How Have Ga. Experts' Predictions About Abortion Rights Changed Since the Barrett Nomination?

A former Georgia chief justice fears the U.S. Supreme Court and the Georgia high court may restrict abortion rights, but another expert thinks a recent Georgia decision may have bolstered its privacy precedent.

Leah Ward Sears wasn't concerned two years ago, when abortion rights advocates predicted that then-Judge Brett Kavanaugh's joining the U.S. Supreme Court would doom *Roe v. Wade*—but she is worried now.

Sears, who served 17 years on the Supreme Court of Georgia, including a stint as chief justice, has changed her mind as the Republican-controlled U.S. Senate stands poised to confirm Judge Amy Coney Barrett to the U.S. high court. A former clerk to the late Justice Antonin Scalia, Barrett is widely considered a vote against abortion rights, although she **said in 2016**, "*Roe's* core holding, that women have a right to abortion, I don't think that would change."

Nonetheless, if Barrett's confirmation leads to the end of a federal right to abortion, it's expected that individual states would make their own rules. Georgia Supreme Court precedent recognizes one of the oldest and broadest rights of privacy in the country, but Sears fears that would not stop the current state justices from upholding restrictions on whether a woman can choose to end her pregnancy.

Sears was one of four appellate law experts the Daily Report contacted in 2018 to explore what would happen in Georgia if Kavanaugh's confirmation led to the end of federal abortion rights. We contacted those experts again in the past week to discuss their views in light of Barrett's nomination to succeed the late Justice Ruth Bader Ginsburg. (The original 2018 article can been seen at the bottom of this piece.)

Sears in 2018 said she thought the U.S justices would adhere to precedent and leave *Roe* alone. Similarly, she said Georgia's precedent from 1905 holding privacy as a right under the Georgia Constitution was safe. That decision was the basis for her 1998 ruling ending criminalization of homosexual sodomy; the right to privacy also undergirds abortion rights.

Sears, now a partner at Smith, Gambrell & Russell, told the Daily Report in an email last week, "I suppose a couple of years ago, I was more optimistic than I am today."

"Back then, I believed that because more than 60% of Americans believed women had the right to control their reproduction and not the government, I didn't think the Supreme Court would overturn *Roe v. Wade*. Given the current hyper-partisan nature of our government's two political branches, however, and how the recent Supreme Court nominee is being ushered onto the bench at such rapid speed, I am not as

encouraged."

"Instead, I now believe that the US Supreme Court could very well overturn *Roe v. Wade* or at least chip away at abortion protections to such an extent that access is, in effect, denied to women who seek abortions," Sears added.

"The Georgia Supreme Court will likely follow suit, unfortunately, notwithstanding the greater protections provided by our privacy laws," Sears concluded.

Among the four experts contacted for the 2018 article, Sears' views changed the most. Asked by the Daily Report for any updated thinking, another expert said Georgia's justices could follow Kavanaugh's lead in pushing the high court to be more open to overruling precedents, while a third lawyer found a recent state Supreme Court decision actually bolstering the state right to privacy. A fourth lawyer did not see the landscape as significantly different.

'Law of Nature' and Textualism

One new aspect to the abortion fight in Georgia is the 2019 state law pushed by Gov. Brian Kemp and the Republican-controlled General Assembly that criminalizes most abortions. In July, a federal judge ruled that the law was unconstitutional—including by violating the right to privacy. Georgia is **appealing the ruling**.

Cases like Georgia's are percolating through the federal courts and could serve as vehicles for the U.S. high court to reassess its abortion and privacy rulings. If the issues are left to individual state governments and their courts, abortion advocates in Georgia could take comfort in the 1905 case, ***Pavesich v. New England Life Insurance Co.***

The case has little to do with the culture wars of today. It 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 acknowledged that the right of privacy "was founded upon a supposed right of property, or a breach of trust or confidence, or the like."

Two years ago, John Amabile of Parker Poe said many Georgia justices—most having been appointed by Republican governors—would likely "hit the roof" interpreting the language in *Pavesich*. Many on the state court espouse a "textualist" view of legal analysis, which can be highly skeptical of rights that judges have discovered in constitutions that were not mentioned specifically in those documents.

"In a purely textualist view," Amabile said in 2018, the right of privacy under the Georgia Constitution "probably goes away," but he cautioned that the court wouldn't necessarily reduce its analysis to a textual approach, and deference to precedent would prevail.

Last week Amabile wrote, "The basis for my thoughts remain the same," but he pointed to cases in the U.S. Supreme Court suggesting more openness to overturning precedent. The most interesting example came from a concurring opinion by Kavanaugh in the case of *Ramos v. Louisiana*, 140 S.Ct. 1390, in which he argued the precedent could be overturned if, among other things, it was "not just wrong but grievously wrong."

"It would not be terribly surprising to see the Georgia Supreme Court use this concurrence as a guideline in re-visiting old precedent," Amabile added. "Once the door is open, the textualist view to a right of privacy in

the State of Georgia, and the unlikely finding that the right of privacy exists because of the ‘common law of nature’ could become extremely important.”

“There would still be significant challenges,” Amabile noted, “as the concept of privacy in Georgia is pretty well entrenched.”

A Boost to *Pavesich*?

Two years ago, 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.” But he also didn’t predict the state high court would automatically dump the privacy right as found in the case, noting many other factors that go into the court’s decisions.

“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.”

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Asked to reassess his views, Belinfante—emphasizing that he is speaking only for himself, not for clients or the Federalist Society, where he heads the local chapter—pointed to a “significant change” on the role of

privacy in the Georgia Constitution.

Last year Justice Nels Peterson of the Georgia high court wrote in *Elliot v. State*, 305 Ga. 179, that Georgia courts will seek to apply the "original public meaning" of a constitutional provision, which is determined by looking at the meaning at the time of the constitution's ratification.

Belinfante pointed to Peterson's holding that the court presumed that "a constitutional provision retained the original public meaning that provision had at the time it first entered the Georgia Constitution, absent some indication to the contrary."

Noting that Georgia's most recent constitution was approved in 1982, Belinfante wrote to the Daily Report, "Applied here, the question of whether a presumption of the right of privacy exists turns on whether, in 1982, it was 'sufficiently part of the public legal context' about Georgia's due process clause."

"It would seem that the answer is 'yes,'" Belinfante wrote, "and at least the presumption would apply: 'where a constitutional provision has received a settled judicial construction, and is afterwards incorporated into a new or revised constitution, or amendment, it will be *presumed* to have retained with a knowledge of the previous construction.'"

"It seems to me that *Elliot* gives the Georgia right of privacy the precedential and analytical footing that will, at the very least, give the right of privacy a presumption of validity," Belinfante noted.

Civil rights lawyer Gerry Weber said the the landscape around abortion and privacy in Georgia is largely the same as it was in 2018, when he noted decisions over the years since *Pavesich* have said the right to privacy—and bodily autonomy—prevail over "a compelling government interest in preserving human life."

"It's one thing to overrule a precedent," said Weber at the time. "It's another thing for a state Supreme Court to revisit 113 years of case law."

Responding to a query last week, Weber told the Daily Report, "I've seen no cases that mark retreat … from the *Pavesich* case," adding that "much will depend on the Legislature."

Andrea Young, who directs the ACLU's Georgia chapter, knows how much the state Legislature matters, given her organization leads the challenge to the state's 2019 abortion ban.

Candidly, Young said she focused more on federal rights recognized under *Roe v. Wade* than on state privacy rights. The underlying question, she said, is, "Who decides?" If women can't decide with their doctors how to handle a pregnancy, she added, "The state or district attorneys are deciding."

A spokeswoman for Attorney General Chris Carr, who is leading the state's defense of the abortion ban, said he declined to comment.