What the Kavanaugh nomination means for legal and social movements (audio with transcript)

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Interviewer: Welcome to Case in Point, produced by the University of Pennsylvania Law School. I’m your host, Ashton Lattimore. In this episode we’ll be talking with Serena Mayeri, Professor of Law and History at Penn Law, and author of Reasoning from Race Feminism Law and the Civil Rights Revolution. We’ll be discussing the confirmation hearings of Supreme Court Nominee and DC Circuit Judge, Brett Kavanaugh and what his confirmation may mean for the future of legal and social movements. Thank you for joining us Serena.

Interviewee: Thank you for having me.

Interviewer: In your writing, you’ve referred to a conservative legal movement that paved the way for Kavanaugh’s nomination. Could you describe the movement, and how it brought us here?

Interviewee: Sure. Well, there have been a number of conservative legal movements throughout American History. But I think the movement that really paved the way for Judge Kavanaugh’s nomination to the Supreme Court has its roots broadly in the partisan realignments of the 1960s and 70s. But more specifically in the Reagan administration under Attorney General Ed Meese, which was the first time that judicial appointments really became a central part of the republican party’s agenda.

And what was really crucial to the effort to find judges who would advance a conservative agenda was, the Federalist Society which was an institution founded by law students in 1982.

And the Federalist Society created a network of law students, lawyers, activists, government officials, and eventually judges who have provided a kind of farm team for the federal judiciary. And conservatives in founding the federal society really saw themselves as the underdog kind of set by liberal domination of the supreme court of the legal academy, and the upper echelons of the profession generally.

And they set out to target a lot of the constitutional precedence that developed in the 1930s with a new deal, through the 1960s really across a wide range of fields including government regulation, business, civil rights, civil liberties, the rights of criminal defendants, laboring and employment law, reproductive freedom, property rights, gun control really across a wide range of different areas.
I think where the conservative legal movement has been especially effective is in really centralizing and systemizing a pipeline to the judiciary. And also - and this is really important - I think, in mobilizing voters, you know, ordinary citizens to care deeply about judges, and court appointments.

They’ve also been very effective I think at packaging the judicial philosophy of originalism for public consumption. And all this means that today, polls regularly show that Republican and Conservative voters place court appointments which were much higher on their list of priorities than do liberal or democratic voters.

And I think it’s also important to remember how conservatives learned the importance of carefully vetting judicial nominees. They learn that during the Reagan and George H. W. Bush Administrations. When republican appointees such as Anthony Kennedy, Sandra Day O’Connor, and David Souter really deeply disappointed conservatives who felt betrayed by folks who they thought going to be much friendly to their views than the justice has turned out to be in at least some cases.

And so, by the time George W. Bush was elected, the Federalist Society really flexed its muscles on each of his supreme court appointments. They were normally influential in the appointments of Samuel Alito, and Chief Justice John Roberts.

And then of course President Trump’s promise that he would select judges and justices from Federalist Society that are less, you know, it was arguably crucial to his winning support from conservatives in 2016 and in maintaining that support.

Interviewer: Would you say that there is a corresponding progressive legal movement? So, is there an analog to the Federalist Society that progressives can look to, or have been able to look to build a pipeline of judges of that side of the aisle?

Interviewee: You know, I think, there is certainly have been many progressive legal movements throughout this period and indeed conservatives model their litigation strategy in many ways on the liberal social movements of the 60s and 70s.

I think where liberals and progressives have maybe fallen short is - at least fallen short of the example of the conservative movement is in really prioritizing the judiciary and making courts central not only to their kind of internal strategy, but also to their political and
electoral platform. They’ve been less successful in making voters really care about the courts and vote accordingly.

**Interviewer:** For the conservative legal movement some might say that, if Kavanaugh is confirmed, to some extent the movement has achieved its goal, which is shifting the balance of power of the supreme court.

So, where does a movement like the conservative legal movement go after something like this, what’s the next step for them?

**Interviewee:** Well I guess, I would say first, historians are notoriously hesitant to predict the future. So, I might take off my historian hat a little bit here, and say I don’t see any reason to believe that this conflict between conservative and progressive movements is going to simmer down anytime soon. I think when progressives lose the courts, they’ll find other avenues. Class reductivism, electoral politics legislature reform. Not just at the federal level, but at the state and local levels as well.

And I think just as the conservative movement learn lessons from liberal social movements of early periods, there is already a lot of indications that progressive movements are trying to emulate some of the successes of conservative political activists in the last several years - or, last couple of decades.

One key question I think is whether these kind of democratic - small the democratic channels of creating legal change will continue to exist and thrive if we continue to see some of the influence of voter suppression laws the influence of dark money in politics, and maybe even most importantly the effects of partisan gerrymandering.

So, there are some question marks about, you know, the efficacy of those avenues of reform. But I don’t think there is any reason to think that either movement is going to ease up as a result of this appointment.

**Interviewer:** So, shifting gears to the confirmation hearings that are going on this week. And part, because Republicans have the votes to confirm Judge Kavanaugh with or without any democratic support. Many have derided this week’s confirmation hearings as a sham. What value do you think the hearing serve in this situation? Either for the conservative legal movement, or for progressives?
Interviewee: You know, I guess it seems to me that once the democrats tried and failed to postpone the hearings until after the midterm elections, it seems to me that for progressives, the value of the hearings might be first highlighting what’s at stake in judicial nominations in general, and this nomination in particular really highlighting the positions that Judge Kavanaugh has taken in the past, and more importantly what he can be expected to do in the future.

And perhaps a little bit more immediately, I think it could serve a function of highlighting the stakes of the midterm congressional elections, and of course the presidential election for the future of really every issue that’s important for us as voters. So, I think at this point in some sense it’s hardly the first person to say that it’s a bit of a political exercise rather than that that is going to affect the outcome necessarily.

Interviewer: This week, the New York Times reported on emails in which Judge Kavanaugh called into question whether Roe v Wade should be described as “Settled law”, that phrase in his opinion on the issue, have been a central focus of the public conversation surrounding his nomination. What does the phrase, “Settled Law” mean in this context? And do you have a sense of why those words have been assigned such significance on the issue of abortion rights?

Interviewee: That’s a really good question. I find the focus on whether Judge Kavanaugh thinks that Roe vs Wade is settled are pretty misleading for a couple of reasons. So, one reason is that, Roe vs Wade itself while it serves as a kind of short hand for abortion rights, the Roe opinion hasn’t governed the law of abortion regulation since 1992. Which was when the supreme court decided, planned Parenthood of Southeastern Pennsylvania vs Casey.

And in Casey the court did a couple of things. One was that it placed the abortion right on former constitutional grounds by basing it on not just on the right to privacy, it had been emphasized in Roe vs Wade, but on Women’s right and ability to participate equally in the economic and political life of the nation, and to have the freedom and the dignity to determine their own life course without interference from the government.

Casey also though, recognized a greater role for the government and more important state interest in protecting potential life. And so, as a result, Casey subjected abortion regulations to a much less stringent standard of review than Roe had. So, Casey replaced
Roe’s scrutiny standard with an undue burden standard. And what qualifies as an undue burden is very much in the eyes of the beholder as it turns out.

So, the result is that, under the undue burden standards, states have been able to enact many abortion restrictions and regulations that would have been struck down under Roe, but are upheld under Casey.

But at the same time it was really Justice Kennedy who was the swing vote on the cases that ended up in the supreme court. And most recently Justice Kennedy joined the majority in striking down a track law - and track refers to the targeted regulation of abortion providers. Regulations that had closed down I think, half of the clinics that were providing abortion services in Texas.

So, Casey’s undue burden standard is important here, because it’s proven already to be malleable enough to allow courts to chip away at abortion rights more gradually. And that’s important both on its own terms it will be much easier for under Casey’s undue burden standard for the supreme court to uphold more state and potentially federal regulations than they have in the past.

And it will also, provide the opportunity for the court and the republican party more generally to avoid the political backlash that would very likely accompany a decision that overturned Roe vs Wade outright.

And I think it’s fair to say that there are some, if not many opponents of abortion who would prefer that strategy. Because they understand where public opinion is on abortion. A solid majority of American’s don’t want to see Roe overturned. And doing so, very solicitly and dramatically could cause the Republican Party a very serious setback.

And then the other reason why I think it’s misleading to focus on Judge Kavanaugh’s position on whether or not, Roe vs Wade, or anything else is settled law, is that I think his position on reproductive freedom as well as a whole host of other issues is really not a mystery at all.

His record is littered with indications that he opposed abortion rights. But even if we didn’t have these indications in his written and spoken record, the Casey decision taught conservatives a really important political lesson that they’ve learned very, very well. When Casey upheld the core of holding a Roe vs Wade. And it was
a bitter disappointed and betrayal for antiabortion advocates. And it was a decision that was coauthored by three Republican Appointees, Kennedy, O’Connor and Souter. And conservatives vowed then and there, never to make that - or to allow a republican president I should say to make that mistake again.

The simple fact is, therefore that any person approved by the Federal society for a seat on the supreme court is someone who the Federalist Society is absolutely certain will vote against abortion rights. And the other question is, how will they come to that decision? Whether they’ll come to it by overturning Roe outright, or getting abortion rights more slowly under Casey’s undue burden standard.

So, I think the bottom line is that, the conversation about federal law - and really anything else that Judge Kavanaugh says about abortion, shouldn’t mislead anyone into that that there is really any genuine possibility that Justice Kavanaugh wouldn’t be a fifth vote against abortion rights.

**Interviewer:** You mentioned that the Federalist society - it sounds like essentially uses the abortion rights question as sort of a witness test for the kind of judicial nominees that they are throw their support behind. Would you say that there are other areas of law that could incur changes? Are there other areas that the Federalist Society looks to vet potential nominees?

**Interviewee:** Absolutely. I mean, I think one of the points that it’s important to underscore is that, part of the brilliance frankly of the conservative legal movement, is that it’s really been able to very effectively tie hot button issues like abortion and gun rights to a much wider ranging agenda. And across a wide range of areas the movement has been extraordinary effective at shifting the terms of legal and constitutional debate to the right.

And in some cases so that arguments that were once really at the margins of legal discourse, or adhered to by one or two outliers on the supreme court, are now not only mainstream, but are possibly about to become a dominate view.

So, as many people have noted, the courts conservatives have already remade entire areas of the law including labor, free speech, campaign finance, voting rights. And as the decisions of the court in this last term underscored Justice Kennedy cast a lot of conservative votes on a court that is already very friendly to corporations and business interest in this larger agenda.
That said though, there are also many areas in which Justice Kennedy was a swing vote. Areas like, school desegregation, affirmative action, cases involving civil liberties, criminal justice, government regulations and of course, Justice Kennedy was also known as a leader on the issue of gay rights.

There are many areas in which I think the court is certain to continue to shift to the right in ways more less dramatic depending on what Justice Kennedy’s position was on the questions at hand.

**Interviewer:**
Given that rightward shift, do you think there is any possibility that certain rights might not just lose the protection that they currently have, but actually be affirmatively dismantled or outlawed?

So, for example, if the supreme court did more than just reverse Roe and decided to let states make the choice about what abortion laws to permit. But rather, perhaps the supreme court actually struck down the law that permitted abortion. Or, struck down the law that permitted gay marriage. Or, struck down some form of affirmative action.

**Interviewee:**
Yes, I mean I think that’s a real possibility if not a probability at least on certain of the issues that you mentioned. So, for example, the court has already made it virtually impossible to enact most restrictions on campaign finance.

That’s kind of affirmative limitation on what the government can do based on a provision of the 1st Amendment. I think measures to counteract the fact that are racial segregation and public schools and affirmative action in education and employment more generally our clearly vulnerable after Kennedy’s retirement. He was the swing vote in those cases.

Seems live provisions of the Affordable Care Act that still remain in aect are now in jeopardy. And to the extent that the court rules that certain laws and protections are prohibited under the constitution as you suggested. The justices can actually prevent the other two branches from doing things like regulating health care markets or the environment, or enacting gun control laws and so forth.

One of the areas where this is already, you know, to some degree come to pass, but certainly could go much further is in first amendment law, Texas _____ recently wrote about how the courts majority had - she put it weaponized the 1st Amendment - used the
1st Amendment to strike down government actions across a wide range of areas.

I think in the longer term, so those are sure some of the short term impacts I think of the Kavanaugh appointment. In the longer term I think one could imagine a shift toward recognizing the rights of fetuses or even embryos that might require abortion and even some forms of birth control to be outlawed.

I do think that’s a - would be a longer-term development. I don’t think that’s where the court would go in the near term. I do think it’s harder to imagine the court preventing states who wish to recognize gay marriage from doing so. But there are plenty of other ways that the court can undermine the rights of LGBT Americans. Including through recognizing religious exemptions from antidiscrimination laws which is something that the court with Justice Kennedy on it, has done in other areas, but refrained from doing so far in gay rights cases.

Interviewer: Thank you Serena for joining us today. This has been a great discussion.

Interviewee: Thank you so much for having me.

Interviewer: And thank you for listening to Case in Point [Music Playing].

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