Dobbs v. Jackson Women's Health

By Paul Engel

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- After almost 50 years, the Supreme Court opinions in Roe and Casey have been overturned.
- The right to obtain an abortion is not in the language of the Constitution, neither is it in the history of this country before 1973.
- While this decision has certainly caused an uproar, this is an opportunity to review the court's opinion.

After almost 50 years, a landmark decision of the Supreme Court has been overturned. Will it be remembered with other decisions like Dred Scott or Plessy v. Ferguson? Only time will tell. After all of the furor when a draft of the opinion was leaked, we finally get a chance to review that actual opinion in Dobbs v. Jackson Women's Health in its final form.

At 213 pages, the opinion and dissents in Dobbs v. Jackson Women's Heath is not only large in size but in scope. There are so many quotable phrases, it can easily become overwhelming. For that reason, and my own sanity, I've focused mainly on the syllabus and the summary of the opinion, adding quotes from the opinion, concurrences, and dissent only as necessary. As with all cases before the Supreme Court, this one started with a question.

Mississippi's Gestational Age Act provides that "[e]xcept in a medical emergency or in the case of a severe fetal

abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." Miss. Code Ann. §41–41–191. Respondents–Jackson Women's Health Organization, an abortion clinic, and one of its doctors–challenged the Act in Federal District Court, alleging that it violated this Court's precedents establishing a constitutional right to abortion, in particular Roe v. Wade, 410 U. S. 113, and Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833.

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The framing of a question is just as important as the question itself. Mississippi passed a law that limits abortions after fifteen weeks gestation. Jackson Women's Health Organization and one of its doctors believed that the law "violated this Court's precedents establishing a constitutional right to abortion." Notice two very important things in that statement. Jackson Women's Health did not claim that Mississippi's law violated federal law or the Constitution of the United States, but judicial precedent. Judicial precedent is not law, neither is it recognized by the Constitution as supreme over the laws and constitutions of the states.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Article VI, Clause 2

Jackson Women's Health is asking the court to place a previous opinion of the court above the supreme law of the land. That really isn't surprising, since the court has been doing that

for decades, though please notice the second part of the original plaintiff's statement. The court, through its precedent, established a constitutional right to abortion. I have not reviewed the Planned Parenthood v. Casey opinion, but I have reviewed the Roe v. Wade opinion, and you know what I did not find: A claim of a "constitutional right to abortion". Rather, the court claimed that the decision to have an abortion was private between the woman and her doctor, and that Texas' law criminalizing abortion represented an unreasonable seizure of her body. For almost 50 years, courts have used the precedent set in Roe and Casey, frequently referring to this so called constitutional right to abortion. If the Supreme Court said there was a right to abortion, then there's a right to abortion.

However, in the Dobbs case, the majority of the court, rather than relying on the opinions of previous justices, looked at the Constitution and made a startling discovery.

Held: The Constitution does not confer a right to abortion; Roe and Casey are overruled; and the authority to regulate abortion is returned to the people and their elected representatives.

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Most people I've read or heard discuss this opinion, have rightly focused on the overruling of Roe and Casey. But did you notice the Tenth Amendment undertones in the holding? If the Constitution does not confer a right to abortion, then it's not within the judicial power of the court to protect it. It's therefore reserved to the people and their elected representatives.

How did the court come to such a decision?

(a) The critical question is whether the Constitution, properly understood, confers a right to obtain an abortion. Casey's controlling opinion skipped over that

question and reaffirmed Roe solely on the basis of stare decisis. A proper application of stare decisis, however, requires an assessment of the strength of the grounds on which Roe was based. The Court therefore turns to the question that the Casey plurality did not consider.

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As I've already pointed out, the Constitution, not court precedent, is the supreme law of the land. The Casey court, like so many others, placed the idea of "stare decisis" (Latin for "Let the decision stand"), above all other considerations. Since judges and justices are human, there must be a recognition of their fallibility. Courts get things wrong. If a court opinion could not be reviewed, courts would still enforce segregation laws and the concept of separate but equal. So are the grounds of Roe and Casey strong enough to survive a constitutional review?

The Constitution makes no express reference to a right to obtain an abortion, but several constitutional provisions have been offered as potential homes for an implicit constitutional right. Roe held that the abortion right is part of a right to privacy that springs from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. … The Casey Court grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.

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The Ninth Amendment to the Constitution makes it quite clear:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Constitution, Amendment IX

So, is the right to an abortion among those that while not enumerated in the Constitution, are still protected by it? To find out, the court needed to look at the history of this so called right to abortion.

Next, the Court examines whether the right to obtain an abortion is rooted in the Nation's history and tradition and whether it is an essential component of "ordered liberty." The Court finds that the right to abortion is not deeply rooted in the Nation's history and tradition. The underlying theory on which Casey rested—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial.

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Let's start by asking what is this "ordered liberty" the court is so concerned about?

A loosely used term, diversely applied in scholarly literature and judicial opinions, "ordered liberty" suggests that fundamental constitutional rights are not absolute but are determined by a balancing of the public (societal) welfare against individual (personal) rights.

Ordered Liberty, Encyclopedia.com

The concept of "ordered liberty" is itself a violation of the Constitution of the United States. Remember when I quoted Article VI, Clause 2?

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Article VI, Clause 2

The Constitution is the supreme law of the land, not a court's attempt to balance your constitutionally protect rights against a public interest. "Ordered liberty" is the court usurping the role of supreme law of the land.

What did the court find in America's history and traditions around abortion?

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided Roe v. Wade, … Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (e.g., its discussion of abortion in antiquity) to the plainly incorrect (e.g., its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Dobbs v. Jackson Women's Health – Opinion of the Court

The court looked at the history and traditions of abortion in the United States and did not find it sufficient to establish as a right that was not enumerated in the Constitution, and therefore protected by the Ninth Amendment. It was not considered a constitutionally protected right for the first 185 years of the Constitution, and it was not recognized under either American law or common law. Although the Roe court attempted to come up with a history to justify their preferred outcome, their reasoning used both the irrelevant and the incorrect to find this missing right.

Which leaves us with a simple question. What will govern our

nation, the Constitution of the United States or the previous opinion of justices?

The doctrine of stare decisis does not counsel continued acceptance of Roe and Casey. Stare decisis plays an important role and protects the interests of those who have taken action in reliance on a past decision. It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." …. It "contributes to the actual and perceived integrity of the judicial process." … And it restrains judicial hubris by respecting the judgment of those who grappled with important questions in the past. But stare decisis is not an inexorable command,

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Stare decisis does have its place, but not at the expense of the law. When looking at a case, is it wise for judges and justices to look at the opinions of their predecessors? Yes. But to place the opinions of judges above the laws of our land is not only a violation of the judges' oath of office, but an attack on self-government and an imposition of a dictatorial oligarchy on the American people. I'm not saying that precedent should be ignored, merely kept in proper perspective. And a majority of the court agrees.

The dissent argues that we have "abandon[ed]" stare decisis, … but we have done no such thing, and it is the dissent's understanding of stare decisis that breaks with tradition. The dissent's foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can "poin[t] to major legal or factual changes undermining [the] decision's original basis."

Dobbs v. Jackson Women's Health – Alito Opinion

So when precedents as poorly founded as Roe and Casey are challenged, the court must act, or violate the very reason for

their existence.

Like the infamous decision in Plessy v. Ferguson, Roe was also egregiously wrong and on a collision course with the Constitution from the day it was decided. Casey perpetuated its errors, calling both sides of the national controversy to resolve their debate, but in doing so, Casey necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who disagreed with Roe.

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As I said, Roe and Casey substituted the opinions of oligarchs for the rule of law.

Without any grounding in the constitutional text, history, or precedent, Roe imposed on the entire country a detailed set of rules for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation. … Roe's failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong.

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Based on these facts and the law, the court had no other legitimate course of action.

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."

Dobbs v. Jackson Women's Health – Opinion of the Court

There is no right to abortion, either in the text of the Constitution or in the history and traditions of the nation. On a personal note, I find it interesting that both Roe and Casey based their claims of a right to abortion in the Fourteenth Amendment's due process clause:

nor shall any State deprive any person of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment XIV, Section 1

The very right to have your life protected is the right these two courts claimed gave a women the right to take the life of an unborn child. The court went on:

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in Roe could have said of abortion exactly what Glucksberg said of assisted suicide: "Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]."

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This is the hubris of the court. Without any legal basis, the Roe court made up a supposed right to abortion, and inflicted it on the nation. Then the Casey court abdicated their duty to review the law and simply allowed this abuse to continue.

The Dissent

Of course, not all of the justices agreed:

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis.

Dobbs v. Jackson Women's Health – Breyer, Sotomayor, Kagan Dissent

In other words, those in the dissent assume no prior court could possibly be wrong. Without "major legal or factual changes undermining a decision's original basis", we are to forever be stuck with the decision. The possibility that a court has been wrong is not allowed.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. … If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

Dobbs v. Jackson Women's Health – Breyer, Sotomayor, Kagan Dissent

And thus we again see the hubris of the court and all those who believe the "living, breathing document" theory. These dissenting justices claim the authority to ignore the language of the Constitution, and the basic tenets of contract law (the Constitution is after all a compact between the states), and determine for themselves the understanding of rights. This is not a power delegated to the judicial branch. If, as these dissenters believe, the understanding of what is central to freedom changes, it is up to the people and the states to change the Constitution, not nine high priests in black robes. As Alito pointed out in the opinion of the court:

The Court in Roe could have said of abortion exactly

what Glucksberg said of assisted suicide: "Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]."

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The dissenting justices furthered their heavy-handed opinions when it comes to the application of state laws.

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.

Dobbs v. Jackson Women's Health – Breyer, Sotomayor, Kagan Dissent

Once again we see justices of the Supreme Court placing their opinions above not only the law, but of the people's right to govern themselves. If an abortion is the claiming of a human life, and it is done illegally, should not all who participate be subject to judgment? After all, if two people conspire to murder another, both are charged with a crime. As for Breyer's comment about the state of Texas, I would remind him that it was the Supreme Court that prohibited the state of Texas in the Roe case from criminally punishing abortion providers. Meaning, Texas was merely finding a way to fulfill its duty to prevent the taking of human life without due process within the ridiculous restrictions placed on it by the Roe court.

Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-

state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming "interjurisdictional abortion wars."

Dobbs v. Jackson Women's Health – Breyer, Sotomayor, Kagan Dissent

Are the states sovereign or vassals of Washington, D.C.? That is the question Breyer brings up here. Apparently, in the mind of the dissenters, the states are mere vassals to their opinions. These justices act as if the rest of the Constituiton does not exist when it supports their rhetorical purposes. But remember, the question presented to this court was not travel, advertising, or mailing, but the legality of Mississippi's law regulating abortions.

For half a century, Roe v. Wade,… and Planned Parenthood of Southeastern Pa. v. Casey,… have protected the liberty and equality of women. Roe held, and Casey reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. Roe held, and Casey reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. … Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Dobbs v. Jackson Women's Health – Breyer, Sotomayor, Kagan Dissent

Once again we see justices misleading those who read their

opinions in an emotional attempt to promote their political agenda. The question in Roe, Casey, and Dobbs was not whether or not a woman could decide for herself whether or not to bear a child, but if and when the killing of the life in her womb is protected by the Constitution. Put another way, was the taking of a human life a legal form of contraception? As Alito noted in the opinion he wrote:

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a "'deeply rooted'" one, "'in this Nation's history and tradition.' "

… The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life.

Dobbs v. Jackson Women's Health – Alito Opinion

The dissent's case reminds me of a story I heard:

There is an old trial lawyers' saying "When the facts are on your side, pound the facts. When the law is on your side, pound the law. When neither is on you side, pound the table."

1975 December 30, Chicago Tribune, Mr. Ford, meet Mr. Harris by Patrick Buchanan

Conclusion

Even in a generally well thought out opinion, courts often get things wrong. The concept of "ordered liberty" the court used is a violation of the Constitution, and therefore a violation of the justices' oaths to support it.

The Roe opinion was so badly decided, not because people disagreed with it, but because it failed the most basic concepts of judicial scrutiny. It should become a lesson on the dangers of "ordered liberty", stare decisis, and our court's slavish devotion to precedent above the laws they have

sworn to uphold. As Justice Kavanaugh noted in his concurrence:

The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views. As Justice Rehnquist stated, this Court has not "been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court."

This Court therefore does not possess the authority either to declare a constitutional right to abortion or to declare a constitutional prohibition of abortion.

Dobbs v. Jackson Women's Health – Kavanaugh Concurrence

In so much of the hype about this opinion, one very important thing is frequently lost. This decision does not make abortion illegal in the United States nor does it does not take away a women's right to get an abortion. It does not even claim that abortion could not be protected by law. It only says that the laws and Constitution of the United States do not provide for a right to an abortion. Those who want legal abortions in this country will have to go to the representatives' legislative branch to get it, rather than relying on a ruling body in the courts.

May the courts, Congress, the Whitehouse, and each and every America learn the lesson of the dangers both of stare decisis and the hubris of courts issuing "rulings". Otherwise, all it will take for those oligarchs in black robes to rule over this nation as kings and queens is the right person to not let a crisis go to waste.

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