# A Tough *Roe*? (Part Two)

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

So…having set the stage in Part One for the potential reversal of *Roe v. Wade* in the 1992 *Planned Parenthood v. Casey* decision, here's the skinny on how *Roe* narrowly escaped:

Justice Sandra O'Connor defied expectations by joining two other presumably anti-*Roe* justices to form a trio affirming its "central rule" that a pregnant woman has a fundamental right to choose abortion before fetal viability. The trio found that *Roe* lacked the deficiencies of other overruled cases: *Roe*'s abortion-rights regime was not "unworkable." Changes in legal doctrines or factual reassessments had not discredited it. Besides, a generation of men and women had "organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion" if contraception fails.

Saving *Roe* came at a cost. The trio significantly lowered protection for abortion rights from strict scrutiny (with its focus on "compelling" interests and narrowly drawn laws) to a middle-level "undue burden" analysis (allowing abortion regulation up to the point that it places a "substantial obstacle" in the pregnant woman's path to abortion).

Three main lessons for today emerge from *Casey's* 1992 reaffirmation of *Roe*.

First, on purely-legal-reasoning grounds *Roe* should continue to escape abandonment. The argument that men and women have relied on its abortion-rights regime is even stronger 26 years later. And although new justices could depart from the *Casey* trio's views about *Roe*'s workability and doctrinal validity -- this argument would look from current eyes even more like a raw exercise of judicial politics.

Which relates to a second lesson of *Casey* – that individual justices can act in surprising ways when it comes to overruling *Roe*. Specifically, although Chief Justice Roberts typically votes to uphold abortion regulations under the "undue burden" standard, his vote to save Obamacare and in several other decisions show his strong concern that the Court not be perceived as a crassly political institution. Even with Kavanaugh on the Court, the Chief Justice could side with four pro-abortion-rights justices to thwart a direct *Roe* overturn and save the Court from seeming illegitimate. (Of course, all bets would be off if President Trump gets to fill another judicial vacancy, on the pro-abortion-rights side.)

A third lesson from *Casey* is that abortion rights can be significantly diluted even if *Roe* is not reversed. This happened in *Casey* itself: the three "undue burden" justices joined more anti-abortion-rights brethren to uphold an "informed consent" requirement that had been rejected in a *Roe*-strict-scrutiny era. Closer to the present, a 2016 majority was

only able to reject extensive Texas abortion-clinic regulations as an “undue burden” because Justice Kennedy provided a critical fifth vote. A “Justice Kavanaugh” would likely form a durable majority coalition supporting more state abortion restrictions.

One final question deserves attention: What would it mean if *Roe* were formally overruled? Without a basis in the U.S. Constitution for claiming special protection, the fate of abortion regulation would become a matter of majority politics.

States whose political climates support abortion rights could continue to allow relatively unhindered abortion access. But states whose politics oppose abortion could significantly limit it, like any other medical procedure, as long as regulators had a “rational basis” for thinking that restrictions in some way furthered an interest they deem legitimate (including protecting potential fetal life).

Even this scenario of state-by-state variations comes with two caveats. It assumes, first, that a pro- or anti-abortion rights Congress and president do not pass federal legislation establishing a national policy preempting state laws. And, second, it assumes that a Supreme Court freed of *Roe* would not go further than even *Roe’s* staunchest critics and hold that fetuses are “persons” with 14th Amendment rights to “life.”

If either of these unthinkable-under-*Roe* scenarios becomes more plausible, another *Constitutional Context* podcast will help you put it in perspective!