

Women Speak FOR THEMSELVES

Fact Sheet: Judge Kavanaugh and Ending Legal Abortion

Abortion is on everyone's mind as we prepare for Supreme Court confirmation hearings for Judge Brett Kavanaugh. Here's what you need to know about the current legal status of abortion, and what could change in the near future.

What is the “legal status” of abortion right now?

The Supreme Court has made abortion a “federal constitutional right.” That means that **every woman in every state can have an abortion pretty much at any time for any reason.** When a right is located in the federal Constitution, that means that no federal law, no state law, and no state constitution, can get rid of that right.

Two Supreme Court cases made this possible. In 1973 in *Roe v. Wade*,¹ and in 1992 in *Planned Parenthood v. Casey*,² the Court stated that the 14th Amendment's³ protection of “liberty” includes rights that are not found in the actual text of the Constitution. One of these is a right to abortion.

Roe stated that abortion was a “fundamental” right (which means that only the strongest of state interests can overcome a woman's right to have an abortion), while *Casey* called abortion a less-strong “liberty interest.”

But frankly, no matter how the Court labeled the right of abortion, in a series of cases over the last 45 years, they have **made it very, very hard for states to pass laws that actually curb abortion** a great deal. It's a very strong constitutional right.

What is the legal reasoning to overthrow *Roe v. Wade* and *Casey*?

It is legally impossible to read a “right to abortion” into the Constitution. Let me explain briefly:

The Constitution was written to make sure the maximum amount of power went to state and local governments, instead of the federal government. The idea is that

¹ 410 U.S. 113 (1973).

² 505 U.S. 833 (1992).

³ “[N]or shall any State deprive any person of life, liberty or property without due process of law.”

the American people should have as much say as possible in how they are governed, and leave only a few topics in the hands of the federal government (i.e., Congress). It is therefore a very big deal to call something a “constitutional right” that governs you no matter what state you live in, and that prevents your state from creating laws that say otherwise.

In addition to the rights specifically given to citizens in the Constitution’s Bill of Rights, there are likely rights and interests that Americans possess that are so fundamental—that even if the Constitution forgot to mention them—they exist. These would include, for example, parents’ rights to decide what school their children attend, versus allowing the state to make that choice.⁴

But abortion is not such a right or interest. At the time the 14th Amendment to the Constitution was passed, almost every state and territory in the US banned abortion for virtually every reason. And those laws stayed on the books right up to the time of *Roe*, in most cases.

We are not dealing here with a right “so fundamental” to the American way of life, that the Supreme Court just had to declare it existed. We are dealing with a practice deemed loathsome by the overwhelming majority of Americans for over 100 years. And even since *Roe* was decided, [states have enacted over 1000 restrictions](#) designed to curb abortion as much as they can, within the narrow limits set by *Roe*.⁵

Many abortion advocates **will insist that the Constitution contains a right to abortion, but they will ALSO state that if *Roe* is overturned, about half the states will ban all or most abortions.** These statements contradict one another. Let me explain: If *Roe* was really a “fundamental constitutional right” in the sense that it is an inescapable part of Americans’ understanding of freedom, then **no way** would half the states ban or limit it the moment they got the chance! Nor would they pass over 1000 laws over 45 years to restrict abortion as much as possible!

Is Judge Kavanaugh, who is up for confirmation to the Supreme Court, pro-life?

There is reliable information that Judge Kavanaugh is solidly pro-life. While Kavanaugh has not publicly stated that he would overturn *Roe v. Wade*, we know the following:

1. President Trump promised that he would appoint only pro-life judges.⁶
2. To quote from respected judicial expert Ed Whelan of the Ethics and Public

⁴ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁵ <https://www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe>.

⁶ <https://www.thecut.com/2016/11/could-a-trump-administration-overturn-roe-v-wade.html>

Policy Center: “In his one foray into the abortion arena, in a very contentious recent case involving a pregnant unaccompanied-alien minor being held in HHS custody, **Kavanaugh objected** to his court’s [grant of relief](#) to the minor. In his dissent, he complained that the majority concocted “*a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.*” The majority’s decision, he said, “*represents a radical extension of the Supreme Court’s abortion jurisprudence.*”

Whelan reasons that while Kavanaugh has also received criticism from some pro-life quarters for his opinion in that case, he does not deserve it because “[Kavanaugh] concluded that requiring the federal government to assist the teenager in getting an abortion would fail to recognize the federal government’s *‘permissible interest in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion.’* He emphatically rejected the creation (by the majority of the D.C. Circuit, sitting [as a whole]) of a *‘new right for unlawful immigrant minors in U.S. government detention to obtain immediate abortion on demand.’* He scoffed at the result in the case, which forced the feds to turn over the minor in the wee hours of the morning to permit her to abort her unborn child, calling it ‘inconsistent with 40 years of Supreme Court precedent.’”

What route might Kavanaugh use to overthrow *Roe* and *Casey*?

Having talked to many people about what Kavanaugh might do on abortion, most see two options:

1. He will **approve more and more state laws limiting abortion** as a way of “whittling away” at the abortion right. This camp believes that Kavanaugh and the other Justices would deem it too great a shock to our legal system to allow states to ban abortion as the result of one opinion. Or,
2. Because abortion is so clearly a “made up” constitutional right, the Supreme Court really has no choice but to say, cleanly: “**Abortion is not dealt with in the federal Constitution** one way or another. If you want a right to abortion, or if you want to ban abortion, you’re going to have to pass a law or a constitutional amendment **in your own state** to say so.”