If 'Roe v. Wade' Is Overturned, What Happens in Georgia?

Beyond a mountain of “ifs” lies a potential Georgia Supreme Court clash of abortion, privacy, precedent and conservative judicial principles.

The “ifs” start with abortion rights advocates, who openly fear that, if Judge Brett Kavanaugh is confirmed to the U.S. Supreme Court, he will tilt it to overrule *Roe v. Wade*. That’s the 1973 decision holding that states largely may not interfere with a woman who wishes to terminate her pregnancy.

The end of *Roe* would mean the question of abortion legality returns to individual states—and most likely their high courts.

A case in the Georgia Supreme Court could test its 113-year-old decision finding a right of privacy in the state constitution, considered the first of its kind in the country. The decision was key to the court striking down the state’s law criminalizing sodomy in 1998.

The state high court’s current justices, most of whom were appointed by Republican governors in the past 13 years, have adopted an approach spearheaded by the late U.S. Supreme Court Justice Antonin Scalia. The court declared in a decision last year, “we must construe a constitutional provision consistent with the meaning of its text at the time it was adopted.” That same “textualist” philosophy can be highly skeptical of rights that judges have discovered in constitutions that were not mentioned specifically in those documents.

The 1905 ruling establishing a right of privacy in Georgia, *Pavesich v. New England Life Insurance Co.*, stemmed from a man suing the insurer because it used a photograph of him in an advertisement that purported to show him as a satisfied customer.

Justice Andrew J. Cobb wrote: “It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like.”

“In such a case although there be no precedent,” Cobb continued, “the common law will judge according to the law of nature and the public good.”

Confronted with that language, “I suspect the textualists would hit the roof,” said John Amabile, a business litigator at Parker Poe who has written about trends at the current state court.

In a purely textualist view, he added, the right of privacy under the Georgia constitution “probably goes away.”

But Amabile cautioned that an abortion rights case “is very unlikely to be reduced to a textualist approach.”

“I suspect the court won’t do that,” assuming courts try not to upend case law, Amabile said.

Civil rights lawyer Gerry Weber, the former legal director of Georgia’s American Civil Liberties Union, said the right to privacy is grounded in the state’s guarantee against depriving a person of liberty without due process of law—a point the *Pavesich* court explained.

Significantly, he argued, subsequent decisions have said the right to privacy—and bodily autonomy—prevail over ”a compelling government interest in preserving human life” in cases over a quadriplegic seeking removal of a respirator and a state prisoner on a hunger strike.

“It’s one thing to overrule a precedent,” said Weber. “It’s another thing for a state Supreme Court to revisit 113 years of case law.”

Considering the portraits of historic justices on the walls of the state Supreme Court, Weber added that, to overrule *Pavesich*, “You’d have to put Xs over half their faces.”

Weber concluded that, compared with other states, some of which followed Georgia’s lead in declaring a right to privacy under their constitution’s due process clauses, “I think Georgia has a stronger argument” to preserve abortion rights “if this set of dominoes fell.”

Josh Belinfante of the **Robbins Firm**, who was the top lawyer to Republican Gov. Sonny Perdue, noted the *Pavesich* ruling “is indicative of a judicial analysis that is not in favor.”

The lack of a textual privacy right “would certainly be a factor, but it’s not determinative” in an abortion case, he said.

Belinfante said he’s seen the current state high court adopt prior precedent in cases where the textual basis of a rule was questionable.

“They take each case as it comes,” Belinfante added.

The court could come to the same conclusion as *Pavesich* but use different reasoning, Belinfante said. Or it could find a privacy right but allow legislation that would make abortion more difficult to obtain.

Leah Ward Sears, who served on the state Supreme Court for 17 years, including four as chief justice, said she considers Georgia’s privacy right more powerful than the one under the U.S. Constitution. She embraced *Pavesich*‘s privacy right in the sodomy decision in 1998.

Today’s court, she said, “may very well be different.”

“They could get there if they wanted to,” Sears said, referring to a decision allowing the state to ban abortion. However, there are many factors beyond textualism that could go into a decision, such as stare decisis and stability, she said.

For similar reasons, Sears—now a partner at Smith, Gambrell & Russell—said she does not expect the U.S. Supreme Court to overturn *Roe v. Wade*.

"*Miranda* still lives," she said, referring to the 1966 *Miranda v. Arizona* decision finding that criminal suspects must be warned that their statements could be used against them. That decision was frequently criticized by conservatives but then upheld in 2000 in a decision by Chief Justice William Rehnquist.

Laura Simmons, the director of NARAL Pro-Choice Georgia, isn't comfortable with predictions that *Roe* could be upheld or that the state high court would keep abortion legal. Speaking of the privacy decision, she said, "We don't have any assurances that it'd be upheld. The court is just not the court we had in 1998? when *Pavesich* led the way to the striking down the sodomy laws.

"We feel our rights are under attack," she added, noting the group's support of Stacey Abrams, the Democratic candidate for governor. Simmons called Abrams "a true champion for reproductive freedom" who would be able to veto any abortion ban passed by the General Assembly.

The Republican candidate, Secretary of State Brian Kemp, said on Facebook during the primary race, "I back Mississippi's ban on abortions after fifteen weeks and vow to sign the toughest abortion laws in the country as your next governor. If abortion rights activists want to sue me … bring it!"

Shannon Vogt, vice president of Georgia Right to Life, said her group would "welcome the change" if *Roe v. Wade* were overruled, but she said she could not speculate on what would happen in Georgia.

Attorney General Chris Carr, a Republican, had no comment on *Roe* being overturned and how he'd respond to a law banning abortions. Last year, his office defended a 2012 law banning abortions at 20 weeks before the state high court. The brief he and his staff submitted argued that the Georgia Constitution "contains no direct language regarding privacy."

Moreover, Carr and his staff argued in the headline to one section of their brief, "The Constitution Itself Does Not Provide a Remedy for a Violation of the Right to Privacy."

In a decision some considered highly textualist, the court ruled that the doctors' lawsuit against state officials over that 2012 law had to be dismissed because the officials enjoyed sovereign immunity from this type of suit. Weber, the civil rights lawyer, said that decision would not preclude a suit over the constitutionality of a post-*Roe* abortion ban.

Charlie Bailey, the Democratic candidate for attorney general, said if *Roe* were overturned, he'd urge the governor and General Assembly not to curtail a woman's right "to make her own healthcare decisions."

If an abortion ban went to the state Supreme Court, Bailey said he'd "closely examine whether such legislation oversteps the new boundaries drawn by the U.S. Supreme Court, and if I believe they do, I will take action as attorney general to see that such legislation is struck down by the appropriate court."