

Minnesota Now (MPR) | Minnesota Now Top stories of 2022: Roe v. Wade's fall and its impact on Minnesota
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CATHY WURZER: One of the top stories of the year was the battle over abortion rights. On June 24, the Supreme Court overturned *Roe v. Wade*, the 1973 court case that legalized abortion nationwide. Hours after that June decision, I talked with University of Minnesota law professor Jill Hasday about the impacts of the ruling. We started that conversation by welcoming her to the show.

JILL HASDAY: Thank you for having me.

CATHY WURZER: The opinion released this morning is what? 200 pages. Can you explain it for us in simple terms what the argument in favor of overturning was?

JILL HASDAY: OK, so the first thing I want to say is the Minnesota Constitution protects the right to abortion, so abortion is still legal in Minnesota. The Supreme Court's decision was about is there a-- does the federal Constitution, the US Constitution place any limits on a state's ability to restrict abortion? And the bottom line is the Supreme Court says, no, the federal Constitution doesn't help protect abortion access. The states can do whatever they want.

The basic theory that the majority had was when we're deciding what liberty the Constitution protects, we have to look back in time to the moment when the 14th Amendment was ratified in 1868 and ask, was there a constitutionally protected right to abortion then? If the answer is no, then the answer is still no. I think there's at least two counterarguments to that argument. First, abortion actually is not criminalized as common law before quickening, which is when the pregnant person can first detect fetal movement, which can be as late as 25 weeks. So actually, historically, abortion is not a crime for most of the pregnancy.

The second counterargument, which the dissent says at length is, of course, who decides what the law is in 1868? Well, they had one thing in common, they were all men. So if that's the way you're going to reason about what the Constitution protects now, you're going to enshrine women's past inequality in the present.

CATHY WURZER: What did you think of the dissent from Justices Breyer, Kagan, and Sotomayor?

JILL HASDAY: I think they did a number of striking things. So first, usually a dissent is written by one justice and then the other sign it. All three of them signed it, which is a way of signaling both unity and the importance of the decision. And they really, in my view, addressed the central counterarguments.

So one thing the majority says is, look, we don't know what effect abortion is going to have on women. How could we know? So we'll just ignore that issue, which is striking because the court often says we actually know exactly how the world works. But here they say we can't tell what getting rid of constitutional protection for abortion rights will do to women, so we'll just not consider that.

The dissent leads with that. And it points out that eliminating federal constitutional protection for abortion means that in a state that is very anti-abortion, women can be forced to have-- forced to give birth, including with rape, including if the pregnancy is a result of incest, including if the child will only survive for a few days and have a painful life because of some fetal anomaly or something. The dissent points out, the majority's basic theory for overturning *Roe*, which is we look back to 1868 and we ask how would you have fared if you brought a suit then? If that's the question we're going to ask, there's no protections for right of access to birth control in 1868.

There's certainly no protection for same sex marriage. All those precedents are in play. And that's a point that the majority really wants to deny and that the dissent brings forward.

CATHY So those precedents could be in jeopardy. The testimony of now Justice Gorsuch in his confirmation hearing, Justice Kavanaugh, Justice Coney Barrett all said *Roe v. Wade* was the law of the land. They accepted the law of the land. Coney Barrett said *Roe v. Wade* clearly held that the Constitution protected a woman's right to terminate her pregnancy. There's now this decision. What do you make of what we heard in confirmation hearings versus what's actually happening?

JILL HASDAY: Well, not to get too cynical, but I think people go to confirmation hearings to be confirmed. And abortion rights are very popular, so it would-- I don't know maybe, but I think it possibly would have been hard for them to be confirmed if they said that they were going to overturn *Roe*. That's just a very unpopular decision.

CATHY So go ahead. What does the decision then mean for the Supreme Court? Will it shake the public's trust?
WURZER:

JILL HASDAY: OK, so I teach 14th Amendment. I teach constitutional law more generally. And one lesson I've always taught the students is there's only so much institutional capital the court has. And there's cases where they save it and there's cases where they spend it. Whatever you think of the opinion on the merits, it's just an enormous expenditure of institutional capital, the court overturning *Roe* in one fell swoop.

Chief Justice Roberts in his concurrence, he doesn't like *Roe* either, but he wants to do it gradually. So we'll see. It's just it is an enormous expenditure of institutional capital and it does make the court's legitimacy vulnerable because the court doesn't have an army to enforce its decisions.

It doesn't have the power of the purse. All it really has is public confidence. And if you lose that, it can be hard to regain it.

CATHY During the last presidential election, as you know, there was a lot of talk about creating a seat for a 10th justice on the bench. Do you think this decision will renew calls for that?
WURZER:

JILL HASDAY: Yes. Yes. In fact, one of the reasons people thought that the court is more cautious about spending its institutional capital is when the court went against FDR during the Great Depression, he responded in the 1930s with the so-called court-packing plan. Let's expand the court and not coincidentally give me enough justice so I'll have a majority to do what I want.

The court actually ended up switching and started upholding FDR's New Deal and the court-packing plan then went away. But many people thought, and the lesson you classically learned in law school is this teaches the court you don't want to be too far away from mainstream opinion. Because the price of it is there's all sorts of things Congress could do to discipline you.

So I think there are certainly many people who would like to expand the court. That said, I think it's about the votes. Right now there's not the votes to expand the Supreme Court, but we'll see.

CATHY I'm glad you brought up that legal abortion is protected under a 1995 Minnesota Supreme Court ruling in the case of *Doe v. Gomez*. And that ruling established a right to an abortion under the state constitution. And because it is in the state constitution, does it offer even stronger protections than those offered under federal law?
WURZER:

JILL HASDAY: The Minnesota Supreme Court is the ultimate arbiter of what the Minnesota Constitution means. The US Supreme Court is the ultimate arbiter of what the US Constitution means. So the Minnesota constitutional judgment that the right of privacy in the Minnesota Constitution protects some access to abortion, that's unchanged. That's unchanged now. And it's also not a judgment that can be changed by legislative action.

There was this 1995 decision *Doe v. Gomez* recognizing it. And there really hasn't been subsequent litigation because when *Roe* was still good law, there wasn't the same kind of pressure on state constitutional law. Now that the federal constitution no longer provides any protection, I would anticipate that there's going to be significantly more litigation in the state constitutional arena about exactly what is the boundaries of that right.

The other thing just related to that, I want to say, is another theme that's running through today's opinion-- so what are the implications? So one possibility is what are the implications for same sex marriage, for access to contraception? But another theme is, well, what are the implications for abortion regulation itself?

Overturing *Roe* has never been the ultimate goal of the anti-abortion movement. Their ultimate goal is actually what they call fetal personhood, meaning recognizing the idea that a fetus has constitutional rights. So even if a state wants to allow abortion, it can't.

And there are hints in the *Dobbs* opinion along those lines talking about the fetus as having a human right to life. Not quite saying it, but sort of on the edge of that. And that's going to be the new push.

CATHY All right, interesting conversation, Professor. Thank you so very much for your time.

WURZER:

JILL HASDAY: Thanks for having me.

CATHY Jill Hasday is a law professor at the University of Minnesota. I spoke with her on June 24 of this year, the day the

WURZER: Supreme Court overturned *Roe v. Wade*.