



Activists see Anthony Kennedy retirement as chance to upend abortion law

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Anti-abortion groups are hailing the retirement of Supreme Court Justice Anthony Kennedy as a once-in-a-lifetime opportunity to overturn major abortion rights rulings — and possibly even *Roe v. Wade*.

Kennedy was the deciding vote on major abortion rights rulings for decades, including the pivotal 1992 *Planned Parenthood v. Casey* that upheld *Roe* and said a state couldn't create an "undue burden" on a woman seeking an abortion.

Anti-abortion groups who have spent 45 years fighting to get *Roe* overturned believe Kennedy's retirement is a chance to overturn those rulings, giving lawmakers in each state leeway to place restrictions on abortion.

"Justice Kennedy's retirement from the Supreme Court marks a pivotal moment for the fight to ensure every unborn child is welcomed and protected under the law," said Marjorie Dannenfelser, president of the anti-abortion group Susan B. Anthony List.

The anti-abortion group Students for Life of America also chided Kennedy's decision in *Casey*, which was upheld by the court last year.

"In cases like *Planned Parenthood v. Casey*, he did not address the most critical issues and allowed for a swamp of mismatched abortion laws that permit the abortion industry to continue to operate in ways that harm women as well as preborn children," said President Kristan Hawkins. "We expect that President Trump will live up to his promises and appoint a justice in the tradition of Justice Antonin Scalia who respects the law as written."

Scalia's scorching dissent in *Casey* took direct aim at *Roe*. He was joined in his dissent by current Supreme Court justice Clarence Thomas. But Kennedy co-wrote the majority opinion.

Women's health and abortion provider Planned Parenthood said that "the significance of today's news cannot be overstated: The right to access abortion in this country is on the line."

But some legal experts believe that the court will come short of overturning *Casey* and *Roe*.

"I don't think there is an appetite to overturn *Roe* or *Casey*," added Josh Blackman, a law professor for South Texas College of Law and adjunct scholar at the libertarian think tank Cato Institute.

But Blackman said that stricter anti-abortion laws from states, like bans on abortion after 20 or 15 weeks, could be upheld in a more conservative court.

“I think states are going to be more ambitious now pushing the envelope because they know they can probably survive it upstairs,” he said.

Mississippi placed a ban on abortions at 15 weeks into a pregnancy and Kentucky after 11 weeks. The most stringent law to pass has been in Iowa, which bans abortion at around six weeks, when a fetal heartbeat can be detected.

Each of these laws have been temporarily blocked by judges.

In the U.S., abortion is legal until “fetal viability,” which is generally understood to mean 24 weeks. At least 18 states have banned the practice after 20 weeks.

But Kennedy’s departure also leaves the mantle open for a new swing vote on the divided court.

Paul Schiff Berman, a professor at the George Washington University School of Law and former clerk for liberal Justice Ruth Bader Ginsburg, said that if another conservative judge is confirmed then “we will have at least four votes for a view of our constitutional tradition that is not only politically conservative but largely uninterested in the idea of respecting precedent.”

He pointed to Chief Justice John Roberts as the justice to keep the law from swinging more conservative.

“Generally, when the U.S. Supreme Court veers too far from popular opinion, it begins to lose credibility and legitimacy, and it will be up to Chief Justice Roberts to make sure that doesn't happen,” he said.

In 2012, Roberts shocked many when he joined four liberal justices in upholding Obamacare, suggesting an unwillingness to overturn a major act of Congress even as all four conservatives on the court, including Kennedy, had voted to tank the whole law.

"Yes, this makes Chief Justice Roberts the 'swing justice,'" said Erwin Chemerinsky, dean of the School of Law at University of California-Berkeley. "But he is significantly more conservative than Justice Kennedy, especially in the area of reproductive rights. Justice Kennedy was the fifth vote to reaffirm *Roe* and the fifth vote to strike down the restrictive Texas abortion law two years ago. Roberts never has voted to strike down any abortion restriction."

When Senators questioned Roberts during his confirmation hearing in 2005 on *Roe* and *Casey*, he treaded carefully so as to avoid stepping on a political landmine. Roberts said that he couldn't comment on issues that could come before the court, but elaborated on the concept of *stare decisis*, a principle of deferring to prior Supreme Court decisions as precedent that justices relied on when they affirmed *Roe* in the *Casey* decision.

Roberts said that *Casey* was "entitled to respect" under the principle, but noted there were competing considerations. On the one hand, the court had to consider settled expectations — that is, the degree to which people have made decisions based on the assumption that a given law would be in place. On the other hand, he said courts had to consider whether, over time, the earlier decision proved unworkable, or whether times had changed and its power as precedent had eroded over time.

Roberts does have a “penchant for gradualism and incrementalism,” said Carrie Servino, legal counsel for the Judicial Crisis Network, an organization that campaigns to confirm conservative judges. She also clerked for conservative Justice Clarence Thomas.

But Servino cautioned that it was “anyone’s guess” what would happen on the court.

“I don’t think anyone can fully predict what will happen,” she said.