

The Politics Classroom
Professor Floros
Episode 2022.17: SCOTUS Summer School I (Abortion)
Recorded: June 30, 2022

Professor Floros

June is a very busy month in the legal world, because it is when the us Supreme Court hands down the majority of its decisions. June 2022 has indeed been very busy with many consequential decisions that have reversed the longstanding precedent on abortion access, strengthen free exercise of religion claims, and determined that individuals have a right to carry firearms outside the home. They also decided several cases pertaining to the relationship between state, federal, and tribal law, as well as limiting the role of federal Courts in immigration proceedings. In the realm of criminal justice decisions included the clarification that Miranda warnings, you know, "the right to remain silent" are not constitutional rights, but rather a prophylactic against violating the constitutional right against self-incrimination, and that defendants are not guaranteed a right to counsel during the appeals process, only the original trial. So, if the attorney on appeal is incompetent, then the defendant is held responsible for any errors the incompetent attorney makes and can't use that incompetence as a reason for federal Courts to intervene.

Now I'm not a lawyer and I'm not sure if either what I just said is accurate or what some of what I just said actually means. So, luckily I'm joined by a political science professor who is also a licensed attorney. We can't cover all the momentous decisions of this term, but we'll try to cover the big ones. So, let's get started in The Politics Classroom, recorded on June 30, 2022.

Intro Music: Three Goddesses by Third Age

Professor Floros

You're listening to The Politics Classroom, a podcast of UIC Radio. I'm professor Kate Floros, a political scientist at the University of Illinois, Chicago. You can find me on Twitter and now on TikTok @DrFloros.

While I usually only release podcast episodes during the fall and spring semesters, the recent decisions of the US Supreme Court have prompted me to dust off my microphone to try to understand the implications of these rulings. To help me do that, I'm thrilled to welcome Professor Evan McKenzie back into The Classroom. Professor McKenzie is a professor of political science at UIC and associated faculty at the UIC School of Law. He received his PhD in political science from the University of Southern California and a JD from UCLA Law School. Professor McKenzie, welcome back to The Politics Classroom.

Professor McKenzie

Oh, thank you. I'm very happy to be here. Thanks for inviting me.

Professor Floros

So, the Supreme Court <sigh>

So much will change, is changing, has already changed as a function of some of these rulings. But before we dive into the specific cases, I'd like to review the makeup of the Supreme Court and recent changes in membership have led to many of the decisions that we'll talk about today. So, I'm gonna do a little, short, brief Supreme Court 101.

So, there are nine justices who sit on the Supreme Court. They are appointed by the president and confirmed in the Senate, and they hold lifetime appointments. They can retire or a vacancy can come about upon the death of a sitting justice. So, in January 2016, there were five justices who were considered conservative or right leaning, and four who were considered liberal on the Court. In February 2016, conservative justice Antonin Scalia died leaving a vacancy. Barack Obama was president at the time and nominated Merrick Garland, the current Attorney General to fill the vacancy. The reason that Merrick Garland is the current Attorney General and not a justice on the Supreme Court is because the Republican party controlled the US Senate and Senate Majority Leader Mitch McConnell said that since it was an election year, the seat should not be filled until the results of the November election were decided and refused to hold a vote on Garland's nomination. Remember that Scalia died in February before a November election.

Donald Trump won the November election and he nominated Neil Gorsuch who was confirmed by the Senate after Republicans deployed the "nuclear option" to allow them to break the Democratic filibuster with only 50 votes instead of 60. In 2018 Justice Anthony Kennedy, the pivotal swing vote on most 5-4 decisions, retired and Trump nominated Brett Kavanaugh to fill the vacancy. After a rancorous confirmation process that included sworn testimony about an alleged sexual assault committed by a Kavanaugh as a teenager, Kavanaugh was narrowly confirmed by the Senate.

While Kavanaugh was more conservative than the justice he replaced, the 5-4 conservative majority of the Court remained until September 2020 when liberal justice Ruth Bader Ginsburg died after a long cancer battle. Despite the fact that the 2020 election was less than five weeks, rather than the nine months away as was the case in 2016, and early voting had already started in many states, the Republican-controlled Senate moved hastily to confirm Trump's third Supreme Court nominee, Amy Coney Barrett tipping the ideological scale, 6-3 in favor of conservative justices.

Professor McKenzie

I think your summary is very accurate. I would only take issue with one word.

Professor Floros

Okay.

Professor McKenzie

And that is the word conservative.

Professor Floros

Yes, that was gonna be my next question. So, the last time you were in The Classroom, you argued that it is not accurate to label at least five of the six conservative justices as conservatives. Can you remind us why you think that conservative is in an incorrect way to categorize Trump's three nominees plus Clarence Thomas and Samuel Alito?

Professor McKenzie

Yes. Well, you can call Justice, Chief Justice Roberts "conservative."

Professor Floros

Okay.

Professor McKenzie

And, and that fits within accepted meanings that we've had for the term. And terms like conservative and liberal, they have meanings in a certain historic context. And we think of just people like Roberts as being conservative because they, they tend to resist a rapid change. They, they tend to say, let's, let's not make dramatic changes in the powers of government. Let's make, not make dramatic changes in expanding rights. And, and, and I think that is more or less what he is. He's, he's constrained. He believes in judicial restraint, or at least he appeared to until recently. Now I, I'm not even sure if that's true of him anymore, but you could have said it about him, but these other five - Thomas Alito Gorsuch, Kavanaugh, Barrett - they're not conservatives; they're reactionaries. They are, they are on the far right of American politics.

There's nothing conservative about them in these decisions that I, I hope we'll talk about today on abortion, on religion, on guns. And the one that came down this morning on the EPA, but mainly the ones on abortion, religion, and guns, they're just taking existing established law that has been on the books for decades that normally conservatives would preserve because we've gotten accustomed to living according to these laws. They're just taking them and shredding them. They are throwing established precedents into the waste basket. And they're not just, they're not just throwing out the rulings, they're throwing out the tests, the constitutional tests, that have been used for decades to make those decisions. These are really radical. Or I, I would say reactionary attempts to take us back to truthfully the 18th century.

Professor Floros

Yeah.

Professor McKenzie

And, and many of the precedents that Thomas and Alito and so forth cite, you know, chapter and verse are from the 1800s or even the 1700s.

Professor Floros
Yeah.

Professor McKenzie

And so I don't, that's not conservatism, this is not conservatism. This is the radical right in control of the US Supreme Court.

Professor Floros

In the gun case, I saw that they went back to the 1200s about carrying weapons for self-defense, which we'll talk about more in a minute, but I thought, wow, if we're going back to the 1200s...

Professor McKenzie

Yeah.

Professor Floros

...That's something. Okay. So, Justice Steven Breyer, who is one of the three liberal justices, announced his retirement, which takes effect today, June 30, probably shortly after we're done recording. And he is being replaced by president Biden's nominee, Judge Katanji Brown Jackson, who will be the first black woman to serve on the Supreme Court. How do you think she will compare with the two remaining liberal justices, Elena Kagan and Sonya Sotomayor?

Professor McKenzie

Well, I, I think in terms of judicial philosophy and their position, sort of on the, what you might call the ideological spectrum, their general view of rights and liberties, their general view of the powers of government, I think they'll be very similar. Uh, the three of them will be very similar. I think Kagan and Sotomayor certainly are very similar. And based on Jackson's previous rulings and her history, uh, I think I would expect much of the same. I think you'll see them three of them in the minority in a lot of very important decisions, in dissent, which is what we've seen, you know. This, all these recent decisions we've got, you know, a whole series of very important decisions in a row they're all 6-3 with the same six against the same three. And I, I think that's where Jackson will fit in with those three.

Professor Floros

In Justice Thomas' majority opinion in the case that expanded the constitutional protection to bear arms outside the home, Thomas said that future courts should uphold gun restrictions only if there is a tradition of such regulation in US history. And many of the decisions of this term seem to rely on this "deeply rooted in history" idea, which you referenced. It seems like basically any practice before this civil rights era is legitimate while everything after is not considered "deeply rooted." So, you know, before we talk about specifics, what should women, people of color, religious minorities, members of the LGBTQ+ community make of a Court that thinks only the decisions that were made by landed white Christian men are the legitimate basis for how the law should be interpreted today?

Professor McKenzie

Well, it's very distressing. Because it should, they should be very, I think, very alarmed for that reason, for the reason that the, this Court is just embracing this philosophy of originalism, which we can talk about more, but essentially that amounts to is saying that, uh, all these constitutional terms, the vague clauses and phrases that we find throughout the constitution that require interpretation, all of them have to be interpreted in light of what these judges say today was the original understanding of what those words meant. And just to give you a quick example of how that's just a nonstandard, basically it means these terms are gonna mean whatever five or six members of the Supreme Court say they mean. That's really what it amounts to because they cherry pick from history. And this is, what the worst example is Thomas in this Bruin decision, the gun case...

Professor Floros

Okay.

Professor McKenzie

...where the state of New York put forward numerous, numerous examples throughout American history of states and territories, in England, and all sorts of regulations that were very similar to the New York state regulation that simply said, if you want to conceal carry permit, carry a gun outside the home, you have to show proper cause which had been judicially interpreted to mean something more than just a generalized sense, "So I'd like to have a gun." You need some reason, you need some justification, it's called a "may issue" standard as opposed to a "shall issue" standard.

Professor Floros

Okay.

Professor McKenzie

And so the New York, in defending that said, well, here are many, many examples of comparable laws, you know, that were adopted in the West, even the state of Texas, all over the country, throughout the 1800s and going back to England and, uh, Thomas says, "Oh yeah." He just sets all this like, "Oh no, no, no, no. Those, those are no good. Uh, well that one, that one was a territory before it was a state. And then these are," he calls them "outliers. They're just outliers." Uh, he decides it's not really a tradition. It's not really enough for a tradition. Well, what's enough for a tradition?

Professor Floros

Right. Okay.

Professor McKenzie

They showed three states, multiple territories and so forth. He said, "Well, that's not enough." So this allegedly objective historical test is actually purely subjective in all these decisions with the, in the abortion case, Alito simply rejects all the history that contradicts his version of it. And he adds on an appendix in which he says, "Here are the places where abortion was a crime in the 1800s." I mean, like, what? If he doesn't,

if they don't like the history, they say it doesn't count. They cherry pick, they're not historians. They just cherry pick whatever they want.

Now the scariest part, that's the general approach that they took. And it's very, it's, it's basically highly, highly subjective. But I think the worst concern for the LGBTQ population in this country, looking down the road at what's what's coming...

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

...is in Thomas's concurring opinion...

Professor Floros

Yeah.

Professor McKenzie

...in the Dobbs case, which is the abortion case, because he names three specific, you know, precedents of the Court. He's he talks about Lawrence versus Texas, which is the, the one that the, well, the Supreme Court said, you can't just criminalize same sex, sex activities. It was the so-called sodomy law.

Professor Floros

Right.

Professor McKenzie

So that was struck, struck down a sodomy law. Well, Thomas says, "Oh no, that was wrongly decided. It should be perfectly okay for a state to criminalize quote sodomy." So we're talking about making sex act a crime.

Professor Floros

Yeah.

Professor McKenzie

The Obergefell versus Hodges. He singles that one out too. That's the same sex marriage case. He's saying that should be overruled. Which would mean any state can outlaw same sex marriage, which has been universally accepted in all 50 states since that case was decided. He says it should be reversed. And he even says, Griswold versus Connecticut. This is 1965...

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

...should be overturned. Well, that is the case that created the right to privacy. That is where they found the original right to privacy is saying that should be repealed in its

entirety. And what was the subject? That case, obtaining contraception by married couples.

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

He is saying that states should be able to ban contraception by married couples. That is what is coming now. Alito tries to distinguish that way saying, well, you know, abortion is different than some of these other privacy cases because there's this, this whole question of, uh, protecting potential life that isn't present and the others, et cetera, etcetera. But you know, Thomas lets the cat outta the bag completely. He says, this is where we're going.

Professor Floros

Isn't it strange that one of the decisions that was based on this right to privacy is Loving versus Virginia, which allowed interracial marriage, especially considering that he is in an interracial marriage. Is Loving versus Virginia somehow different than these other things that somehow privacy in that case is okay?

Professor McKenzie

Mm-hmm <affirmative> yeah. Right. Somehow he may, he must have neglected to put that in.

Professor Floros

Yeah.

Professor McKenzie

I'm sure he just forgot. Yeah. So, yeah, the one that, the one that affects his life doesn't get thrown in the basket with all the others.

Professor Floros

Nice.

Professor McKenzie

Yeah.

Professor Floros

Isn't his argument for why these other cases were wrongly decided is because the 14th amendment, which is one of the amendments that came together to form the right to privacy, it does not deal with substantive due process. The idea that the Due Process clause of the 14th amendment only protects that a procedure needs to be followed properly before the state can take away life, liberty, or property.

Professor McKenzie

Right.

Professor Floros

But doesn't provide any actual rights beyond proper procedure. Do I have that understanding, right?

Professor McKenzie

Yeah. Yeah. We have, yes. The constitutional doctrine about due, uh, the Due Process clause of the 14th amendment, which limits the activities of states. The Due Process clause says that states cannot deny any citizen life, liberty, or property without due process of law. And so the substantive due process argument has always come from answering the question, "well, wait a minute, what liberties?" I mean, we know what life means. We know what property means. So they can't deprive you of life or property without due process of law. But what liberties? And so historically, and this, again, this is, this is nothing new. This is, this, this is, this is 120 plus years old. The Supreme Court has been saying for over 120 years that the word liberty in the Due Process clause includes substantive liberties. So Due Process of law includes actual substantive liberties, not just how the government does things, but what liberties are, are protected by the 14th amendment...

Professor Floros

Okay.

Professor McKenzie

...against state infringement. And that is called substantive due process. Then the Supreme Court has held over and over and over again that all the first eight, basically almost all the first eight amendments to the Bill of Right, uh, to the Constitution. The first eight amendments of the Bill of Rights are included within the protection of the 14th amendment. What does that mean? It means the original Bill of Rights only limited the national government. It did not restrict the states at all, but the 14th amendment passed after the Civil War was expressly intended to limit the ways in which states infringed on the liberties of American citizens. So, you know, for a long time, the Supreme Court has said that no, the Due Process clause incorporates substantive provisions of the Bill of Rights and potentially other fundamental rights that are not enumerated in the first eight cuz the ninth amendment says, Hey, there are other amendment, there are other rights that we haven't mentioned right now. Alito, in his opinion, he, he says, "Well, you know, we have to be very reluctant to recognize rights that are not actually in the text," cuz you know, he's, he just, it would be terrified if people had rights or liberties that would upset his sense of propriety.

Professor Floros

Right, and at some landed white men 200 and some years ago, didn't think about.

Professor McKenzie

We're all supposed to live according to the notions of the 1800s, except for, by the way, if I could just throw, there's one exception.

Professor Floros
Okay.

Professor McKenzie

Okay. In the gun case, in, in the ah, Bruen case, Thomas says, "Well of course we know that, you know, the term 'arms' in the second amendment does not mean just the arms that were around then. That includes today's arms. So obviously it means the guns get today. But the limitations on the, on those rights, those, we have to stick with the ones that were in place in 1789, but for the guns, well that obviously includes today's guns." So you get to have today's guns limited by 1789 gun laws.

Professor Floros
Yeah.

Professor McKenzie

That's basically what he said. And this is what I mean when I'm saying like I have a hard time taking these people seriously anymore. And I have always throughout my teaching constitutional law, which I've been doing since 1990, I've always tried to be respectful of the decisions that I disagree with. I really, sincerely have. And these people with these three Trump appointees who have been put on there basically like a gui-, like guided missiles, you know, to just, that it is so obvious that this is nothing more than policy making. This is, this is exactly what they claim the Democrats always do.

Professor Floros
Mm-hmm <affirmative>

Professor McKenzie

This is pure and simple policy making. They are on there for a reason; they're on there to change the law. They're on there to block Congress. They're on there to, you know, to expand the rights of people with extreme religious beliefs. Uh, Christians basically. I mean, they're on there to do these things and they're going to do them and they're, they're not gonna admit that they're doing these things. And I just can't, there's a point where I just can't avoid calling this what it is. These yeah. These, what they're doing here is so flagrantly obvious that I just can't not point it out. And I, I, I feel uncomfortable doing it, but I don't see what, how I can speak honestly about it.

Professor Floros
Yeah.

Professor McKenzie

Without saying this is what's happening.

Professor Floros

Yeah. Okay. One more preliminary question. There seems to be an excessive reliance

on the dictionary. In many of these decisions, a lot of the decisions hinge on how the dictionary or the dictionary at the time the law was passed, defined things. Is this what is meant by "textualism"? That what the exact word means and nothing more? I, I just don't understand why? In political science, we do not let our students define terms using the dictionary as the basis for their arguments. How can the Supreme Court do that?

Professor McKenzie

Yeah. Well, thi, this comes from this notion of what's called textualism. Former Justice Scalia is the person who really tried to elaborate that into a kind of a theory. And so I think he was making an attempt to come up with a real theory with Scalia. I mean, I, I would definitely give him credit for having tried to be consistent throughout his career in this. He was trying to find a way to interpret the meanings of words, but he wanted to constrain the judges of today, who would say, well, now I've got a word here and I can use this to mean whatever I want it to mean. So he said, we'll go with the text. And we start trying to think about what the word meant at the time. So he used in one of his articles, he used the example of, of cruel and unusual punishment.

Professor Floros

Okay.

Professor McKenzie

So the eighth amendment prohibits cruel and unusual punishment. What do those words mean? What does "cruel" mean? What does "unusual" mean? And so he said one way to do this, which he rejected, would be to say, well, whatever they thought was cruel or unusual in 1789 would be what is cruel and unusual today. Well, and he says, but back in those days in 1789, they might have used thumb screws and the rack and all sorts of things, the things that, that would be unthinkable today. So he said that really is not the way to do it. This is why I'm saying, I give him some credit. Cuz he said that that really is not what we need to do. We need to think about the terms cruel and unusual and what they mean to us today. And so is the death penalty cruel and unusual punishment to us today?

And he tried to understand what, what that would mean. It would shock people. It be a you, well, you can look at things like opinion polling and so forth and try to answer that question. So he tried in his, what I always call kinda like "smart originalism," where he, he tried to have it make some sense. You know? Now other words don't mean just whatever we want them to mean. They're constrained in terms of the original understanding of what they meant, but that understanding is not confined to the way James Madison saw it.

Professor Floros

Okay.

Professor McKenzie

It would be what might have shocked them versus what might shock us. You see? So

he was transplanting words into the present. Now what these people are doing these five, cuz these people, Thomas and Alito, have always been just on the far, far right fringes of American politics. And we know, you know, Clarence Thomas' wife is actually, you know, was heavily involved in the insurrection that tried to overturn our, our system of government and stage a coup and Alito goes around making speeches to the Federalist Society, which he denounces liberals, you know, just openly. They don't even, these two don't even make an attempt to act like judges.

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

The three Trump appointees, they were sent there with basically objectives, you know, in mind. And they all said things in their confirmation hearings that appear they didn't even mean. Yeah. So, uh, now when they interpret words, they just find some way to justify it and pull out a dictionary. Uh, maybe they'll use the third definition or whatever. I mean, to me, they are casting about for some way to make it look like they're not doing what they are in fact doing, which is just imposing their own values on the country.

Professor Floros

Okay. Thank you.

With those preliminaries out of the way, let's take a quick break, and when we come back, we'll jump into some of the major cases of this term in more detail. I'm Professor Floros, and you're listening to The Politics Classroom, a podcast of UIC Radio.

Music Interlude: Offering by Cast of Characters

Professor Floros

Welcome back to The Politics Classroom. I'm Professor Floros and I'm joined in The Classroom by UIC political science professor, Evan McKenzie.

So, the Supreme Court decision that has gotten the most attention is Dobbs versus Jackson Women's Health Organization. In a 6-3 decision the majority declared that there is no constitutional right to terminate a pregnancy, which overturned the precedent established in the 1973 case, Roe versus Wade, and affirmed in many other decisions, including Planned Parenthood versus Casey. Decisions regarding access to abortion are now in the hands of states, which can ban abortion outright or place stricter restrictions on access than previously allowed. So, what reasoning did the majority use to determine that there is no constitutional right to abortion after 49 years of saying that there is a constitutional right?

Professor McKenzie

This decision was written by Justice Alito and it's really kind of scathing. I mean, he's,

he denounces the Roe versus Wade decision is just, you know, completely unjustifiable, terrible law, bad law. He compares it to Plessy versus Ferguson of the decision that, that established the doctrine of separate but equal being, you know, equal protection of the laws in 1896.

Professor Floros

Mm-hmm <affirmative>.

Professor McKenzie

And you know, he compares himself in this decision, as if he was writing Brown versus the Board of Education. You compare that's, I mean, it's just sort of laughable. So this is, what we have here is the first decision that I'm aware of, uh, in which the Supreme Court took away from American citizens, a a major constitutional right. Uh, I, I, I didn't even think of any, any others of that has even happened. Although they've been eroded, you know, like the rights of the accused have been seriously eroded, but to just strip away in its entirety, an entire constitutional right is unprecedented.

Well, so basically, he goes at it like this, he says Roe was wrongly decided, Planned Parenthood versus Casey, 1992, wrongly decided. Uh, now lemme just point something out, okay?

Professor Floros

Sure.

Professor McKenzie

Roe versus Wade, the decision itself was written by Harry Blackmun. Harry Blackmun was a Republican. He was appointed to the bench by Richard Nixon. This is the wrongly decided wacky decision that's so wrong.

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

Harry Blackmun was the general counsel for the Mayo Clinic. He knew a few things about medicine...

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

...which Alito does not know.

Professor Floros

Right.

Professor McKenzie

Okay. Planned Parenthood versus Casey. The majority opinion was written by Anthony Kennedy, Sandra Day O'Connor and David Souter, all three of them Republicans.

Professor Floros

Hmm!?

Professor McKenzie

Appointed two. Yeah. I mean, we're talking about Reagan, uh, appointees and Bush 41 appointees. All this law that is being rejected, right? It was all written by Republicans. So basically he says, he goes as follows.

He says that there are two possible grounds for finding a right to abortion. One, which was in Roe versus Wade in '73, that is the right to privacy

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

And we can talk about where that comes from, but it's basically derived from the ninth amendment and other amendments. It's a right to privacy that encompasses all these things. We, we've talked, you know, contraception, the same sex marriage is partly grounded in that, and protection against these sodomy laws that criminalize people's sexual conduct, et cetera. So that's, that's where Roe came from, the right to privacy. But when, ah, Planned Parenthood versus Casey came along in 1992, they refounded the right to abortion in the 14th amendment Due Process clause itself. They said it's a, it's a fundamental right that is part of the 14th amendment. And so there were two separate foundations in the law for the right to obtain an abortion.

And then he proceeds to strike down both of them.

Professor Floros

Okay.

Professor McKenzie

And says, well, it's not part of any right to privacy. It's different. And that's where he distinguishes these other things like contraception. And he says, "Well, we're, I'm not really talking about that because in this case," he says, "you've got this issue of critical moral question," as he calls it, "involving the potential life, uh, of the unborn human being," as the Mississippi law calls it. So he says, "This is different," but he says, "this, there, there's, no, this is not covered by any right to privacy." And he throws that all out. Then, he turns to Planned Parenthood versus Casey, which is the more recent precedent from '92. And he says, "Here, this is goes too far. Uh, whatever rights you might have, whatever substantive due process rights you might have, abortion is definitely not one of them."

There's no right to abortion either under the 14th amendment Due Process clause or under a right to privacy founded in the ninth amendment and portions of other amendments. It's just simply not there. It's never been there. This is where he uses history. He goes back and, and he lists in an appendix, all the different state laws from the 1800s...

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

...that in his view, criminalized abortion. And again, in opposing the Mississippi law, the, uh, attorneys basically who are in favor of abortion rights to, to simplify it, cite all kinds of, of historical precedent, whereby abortions were allowed. They were not criminalized. These, this jurisdiction or that jurisdiction. And again, he just disregards it.

Professor Floros

Mm.

Professor McKenzie

This, this is what they do with their historical analysis. If you put forward examples that support the, the opposite position, uh, Alito, Thomas, et cetera, they just say, well, that, that's, that's just, uh, that's not enough. That doesn't establish a tradition and they, they just argue it away. And so you end up with the, all these little, you know, nuanced arguments, but the bigger issue here is really he's saying that today's right to abortion is invalid because it's not within the understanding of the 14th amendment or the previous amendments that were in place in previous centuries.

Professor Floros

So wait! Because the crafters of the 14th amendment couldn't possibly have been thinking that it applied to abortion, it doesn't apply to abortion, right?

Professor McKenzie

Right. Exactly.

Professor Floros

<laugh> But the exact same argument could be made, that I am sure that the crafters of the 14th amendment would not have been in favor of allowing same sex, sexual contact either, right?

Professor McKenzie

Oh, absolutely. Absolutely. And that's why no, that's the point.

Professor Floros

Yeah.

Professor McKenzie

That, despite the fact that he says, well, we're only talking about abortion here. Yeah, in this case, but Thomas, you know, lets the cat outta the bag...

Professor Floros

Right.

Professor McKenzie

...cause he says it correctly. He's absolutely right. Every word practically of Alito's opinion could just as easily be used to strike down, uh, the right of married people to get contraception, the same sex marriage or sodomy laws. It could, you could just use the same logic. It's all the same thing. All he's gonna do is say, well, it wasn't contemplated at the time they wrote it. And here, here's an interesting thing. It has been pointed out that when the 14th amendment was written, when it was adopted right after the Civil War, it was very much in the minds of the people who ratified the 14th amendment. That for example, women who had been enslaved were forced to bear children against their will.

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

They had no bodily autonomy. So for him to say that the 14th amendment does not encompass these privacy rights and bodily autonomy, personal choices and reproductive choice. Excuse me!

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

It most certainly did! I mean, it was very much in the minds of people who wrote the 14th amendment. They were protecting women and, and men for that matter against having their bodily autonomy invaded and their privacy invaded because that is exactly what's slavery included.

Professor Floros

Yeah.

Professor McKenzie

So his argument is historically inaccurate and this has been pointed out at some length, but you know, again, it doesn't make any difference because if they don't wanna hear, you know, the historical argument. They just say it doesn't count. And that's that.

Professor Floros

Oh, so you, you mentioned the potential life of the fetus or the human being is Mississippi law states. Is there some notion that the fetus has 14th amendment rights

to life too? Is that part of this or that's not articulated in this decision?

Professor McKenzie

No, no. That's not articulated in this decision.

Professor Floros

Okay.

Professor McKenzie

The state interest that is being protected here by these laws, these anti-abortion laws is the, uh, state's interest in the protection of what Mississippi calls, "unborn human life" and what Planned Parenthood versus Casey and Roe versus Wade called "potential life." So they, they avoided the question of where does life begin...

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

...by calling it "potential life." And they said, it's okay for states, states have a legitimate interest in the protection of potential life. And so now essentially they're saying that is a legitimate interest. Now that the current law now is that is still a legitimate interest and there's no other interest because the other interest in Casey and in Roe was the woman's constitutional right to her own autonomy, her own reproductive choice. That right no longer exists; it is gone. There is only one interest involved here. It is the state's; there is no countervailing interest. And so the test that is now gonna be used to judge abortion laws is what's called the rational basis test. Is the law rationally related to any legitimate government objective? It is the lowest test of constitutionality that we have. And virtually every law passes that test. That's the test that we use for deciding whether a parking law is constitutional or not.

Professor Floros

If, except government interests in protecting actual life from gun violence.

Professor McKenzie

<laugh> yes.

Professor Floros

Right. I mean.

Professor McKenzie

Right.

Professor Floros

I thought if the state had an interest, then they could regulate constitutional rights. So how is it that they can do that in this case, but state interest doesn't matter in limiting the rights of people to carry guns outside their home, in the street, et cetera?

Professor McKenzie

Because the way they treat the gun laws is completely different. They give them a very special treatment in which all this means-end conversation has now been thrown completely out entirely.

Professor Floros

So, hypocrisy is A-okay, different standards for different constitutionally protected rights is legitimate.

Professor McKenzie

As of now, there is no federal constitutional right to obtain an abortion. There is nothing to balance it with because it's gone; it's gone. There is no federal right to obtain abortion anymore. It has been erased entirely. There's nothing to balance it against. There is only a state interest in protecting what they have previously called a "potential life." But which I think in this Court, they'll probably just accept. They just seem to accept the "unborn human life" version, but that is a legitimate state interest. And so states can pass any law they want to advance that interest as long as it bears some rational relation to protecting fetal life. Which means, and as the dissent says, they can ban abortion from the moment of fertilization in all cases. They can ban abortion with no exception for the life or health of the mother. They can ban abortion in the case of ec-, ectopic pregnancies, rape, incest. They, they can do whatever they want. Now there's another interest here, which was recognized in Roe, which was the state's interest in protecting the health and life of the mother. And so the only thing that comes to me is that if laws are passed where states like, say Mississippi or Missouri, say that you can't obtain an abortion at all, can that be challenged on the grounds that they have trampled all over a woman's interest in protecting her own life, her own interest? The problem is this is an interest balancing question...

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

...that they might just leave to state legislatures and say, "Look, we told you that there's no federal right to an abortion in any case." And it's gone, you know. I'm sure there will be attempts by Planned Parenthood, et cetera, to safeguard the health and life of mothers. But I really feel that at this point, it's gonna be a tremendous uphill battle. This Court is not gonna recognize, I think, any part of a right to abortion at all.

Professor Floros

So the state's interest in protecting a potential life weighs more heavily than a woman's interest in remaining alive.

Professor McKenzie

Yeah. I think the way I'm reading this...

Professor Floros
Uhhuh <affirmative>

Professor McKenzie
...and this is the way this is the way the dissent reads it. If a state balances it off that way, if the state of Mississippi, for example says, "Yeah, well, we know that sometimes mother's health and life could be at risk, but we choose, in all cases, to protect the life of the fetus." If that is what they choose to do, I think there's no constitutional barrier to them doing that.

Professor Floros
So the 14th amendment protection of the due process of life, liberty, and property, that can't be taken away would not come into play there. If it's the mother's life, isn't that protected by the 14th amendment that you can't have laws that deny a woman her life?

Professor McKenzie
Mm-hmm <affirmative>. Yeah. If you look at the dis-, at the dissent, I think this is what they are concerned about. As things stand right now, states can completely ban abortion, even if it is viewed as necessary to save the life of the mother. I think that is the concern. And you know, many state legislators have had this question put to them and they have said publicly, "Well, you know, in my view, the fetal life is the only consideration that we're gonna take into account." And if there's gonna be a carve out for abortions that are necessary to protect the life or health of the mother, they're gonna have to be found someplace other than in a constitutional right to abortion, because that is gone. Yeah.

Professor Floros
But it could be found in the protection of life can't be infringed without due process of the law?

Professor McKenzie
It occurs to me, you could do something like that. It would make sense, yeah, to try that.

Professor Floros
It seems like a lot of hoops to jump through.

So, let's take another break. I'm Professor Floros, and you're listening to The Politics Classroom, a podcast of UIC Radio.

Music Interlude: Offering by Cast of Characters

Professor Floros
Welcome back to The Politics Classroom, a podcast of UIC Radio. I'm Professor Floros,

and I'm speaking with UIC political science professor and attorney Evan McKenzie.

So in a concurring opinion, Kavanaugh said, you know, this doesn't threaten or cast doubt on these other rights that we've been talking about. And he also said that other questions that may arise are also not in doubt, like whether or not states can prevent their residents from crossing state boundaries to get an abortion or prosecute those who received an abortion before this Dobbs decision, that the Dobbs decision does not allow either of those things, either to prosecute residents whose cross state boundaries to get an abortion or to prosecute those who have received an abortion before Dobbs. We're already seeing states trying to come up with ways to criminalize leaving the state to get an abortion

Professor McKenzie

Mm-hmm <affirmative> Right.

Professor Floros

Does that, what, what do you think about challenges to those kinds of laws given this Court?

Professor McKenzie

Yes. Well, now this is going to be a complicated area because there's, uh, concept of privileges and immunities. This is also part of the 14th amendment, but there's a privileges and immunities clause where states can't infringe on the privileges or immunities of American citizens. Now this is, this has had very limited utility since the 1800s on the Supreme Court narrowed it in the thing called the Slaughterhouse Cases. But without getting too technical, we do have a right of movement. That is the Supreme Court has held it. We have a right to go between states, you know, to move back and forth. And if states try to criminalize an abortion that happens in another state or leaving the state to obtain an abortion, this is going to bring other legal doctrines into play and also could involve statutes because it's conceivable that there could be either executive orders or maybe even laws passed that could prohibit states from doing that.

And then we're gonna get into a federalism questions, you know, the powers of the federal government versus the states, the greater concern. I don't think states are gonna be able to do that. I mean, I don't think that that states will constitutionally be able to prohibit people from leaving the state to obtain an abortion elsewhere. I do. I, I do not believe they can do that because it would be happening outside the jurisdiction. But there's another concern, which is Congress passing a, basically a national abortion ban. And, you know, the, the Republican party is trying desperately to downplay this...

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

...because they're terrified that, particularly young people, will wake up and realize that

if Republicans take over both houses of Congress and then the presidency, in fact, even if they just take over both houses of Congress, they're gonna pass a national abortion ban.

Professor Floros
Yeah.

Professor McKenzie
There is very likely that they will

Professor Floros
And blow up the filibuster in the Senate to do it?

Professor McKenzie
Oh, absolutely. I think they will.

Professor Floros
Okay.

Professor McKenzie
I mean, it's certainly very likely that they will. I, I, I think that that's gonna happen as soon as <laugh>, as soon as, uh, Republicans get control of both houses of Congress and the presidency, they're gonna blow up the filibuster.

Professor Floros
Yeah.

Professor McKenzie
So, you know, you, we could very easily be just a couple of years away, you know, two years, two and a half years away from a national ban on abortion. If they take Congress, the only thing standing in their way for the next two years would be Joe Biden. And then, uh, you know, if they can, if they win the presidency and we have president DeSantis or whatever, I think very, yeah, absolutely. They'll, there'll be national ban. And then that does away with that whole movement between state lines they'll, can one state criminalize? It won't matter. It'll be, they'll make the abortions illegal nationwide,

Professor Floros
But wouldn't that be a federalism thing? I mean, if the Supreme Court said this should be decided by the states, will they then say, oh, but now there's a federal law, I guess that's okay? The states don't get to decide anymore?

Professor McKenzie
Well, they do. A state can have any law they want, they could still have any law. No, it's not a federalism problem because, uh, the state, the state of Illinois can say, well, we're not gonna criminalize abortion. And the federal government would say, fine don't, but

it's gonna be federal crime. You don't have to prosecute it if you don't want to. In other words,

Professor Floros
Oh.

Professor McKenzie
you know, maybe Iowa makes it a crime to get an abortion, but Illinois, doesn't. Fine. That's, that's fine. This states, they're afraid to not make it a crime under state law, but we could still have a federal statute banning abortions.

Professor Floros
But that wouldn't be enforced in Illinois.

Professor McKenzie
Yes. It certainly would. It would enforced everywhere in the entire United States. Like all federal laws are.

Professor Floros
So, who would arrest them? Like the FBI?

Professor McKenzie
The FBI. Yeah.

Professor Floros
Let's not borrow trouble. Hopefully in two years we won't have to have this conversation, but okay.

Professor McKenzie
Well, I just say this because, you know, uh, often, particularly young people, like to sit out these midterm elections.

Professor Floros
Right.

Professor McKenzie
You know, and, and they don't, and the state, state elections,

Professor Floros
Mm-hmm, <affirmative>

Professor McKenzie
state legisla-. Why should I vote in the state election? Why should I do this? Why should I do that? And what has happened here is that abortion laws are going to be made by state legislators.

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

That's the go-, the way it is. And they're gonna be able to make basically any law they want. So in at least 22 states, within a few days, it's already, I think, 14 now and another eight at the end of the, another month, 22 states, it's gonna be illegal. And that's because of state legislatures. And, you know, and so with young people, we always try to get them to understand this over our students.

And it's very, very hard. I mean, I can remember in the 2016 election, having long conversations with students who said, you know, I don't like Hillary Clinton. I, I don't like her. I'm gonna feel good when I cast my vote. So I'm gonna vote for Jill Stein. And I'd say, do you understand what's gonna happen? If Hillary Clinton loses and Donald Trump wins, you know, understand what's gonna happen to the Supreme Court? And they said, I don't care about the Supreme Court.

Professor Floros

<laugh>

Professor McKenzie

So, and I, I mean, I had those conversations with people.

Professor Floros

Yeah, yeah.

Professor McKenzie

Including, including young women whose lives stand to be affected. If they, if live in Texas or Georgia or one of these other states, their lives are directly affected by that

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

And so I wonder if they, you know, if they have reflected back on this and if they now understand why it makes a difference that it's a Democrat versus a Republican, in terms of the composition of the Courts.

Professor Floros

Couple more things about abortion before we move on. One, Chief Justice Roberts concurred with the decision in Dobbs, but not the opinion, because he just wanted to uphold Mississippi's 15 week abortion ban, which was, which was what the Dobbs case was all about, rather than throw out the constitutionally protected right to abortion. He couldn't get anybody else to go along with that idea. Does the fact that he even articulated this position matter at all?

Professor McKenzie

No.

Professor Floros

Okay. <laugh>

Professor McKenzie

No, it doesn't because now it could have, if he had been the fifth vote, then it would matter because then you'd have, uh, a majority opinion. That would be an outcome. The, the Mississippi statute is upheld, but you wouldn't know why. You'd have four votes on one ground and the fifth vote from a different, but there are five <unintelligible> majority of five, okay? To overturn Rowe. So his sixth vote doesn't make any difference. It's just his, his viewpoint on the matter is different than theirs. And, uh, that's why I say, you know, you can make an argument. He's a, he's a bit closer to what we used to call a conservative, cuz he's saying, well, as you said earlier, this is a precedent. We have organized our lives around the existence of a right to have an abortion since 1973.

Professor Floros

Yeah.

Professor McKenzie

This is so shocking, you know? And he at, because he still has some conservative sentiments, even though I'm sure, you know, he thinks Roe is wrong. He respects the precedent. And he said that in his confirmation hearings and he was true to his word, he did respect the precedent.

Professor Floros

Yeah.

Professor McKenzie

But the other, uh, five justices now, you know, the three that we've really focused on are the Trump appointees and they just flat out misrepresented their intentions in their confirmation hearings because, you know, we've all seen the quotations of them saying, "Oh no, it's a, you know, I respect the law. It's the law of the land. And I respect the law of the land. It's an established precedent. It's a, you know, this, that," and, and, and they just, you know, immediately just, you know, went contrary to their own stated intentions. Apparently, that's the way it looks.

Professor Floros

Okay. So usually in a dissenting opinion, the last line is, "I respectfully dissent," or, "we respectfully dissent." In the Dobbs decision, the three dissenting justices just dissented. They did not respectfully dissent. They just dissented. So, how much bad blood has this decision caused among the justices? And does that even matter?

Professor McKenzie

This is the most acrimonious Court we I've seen in my lifetime. And, you know, I was around in college during the years of the Warren Court, you know, when there was a lot of contention going on, but this is personally nasty. And it isn't just this one, it comes up in these other recent opinions as well, where you see just evidence of personal nastiness between them like real bitter hard feelings about it. And I can't imagine what it is like for Roberts to preside over their, uh, <laugh> conferences.

Professor Floros

Yeah.

Professor McKenzie

Scalia, you know, who was very conservative and so forth, was the closest of friends with Ruth Bader Ginsburg. They were, and they both said it.

Professor Floros

Yeah

Professor McKenzie

They were ideological opposites and they absolutely loved each other. They went on vacation together.

Professor Floros

<laugh>

Professor McKenzie

They wrote an elephant together. There have all these stories. They delighted each other's company, even though they disagreed on things.

And that's the way things are supposed to be. You know, it's the way it is with lawyers. Generally. You know, when I was practicing law, I had bitter courtroom battles with, with people. Like, when I was a prosecutor and a bitter controversy with public defenders and literally joke and laugh with them afterward and go, you know, have lunch together or something after the case was over and you could still be colleagues. And that seems really to have just gone out the window with this Court. There's a lack of respect and a lack of comity and just sort of personal nastiness coming through that is really disturbing.

Professor Floros

Hmm. Okay. Last abortion question. So there was a lot of controversy in late summer last year after Texas passed SB 8, that was the six week ban on abortion and the vigilante enforcement of that law. The Supreme Court allowed that law to go into effect. And we talked about this the last time you were in The Classroom about why this was different than what they normally do in cases like this. But now that Roe and Casey have been overturned, the six week ban is perfectly fine. Constitutionally, is the vigilante part of that law under scrutiny anywhere, or where, or is that continue to be

the legal remedy to enforce the six week ban in Texas?

Professor McKenzie

Well, it's certainly still enforcing. There's no reason they can't do it, but remember why they did that.

Professor Floros

Right. <laugh> So they couldn't challenge it in Court.

Professor McKenzie

Yeah. They did it that way because Roe versus Wade is still on books and there, and there's limits to what the state can do.

Professor Floros

Right.

Professor McKenzie

Because Roe versus Wade prohibits the government from doing certain things. So they basically privatized it and they tried to privatize the enforcement in a way that was nothing the courts could do about it. And so that's still there, but now Texas and all these states are just gonna, we're talking about flat out...

Professor Floros

Yeah.

Professor McKenzie

...criminalizing abortion. They don't need to worry about vigilantes and bounty hunters. They're just gonna make it a crime.

Professor Floros

Yeah.

Professor McKenzie

You know, they're just gonna make it a crime. And, and, and the question then is like, how do you enforce it? How will they determine whether a woman has, you know, had an abortion or not, uh, there's all this concern about online pregnancy or ah, period trackers, right?

This sort of thing, like how intrusive is this going to get? And, you know, we don't know, but there aren't any real limits at this point to what they can do. So, you know, we'll see, uh, down the road will things like the life of the mother, et cetera, what will get challenged? What enforcement procedures will come about? What about HIPAA violations and on and on and on

Professor Floros

Mm-hmm <affirmative>

Professor McKenzie

Uh, what will hospital practices look like? Yeah, because if doctors are gonna be prosecuted and hospitals are worried about prosecution and losing their licenses, et cetera, um, what's gonna happen? What's gonna happen when women have to have abortions because they have ectopic pregnancies or some other medical condition? And the hospital says, "Well, you know, we think we need to wait until it's actually a life-threatening emergency."

Professor Floros

Yeah. That the woman crashes.

Professor McKenzie

Yes, exactly. This is the problem with judicial decisions. Generally, this is really a problem when they make, uh, a decision that has far reaching ramifications. Now, when they expanded liberties, you know, when they, uh, Miranda, when they created the, the Miranda rule, there are all these people said, "Oh, this is gonna be a disaster. The police won't be able to get any more confessions." And we know that all went right out the window. I mean, the police adapted to Miranda and they've been getting confessions ever since. And it is never a problem in getting confessions. That turned out not to be true, but what we're talking about here.

Professor Floros

Yeah.

Professor McKenzie

These really do seem to be realistic concerns for the ability of women to just to protect their health.

Professor Floros

Yeah. Okay. I guess I was, I was more curious about the vigilante enforcement, so maybe we'll just have to wait until another vigilante enforcement mechanism is put into some other law to see if you can privatize enforcement of law. So, hopefully we don't have to deal with that in the future, but we'll come back and talk about it when we do.

There's so much more to talk about with Professor McKenzie. Unfortunately we've run out of time for this episode, but join me next week in The Politics Classroom when Professor McKenzie is back to talk about other consequential Supreme Court decisions, including those involving religion, guns, and federal regulation. I'm Professor Floros. Find me on Twitter and TikTok @DrFloros. You can also check out further reading at thepoliticsclassroom.org. Until next week, that's all I've got. Class dismissed!

Outro Music: Three Goddesses by Third Age