

**Minnesota Now (MPR) | What's the legal argument for reversing Roe and how will it Minnesota law?  
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INTERVIEWER: The high court heard arguments and then ruled on the Dobbs v Jackson Women's Health Organization case. And today's ruling on that case overturns the landmark Roe versus Wade abortion decision. And now that means Americans don't have a federally protected right to an abortion.

We have a special show about this here over the noon hour. Joining us next is University of Minnesota Law Professor Jill Hasday. She's the author of *Family Law Reimagined* and *Intimate Lies and the Law*. Welcome back, professor.

**JILL HASDAY:** Thank you for having me.

**INTERVIEWER:** The opinion released this morning is, what, 200 pages. So it's not simple. 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, does the federal Constitution, the US Constitution, place any limits on a states' 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 at common law before quickening, which is when the pregnant person first detects 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.

**INTERVIEWER:** 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 others 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 protections 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 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. And that is just not a story the majority wants to tell what the actual practical impact is, and the dissent foregrounds it.

Also, another dispute between the majority and the dissent is, well, what are the implications of this case for other cases? The majority a number of times says, don't worry. This doesn't put precedence protecting same sex marriage or right of access to birth control in play. Abortion is different because abortion is about fetal life.

But as 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.

**INTERVIEWER:** So those precedents could be in jeopardy.

**JILL HASDAY:** Who knows what the court will do. But if those opinions are going to be overturned, they will all be citing *Dobbs*, which is the case from today. Because the logic of *Dobbs* is the same logic you would use to overturn those opinions.

**INTERVIEWER:** 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 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.

**INTERVIEWER:** What does the decision, then, mean for the Supreme Court? Will it shake the public's trust?

**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 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 the purse. All it really has is public confidence. And if you lose that, it can be hard to regain it.

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

**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 now, 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.

**INTERVIEWER:** 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?

**JILL HASDAY:** Well, the Minnesota Constitution-- 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 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.

Similarly, Minnesota statutory law the legislature passes currently protects the right to abortion. I think we've already seen the anti-abortion movement as, obviously, jubilant, and, presumably, will be pushing for rolling that back. The other thing just related 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? Overturning *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. So right now, it's up to each state the federal Constitution doesn't help access to abortion. But the next push is, well, could the federal Constitution actually be used as a cudgel even against pro-choice states? And I think that's where the anti-abortion movement is going right now.

**INTERVIEWER:** All right. Interesting conversation, professor. Thank you so very much for your time.

**JILL HASDAY:** Thanks for having me.

**INTERVIEWER:** Jill Hasday is a law professor at the University of Minnesota.