SCOTUS for law students: *Roe v. Wade* and precedent

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Next month will mark 44 years since the Supreme Court declared the existence of a constitutional right for women to choose to terminate their pregnancies through abortion. Yet, unlike any other decision in recent decades, the longevity of *Roe v. Wade* as precedent remains in doubt, under continual attack in courts, legislatures and political campaigns.

The curious status of *Roe* was brought into dramatic relief last month when CBS aired an interview with President-elect Donald Trump on its "60 Minutes" broadcast. Trump reiterated his oft-stated campaign pledge that he would appoint judges and justices who were pro-life and committed to overturning *Roe*; he suggested that if *Roe* were reversed, access to abortion would be up to each state. In the same interview, he asserted that argument over the legal status of same-sex marriage is now "irrelevant": "It's law. It was settled in the Supreme Court. I mean, it's done. And I'm fine with that."

How can that be, you might ask? The constitutional right to same-sex marriage was announced just a year and a half ago in *Obergefell v. Hodges* and is 'settled," but *Roe* was decided in 1973 and remains in legal limbo? How is that possible? Why does the Supreme Court's ruling in *Roe*, which has clung to life for nearly a half century, seem to have such a tenuous hold as constitutional precedent? The answer, to the extent there is one, may be more political than legal.

On the legal side, several Supreme Court justices engaged in a lengthy discussion of this question in 1992, when they considered the precedential status of *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In a highly unusual opinion written jointly by Justices Sandra Day O'Connor, Anthony Kennedy and David Souter, the court examined at length the judicial doctrine called stare decisis, a Latin phrase that means "the decision stands."

In the realm of constitutional law, justices generally assert that stare decisis, or respect for precedent, is an important value, but not a definitive one. Respect for precedent is an important part of maintaining doctrinal consistency and advancing the rule of law, they maintain; at the same time, if they believe that a constitutional precedent is or has become erroneous, they will feel less of an obligation to follow it.

To help decide when to reaffirm a precedent and when to overrule it, the justices in *Casey* collected four factors from other cases and past practices. They said respect for precedent should be guided by whether a constitutional rule has proven to be unworkable; whether society has built up reliance on the rule; whether legal doctrines have changed so that a rule has become obsolete; and whether facts have changed so much that a rule has become insignificant or unsupported.

There has been no occasion for the Supreme Court to apply these standards to the still-new*Obergefell* ruling on same-sex marriage. But a quick scan would suggest that the factors work strongly in favor of the same-sex marriage decision as precedent entitled to respect. The constitutional right to marry as extended to same-sex couples has not proven unworkable, and neither the legal doctrines nor the facts have changed in any way. Moreover, there has been extraordinary reliance on the decision, as hundreds of thousands, perhaps millions, of marriage licenses have been issued to same-sex couples.

The problem with the *Casey* test is that it does not resolve the conundrum of why *Roe* remains so clearly on the chopping block of constitutional precedent. In discussing the four factors in their joint*Casey* opinion, O'Connor, Kennedy and Souter concluded that *Roe* merited respect as precedent and should not be overruled, although they changed the analytical framework for evaluating abortion issues.

None of the three justices could be considered pro-choice or favoring abortion, but they reached the following conclusion in *Casey*: "Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe's*central holding, with whatever degree of personal reluctance any of us may have, not for overruling it."

The three justices went on to explain why overruling was appropriate in two high-profile lines of cases earlier in the century and how they differed from the abortion ruling. In the late 1930s, the Court repudiated the line of cases that had come to define the Lochner era, after *Lochner v. New York*, a 1905 case in which the court struck down a labor law that limited working hours as an arbitrary limitation on freedom of contract that violated the due process clause. Over the next 30 years, the court invalidated many state laws as interfering with economic autonomy and exceeding the power of states to regulate the health and safety of their citizens.

The *Casey* justices noted that the court's sharp change of direction in the 1930s, after the Great Depression, reflected a recognition that the free-market economic view that had dominated the court for three decades was no longer viable and had been abandoned by society.

The second example discussed by O'Connor, Kennedy and Souter was the overruling of the racial segregation doctrine of separate-but-equal that had been adopted by the court in 1896 in *Plessy v. Ferguson*. In *Brown v. Board of Education* in 1954 and in other desegregation rulings, the court said that the nation's understanding of the impact of segregation had changed, thus destroying the factual underpinnings of *Plessy*.

In both historical examples, the justices wrote in *Casey*, "changed circumstances" meant that "the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." But in the case of abortion, the justices said, "neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed."

These arguments about *Roe* in *Casey* are, themselves, nearly 25 years old. Yet little has changed in the application of the standards for stare decisis that would make the right to abortion less settled than it was in 1992. This fact, combined with the longevity of the right to abortion, ought, by legal measures, to give *Roe* a greater claim to stare decisis than *Obergefell*.

The answer, then, to *Roe's* continued uncertain status as settled precedent must lie outside legal reasoning, and, therefore, beyond this writer's expertise. Many commentators have observed that a variety of interest groups have gained and exerted political traction by using the issue of abortion as an organizing principle and rallying point. The intersection of anti-abortion political movements with pro-life moral values and religious teachings by the Catholic Church and others may have added to the power of the issue as a political rallying cry. A number of state legislatures have stoked the debate over abortion rights by annually passing new abortion restrictions or even partial or near-total bans, some clearly designed as vehicles for the court to reconsider *Roe*.

The anniversary of the 1973 *Roe* decision falls just two days after Trump's inauguration. The president-elect has made it clear that he will not be celebrating this pro-choice milestone, and that he should be counted among those who want to shake the foundation of *Roe* as a constitutional precedent.