There's more to constitutional law than just abortion

Ilya Shapiro

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Ever since an octogenarian judge shattered the bucolic civility of our nation's political discourse by having the gall to announce that, after 43 years on the bench, he was retiring, our political tribes have been in a frenzy. Twitter lawyers were apoplectic. The New Yorker's Jeffrey Toobin explained what the significance of replacing Justice Anthony Kennedy with a mythical "Gorsuch 2.0" would mean:

It will overrule Roe v. Wade, allowing states to ban abortions and to criminally prosecute any physicians and nurses who perform them. It will allow shopkeepers, restaurateurs, and hotel owners to refuse service to gay customers on religious grounds. It will guarantee that fewer African American and Latino students attend elite universities. It will approve laws designed to hinder voting rights. It will sanction execution by grotesque means It will invoke the Second Amendment to prohibit states from engaging in gun control … .

That probably sounded better as Ted Kennedy's tirade against Robert Borkin 1987 — the failed nomination which eventually produced Justice Kennedy — but, regardless, it betrays a simplistic and demagogic view of our judicial branch. This line of thinking implies that our judges are no different than legislators. While it's true that too many people now think of "Republican" judges and "Democratic" judges (which is even worse than "conservative" and "liberal"), this civically damaging shorthand is a function of divergent legal theories that have come to map onto ideologically sorted political parties.

To be sure, plenty of conservatives are salivating at the possibility of overturning Roe v. Wade (actually Planned Parenthood v. Casey, which completely rewrote the framework judges are supposed to apply in evaluating restrictions on abortion), or at ensuring that skin color isn't a factor in college admissions. And they're trying to tamp down their glee now, lest it trigger progressives into evermore paroxysmal tantra, but that's just not how judges decide things — at least not judges who are originalists and textualists.

Originalists try to discern what the text of a constitutional provision meant when it was ratified (typically the late 18th century for the original Constitution, or 1868 for the Reconstruction amendments). Textualists apply what the text of a statute says, without trying to divine the "intent" of the legislature. The related methodologies can sometimes lead to surprising results — Justice Antonin Scalia found that the First Amendment protected flag-burning — but also to outcomes that can seem "unjust." The remedy for that kind of wrong, however, is to pass a new law — like the Lilly Ledbetter Act of 2009, the first law signed by President Obama to fix the statute of limitations for pay-discrimination claims.

And while justices appointed by Democratic presidents tend to vote in lockstep when presented with controversial cases — when was the last time a "liberal" justice joined four "conservatives" to make a 5-4 majority in a major case? — the more "conservative" justices have disagreements that go beyond interpretive theories:

1. How much weight do you put on old decisions, what's called stare decisis? Justice Scalia rarely voted to overrule precedent, while Justice Clarence Thomas can hardly stop reconsidering old doctrines.

2. How broad should a ruling be? Chief Justice John Roberts famously practices judicial "minimalism" and "incrementalism," ruling in ways good for that particular case only — think of this term's Masterpiece Cakeshop, or political gerrymandering cases — or taking the law in a certain direction only in a series of steps.

3. How much should judges defer to executive agencies? How much statutory ambiguity is even necessary to allow bureaucrats to "fill in the gaps"?

4. Most fundamentally, how "restrained" should judges be? Some judges bend over backwards to defer to the people's elected representatives, only striking down laws for which there's no conceivable rational purpose. Other judges don't apply a "presumption of constitutionality," forcing the government to meet a higher standard when justifying any restriction on liberty, in what is sometimes called judicial "engagement."

These are the sorts of issues that the White House Counsel's Office and the Justice Department have been examining in vetting the potential Supreme Court nominees. It's certainly the ones I've been keeping in mind in going through the short-listers' writings.

Long story short: If you're an originalist or textualist, you have to love that list of 25 candidates. They're all solid, and the largest differences among them involve approaches to criminal law, with some being more law-and-order types like Justice Samuel Alito (or Judge Merrick Garland, for that matter) and others more into the Constitution's protections for criminal defendants, like Justices Scalia and Neil Gorsuch. There's some variation on the restraint-engagement axis as well — some protecting unenumerated rights more than others — but less than many libertarians fear.

The candidates all have their pluses and minuses — on those dimensions and in considering who has the capacity for intellectual leadership on the Court. But, regardless, when the eventual nominee testifies at his or her confirmation hearing that nobody asked about Roe v. Wade, you can believe it. Because that's not how you start understanding how a judge thinks. There's much more to constitutional law than abortion.

Ilya Shapiro (@IShapiro) is a senior fellow in constitutional studies at the Cato Institute, a nonprofit libertarian think tank.