

Reflections Lawrence P. Grayson

Conflicting Rights in a Divided Nation

The recent Senate Judiciary hearings to confirm Brett Kavanaugh as an associate justice of the Supreme Court were brutal to his personal reputation, devastating to the comity of the congressional body, and inflammatory in an already divided nation. Protesters shouted in the hearing room, had sit-ins in the hall, accosted a senator in an elevator and another while with his wife in a restaurant, put legislators' personal information on the internet, and later assaulted congressional candidates, while receiving encouragement from legislators who opposed the appointment.

The arguments against confirmation centered on an uncorroborated allegation of sexual misconduct when Kavanaugh was a 17-year-old high school student, and whether the unsupported assertion should outweigh his denial and three decades of exemplary, unblemished conduct as a lawyer, judge and public servant.

The stated concerns, however, masked the root reason behind them – maintaining the legality of abortion and the fear that a Justice Kavanaugh might cast the deciding vote to overturn *Roe v. Wade*. The abusive attacks were not tempered, even though just prior to the hearings Judge Kavanaugh said that he regarded the decision as “settled law.”

But what is settled? When *Roe v. Wade* was decided in 1973, Justice Harry Blackman, writing the majority opinion, based a woman's right to abortion on a penumbra of privacy rights which though unstated in the Constitution were deemed implicit in the liberty guarantees of the due process clause of the 14th Amendment. That right to abortion, the opinion continued, must be balanced by protection of the “potentiality of human life” of the fetus.

The Court in its ruling left one key point undecided. It stated: “We need not resolve the difficult question of when life begins. The judiciary at this point in the development of man's knowledge is not in a position to speculate as to the answer.” Further, if the personhood of a child in the womb is established, the right to abort “collapses, for the fetus' right to life is guaranteed specifically by the [14th] Amendment.” *Roe v. Wade* may be settled law and not be overturned, but it could be nullified.

Law and science are not yet in synchronization. With recent advances in obstetrics and neonatology, coupled with the increasing availability of ultrasound images, more and more people recognize that the fetus is an early stage of a preborn, developing person. Children now can survive outside of the womb at 24 weeks of gestation and less. An unborn child is known to feel pain at 20 weeks. Fetal surgery is performed at 18 weeks and earlier. People can see a human form emerging at eight weeks. And, the developing child has a DNA distinct from that of its mother from the moment of conception. The science of embryology views life to begin the instant the male's sperm unites with the female's egg.

In order to bring law and science into harmony, the Life at Conception Act was introduced into both Houses of Congress in 2017. While it is unlikely to pass in this session of Congress, it may very well be reintroduced in the next. If enacted, it would define a person as existing from the moment of conception, thus providing a Constitutional safeguard for the life of the unborn child.

A woman may then have a right to an abortion, but only if from the instant of its creation her child is not harmed.

That is the fear of those obsessed with sexual freedom, who do not want consequences for their actions. They claim complete autonomy over their bodies, even to the point of destroying a distinct being within them. They rebel at the threat to their independence and irresponsibility. In contrast, those who truly believe that everyone has a right to life, that people are created by God in His image and imbued with a soul can never condone abortion.

Compromise between such resolute, incompatible views can only be a temporary measure to gain a partial advance. The right to life from the moment of conception and the right to abortion cannot exist simultaneously. Passionate disagreements will continue, with one side or another having a legal edge depending on the current governmental leadership.

Fortunately, President Trump recognizes the importance of safeguarding human life from its earliest stages. In a letter to the National Right to Life Committee on June 28, 2018, he stated: “We all have a duty to defend the most fundamental and basic human right – the right to life. As President, I am dedicated to protecting the lives of every American, including the unborn.”

He is taking steps to support his belief. Shortly after his inauguration, the President reinstated the Mexico City policy to ensure that federal dollars are not used to fund non-governmental organizations that perform or actively promote abortions in other countries. The policy which was established by executive order is a political bellwether of the Administration’s support for life at conception or abortion. First established by President Ronald Reagan in 1984, it was rescinded by President Bill Clinton in January 1993, reinstated by President George W. Bush in January 2001, rescinded by President Barack Obama in January 2009, and again reinstated by President Trump in January 2017.

The Trump Administration has also proposed regulatory changes to the Title X program, which supports family planning services for low-income women. These actions would block the availability of federal funds to family planning providers like Planned Parenthood that offer abortion services.

Further, the Department of Health and Human Services (HHS) in its 2018-2020 Strategic Plan states: “HHS accomplishes its mission through programs and initiatives that cover a wide spectrum of activities, serving and protecting Americans at every stage of life, from conception.” Undoubtedly, as these plans are implemented through regulations, the Supreme Court will be presented with a case to resolve the conflict between the implied right to abortion and a definition of when life begins. Justice Kavanaugh, as a presumed swing vote, will once again be in the midst of turmoil.

The remaining two years of President Trump’s term will be tumultuous. If adamant abortion supporters cannot win through legislative action, executive control or judicial decisions, they will do all they can to maintain the status quo through social disruption, intimidation and personal vilification. History has shown that to be true.

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