THE THIRD BRANCH:

The Supreme Court of the United States (SCOTUS) Week 2

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Fall 2022, Jefferson County Library

Abortion: Dobbs v. Jackson

***Roe v. Wade*: a 7-2 decision in 1973 written by J. Harry Blackmun**

- The **Due Process Clause of the Fourteenth Amendment** protects, against state action, the right to privacy, and a woman's right to choose to have an abortion falls within that right to privacy. ***A state law that broadly prohibits abortion without respect to the stage of pregnancy or other interests violates that right.*** Although the state has legitimate interests in protecting the health of pregnant women and the "potentiality of human life," the relative weight of each of these interests varies over the course of pregnancy, and the law must account for this variability.
- **14th Amendment:** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ***nor shall any state deprive any person of life, liberty, or property, without due process of law***; nor deny to any person within its jurisdiction the equal protection of the laws.
- In the first trimester of pregnancy, the state may not regulate the abortion decision; only the pregnant woman and her attending physician can make that decision. In the second trimester, the state may impose regulations on abortion that are reasonably related to maternal health. In the third trimester, once the fetus reaches the point of "viability," a state may regulate abortions or prohibit them entirely, so long as the laws contain exceptions for cases when abortion is ***necessary to save the life or health of the mother***.
- The Court classified the right to choose to have an abortion as "fundamental", which required courts to evaluate challenged abortion laws under the "strict scrutiny" standard, the highest level of judicial review in the United States.

Abortion (continued)

***Planned Parenthood of Southeastern Pennsylvania v. Casey*: a 5-4 1992 decision written by J. Sandra Day O'connor**

- Question presented: Can a state require women who want an abortion to obtain informed consent, wait 24 hours, if married, notify their husbands, and, if minors, obtain parental consent, without violating their right to abortion as guaranteed by Roe v. Wade?
- In a bitter 5-to-4 decision, the Court reaffirmed Roe, but upheld most of the Pennsylvania provisions. For the first time, the justices imposed a new standard to determine the validity of laws restricting abortions. The new standard asks ***whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."*** Under this standard, the only provision to fail the undue-burden test was the husband notification requirement. In a rare step, the opinion for the Court was crafted and authored by three justices: O'Connor, Kennedy, and Souter.
- Casey ended the trimester regime in favor of a **viability** standard.

Abortion: State Restrictions Before Dobbs

38 states require a licensed physician. 19 require a hospital after a specified point in the pregnancy;17 states require the involvement of a second physician after a specified point.

43 states prohibit abortions after a specified point in pregnancy, with some exceptions provided. The allowable circumstances are generally when an abortion is necessary to protect the patient's life or health.

21 states prohibit "partial-birth" abortion. 3 of these apply only to postviability abortions.

16 states use their own funds to pay for all or most medically necessary abortions for Medicaid enrollees in the state. 33 states and the District of Columbia prohibit the use of state funds except in those cases when federal funds are available: where the patient's life is in danger or the pregnancy is the result of rape or incest. In defiance of federal requirements, South Dakota limits funding to cases of life endangerment only.

12 states restrict coverage of abortion in private insurance plans, most often limiting coverage only to when the patient's life would be endangered if the pregnancy were carried to term. Most states allow the purchase of additional abortion coverage at an additional cost.

45 states allow individual health care providers to refuse to participate in an abortion. 42 states allow institutions to refuse to perform abortions, 16 of which limit refusal to private or religious institutions.

18 states mandate that individuals be given counseling before an abortion.

25 states require a waiting period, usually 24 hours, between counseling and the procedure.

37 states require some type of parental involvement in a minor's decision to have an abortion. 27 states require one or both parents to consent to the procedure, while 10 require that one or both parents be notified

Source: https://www.guttmacher.org/state-policy/explore/overview-abortion-laws

Abortion: Dobbs v. Jackson Women's Health

- In March 2018, the state of Mississippi passed the Gestational Age Act, which banned any abortion operation after the first 15 weeks of pregnancy, with exceptions for medical emergencies or severe fetal abnormality, but did not include any exceptions for cases of rape or incest.
- The law was enjoined from being enforced by the D. Ct. and the Fifth Circuit as clearly unconstitutional and came to the Supreme Court for argument in December.
- The Court granted *certiorari* to the petition on May 17, 2021, limiting the case to the single question ***"Whether all pre-viability prohibitions on elective abortions are unconstitutional."***

Abortion:

How much does the language of the constitution matter to the justices, and how much simply depends on how they feel about abortion? Language from Roe:

- 'The Constitution does not explicitly mention any right of privacy … the Court has recognized that a right of personal privacy … does exist under the Constitution. … the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, …; in the Fourth and Fifth Amendments, …; in the penumbras of the Bill of Rights, *Griswold v. Connecticut* …; in the Ninth Amendment, …; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, … ***only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," … are included in this guarantee of personal privacy … the right has some extension to activities relating to marriage, Loving v. Virginia, …; procreation, Skinner v. Oklahoma, …; contraception, Eisenstadt v. Baird.' … This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is … is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'***

Abortion: The Dobbs Decision

Majority 5-4 Decision

Opinion written by Justice Samuel Alito, joined by Thomas, Gorsuch, Kavanaugh and Barrett (Thomas & Kavanaugh file concurring opinions)

- The Constitution does not confer a right to an abortion
- *Roe* and *Casey* are overruled
- The authority to regulate abortion 'is returned to the people and their elected representatives'

6-3 Decision

Chief Justice Roberts

- Votes to uphold the Mississippi statute, concurring in the judgment, also filing a concurring opinion
- Would not have explicitly overturned *Roe*

Dissent

- Breyer, Sotomayor and Kagan file a joint dissenting opinion

Abortion: The Dobbs Decision

Majority Rationale

- Essential question: does the Constitution confer a right to an abortion.
- *Casey,* in Alito's view, skipped that question and simply reaffirmed *Roe* on stare decisis, but stare decisis requires an assessment on the grounds on which *Roe* is based.
- Alito reviewed the standard which the Court's cases have used to determine whether the 14th amendment 'liberty' reference protects a particular right:
  - The constitution has no express reference to a right to abortion; *Roe* held that it is part of a right to privacy stemming from the 1st, 4th, 5th, 9th and 14th amendments and protected via the due process clause of the 14th amendment.
  - That being the case, **is a right to an abortion 'rooted in the Nation's history and tradition' and is it 'an essential component of "ordered liberty,"' these being the test, in Alito's view, for substantive due process protection**.
  - Thus, **a historical inquiry is 'essential whenever the Court is asked to recognize a new component of the "liberty" interest protected by the Due Process Clause**.

Abortion: The Dobbs Decision

Majority Rationale

- The court then outlines the history of abortion in the U.S., noting the following:
  - There was no support in American law for a constitutional right to an abortion until the latter half of the 20th century
  - No state constitutional provision had recognized such a right
  - Until a few years before Roe, no federal or state court or scholarly treatise had recognized such a right
  - Abortion had long been a crime in every single state
  - At common law abortion was criminal in at least some stages of pregnancy and regarded as unlawful
  - American law followed the common law until a wave of statutory restrictions in the 1800'expanded criminal liability
  - At the time of the 14th amendment, ¾ of the states had made abortion a crime at any stage of pregnancy; this consensus endured until *Roe*

Abortion: The Dobbs Decision

Majority Rationale

- Having determined this, 'the history and tradition that map the essential components of the Nation's concept of ordered liberty, the Court finds the 14th Amendment clearly does not protect the right to an abortion.'
- In responding to the arguments against this conclusion, Alito points out that even a 'pre-quickening' abortion was unlawful in some sense if not criminalized.
- And in particular: 'the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortion does not mean that anyone thought the States lacked the authority to do so.'
- Arguments to a broader concept of personal autonomy are also dismissed by Alito, and he goes on to point out that **other cases that rely on privacy rights are sharply different: abortion is different because it destroys 'potential life' which poses a critical and distinct moral question**.
- This is a clear case of originalist thinking obviously, and not of the Constitution as a living document that must adapt itself to the times.

Abortion: The Dobbs Decision

Majority Rationale: stare decisis

Alito rejects the arguments based on stare decisis; his analysis of five factors:

1. **The nature of the court's error** – in Alito's view, bad analysis, which view is driven by the originalist/textualist/historical approach, resulted in an egregiously wrong decision in *Roe*
2. **The quality of the reasoning –** Alito goes into an extensive critique of Roe, its basis, its analysis and its decisional structure, particularly pointing out how its three trimester scheme looked like legislation and its failure to distinguish between pre- and post-viability abortions.
3. **Workability –** Alito argues that *Casey's* 'undue burden' test has led to a long list of Circuit conflicts and asserts that continuing with this standard is 'unworkable.'
4. **Effect on other areas of law –** Alito asserts that *Roe* and *Casey* have led to the distortion of other unrelated legal doctrines.
5. **Reliance interests –** traditional reliance interests are not implicated because an abortion is, generally, an unplanned activity.

Abortion: The Dobbs Decision

Other Justices' Opinions

- **Thomas** argued that the Court should reconsider other cases that granted rights based on substantive due process such as ***Griswold v. Connecticut*** (the right to contraception), ***Obergefell v. Hodges*** (the right to same-sex marriage), and ***Lawrence v. Texas*** (banned laws against private sexual acts).
- **Kavanaugh** stated that it would still be unconstitutional to prohibit a woman from going to another state to seek an abortion under the right to travel and to retroactively punish abortions performed before Dobbs when they had been protected by Roe and Casey.
- **Roberts** concurred in the judgment as he believed the Court should reverse the Fifth Circuit's opinion on the Mississippi law and that "the viability line established by *Roe* and *Casey* should be discarded." He did not agree with the majority's ruling to overturn *Roe* and *Casey* in their entirety, suggesting a more narrow opinion to justify the constitutionality of Mississippi's law without addressing whether to overturn *Roe* and *Casey*. Roberts also wrote that abortion regulations should "extend far enough to ensure a reasonable opportunity to choose, but need not extend any further." He said that the Court should "leave for another day whether to reject any right to an abortion at all." Hence the 5-4/6-3 votes. Question: what do you think of Robert's approach? Just trying to delay the inevitable?

Abortion: The Dobbs Decision

Breyer, Kagan, and Sotomayor jointly wrote the dissent

- "The right *Roe* and *Casey* recognized does not stand alone. … the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. … the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. **Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other**." (emphasis added)
- "The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman's rights to equality and freedom. Today's Court, that is, does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs."

Abortion: The Dobbs Decision

Dissent, continued

- Addressing the argument that a right must be "deeply rooted in the Nation's history", the dissenters reflected on what that approach would have meant for interracial marriage: 'The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia* … read the Fourteenth Amendment to embrace the Lovings' union.'
- 'The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination."
- In response to Kavanaugh's concurrence, they wrote, "His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being 'scrupulously neutral' if it allowed New York and California to ban all the guns they want?" Question: what is the basic distinction between the right to bear arms and the right to have an abortion?

Abortion: Rights after Dobbs

- https://reproductiverights.org/maps/abortion-laws-by-state/
- Banned: Idaho, South Dakota, Wisconsin, Missouri, Texas, Oklahoma, Louisiana, Arizona, Mississippi, Alabama, Tennessee, West Virginia
- Banned after six weeks: Ohio, Georgia
- Banned after 15, 18 or 20 weeks: North Carolina, Florida, Utah
- Ban coming: Indiana
- Bans blocked: Montana, Wyoming, Utah, Arizona, North Dakota, Iowa, Mississippi, South Carolina
- Legal: Washington, Oregon, California, Alaska, Hawaii, Minnesota, Illinois, New York, Maine, Vermont, Massachusetts, Connecticut, New Jersey, Maryland, New Mexico
- Legal with limitations: Nevada, Colorado, Nebraska, Kansas, Rhode Island, Pennsylvania, Virginia, New Hampshire, Delaware

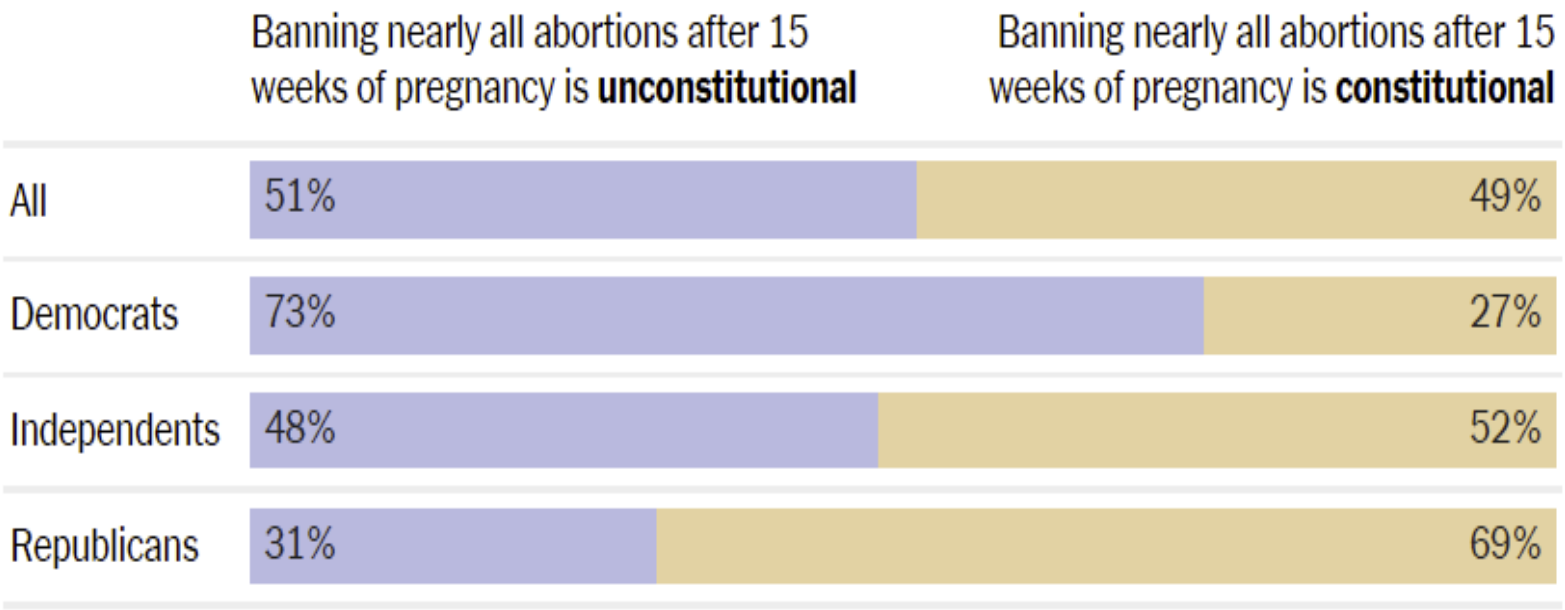
Abortion: Rights after Dobbs

- HHS issued guidance stating that abortions are still allowed if a physician determines that the pregnant woman's life is at risk under the federal Emergency Medical Treatment and Active Labor Act (EMTALA), which requires hospitals receiving Medicare funding to provide emergency stabilizing medical treatment. As a federal law, EMTALA preempts inconsistent state law. Idaho and Texas are currently in litigation over this w/ inconsistent opinions from District Courts.
- The Department of Veterans Affairs said it would continue to offer abortion and related services to military veterans if the woman's life is in danger and in cases of rape or incest, under Department of Defense regulations, even in states where abortion has been completely banned.
- Inevitable conflicts in laws between states seem sure to keep the courts busy.
- Federal laws are proposed to enshrine the right to an abortion as well as to enshrine a 15 week limit. Constitutionality concerns would remain, though certainly some protections could be based on the Interstate Commerce Clause.

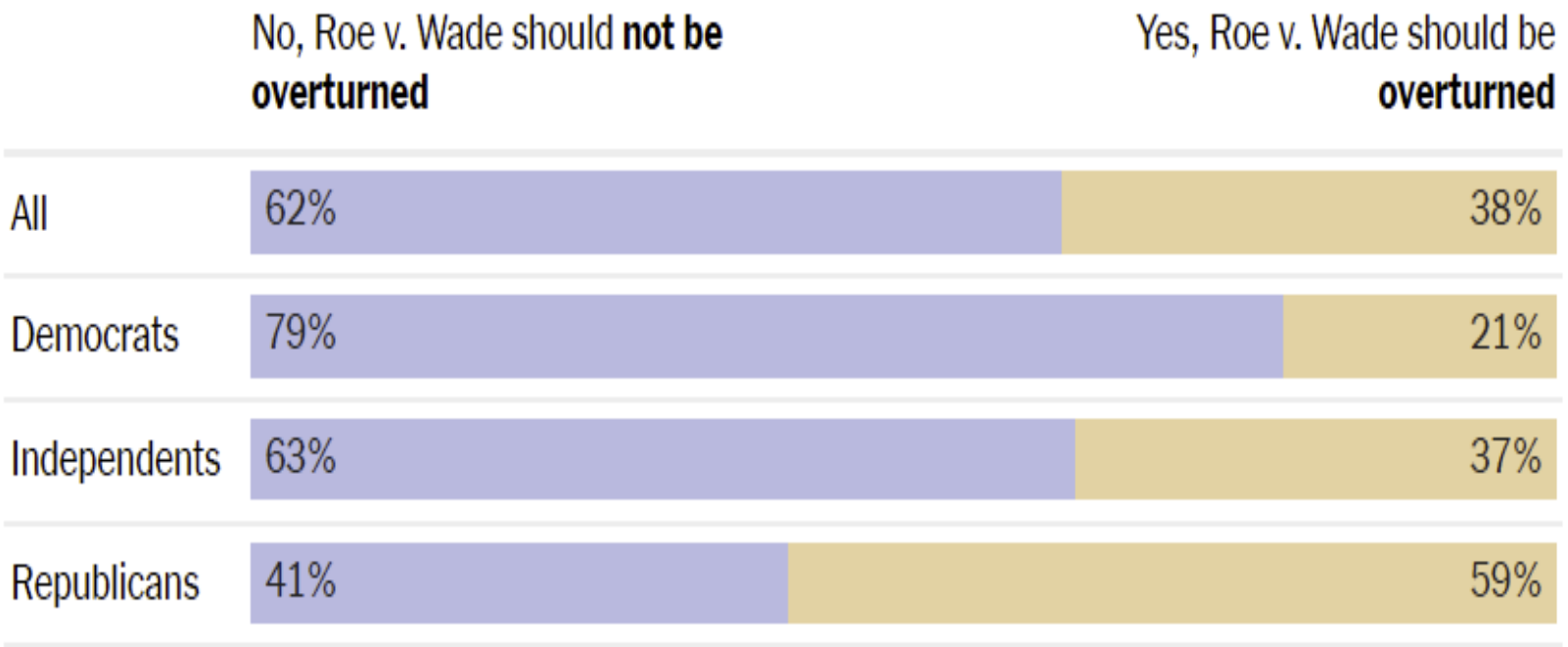
Abortion: Rights after Dobbs

- **Fetal Rights**: *Doe v. McKee*, a petition for writ of cert. to SCOTUS
  - The Rhode Island SCt. had essentially denied any fetal rights
- **Questions presented:**
  - Whether, in light of *Dobbs v. Jackson Women's Health Organization*, …, the Rhode Island Supreme Court erred in holding that the unborn Petitioners, regardless of gestational age, are not entitled to the protections and guarantees of the due process and equal protection clauses of the United States Constitution?
  - Whether, in light of *Dobbs*…, the Rhode Island Supreme Court erred in holding that the unborn Petitioners, regardless of gestational age, categorically lacked standing to advance their claims?
- The court decided not to jump at this bait and declined the petition without comment.

Where the public stands



Question wording: A new law in Mississippi bans nearly all abortions after 15 weeks of pregnancy. Some people think that this law is unconstitutional. Others think it is constitutional. What do you think? | Source: SCOTUSPoll



Question wording: Should the Supreme Court overrule Roe v. Wade, the 1973 decision that established a constitutional right to abortion and prohibited states from banning abortion before the fetus can survive outside the womb, at around 23 weeks of pregnancy? | Source: SCOTUSPoll

Religious Freedom under the 1st Amendment

- **Establishment Clause** ←→ **Free Exercise Clause**

  "Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof; . . ."

- **Precedent for testing Establishment Clause** – Under the "Lemon Test" (*Lemon v. Kurtzman*, 1971), the law or practice will pass constitutional muster if:
  - it has a secular purpose,
  - its principal effect does not advance OR inhibit religion, and
  - it does not create an "excessive entanglement with religion."
- **Erwin Chemerinsky** – *"The court has obliterated any notion of a wall separating Church & State."*

Kennedy v. Bremerton School District

Facts of the Case

- **Joseph Kennedy**, a high school football coach, **engaged in prayer with a number of students** during and after school games.
- The School District ordered him to discontinue the practice in order not to violate the Establishment Clause. When he continued, **he was suspended and his contract was not renewed**.

Question

- Is a public school employee's prayer during school sports activities **protected speech**, and
- If so, **can the public school employer prohibit it** to avoid violating the Establishment Clause?

District Court & 9th Circuit ruled for School District

SCOTUS in 6:3 (partisan) Decision overturned, ruling for Kennedy

Kennedy v. Bremerton School District (cont.)

Majority Opinion - **by Gorsuch**, joined by Roberts, Thomas, Alito, Kavanaugh, & Barrett

- Kennedy's prayers were **not part of his duties** as a coach
- Prayers "*were not publicly broadcast or recited to a captive audience,*" and students "*were not required or expected to participate.*"
- District's argument that allowing prayer violated the establishment clause rested on **Lemon Test**, which Gorsuch dismissed as ***"long ago abandoned,"*** though it is unclear how/when that happened.

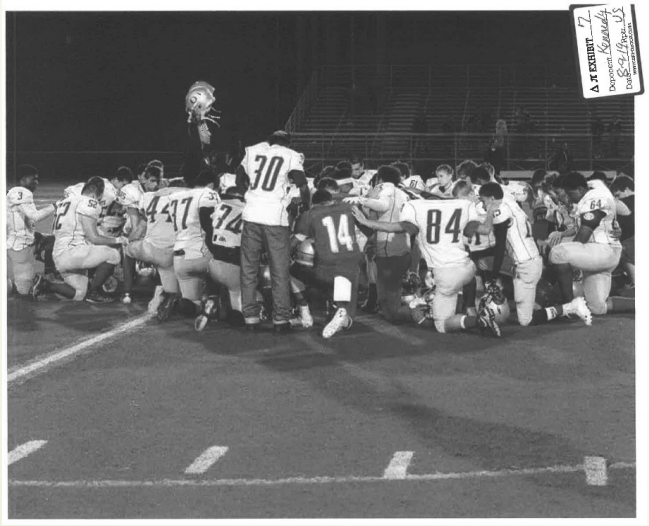
Kennedy v. Bremerton School District (cont.)

Dissent – **by Sotomayor**, joined by Breyer and Kagan

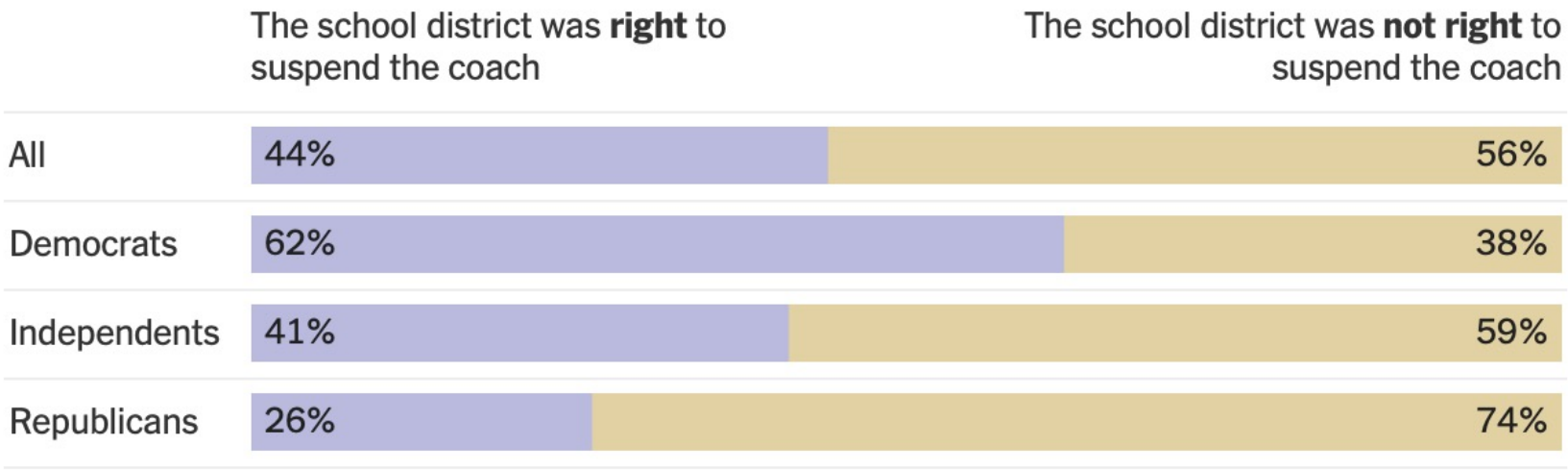
- Gorsuch ***"misconstrued the facts"*** of the case, depicting prayers as "*private and quiet*" when they had actually caused "*severe disruption to school events.*" **Included photos** to support this challenge of the facts, which is most unusual
- Challenged notion that Lemon is "*long ago abandoned.*" This ruling **replaces the Lemon Test with a history-and-tradition test** with no meat or guidance.
- Gorsuch **mischaracterized the key question**, which was indeed, "*whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event.*" She answered NO.
- Ruling ***"weakens the backstop"*** of the establishment clause, eroding the protections for religious liberty for all.

PHOTOS IN DISSENT

Very unusual to include photos in a decision or dissent, but Sotomayor clearly has a difference of opinion on the facts of this case.



Where the public stands



Question wording: The football coach at a public high school led prayers with players before and after games. The school district asked him to stop, and the coach refused. He was then suspended. Some people think the school district was right to suspend the coach because of the First Amendment's separation of church and state. Other people do not think the district was right to do so because of the coach's right to free exercise of religion. What do you think? | Source: SCOTUSPoll

Carson v. Makin
Taxpayer Funding of Religious Schools

Facts of the Case - Parents in Maine sued over the state's exclusion of religious schools from a tuition program for families who live in towns that don't have public secondary schools.

Question – Does a state law prohibiting students participating in an otherwise generally-available student-aid program from choosing to use their aid to attend schools that provide religious instruction violate the Religion Clauses or Equal Protection Clause of the constitution.

District Court & 1st Circuit ruled for the State of Maine

Our Prediction Last Year - The court will rule that you can't treat religious schools differently than other private schools (opportunity to participate), but the state can set educational standards that must be met by all.

Carson v. Makin (cont.)

Majority Opinion – **by Roberts**, joined by Thomas, Alito, Kavanaugh, Gorsuch, and Barrett.

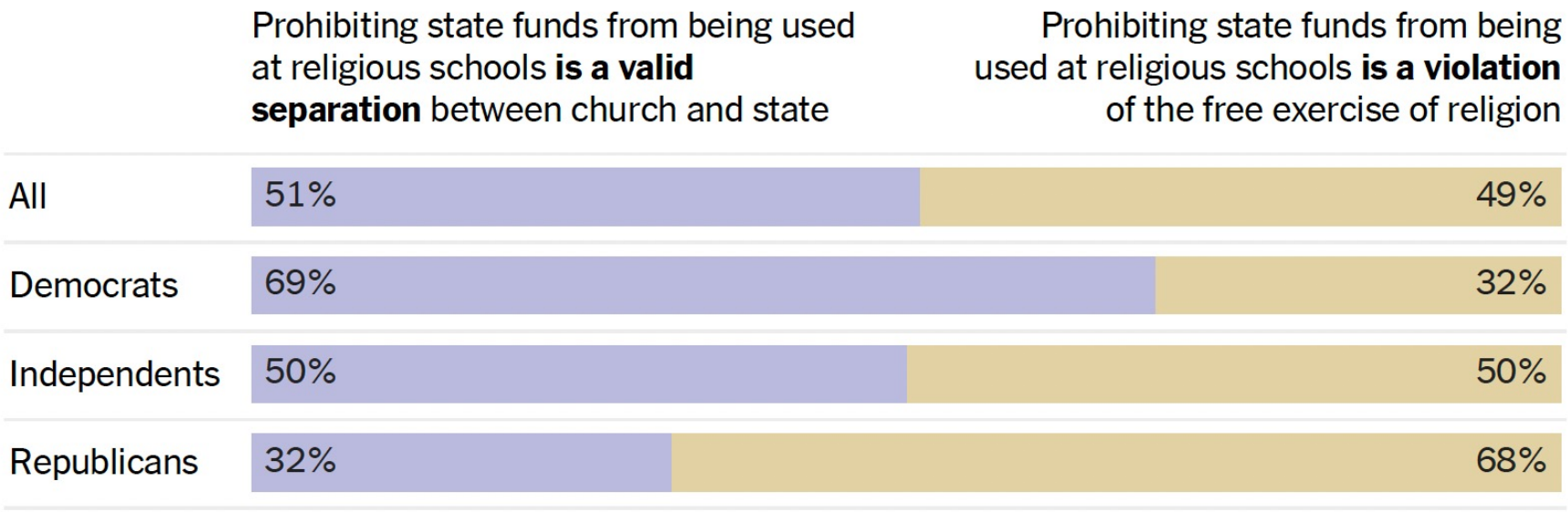
- Maine violated the Free Exercise Clause because it prohibited families from using otherwise available scholarship funds at religious schools
- Maine has other options to eliminate its need to fund private schools. It could, for example, create more public schools or improve transport to public schools. But having chosen to provide public funding for private schools, "*it cannot disqualify some private schools solely because they are religious.*"
- Maine can, however, set curriculum standards that apply to all schools.

Carson v. Makin (cont.)

Dissent – **by Breyer**, joined by Sotomayor and Kagan

- The 1st Amendment's free exercise and establishment clauses were intended to strike a balance between church and state to avoid religious strife.
- Maine's program is intended to foster this balance.
- This ruling, he warned, creates the prospect that states may now be required to provide funds for religious schools simply by operating public schools or by giving vouchers for use at charter schools.
- In a separate dissent, Sotomayor argued, that SCOTUS has *"shifted from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars."*

Where the public stands



Question wording: The State of Maine pays private school tuition for students in rural areas that do not have public secondary schools. Maine prohibits students from using this public money to attend schools that are religious (or "sectarian"). Some people think that this is a violation of the First Amendment protections of the free exercise of religion. Other people think that this is a valid policy to maintain the separation between church and state. What do you think? | Source: SCOTUSPoll

Yeshiva University v. New York
Shadow Docket – Sept 9, 2022

Facts of the Case

- The Pride Alliance, a gay rights student group at Yeshiva University, had been denied the university's recognition.
- The Alliance was thus unable to take advantage of classrooms, bulletin boards and presence at the club fair. They filed suit in state court.

State Court

- Ruled that NY City Human Rights Law requires all student groups equal access and ordered the university to comply.
- Yeshiva appealed to Justice Sotomayor to intervene, who granted a temporary reprieve in early September.

Yeshiva University v. New York (cont.)

5:4 Unsigned Majority Ruling on Sept 14 - by Sotomayor, Roberts, Kagan, Kavanaugh, and Jackson (assumed because not in dissent)

- SCOTUS reversed itself, sending the case back to be continued in state/appeals courts
- News reports note that the school does not require its officers or professors to be Jewish, and it enrolls 5,000 undergraduate and graduate students of all religious backgrounds.
- Its affiliated Cardoza Law School has had an official gay student group for years.

Yeshiva University v. New York (cont.)

Dissent – written by Alito, joined by Thomas, Gorsuch, and Barrett

- *"The First Amendment guarantees the right to the free exercise of religion, and if that provision means anything, it prohibits a State enforcing its own preferred interpretation of Holy Scripture. Yet, that is exactly what New York has done in this case, and it is disappointing that a majority of this Court refuses to provide relief."*
- *"At least four of us are likely to vote to grant"* review if the university loses on appeal, *"and Yeshiva would likely win if its case came before us. . . A State's imposition of its own mandatory interpretation is a shocking development that calls out for review."*

Sept 19 – Yeshiva University suspended ALL undergraduate student activities.

SCOTUS and Religion

Erwin Chemerinsky – *"The court has obliterated any notion of a wall separating Church & State."*

What do YOU think?

Preview of Cases for Week 3

- **GUNS – *NY Rifle & Pistol Association v. Bruen*** – State laws with strict limits on public carry violate 2nd Amendment
- **NATIVE AMERICANS – *Oklahoma v. Castro-Huerto*** - States may prosecute non-Indians' crimes against Indians.
- **CLIMATE – *West Virginia v. EPA*** – Curtails the EPA's ability to regulate the energy sector.
- **IMMIGRATION – *Biden v. Texas*** – Allows end of Trump's "Remain in Mexico" policy.
- **STATE SECRETS – *U. S. v. Zubaydah*** – Government not required to disclose location of a CIA black site.

Hope to see you next week!