National Association of NAFSL Former State Legislators

Vol. 2, No. 7

ISSUE BRIEF

"Information to Action"

Topic: State Sovereignty

Title: *WHAT THE SUPREME COURT DID AND DIDN'T DO ON ABORTION* by Joshua Charles

Since the overturning of the famous 1973 case *Roe v. Wade* by the Supreme Court last month, a great deal has been said about what the Court did and didn't do.

The Supreme Court summarized its holding as follows:

> We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 721 (1997)

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy.

As such, the Court said, "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives…That is what the Constitution and the rule of law demand."

In Appendices A and B beginning on page 79 of its decision, the Court provided many examples of state laws that forbade abortion at any stage, or otherwise restricted it, both at the time of the ratification of the Fourteenth Amendment, and prior to the *Roe* decision.

Some on the Left claimed the Court had essentially made abortion illegal across much of the United States. Others on the Right wished the Court had outlawed abortion altogether based on, ironically, the Fourteenth Amendment, which they argue specifies that life cannot be infringed without due process of law, and the child in the womb is a life.

Instead, the Court ruled that while the Constitution itself provides no right to an abortion—as evidenced by its plain language, and the fact that such a "right" had never been acknowledged in American law prior to 1973—state legislatures are empowered to legislate on the issue, and devise their own policies.

Ironically, the Court at least partially aligned with none other than the late Justice Ruth Bader Ginsburg, an acknowledged advocate of abortion rights. Ginsburg has long claimed that *Roe* went too far too fast: *"Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades is Roe v. Wade…A less-encompassing Roe, one that merely struck down the extreme Texas law and went no further on that day… might have served to reduce rather than to fuel controversy."*

But because *Roe* simply overruled the vast majority of state legislatures, it *"invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislators' court."*

Just a few years ago, she observed that *"My criticism of Roe is that it seemed to have stopped the momentum on the side of change."* Ginsburg believed a more gradual, consensus-based approach to abortion would have led to better long-term results for those of her persuasion.

In this instance, her position oddly aligns with the conservative Court that overruled *Roe* and returned the issue of abortion to state legislatures. Whereas from 1973 to 2022 Americans were prevented from outlawing or significantly infringing on abortion, they are now free, the Court says, to adjudicate the issue of abortion through the more democratic means of voting at the state level.