

Faculty on Topic: Roe v. Wade

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[text] On June 24, 2022, the Supreme Court overturned Roe v. Wade, 5-4. Two of William & Mary's legal experts sat down to discuss the legal questions raised by this landmark decision.

Two people walk into a room in a library and sit opposite one another.

Allison Orr Larson: Hi Neal.

Neal E. Devins: Hey Alli.

Alli: So Neal, the Supreme Court handed down a huge decision overruling Roe versus Wade and we thought it might be useful for the two of us to sort of talk through some of the details and implications of that decision.

Neal: Yeah, so a huge decision, but can you explain why it's getting all the attention it's getting?

Alli: Yeah. I mean it is, it is a landmark decision so I think the most obvious reason is because the Court overturned Roe versus Wade and held squarely that the liberty guaranteed in the 14th Amendment does not cover a person's right to an abortion at all; and so that's a big change so that's part of why it's a landmark decision, leaving it up to the states.

But the other reason, and this is what's getting a lot of attention, is because that reasoning brings up a lot of other rights that have been recognized as part of that liberty. So for example, the right to marry, or the right to intimate association; and those rights have all been held by the Court to be part of the liberty guaranteed by the 14th Amendment.

Justice Alito says "we're only talking about abortion here, we're only talking about abortion here," but the reasoning that he uses defines that liberty as those rights deeply rooted in our history and tradition and as you well know, there's a lot of those rights that we enjoy today were not deeply held in our tradition in 1868 when the 14th Amendment was ratified. Do you think that's right?

Neal: Yeah, that is correct and there are a couple of things you said that I just want to get your take on.

First, the Court had two rulings. They had one ruling about whether Roe was right or wrong and a second ruling about stare decisis and whether Roe is our stare decisis.

Alli: Right, stare decisis being, let the decision stand. Sort of the principle that we don't make big waves and we adhere to prior decisions for the interest of stability. And stare decisis doesn't mean you always do so. I mean there's a lot of examples of history where precedents were overturned, Brown versus the Board overturned Plessy, for example. West Coast Hotel overturned Lochner, as you know.

But Roe, a lot of people thought going into this decision Roe might be off the tables in terms of being ripe for reconsideration based on its age and reliance. And the Supreme Court was not persuaded.

And it said something interesting, which is instead of, for example, what the Casey Court said, which is "this is really controversial and in an area that's really controversial, we can't make big changes or people are going to think we're political actors." The Dobbs Court said something quite different, they said, "this is really controversial so we have to be brave and do what's right and not care what the public thinks." That's a, that's a significant change, I thought.

Neal: Right, well with respect to stare decisis, it suggests that there's not much respect for stare decisis by a court that says "we must be brave, we must be bold, we must not be bound by the past," so to speak. So, it's the anti- stare decisis iteration of what stare decisis is.

Alli: That's right and it's possible it could be specific to Roe. Like this, this is a unique consideration for the abortion decision but it's also possible that that's a tipping the hand of what's to come and certainly justice Thomas thinks so.

Neal: Right, and the dissenters raised that flag as well. One of the things that was very striking about the dissent was the notion that there were three justices at the time of Casey 30 years ago who were appointed by Republican presidents committed to overturning Roe, who said that to rule or to overrule under political fire would make the Court illegitimate. And the dissent said unlike those three justices, we have three new justices appointed by a different Republican president who have a much more of a, rather than a cautious attitude, more from the dissent's perspective, a reckless attitude. And the dissent seems to sound a warning sign that what we're seeing in this case may be what we see in a whole range of cases, on a whole range of issues.

Do you think the dissent is going that far, are they sounding that strong an alarm?

Alli: Yes, I think they are. I don't know if they're correct or not but that is, they are definitely sounding that alarm.

Neal: Maybe we should say something about Justice Kavanaugh.

Alli: Let's talk about that.

Neal: Justice Kavanaugh suggests that the Court should get out of the business of abortion after this case. Should just have it returned to the states. What's he thinking?

Alli: I mean I think that's what he would like is to get out of the business of making these decisions and turn it over to the states but I don't think that's a reality that's going he's going to encounter, because there are going to be lots more decisions with legal implications like what happens crossing the border to a state that permits abortion, what about abortion pills? I mean that- he takes a position on this in his concurrence and says "those are going to be easy like

we're not, you know, we don't have to deal with those now." But I'm not sure his prediction is correct there.

Neal: Yes, I think we're clearly going to see states seek to prohibit, indeed some states are already prohibiting the abortion pill, and there's separate questions in that case as to why you can do with respect to regulating the abortion pill within the state borders in terms of placing limitations on physicians consulting women about the abortion pill versus whether you can actually prohibit an out-of-state provider from supplying the abortion pill.

Alli: Do you think there'll be a lot of variation among, in the state level, on the answers to those questions? Or do you think it'll eventually need a uniform answer from the U.S. Supreme Court?

Neal: Well, you know some of these questions will be decided by state law and perhaps there will be access to the pill under state law. But if the state forbids it through and through, and the federal government seeks to allow it, then there'll have to be a national standard. So I think ultimately we will get to a place where there will be a national standard. It may take a little bit of time, but I can't see how we're going to avoid that issue.

Alli: Okay Neal, so what's next? Now that there's no federal right to abortion, what happens in the states?

Neal: Well one thing that is beginning to happen now is that pro-choice advocates, recognizing that you can't go into federal court are going to make an effort at going into state courts and ask state courts to interpret state constitutions to provide for protections. That may work in a state like Michigan which is what is known as a purple state, but in the 13 states that have trigger bans where abortion either is now officially outlawed or will be outlawed in the next few weeks, none of those states, I think are likely to see state court interpretations finding for abortion rights because there, the judges stand for election, it's, they're all sort of conservative, Republican states where the party platform opposes abortion rights and public opinion in those states is not like it is in California and New York which strongly support abortion rights.

Public opinion in Mississippi and Idaho and Arkansas is generally against abortion rights. So it's hard to see how Supreme Court Justices on the state court are going to find abortion rights which is politically unpopular in their state, when they often have to stand for election. So I don't think there's going to be much action in the state supreme courts where there are trigger laws. There may be a couple of states, but remember the real question is whether it's the states that have the restrictive laws are willing to find a state constitutional right.

Alli: And here in Virginia, I don't think we'll see an imminent change, but it's possible we'll see a change in the next few years because Virginia has a divided government. So we have a Republican governor and we have the two houses in the legislature are split Republican/Democrat. But Virginia politics is volatile and changes a lot and so it's quite possible

that even if there are no additional restrictions on abortion today that that won't be true in a few years.

Neal: Yes and but when Virginia gets around to revisiting the issue, there will be a lot of water under the bridge, so to speak, from what happens in the next six months to a year and I think that will be very telling in terms of whether there's a political cost to pursuing limitations on abortion access or whether you can actually advance your political agenda and this question, notwithstanding its moral implications, is ultimately for political candidates, a political question. So I think that's going to unfold on its own.

Alli: Yeah, that makes sense to me. In terms of what's next for the U.S. Supreme Court, they've already taken some doozy cases for next year's term, including they're going to revisit race-based affirmative action and they're going to revisit the question of religious accommodations when you're a wedding vendor for a gay couple. So it seems to me at least that the stage is set for more big decisions and more stare decisis fights and more precedent overrulings.

Do you agree with me on that?

Neal: Yeah I think that's clear and I think in the affirmative action case, I think there's a general consensus that the Court is ready to strike down affirmative action.

And I think there's a general consensus on the religious exemption case that the Court is ready to grant a religious exemption, and along those lines, that's my guess as to how the Court's going to handle the same-sex marriage issue; that they're going to leave the right alone but they're going to allow those who oppose same-sex marriage to have the freedom to make a religious liberty claim that they don't have to participate in commercial endeavors like baking a cake, taking a photograph at a wedding, or any of those things, and I think that's going to be the compromise that the Court's going to work out on same-sex marriage. The other thing hinged on that, is that we're going to see abortion access being defined perhaps by whether we have a Republican or a Democratic administration.

If the pill is something that a Republican administration can take measures to prevent from going across state lines, whereas the democratic administration takes measures to facilitate, we can see national elections turn into referendums on abortion.

Alli: And that does bring up an important point that the dissent makes in this case which is- Justice Kavanaugh and his concurrence is very clear this is gonna, this is gonna be a state, state by state decision but that's not entirely inevitable because you could have federal legislation either protecting a right to an abortion or banning abortion completely. It wouldn't be a constitutional right so it would be subject to change in the future, but that's also possible if one party controlled both Congress and the White House.

Neal: And related to all this, we will see conversations about the filibuster, conversations about expanding the size of the Supreme Court. This is going to lead into a whole range of proposals

that I'm guessing are going to be advanced in Congress, some pro-life, some pro-choice. But there's going to be a lot of activity, particularly as this winds its way to the midterm elections, which will have a big impact, perhaps not on the Supreme Court and its composition, but on the Federal Courts of Appeals, which play a huge role in shaping the cases that come to the Supreme Court and a huge role in putting into action the Supreme Court doctrine. So if the Republicans gain control of the Senate in the midterm elections, that may have future ramifications for what's going to happen for the next several years.

There's going to be a lot of activity particularly as this winds its way to the midterm elections, which may be seen as a referendum on whether the Supreme Court got it right or got it wrong in this case.

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