

Dobbs versus Roe v. Wade



by Idaho State Senator, Phil Hart

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After 50 years of prayer, protests and 60 million aborted babies, *Roe v. Wade* has finally been overturned. The basis for its demise was that in an honest look at *Roe*, support for the *Roe* decision could not be identified. It had no foundation. The decision that overturned *Roe v. Wade* was the Supreme Court case of *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022), whose opinion was written by Justice Alito. In that decision Alito wrote "As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or our Nation's history." *Dobbs* at 77.

There was no basis for *Roe*, and it took our Supreme Court fifty years to reverse itself. But it actually did not fully reverse itself, what it determined was that abortion was not a federal issue. *Roe* was overturned, but that did not eliminate the practice of abortion, nor make abortion illegal. What it did was to make abortion an issue for the states. "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority of the people and their elected Representatives." *Dobbs* at 79.

Abortion is now a state issue. The pro-life states will limit abortions to a narrow set of circumstances if not ban it altogether. The pro-choice state will likely maintain the status quo that existed under *Roe*. However, what might

happen, is that the entire issue could get tied up in federal court slowing down, or frustrating, the implementation of the *Dobbs Decision*.

In order to prevent the thwarting of the of the *Dobbs Decision* by lawfare court filings, I am running a Joint Memorial in the Idaho Legislature which calls on Congress to help facilitate the implementation of *Dobbs* in the several States. House Joint Memorial 2 is a resolution focusing on the logic and the conclusions of Justice Alito and the "*Dobbs Decision*." You can read the memorial here:

[HOUSE JOINT MEMORIAL 2](#)

In this case, because the Supreme Court ruled that abortion is a state issue, judicial controversies regarding abortion belong in state courts. The Supreme Court also ruled that the original foundation upon which the "*Roe v. Wade*" decision was based could not be defended. *Roe v. Wade* was decided in 1973, and pro-life proponents had long argued that there was no defensible basis for the court's decision.

Our Joint Memorial quotes multiple times from the *Dobbs Opinion* regarding the Court's position that the abortion issue belongs in the states. The *Opinion* goes so far as to say, "Our decision returns the issue of abortion to those (the states) legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office." *Dobbs* page 65.

Prior to the *Dobbs* ruling, abortion was legal in all fifty states. Now, a number of states, like Idaho, will end the practice of abortion. However, there is a chance that lawfare lawsuits could slowdown the implementation of the *Dobbs Decision*.

The Supreme Court is the only court created by the Constitution. All of the other federal courts were created by Congress. What Congress creates, Congress can control. It follows that Congress has the power to limit the jurisdiction of the lower federal courts. At Article III clause 2 of the United States Constitution, we find the language "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

This Joint Memorial, if passed by both the House and the Senate of the Idaho Legislature, requests that Congress pass a law that limits the jurisdiction of the lower federal courts from hearing abortion cases concerning state legislative power to legislate on the abortion issue. If the lower federal courts are prohibited from hearing these cases, such cases will end up in state court. At the state level, judges are chosen by the people; unlike the federal level where judges are appointed for a term of "good behavior" which usually works out to be a life appointment. In other words, the people of the states will have selected the judges who will hear abortion cases, exactly as Justice Alito reasoned in the *Dobbs Decision*.

Such an act of Congress will allow the people of each state to finally choose what laws they want in their state concerning abortion, and they will have chosen the judges who hear their abortion cases.

Our hope is by narrowing the spectrum of courts that can hear abortion cases, we will streamline the implementation of the *Dobbs* ruling resulting in more babies being born and fewer abortions taking place.

If you want to see the curtailment of abortion, please share Idaho's House Joint Memorial 2 with your state legislator. Encourage him or her to run the same memorial in your state.

If we can get more than a handful of states to promote restricting the jurisdiction of the lower federal courts from hearing abortion cases related to state legislative authority, Congress may actually do it.

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