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## Roberts, Kavanaugh Control Fate of Supreme Court Abortion Case

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All eyes will be on Chief Justice John Roberts and Justice Brett Kavanaugh next term when the U.S. Supreme Court considers an abortion dispute that could limit or even overturn a half-century of precedent dating back to the landmark ruling in *Roe v. Wade*.

At issue is the constitutionality of Mississippi's 15-week abortion ban, which the conservative U.S. Court of Appeals for the Fifth Circuit said implicated the "central holding of *Roe*" and therefore couldn't stand.

Advocates on the left see the case as an existential threat to a woman's right to terminate a pregnancy, while those on the right say it would only make a "minor tweak" to the court's precedents.

But one thing they can agree on: the fate of Mississippi's ban likely rests with conservatives Roberts and Kavanaugh.

The other four Republican-appointed justices—Clarence Thomas, Samuel Alito, Neil Gorsuch, and Amy Coney Barrett—probably would be happy to jettison the court's current abortion precedent, said Cardozo law professor Kate Shaw.

So "Roberts and Kavanaugh are the two to watch together," Shaw said.

### **Risky Business**

Roberts and Kavanaugh have emerged as the justices most likely to be in the majority. They usually side with conservatives but occasionally vote with the liberal wing.

Roberts has a reputation as an incrementalist. He wants to avoid sweeping changes in the law and having the court appear political.

There's a "real risk to the court in changing course very quickly in a way that's clearly attributable just to personnel changes on the court," Shaw said. The Roberts Court has often shied away from big abortion rulings, especially in recent terms.

Kavanaugh is cautious like Roberts, said Cato Institute's Ilya Shapiro.

"Even if in their heart of hearts they want to overturn *Roe*, they'd want to have some sort of incrementalism," Shapiro said.

Risk to the court's credibility likely explains Roberts' vote last term to invalidate Louisiana abortion restrictions in *June Medical Services v. Russo* despite voting to uphold nearly identical restrictions out of Texas in *Whole Woman's Health v. Hellerstedt*. One major difference between the two cases was the composition of the court, which now had Kavanaugh on it instead of the justice he replaced in 2018, Anthony Kennedy.

"I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided," Roberts said in *June Medical*. But "Louisiana's law cannot stand under our precedents."

The question now, Shaw said, is the extent to which Kavanaugh shares those institutional concerns when it comes to overturning the court's core abortion rulings—what Kavanaugh referred to as "precedent on precedent" during his tumultuous confirmation hearings.

In *June Medical*, Kavanaugh attempted to find a middle ground, saying that the case wasn't yet ready for the Supreme Court to weigh in.

If Roberts doesn't wind up in the majority in this case, that means Thomas—the second most senior justice and the one most hostile to precedent—will be the one deciding who gets to write the majority opinion, Shapiro said, and thus how broadly the ruling reaches.

"Roberts probably wants to avoid that," Shapiro said, and so "is willing to work hard with Kavanaugh to try to have a controlling opinion."

### **Middle Ground?**

Shaw noted that it only take four justices to grant a case, even though it takes five to win on the merits.

The court under Roberts has preferred to consider abortion in tangential ways. In recent terms, the court has considered free speech challenges from anti-abortion advocates and the ability of states to set requirements for carrying out abortions. The results have been mixed.

Given that the court agreed to hear Mississippi's outright ban so shortly after Barrett's arrival in November 2020, "it's fair to say that the four really conservative justices—Alito, Thomas, Gorsuch, and Barrett—almost certainly voted to grant," Shaw said. And perhaps they think "that when push comes to shove they believe they have the votes on the merits."

Roberts and Kavanaugh, if left to their own devices, would have probably preferred to take up a different kind of abortion challenge, one that would have allowed states to impose restriction but

doing so within the court's current abortion framework. Shaw pointed to challenges to waiting periods and limits on the permissible reasons for getting an abortion.

But it isn't clear if a middle ground can be found with Mississippi's all out ban, she said.

"I just don't think you can sustain a 15 week ban without fundamentally changing—either explicitly or implicitly—the *Casey* test," Shaw said, referring to the court's 1992 ruling in *Planned Parenthood v. Casey*. In *Casey*, the justices affirmed *Roe*'s recognition of the right to an abortion but changed the standard under which abortion regulations are analyzed to the familiar "undo burden" standard currently employed by the courts.

*Casey* says explicitly that a ban pre-viability—that is, when the fetus isn't capable of living outside the womb—can't be constitutional, Shaw said. "So that part of *Casey* has to be jettisoned if you are going to uphold this ban."

### **Modest Request**

John Bursch, who filed an amicus brief in support of Mississippi in the Fifth Circuit, suggested that itself is a middle-of-the-road ruling.

Mississippi isn't asking for a sweeping ruling that would undo the 1973 *Roe decision*, he said. "They're asking for something much more modest than that," Bursch said.

As Shapiro put it: "*Casey* is the governing standard and *Roe* established the right to an abortion. So you can certainly change the governing standard without threatening the underlying right."

Both acknowledged, however, that the changed standard could work in favor of efforts to limit abortion access, even if *Roe* remains intact.