

A Tough Roe? (Part One)

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

One of (if not THE) most controversial aspects of Judge Brett Kavanaugh’s nomination to succeed Justice Anthony Kennedy is what Kavanaugh’s elevation could mean for the modern scheme of abortion rights ushered in by the landmark 1973 case, *Roe v. Wade*. President Trump’s promise to “put[] pro-life justices on the Court” has led many to hope – or fear -- that Kavanaugh would comprise a majority willing to reverse *Roe*.

The issue is so important – and so often misunderstood – that this podcast devotes a two-part treatment to it. This Part One explains what *Roe* did and did not hold, why it’s so controversial, and how its overruling seemed likely in the early 1990’s. Part Two will explore how *Roe* narrowly survived overruling, the lessons of that near miss for an overrule today, and just exactly what “overruling *Roe*” would mean for reproductive rights.

Roe v. Wade did not liberalize abortion rights on a blank slate. The legal and social climate in a few states had become more accepting of abortion in some contexts – especially for “therapeutic” abortions in which the health of the mother or fetus was at stake. A growing abortion-rights political movement was agitating for broader legal change.

But *Roe* embodied a strong standard for abortion-choice rights that no state’s abortion laws could meet. Expanding a still-relatively-novel theory, *Roe* held that the implied fundamental right to privacy the Court had identified a decade earlier in a landmark contraception-rights case was “broad enough to encompass” a woman’s right to choose abortion.

Roe specifically rejected the theory that a woman has an unlimited right to make decisions about her own body or to receive “abortion on demand” throughout pregnancy. And *Roe* explicitly validated the right of federal and state governments to ban abortion after the point of fetal “viability” (beginning at the seventh month of pregnancy).

Before this viability point, however, *Roe* held that government could only *regulate* (not ban) abortion through laws narrowly drawn to protect “compelling” interests relating to maternal health. Especially in the early years after *Roe*, Court majorities invalidated a number of laws designed to make it more difficult for women to receive abortions. For example, majorities threw out laws requiring that all abortions be performed in hospitals and that health professionals inform all pregnant women about adoption and child-support-enforcement services and the likely gestational-development stages of their fetuses.

Not that *Roe* prevented all abortion-restricting moves. In *Roe*'s aftermath, the Court held that governments could refuse to fund abortions for indigent women, could disallow them in public hospitals and clinics, and could more significantly restrict the abortion rights of minors.

Still, *Roe* remained especially objectionable to many Americans. First, *Roe* was and is anathema to Americans whose religious or philosophical principles equate abortion with murder. Second, *Roe* was and is a flashpoint for social conservatives, who see relatively free access to abortion as a symbol of a morally permissive society and/or the "wrong" view of women's roles in society. Third, *Roe* was and is the poster case cited by legal scholars and pundits decrying the non-originalist, judicially activist approach to constitutional rights.

It comes as no surprise, then, that by 1992, when *Planned Parenthood v. Casey* reached the Court, a majority seemed ready to heed the challenger's call to overrule *Roe*. Four justices had expressly called for this, and the Court's first woman justice, Sandra Day O'Connor, had significantly criticized *Roe*'s methodology and lamented its restrictive impact on legitimate governmental regulation.

In the companion to this podcast, I explore how *Roe* nevertheless escaped overruling, and what the lessons are for the current questions about *Roe*'s continued survival.