# [*If Roe is overturned, it might mark the first time the Supreme Court declared an individual right, then took it back*](https://plus.lexis.com/api/document?collection=news&id=urn:contentItem:65DN-03K1-JBCN-44YP-00000-00&context=1530671)

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**Body**

The Supreme Court denied a right to racial integration in 1896, then granted it 58 years later. The court upheld a state ban on interracial marriage in 1883 and, after an even longer interval, recognized a right to marriage between races in 1967, in the aptly named case of Loving v. Virginia. The justices rejected a right to gay and lesbian sexual relations in 1986 and reversed themselves in 2003.

In the other direction, the court has weakened rights granted by Congress, notably in 2013, when it struck down a key enforcement provision of the Voting Rights Act. A 1990 ruling allowed the government to prosecute religious observers whose practices violated criminal law in that case, a ban on peyote as long as the law applied generally and did not target religious practices. Congress later narrowed the scope of that ruling, and several justices have advocated overturning it.

But if the court, as indicated in a leaked draft opinion supported by five justices, overturns the constitutional right to abortion that it declared in Roe v. Wade in 1973, it will arguably be the first time it has withdrawn a substantive individual right it had previously granted. And other court-approved rights, like contraception and same-sex marriage, could be on the line as well.

"It's a pretty unprecedented reactionary destruction of a right women and families have relied on for a half century," said Ariela Gross, a professor of law and history at the University of Southern California.

"To my knowledge, this is the first time the Supreme Court has rescinded a right it had said was constitutional," said Marjorie Cohn, professor emerita at Thomas Jefferson School of Law in San Diego and former president of the National Lawyers Guild.

Of course, it all depends on how you define "rights."

"The whole point of the argument (by opponents of abortion) is they think that stopping abortion is advancing rights of unborn life," said Steven Teles, a political science professor at Johns Hopkins University in Maryland.

Another commentator said the same phenomenon could even be seen in the Dred Scott case when the court, in 1857, refused to grant freedom to a slave who had been brought to a free state, and went on to declare that all Black people were not entitled to U.S. citizenship and "had no rights which the white man was bound to respect."

Chief Justice Roger Taney, author of the 7-2 ruling, believed he was "protecting the constitutional rights of slaveholders," said Thomas Keck, a political science professor at Syracuse University in New York.

There is, however, one set of rights the court has declared, expanded and then withdrawn, with widespread social consequences: the right of businesses to enforce contracts, even when they conflicted with existing laws.

In the 1905 case of Lochner v. New York, the court ruled that a state law limiting working hours in bakeries to 60 hours in a week, or 10 hours in any day, violated the bakery owner's constitutional right to contract with his employees for longer hours.

Subsequent rulings in what became known as the Lochner era struck down state and federal laws requiring minimum wages, banning child labor, requiring employers to contribute to pension plans and allowing workers to join unions without interference from their employers. After invalidating some of President Franklin D. Roosevelt's New Deal measures, the court, with new Roosevelt appointees and political pressure from the White House, changed course in the late 1930s and said the government was generally entitled to regulate the economy.

In the Lochner cases, "The court thought they were protecting an individual right and said so repeatedly," observed Mark Graber, a constitutional law professor at the University of Maryland.

Regardless, said USC's Gross, overturning Lochner was "arguably an expansion of human rights over the rights of corporations."

Keck, of Syracuse, said conservative lawyers and judges in the early 20th century believed in "an individual right of both employers and employees to enter labor contracts without state interference," even if the result was oppressive working conditions.

But, he said, "there are few if any comparable examples in which the court has extended constitutional rights to a new context, protected them for nearly 50 years amidst great political controversy and then withdrawn that protection in full," as it is apparently prepared to do now.

"It means that people who have relied on what the Supreme Court has said are constitutional rights have now had the rug pulled out from under them," said Cohn, the former San Diego law professor. "That's very, very frightening."

Why hasn't it happened before? One reason is that the court, established in 1789, has been a conservative institution for most of its history.

"Property rights aside (and slavery), the Supreme Court did not protect many individual rights until the Warren court," said Graber, referring to Chief Justice Earl Warren, who served from 1953 to 1969. "Hence, this is really the first time justices were appointed for the purpose of narrowing and reversing constitutional rights."

Keck cited the emergence of generations of advocates to defend the rights declared by the Warren court and its successors. A more apocalyptic assessment came from Elliot Mincberg, an attorney with the liberal advocacy group People for the American Way and onetime counsel for the House Judiciary Committee.

Recalling Martin Luther King Jr.'s pronouncement in 1968, shortly before his assassination, that "the arc of the moral universe is long, but it bends toward justice," Mincberg said the impending decision would reveal "a bare majority of the court trying to bend it in the other direction."

Gross said she was reminded of an earlier era, when the court collaborated with pro-slavery politicians mainly Democrats to suppress individual rights.

"I won't be surprised if we end up, similar to that period, with a kind of underground railroad to vindicate people's rights when they're not protected by any other branches of government," she said.

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