Opinion

News



Pro-life advocates gather near the U.S. Supreme Court during the annual March for Life in Washington Jan. 19. (CNS/Tyler Orsburn)



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Last month, before Associate Justice Anthony Kennedy announced his retirement from the Supreme Court, I wrote, "It is not possible to articulate a real working-class agenda at the same time as you are fighting the culture wars on behalf of the special-interest left and portraying believing, albeit conservative, Christians as boobs." I voiced the hope that Democratic candidates would learn to place a closed parenthesis on discussions about pelvic issues and focus, instead, on wage stagnation. The second Kennedy announced his retirement, that hope flew out the window.

Later today, President Donald Trump will announce his nominee for the court. In the last fortnight, did anyone hear a detailed discussion of what a new justice's thoughts might be on anti-trust law? On labor rights? On anything except *Roe* v. *Wade*? And how should Catholics respond? What stance should the bishops take? How can liberal Catholics shape the debate?

Whether we like it or not, the debate over the forthcoming confirmation will be largely dominated by discussions of abortion. A good place to start in understanding the jurisprudence is this essay at Mirror of Justice by Kevin Walsh. He notes that the fight might not be over *Roe* but instead over attempts to reverse *Planned Parenthood* v. *Casey*, the 1992 decision that created the volatile "undue burden" standard. I suspect that, whoever is nominated, states that wish to enact more sweeping restrictions on abortion, especially late-term abortions, will find a friendlier court than the one that decided *Casey*.

Walsh is a little too sanguine about overturning *Roe*. I agree it was lousy law and that much of it has been superseded by *Casey*. But it introduced a line of legal reasoning about privacy that has affected other cases, such as *Obergefell* v. *Hodges*, the decision that legalized same-sex marriage in 2015. I may be suspicious, and more than suspicious, of that line of reasoning, but millions of Americans have grown up believing what Justice Harry Blackmun told them about their right to privacy, and once conferred, it is hard to roll back a whole slew of rights. It is why people still refer to *Roe* as the key decision and not *Casey*. *Roe* was seminal and remains iconic, even if it was wrongly decided and poorly reasoned.

If the Supreme Court takes steps to allow states more latitude in restricting abortion, what will happen politically? The Washington Post ran a map that highlights the four states with "trigger laws" — if *Roe* were overturned, abortion would be banned in Louisiana, Mississippi, and North and South Dakota. Eight states have laws that protect abortion rights: Those laws could be invalidated by the Supreme Court but only if the high court adopted some version of a personhood argument, bestowing constitutional rights on the unborn child, rather than embracing a jurisdictional argument that simply leaves it to the states to decide. Ten states still have pre-1973 laws restricting abortion on the books.

The problem with this analysis is that it assumes a static political environment. I raise the same concern about polling on the issue. It is a lot easier to say you support restrictions on abortion rights when you think such restrictions are hypothetical. If the Supreme Court leaves the issue up to the states, it will be decided by state legislators, many of whom won election on completely unrelated issues. They may have filled out the questionnaire for the National Right to Life Committee or for Emily's List, hoping for some campaign cash, but they will be a lot more cautious once there are real, not merely rhetorical, consequences to the stands they take.

At The Federalist, theologian Charles Camosy exposes some of the limits to the claim that "a majority of Americans support *Roe*." Camosy is right that polls indicate many Americans support the kinds of restrictions on abortion that *Roe* ruled unconstitutional. He is also right that the stories of illegal abortions pre-*Roe* being done with wire hangers are largely apocryphal. And, importantly, he notes that even many pro-lifers support exceptions in especially difficult cases.

I fear all this gets washed away if *Roe* or *Casey* is overturned. If even one woman dies in a botched illegal abortion, even in Louisiana or Mississippi or the Dakotas, I suspect the legislature would flip in a heartbeat.

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Nor, I fear, is it possible to simply return to the kind of discussion our political branches of government were entertaining before the court jumped in and short-circuited the debate. In Europe, parliaments wrestled with the issue and mostly reached the conclusion that elective abortion should be banned after 10 or 12 or 14

weeks. The women of Europe are not oppressed. But can Americans reach such a common-sense position? I don't see how.

Pro-choice groups focus on a woman's autonomous right to make decisions about her own body. Until the baby emerges from the birth canal, they do not believe it has any moral significance apart from what the mother chooses to impart to it.

Pro-life groups get outraged when anyone does not feel the same level of sympathy with a colony of cells in the very early stages of pregnancy that they feel with a vulnerable woman facing a crisis pregnancy. Abortion at any stage is murder.

Roe not only short-circuited the discussion, it turned it into this categorical debate in which both sides talk past each other and the discussion is dominated by the extremes on both sides.

I had hoped that two technological changes would ameliorate some of the difficulties of the debate. Young people now grow up and see the sonograms of themselves in the womb. I had hoped, over time, that would rob the pro-choice position of its continued ability to deny the moral significance of pre-born life. And now that most abortions in the very early stages will be accomplished by taking a morning-after pill or something like it, this technological change achieves in fact the privatization that Blackmun assigned in legal theory.

I suspect the vast majority of Americans will oppose efforts to ban the morning-after pill and, realistically, only with the eyes of faith can we make the case that an embryo is a human being enjoying full rights. Only after twinning is no longer possible, which is early, does the colony of cells possess that quality of self-sameness that is thoroughly unique that we intend when we speak the word "person." We Catholics believe it is a human life from the moment of conception, but I doubt that will ever be the law.

There is another way the debate has changed in recent years. The president is avowedly pro-life. He is also someone who flirts with white nationalist racism. My hopes for the pro-life movement appear without foundation if we think young people will ignore Trump's race-baiting, and not be drawn to the opposition no matter what they think about abortion.

After Reverend Mother sends her to the Von Trapps, Maria says: "When the Lord closes a door, somewhere he opens a window." Wednesday, we'll look for any open

windows that might satisfy a progressive Catholic.

[Michael Sean Winters covers the nexus of religion and politics for NCR.]

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