for the majority opinion holding the law unconstitutional.

Now, Justice Kennedy is gone, and President Trump has appointed Judge Kavanaugh to take his place. If Judge Kavanaugh is confirmed, he will join a court containing the three dissenters in *Whole Women’s Health* and Justice Neil Gorsuch, who has proved to be quite conservative since joining the court in 2017. Thus, he could be the critical fifth vote to overturn *Roe/Casey*.

So what does Judge Kavanaugh think about the abortion right? He has not yet addressed the question directly, but he has publicly praised Justice Rehnquist for dissenting in *Roe*. Also, he recently dissented from a court of appeals decision ordering that a minor alien held in detention be provided immediate access to the abortion she desired. Perhaps tellingly, his dissent used the loaded phrase “abortion on demand” – a phrase commonly employed by abortion opponents – to describe what the girl was seeking.

In 1992, it looked as though the question of abortion rights would be de-constitutionalized and left to the states. But in *Casey*, the court surprisingly preserved the core of the right recognized in *Roe*. Perhaps the court will surprise again if Judge Kavanaugh is confirmed. But there is very good reason to believe that *Roe*, as qualified in *Casey*, is on life support.

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