

KHN's 'What the Health?'

Episode Title: Supreme Court Overturns 'Roe'

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Julie Rovner: Hello and welcome back to KHN's "What the Health?" I'm Julie Rovner, chief Washington correspondent at Kaiser Health News. And I'm joined by some of the best and smartest health reporters in Washington. We're taping this emergency podcast to discuss the Supreme Court's overturn of *Roe v. Wade* on Friday, June 24, at 2 p.m. But as always, news happens fast, and things might have changed by the time you hear this. So, here we go. Today we are joined via video conference by Joanne Kenen of the Johns Hopkins Bloomberg School of Public Health and Politico.

Joanne Kenen: Hello, everybody.

Rovner: My KHN colleague Sarah Varney.

Sarah Varney: Hi, Julie.

Rovner: And my Kaiser Family Foundation colleague from over the editorial firewall, Laurie Sobel, who's the associate director for women's health policy.

Laurie Sobel: Hi, Julie.

Rovner: So let's get right to it. The Supreme Court this morning formally overturned the two cases that have for nearly half a century guaranteed Americans a right to abortion. *Roe v. Wade*, decided in January of 1973, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, decided in June of 1992 — in fact, 30 years ago next Wednesday. Laurie, your lawyer here: What did the court actually do?

Sobel: So the court took away any federal protection for abortion, and they've sent it back to the states so states can decide whether to protect the right to abortion or to ban abortion, or do something in the middle.

Rovner: So they didn't make abortion illegal. They just said that it's no longer a constitutional right.

Sobel: That's correct.

Rovner: And ... what about the Mississippi law that was at the center of this case?

Sobel: So the Mississippi law that was at the center of this case is actually a 15-week ban. And so, in this ruling, they've upheld the Mississippi 15-week ban, which is before viability, the point at which states were allowed to ban abortion before, under *Roe* and *Casey*. Of course, Mississippi has a trigger law. So the 15-week ban will quickly go away and it will be a complete ban on abortion in Mississippi as well as many other states.

Rovner: Before we get into what happens in the states, what jumped out at any of you guys from the decisions as they were? Three, right? There was the majority and then there was a concurring decision and then there was the dissent by the liberals.

Kenen: Two concurring decisions, because [Justice Clarence] Thomas had one, too.

Rovner: Oh, that's right. So what jumped out at you? Joanne, why don't you start?

Kenen: It's what we expected. It was very, very similar to the version that was leaked to my colleagues at Politico. When was that — May? Early May, I think it was. I have not compared it word for word, but people who have say there's a little bit of language they softened, but the bottom line is they got rid of *Roe*. Like Laurie just said; it's gone. Poof, kaboom. Several states, in fact, more than several, a number of states have trigger laws, meaning as soon as *Roe* goes away, abortion rights goes away. In some places immediately. Like, I don't know; if you were in a clinic today in some of those states that have trigger laws, if you have an appointment for, like, now, are they sending you home? I don't know. Certainly they're going to send you home soon. And some of the states have a trigger law that's 30 days from now. So these states will have basically zero access to abortion other than if a woman's life is in danger, which is itself ... doctors don't agree on ...when do you cross the line from your life in danger versus your health in danger? We can come back to that later. So it's a sweeping ruling. It's a monumental ruling. People are arguing about whether it's 6-3 or 5-4 because technically [Chief Justice] John Roberts didn't endorse the entire thing, but he got rid of *Roe*. I mean, even if he had just done Mississippi, quote, “just Mississippi,” Mississippi would have been not allowed under *Roe*. It just didn't go as far. It had more ... it had 15 weeks instead of zero. It had more exceptions. But Mississippi was not compatible with *Roe* either. So we're at the end of *Roe*, you know — if there was a cemetery, it would be “1973 to 2022: A short and not very happy life.”

Rovner: Sarah, what jumped out at you?

Varney: One of the things that I really noticed was how much [Justice Samuel] Alito relied on the findings of the Mississippi legislature in making his decisions. Many of those findings were just factually incorrect. So, the Mississippi legislature had found that at five to six weeks gestational age, a, quote, “unborn human being's heart begins beating.” That's just incorrect. At five to six weeks, it's not a heart. These are electrical impulses. You would not hear anything if you put a stethoscope up to a pregnant woman who had a five- to six-week-old pregnancy. He goes on to talk about: at nine weeks, all the basic physiological functions are present. At 10 weeks, vital organs begin to function. You know, these things are just incorrect. But he really chose to essentially take the Mississippi state legislature as the medical experts in fetal development and really used their language — talked about how the use of surgical instruments to crush and tear the unborn child. I mean, this is just not at all how the medical field universally thinks about abortion, which is, of course, supported not just here in the United States, but by medical associations around the world.

Rovner: And, of course, I pointed out that Alito, who wrote the majority decision, also wrote the majority decision in *Hobby Lobby*, where he also made unsubstantiated medical claims about how contraception worked. So this isn't the first time we've seen Alito adopt what he deems scientific language that actually isn't. Laurie, in the concurrence from Justice Thomas, he suggested that this might lead to looking at other rights that were formerly guaranteed by the right to privacy. Right?

Sobel: Yes. I mean, he kind of gives a road map, actually, for anyone who wants to litigate this on how to further litigate the rights around contraception, gay marriage, on intimate relationships, and says those are all decided on similar grounds under the due process claims and that he doesn't think those are substantiated either. The dissent really goes after that and says that this is really a slippery slope and we should be wary of this. Alito's decision, whoever signed on to that one, says, Well, this is not at risk, and tries to just say it as a blanket statement. But as the dissent points out, well, either their reasoning is not what they're saying it is, or they're not being honest about how open future litigation around other privacy rights are up for grabs.

Kenen: Laurie's the lawyer and she knows more about the law. But I also agree with what she's saying: We don't know how this is going to play out politically or legally in the future. But I also do think it was significant that the other justices did not side with Thomas, that they let him be out there on his own. And

they explicitly put in language saying that they disagreed and [Justice Brett] Kavanaugh went even further. He had another P.S. statement as well. So, as of now, their stated intent is not a road map to get rid of all those other things. And we don't know what will happen. I mean, there are a lot of things that are happening in our country right now that we would not have thought. I mean, the Texas law caught us all by surprise. So while we don't know what will happen, we can't say that they have said "This is what's next," because they've actually tried to say "This is not what's next." So it's just going to see what happens in the states.

Rovner: So, Sarah, you've been out on the ground, I know, talking to people, to patients and providers in clinics. I mean, what *does* happen now? I have seen reports that as of today, abortions have stopped in many states — not nationwide, but in states with trigger laws, in some of the states that trigger laws. I know Arkansas has already stopped all abortions — or [at least] Planned Parenthood has stopped all abortions in Arkansas.

Varney: Correct. The governor of Missouri just two hours ago — it's been just a few hours since the decision came out — he has already signed a proclamation activating their Right to Life of the Unborn Child Act. So abortion in Missouri is illegal as of this moment. Similar in Alabama. The attorney general there just a few moments ago essentially certified the state law that had been on the books there. So this has happened very, very quickly. I was just in Illinois on a reporting trip, and obviously it was in Missouri where abortion is illegal and up until just yesterday was incredibly difficult to get. And then all the way up to Wisconsin, where they have this law from the 1800s that's on the books. And the Planned Parenthoods in Wisconsin, just across the border, had actually already stopped scheduling women for abortions. So this is coming very, very quickly. I was with the group called the Chicago Abortion Fund. This is one of the many abortion funds around the country that are essentially helping women travel thousands of miles in some cases, dealing with airfare, gas mileage, child care. You know, the vast majority of women who have abortions already have children. So they have to figure out how someone's going to care for their children. And what I also say is, having talked to providers in Illinois that are really bracing for an additional 20,000 patients in Illinois alone, is that this is not just women who are coming to these clinics, right? A lot of the people that come with them are their partners, their children, their mothers, their fathers even. So we talk about tens of millions of women losing this right overnight. But really, obviously, abortion is really a family issue. There are many, many men who, if these women are forced to continue with their pregnancies, will be forced to become fathers themselves. We have an extraordinary amount of money that's not collected in terms of child support already in the United States. So, this spills out into so many different areas of private life, family life. We'll be tracking this for months and years to come.

Rovner: Yeah. We are starting to hear from the Biden administration, which had been kind of closed-mouth about what they might do. Here's the president, in brief remarks earlier this afternoon.

President Joe Biden [on tape]: Now, with *Roe* gone, let's be very clear. The health and life of women in this nation are now at risk.

Rovner: Biden said he would use federal power to ensure that women can cross state lines to obtain abortions in states where it remains legal. That's something that some states have already started to try to ban. And the president suggested, which was emphasized in separate statements from Attorney General Merrick Garland and HHS [Health and Human Services] Secretary Xavier Becerra, that the states can't ban the abortion pill mifepristone either. Are those things that are going to end up before the Supreme Court, too, Laurie? I imagine that they won't go down without a fight.

Sobel: I think so, yeah. They will not go down without a fight. There's current litigation right now that was brought by one of the manufacturers of mifepristone, GenBioPro, in Mississippi. So it's actually *GenBioPro v. Dobbs*, because it's the other *Dobbs* case, and that case was filed before this case made it to the Supreme Court and it was challenging Mississippi's restrictions on mifepristone that were beyond what the FDA required at the time. And so two things have happened. First, the court has overturned *Roe*, and so how does that impact the availability of mifepristone? Is that just considered another abortion method or is it something that's regulated by the FDA that is outside of the purview of the states? And then the second thing is that the FDA has changed its rules around mifepristone and it's no longer required to be dispensed in person. So with those two moving pieces, I think it will be really interesting to see where this ends up in terms of litigation. It's really the FDA power versus the states' power to regulate abortion.

Rovner: Is there anything else that the Biden administration has suggested that it might do? I mean, we're going to talk about politics in a minute, because that's apparently the next thing that happens. But the president doesn't have that much authority to ... he can't say, as someone just said on TV, Oh, I'm going to make an executive order to overturn this court ruling. He would need a Congress to come in and step in and do this.

Kenen: He would need a Congress with 60 votes. And he does not have a Congress with 60 votes. He doesn't.

Rovner: Or to get rid of the filibuster.

Kenen: Yeah. And he doesn't have that.

Rovner: Congress with 60 votes in the Senate or no filibuster. So this decision, I mean, you know, we keep talking about abortion, but this decision is likely to reach beyond abortion, right? Sarah, you've been looking at this. There are an awful lot of other health issues that intersect with abortion that could be impacted by this.

Varney: Yeah, I just did a story actually recently about Plan B, which is the emergency contraception pill. It does actually work by delaying ovulation. But on the packaging, it says that it could work post-fertilization. One of the things I wrote about in that piece was this notion that if the Supreme Court does not defer to the medical standard of when a pregnancy begins, which is after the implantation, then states could, as Oklahoma did in their bill, in their law, that says abortion is banned after fertilization. So interestingly enough, the Oklahoma legislation actually called out Plan B and said, Oh, we don't mean to ban Plan B. But these things are inconsistent. So either you believe that life begins after fertilization and you will move to ban Plan B, certain types of birth control, IUDs. You know, this really does have far-reaching complications for access to birth control.

Rovner: And it has far-reaching implications for access to fertility treatment, too, right?

Varney: Correct. I mean, right now, you know, at most IVF centers, they'll oftentimes harvest, for lack of a better term, five different eggs. Now, this will mean that those infertility clinics will have to essentially work with one egg at a time, which is incredibly expensive, first of all, [and] difficult for the patient who's trying to become pregnant. And there's a very low chance of success with just one egg. So that's why they load in four or five eggs. So, yeah, this is going to have wide-reaching implications for reproduction, for contraception, and for women who have to continue with pregnancies that are incredibly dangerous.

Rovner: Yeah, I know there's been a lot of writing already about doctors who are concerned that even if abortions are allowed to, quote unquote, "protect the woman's life," what constitutes a life-threatening

pregnancy? What about women who have multiple fetuses? Sometimes that's from IVF. Sometimes it just happens naturally. And they do what are called reductions. And they take out one or two of the fetuses, which tend to protect the rest of the babies and the mother. Will *that* be allowed? I mean, there's all kinds of complications here that go well beyond what we think of as woman gets pregnant accidentally and wants to go terminate her pregnancy.

Sobel: Now back to what Sarah mentioned in the beginning about Alito's description of Mississippi and using their determinations as facts, if a state then says, well, we believe Plan B to be an abortifacient, do they get to decide that? Their belief — [does] the legislature's belief then become what happens? I mean, we saw this back in Hobby Lobby, that Hobby Lobby believed an IUD to be an abortifacient. And so, despite the fact that the FDA has always classified an IUD as a contraceptive and not an abortifacient, who gets to decide that?

Varney: And to your point, Julie, too, as we said, this goes way beyond the simple example. So in Alabama, for instance, there was a case a number of years ago where the ex-boyfriend of a woman who decided to get an abortion sued, went down and went to the probate court, got appointed the probate of the fetus' estate. I mean, actually got it. The case went to the Alabama State Supreme Court and the current chief justice of the Supreme Court wrote, I can't essentially rule in your favor, although I would like to, because of *Roe v. Wade*. So you could get ... this is not made-up stuff. I mean, very quickly we get into this territory of, you know, if my partner doesn't believe I should have an abortion and I go out of state and I get one, he can sue on behalf of the fetus' estate? ... I mean, sue for damages? It really spins out very, very quickly.

Rovner: And all these states — well, Texas in particular, but I think also Oklahoma — with these states that allow people to basically get bounties if they report people who have abortions, these are all going to be allowed to continue too, right?

Varney: Absolutely. I mean, I just was looking at Mary Elizabeth Coleman. She's a state representative in Missouri. She's the one that introduced legislation that would ban Missouri women from leaving the state for abortions. I mean, we think that this is ... we live in America, we can travel across state lines. She has every intention of doing this, every intention of bringing this legislation back to the Missouri state legislature. They are intent on stopping abortion not just in Missouri, but across the country. They are intent on stopping Missouri women from going across state lines. How does that, what does that look like? It is almost unfathomable. But you didn't think that the Texas bounty-hunting scheme was possible. And lo and behold, it was.

Kenen: I think we should also point out that, even though the ruling today sends abortion back to the states, we don't know ... the anti-abortion movement achieved a really, really important goal that they've worked for for 50 years, but they're not done. They want to stop abortion nationwide. They want a total ban, except when a clear-cut life exception is the one they agree with. But that definition is not always so clear-cut. But basically, they want personhood. They want a fertilized egg to have the same legal rights as a child that's born, as you and I do, that there's no difference between a fertilized egg and a post-uterine being. They want to take it away from the states. I mean, not every single person, but there is a movement out there that a few years ago, just a few years ago, a person who was considered a real fringe, and now they're a force. So we don't know what's going to happen right now. It is still Democratic Senate, a Democratic House, and a Democratic president. That's not likely to become national law.

Rovner: You're leading perfectly into my next question, which is the most immediate impact is going to be on the midterm elections. That's something that we've been looking at for a while. I want to go around the table and see what each of you thinks this is going to mean in terms of a backlash. I feel like I've said so

many times as a reporter, I've been covering this since 1987 that, you know, Oh, *Roe* could be struck down. And everybody always says, including editors, Oh, no, no, no, that's not going to happen. Well, now it's happened. So what does this mean for voters? Joanne, why don't you start?

Kenen: I think that the big issue in this country right now is inflation and gas prices and it's likely to still be the big issue in November. So if the Republicans are headed for a big retake of the House, if they're headed for a big wave election, this might make the wave a little smaller, but it probably wouldn't stop it. If it's a closer House Democratic-Republican margin in the House, I don't know if it'll prevent the Republicans from taking over, but it could make it a smaller majority. Most House races are not competitive. You know, we have very few swing districts. In some swing districts — I'm particularly thinking about Pennsylvania, where there's also a competitive Senate race and a competitive governor's race. And Pennsylvania is a true swing state. And one of the components of that swing is the suburban woman voter around Philadelphia. They tend to be more pro-abortion rights. I can see this making a difference in Pennsylvania and therefore possibly with the House margin, a couple of very tight Senate races. This could make the difference. ... Georgia is the one I'm thinking of. Again, Pennsylvania could be tight, I'm not sure yet. There are a few other tight Senate races. Younger voters may turn out that could make a difference in a couple of ... the Senate is more up for grabs. The House looks pretty Republican. There's going to be more intensity. The anti-abortion people [are] often very intense, single-issue voters, they turn out. Pro-abortion rights people weren't as intense because they didn't really think they were in danger. But where do they live? Are they already in Democratic seats? How many of them are in swing districts? How many of them are going to be the decisive single-issue vote? I think it'll change November. I don't think it'll radically change in November.

Rovner: Yeah, getting really geared up to vote is not going to be that much help if you're in New York.

Kenen: Right. Right. It's also [the] difference between tomorrow and November. And we live in such a 24/7 news cycle.

Varney: Well, just take Alabama, for example. They just had the primaries down there. The attorney general, Steve Marshall, who just won the primary, he actually, as a local prosecutor, was the architect behind Alabama's chemical endangerment law, which essentially expanded the definition of an environment to a womb and a child to a fetus when they were trying to basically go after parents who were bringing their children to meth labs. They essentially extended that to women who used drugs during their pregnancy. Many of those women are in prison now. They have been for many years. There's a woman who was convicted of fetal homicide, went to prison for 10 years. So he's now the attorney general of Alabama. And he has said in his campaigns for reelection that he will take this as far as he can. So, I think we tend to think about this as we try to be neutral by saying those who support abortion rights and those who are opposed to abortion rights. But truly the pro-life movement is not ... stopping abortion for them is really stopping the genocide. And then after that, there's a lot of steps that they want to take basically to secure this pro-life world that they envision. And we saw it in the Senate race in Alabama as well. I think the key for these states, though, like Alabama, is their statewide races, at least, they're almost exclusively white. So that does not reflect the population of Alabama. It also doesn't really reflect who really needs abortion in Alabama. Black women disproportionately need access to abortion care. But yet, when you look at gerrymandering in districts in Alabama, they are very much left out of the political system there. So it's unclear to me. I mean, I'm not a political reporter, thank God. But I ... it's hard for me to imagine how women in Alabama, for instance, even just respond to what's happening in their own state, let alone the U.S. Congress.

Rovner: And Laurie, obviously, it's going to have some impact on what happens to abortion in each state. Right?

Sobel: Right. In terms of the election, though, I mean, we just recently did a poll that showed that 40% of voters were more motivated to vote if the court overturned *Roe*. So I think it will have some impact. And 75% of those voters who are more motivated to vote are pro-choice. So I think it might have an impact, particularly, as Joanne said, in terms of swing states.

Kenen: We don't have too many swing states anymore. We're down to like two or three.

Sobel: I do think that the reality of the decision will hit in some states. I think that for many places, pushing anti-abortion rules has been a political strategy. And now that it will be a reality, it might play out politically differently. So now that abortion can actually be banned, it might wake up some voters, it might change the dynamics in some states in terms of what people wanted their legislatures to pass, knowing it couldn't be implemented versus what can be implemented now.

Rovner: Yeah, this is literally the dog that caught the car. We will see how this turns out. I think we will leave it there for today. Oh, did you want to add something, Sarah?

Varney: The other thing I was going to say is we haven't talked about medication abortion as much, but that's really a game changer here, right? So this is not going to be 1972. I mean, there will be women who try to self-manage abortions and who will die. But we have things like plancpills.org. We have Aid Access, an organization that's based out of Austria. They are within their rights to mail medication into the United States. Men order Viagra all the time from India and overseas, and no one stops those packages from coming into the U.S.

Rovner: But they're not supposed to. It's technically not legal because you need a prescription.

Varney: I guess what I'm saying is, when you go to clinics now around the country, a lot of what they're doing is medication abortion.

Kenen: Yeah, it's more than half the abortions now.

Varney: Either telehealth or ... and so my point is, I think, especially for young women who are really terrified as they're sitting here listening to this or watching what's happening, there is a big push now to educate young women and women in general around medication abortion and where and how to get pills. You know, I just interviewed a woman, actually just earlier this week, from Texas. She was — found out she was pregnant when she was five weeks into gestational age. She reached out to a friend in Georgia, who sent her some medication abortion pills. One of them, unfortunately, was broken. So then she had to wait another week for them to resend her the pills. So she was technically seven weeks when she took it. But this is happening times 10,000 across the country right now. Women are figuring out how are they going to get access to these pills and to surgical abortions, or procedural abortions, for sure. I think when women are in crisis, they just bear down and figure out what's next. And I think we're going to see a lot of that in the time to come.

Rovner: Well, this is day one of a whole new world. We will obviously be back to this every week for the weeks to come. But thank you for joining us for this special episode. As always, if you enjoy the podcast, you can subscribe wherever you get your podcasts. We'd appreciate it if you left us a review — that helps other people find us, too. Special thanks, as always, to our ace producer, Francis Ying. We will be back in your feed next week. Until then, be healthy.