Supreme Court Overturns Roe, Holds Constitution Confers No Right to Abortion

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Demonstrators protest about abortion outside the Supreme Court in Washington, Friday, June 24, 2022. (AP Photo/Jacquelyn Martin)

WASHINGTON — The Supreme Court on Friday overturned 50 years of legal precedent, ruling that the Constitution does not confer a right to abortion.

The ruling, written by Justice Samuel Alito Jr., overturns both *Roe v. Wade*, the 1973 case that established a woman's right to have an abortion, and *Planned Parenthood v. Casey*, the 1992 case that created the undue burden standard for abortion restriction.

On its face, the majority opinion in *Dobbs v. Jackson Women's Health Organization* does not appear all that different from the "draft" version leaked a few weeks ago.

In its petition to the high court, the state of Mississippi asked the justices to uphold the constitutionality of its recently passed law that generally prohibits an abortion after the 15th week of pregnancy — several weeks before the point at which a fetus is now regarded as "viable" outside the womb.

But Alito seized that request as a springboard to eviscerate the abortion-related protections afforded to women in *Roe* and *Casey*.

"The Constitution makes no express reference to a right to obtain an abortion, but several constitutional provisions have been offered as potential homes for an implicit constitutional right," Alito wrote. "*Roe* held that the abortion right is part of a right to privacy that springs from the First, Fourth, Fifth, Ninth, and 14th Amendments. The *Casey c*ourt grounded its decision solely on the theory that the right to obtain an abortion is part of the 'liberty' protected by the 14th Amendment's due process clause.

"Others have suggested that support can be found in the 14th Amendment's equal protection clause, but that theory is squarely foreclosed by the court's precedents, which establish that a state's regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications," he continued, going on to state that "regulations and prohibitions of abortion are governed by the same standard of review as other health and safety measures."

Further, Alito stated that the "right to abortion is not deeply rooted in the nation's history and tradition."

"The underlying theory on which *Casey* rested — that the 14th Amendment's due process clause provides substantive, as well as

procedural, protection for 'liberty' — has long been controversial," he wrote.

"The court's decisions have held that the due process clause protects two categories of substantive rights — those rights guaranteed by the first eight Amendments to the Constitution and those rights deemed fundamental that are not mentioned anywhere in the Constitution. In deciding whether a right falls into either of these categories, the question is whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to this nation's 'scheme of ordered liberty.'"

Alito goes on to suggest that the *Roe* and *Casey* courts got caught up in the idea of "liberty" and misapplied it when it came to abortion.

"In interpreting what is meant by 'liberty,' the court must guard against the natural human tendency to confuse what the 14th Amendment protects with the court's own ardent views about the liberty that Americans should enjoy," he wrote. "For this reason, the court has been 'reluctant' to recognize rights that are not mentioned in the Constitution."

"Guided by the history and tradition that map the essential components of the nation's concept of ordered liberty, the court finds the 14th Amendment clearly does not protect the right to an abortion," he continued.

According to Alito, until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion.

"No state constitutional provision had recognized such a right. Until a few years before *Roe*, no federal or state court had recognized such a right. Nor had any scholarly treatise," he said.

"Indeed, abortion had long been a crime in every single state," Alito added. "At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages.

"American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time the 14th Amendment was adopted, three-quarters of the states had made abortion a crime at any stage of pregnancy. This consensus endured until the day *Roe* was decided.

"*Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis," he said.

Alito then took aim at supporters of *Roe* and *Casey*, who, he said, never seriously pressed the argument that the abortion right itself has deep roots.

Instead, he said, they "contend that the abortion right is an integral part of a broader entrenched right.

"*Roe* termed this a right to privacy, and *Casey* described it as the freedom to make 'intimate and personal choices' that are 'central to personal dignity and autonomy.' [But] ordered liberty sets limits and defines the boundary between competing interests.

"*Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed 'potential life.' But the people of the various states may evaluate those interests differently.

"The nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated," Alito said.

Accordingly, Alito states for the court majority, "the authority to regulate abortion is returned to the people and their elected representatives."

He was joined in the majority by Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett.

Chief Justice John Roberts wrote a concurring opinion that actually reads more like a dissent, admonishing the court for a lack of judicial restraint in not rendering a more narrow opinion.

"We granted certiorari to decide one question: 'Whether all pre-viability prohibitions on elective abortions are unconstitutional,'" Roberts wrote. "That question is directly implicated here: Mississippi's Gestational Age Act generally prohibits abortion after the 15th week of pregnancy — several weeks before a fetus is regarded as 'viable' outside the womb.

"In urging our review, Mississippi stated that its case was 'an ideal vehicle' to 'reconsider the bright-line viability rule,' and that a judgment in its favor would 'not require the court to overturn' *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*," he continued.

"Today, the court nonetheless rules for Mississippi by doing just that. I would take a more measured course," Roberts said. "I agree with the court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward stare decisis analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further — certainly not all the way to viability.

"Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered 'late' to discover a pregnancy. I see no sound basis for questioning the adequacy of that opportunity. But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more.

"Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception," Roberts said. "But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of stare decisis. The court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us."

In an unusual jointly penned dissent, Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan observe that the *Roe* and *Casey* courts "well understood the difficulty and divisiveness of the abortion issue."

"The court knew that Americans hold profoundly different views about the 'moral[ity]' of 'terminating a pregnancy, even in its earliest stage.' And the court recognized that 'the state has legitimate interests from the outset of the pregnancy in protecting' the 'life of the fetus that may become a child.' So the court struck a balance, as it often does when values and goals compete," they wrote.

"Today, the court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of," the dissenters continued. "A state can force her to bring a

pregnancy to term, even at the steepest personal and familial costs.

"An abortion restriction, the majority holds, is permissible whenever rational — the lowest level of scrutiny known to the law. And because, as the court has often stated, protecting fetal life is rational, states will feel free to enact all manner of restrictions," the justices said.

"Across a vast array of circumstances, a state will be able to impose its moral choice on a woman and coerce her to give birth to a child. … Enforcement of all these draconian restrictions will also be left largely to the states' devices. A state can of course impose criminal penalties on abortion providers, including lengthy prison sentences.

"But some states will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. And as Texas has recently shown, a state can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.

"Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens," the dissenters wrote. "Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. … But no longer. As of today, this court holds, a state can always force a woman to give birth, prohibiting even the earliest abortions."

The three justices also highlighted what they see as an underlying inequity of the decision, observing that, "Some women, especially women of means, will find ways around the state's assertion of power. Others — those without money or child care or the ability to take time off from work — will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives.

"The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all," they said.

Breyer, Sotomayor and Kagan also take issue with what they describe as the majority's "cavalier approach to overturning this court's precedents."

"Stare decisis is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change," they wrote.

"It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs.

"Women have relied on the availability of abortion both in structuring their relationships and in planning their lives," they continued. "The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments,

in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed.

"The court reverses course today for one reason and one reason only: because the composition of this court has changed. Stare decisis, this court has often said, 'contributes to the actual and perceived integrity of the judicial process' by ensuring that decisions are 'founded in the law rather than in the proclivities of individuals.' Today, the proclivities of individuals rule. The court departs from its obligation to faithfully and impartially apply the law.

"With sorrow — for this court, but more, for the many millions of American women who have today lost a fundamental constitutional protection — we dissent," they concluded.

This is a developing story.