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Reversing *Roe*

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On June 24, 2022, the Supreme Court did something truly extraordinary. For the first time in our nation's history, the Court reversed a long-settled fundamental right, the right to an abortion. The ruling takes the courts out of the business of policing restrictions on abortion and leaves questions of abortion access to the whims of politicians.

The ruling was extraordinary for at least three reasons. First, as I say, this was the first time in our nation's history that the Court walked-back a long-settled fundamental right. That cuts against our nation's clear and unmistakable history of *expanding* rights over the long haul. While that expansion has often moved too slowly, and while it often moved in fits and starts, we've never seen the Court outright *reverse* a fundamental right.

Next, the Court reversed the right to abortion in one fell swoop. The Court didn't move incrementally to curtail the right, as it sometimes does, or kill it by a thousand cuts over a series of cases. Instead, the Court categorically reversed the right in a single ruling. And remember: the right to abortion was no ordinary right. The Court had reaffirmed the fundamental right to abortion time and again against sustained and aggressive attacks over its nearly 50-year history. Public polling shows strong support for the right, and judicial nominees, including the most recent nominees to the Supreme Court, routinely acknowledged in their nomination hearings that the right remained on the books. Still, the Court outright reversed it in a single case.

Finally, the Court's ruling unleashed sweeping consequences. Many states have already rolled out brutal restrictions on abortion at all stages of pregnancy. Some of these contain no exceptions for rape or incest; and some demonstrably put women's health, safety, and lives at risk. Some states have even sought to apply their restrictions across state lines, by prohibiting travel to obtain an abortion. (At the same time, other states moved quickly to expand access to abortion.) Moreover, the Court's reasoning threatens other long-standing and deeply-embedded rights—like the right to contraception and the rights to same-sex intimacy and marriage—and hints that the Court is ready and willing to overturn them, too.

But while the Court's ruling was extraordinary, it was not unexpected. Remember that as a candidate for the presidency, Donald J. Trump promised to appoint justices to the Supreme Court who would overturn the right to abortion. Nobody should be surprised when as president he did exactly that. His three appointees were enough to turn the Court on the issue.

Moreover, the Court foreshadowed the ruling in September 2021 when it declined to halt an unprecedented state law that pitted citizen against citizen as the means to enforce a state restriction on abortion. In that move, the Court allowed Texas's S.B. 8 to go into effect, authorizing any individual to sue any other individual who aids or abets another person in obtaining an abortion after about six weeks of pregnancy. The Court's decision in that case didn't squarely address the right to abortion, but it telegraphed the Court's likely bent on the issue.

Finally, the Court's opinion leaked about seven weeks before it issued. The leak was

Francis Chung/E&E News/POLITICO via AP Images

Abortion-rights advocates march outside the U.S. Supreme Court, June 30, 2022.

an extraordinary breach of the Court's famous (or infamous) custom of secrecy, and theories abounded as to who leaked, and why. (The Court initiated an investigation, but to this day we don't have any new information.) Aside from the intrigue, the leaked opinion said exactly what the final opinion said: there is no more right to an abortion under our Constitution.

As I tell my own students, whatever we may think about the underlying right to an abortion—and reasonable minds disagree—the Court's ruling this summer ought to give us all pause. That's because it illustrates just how easily the Court can reverse any right—simply by fiat, and simply because of changed personnel. If the Court can reverse the right to abortion, it can reverse any fundamental right.

A Fundamental Right to Abortion

The Supreme Court first recognized the fundamental right to abortion in 1973, in *Roe v. Wade*. The Constitution, of course, does not explicitly protect the right to abortion, so the Court read the right in the Due Process Clause. This is the same Clause where the Court similarly located other unenumerated fundamental rights touching on bodily autonomy, self-determination, procreation, liberty, equality, and, yes, privacy. These include rights like the right to family relations, the right to marry, the right to raise children, the right to procreation, the right to contraception, and the right to adult consensual sexual intimacy.

But the Court also said that the right to abortion was different than those other rights. In particular, the Court held that the government had a legitimate countervailing interest that grew over the course of a pregnancy—the potential life of the unborn fetus. (Importantly, the Court never held that an unborn fetus had its own independent rights.) As a result, the

Court divided a pregnancy into three trimesters, and devised rules to balance the competing right to abortion against the government's interest. In the first trimester, when abortion is safe for the woman and the fetus cannot survive outside the womb, the government could not restrict the right to abortion. In the second trimester, when abortion becomes less safe for the woman and the fetus still cannot survive outside the womb, the government can regulate abortion to promote the health and safety of the woman. In the third trimester, when abortion is least safe and when the fetus can survive outside the womb (that is, after the point of fetal viability), the government can (if it chooses) ban abortion entirely, with exceptions for the life or health of the woman.

Roe was hotly controversial and came under sustained and aggressive attack in politics, civil society, public policy, and the courts. As relevant here, state legislatures and Congress moved to restrict abortion in various ways, and anti-choice advocates sought to persuade the Court to overturn *Roe*.

Despite these efforts, in 1992, in *Planned Parenthood v. Casey*, the Court specifically upheld the core right to abortion in *Roe*. The Court applied *stare decisis* principles and ruled that *Roe*'s essential holding survived. Indeed, the Court said that overturning *Roe*'s central holding would lead to "an unjustifiable result under stare decisis principles" and "seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."

But at the same time, the Court modified the *Roe* trimester framework. Rather than dividing a pregnancy into three trimesters, the Court divided it into two. The Court held that before fetal viability, the government can regulate abortion so long as the regulation does not create an "undue burden" on the right to abortion. According to the Court, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability." The Court held that post-viability, the government can ban abortion entirely (if it so chooses), with exceptions for the life or health of the woman.

Since *Casey*, states and anti-choice advocates have again moved aggressively to overturn the right to abortion by, among other things, heavily (and unnecessarily) regulating abortion procedures themselves. The Court in recent years has rebuffed these efforts and reaffirmed the fundamental right to abortion. That is, until this Term, and *Dobbs*.

Dobbs v. Jackson Women's Health Organization

In 2018, Mississippi enacted a law that prohibited doctors from performing an abortion

after 15 weeks of pregnancy. The law plainly violated the *Casey* "undue burden" test, because it prohibited abortion about eight to nine weeks before fetal viability. This was no mistake: Mississippi, like many other states, specifically enacted a law that would tee-up a full-frontal challenge to *Roe* at a newly comprised Supreme Court, where the justices (and their proclivities) changed substantially since *Casey*.

The gambit worked. On June 24, 2022, the Court ruled that *Roe* was no longer valid, and that the Constitution no longer protected a fundamental right to abortion. The Court upheld the Mississippi law, and ruled that states and Congress could regulate or ban abortion at any stage of pregnancy, even in cases of rape or incest, and without exceptions for the life or health of the woman.

Justice Alito wrote the majority opinion, joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. The Court applied *stare decisis* principles and concluded that it must overturn *Roe*. First, the Court concluded that *Roe* was "egregiously wrong" in holding that the Constitution protected a fundamental right to abortion, and that *Casey* did not correct the error. The Court said that in order to determine whether a claimed right is fundamental, it must assess whether the right was deeply rooted in our nation's history and traditions and essential to ordered liberty. Applying this test, the Court surveyed the history of abortion regulation from English common law to today, and concluded that abortion failed. (As you might expect from "law-office history," the Court's analysis plays fast-and-loose. That's not just me talking. Professional historians have had a field day with the Court's analysis. But you don't really have to know any history to critically examine the Court's ruling; as you and your students will see, it falls well short on its own terms.)

Next, the Court applied other *stare decisis* principles, and concluded that they demanded the same conclusion. In particular, the Court said that *Roe* and *Casey* "short-circuited the democratic process" by preventing abortion opponents from advancing their interests through ordinary political processes (like state legislatures or the halls of Congress). It wrote that the reasonings behind *Roe* and *Casey* were weak, with no grounding in constitutional text, history, or precedent. It said that *Casey*'s test was unworkable, and led to unintended consequences in other areas of the law. And it wrote that *Roe* and *Casey* did not generate sufficient reliance interests, in part because any particular abortion is usually unplanned.

The Court replaced *Casey*'s "undue burden" test with a "rational basis review" test. This means that states and Congress can regulate abortion so long as the regulation is rationally related to any conceivable legitimate government interest. This is the very lowest-level test known to constitutional law, and almost always means that a government regulation stands.

The Court tried to distance itself from the obvious implications of its ruling by (disingenuously) writing that it was unaffected by "extraneous concerns," and that it was merely relegating abortion policy to the ordinary democratic process. The Court (and Justice Kavanaugh in a separate concurrence) also tried to assuage concerns that its ruling threatened other unenumerated fundamental rights, like those listed above, despite the plain implications of its historical analysis. Justice Thomas, however, wrote separately to argue that the Court *should* reconsider those rights, or at least some of them, and called them out by name.

Chief Justice Roberts dissented. He argued that the Court didn't have to overturn the right to abortion in order to uphold the Mississippi law. He wrote that the Court could reconsider the viability point from *Casey* in a way that would better balance the competing interests. He argued that because the Court didn't *have to* overrule *Roe*, it *shouldn't* overrule *Roe*. Notably, no other justice joined him.

Justices Breyer, Kagan, and Sotomayor together wrote a lengthy, detailed, and scathing dissent. The three justices criticized everything from the Court's historical analysis, to its *stare decisis* analysis, to its likely and certain draconian implications. As to these implications, already the dissent is proving prescient.

Dramatic Implications

In the months since *Dobbs* came down, we already see some of the dramatic implications of the ruling. About half of U.S. states have moved, or are moving, to implement various restrictions on abortion that would have failed under *Casey*'s "undue burden" test. (Some of these restrictions were hold-overs from before *Roe*; these are called "zombie laws." Some are on-the-books restrictions that automatically take effect whenever the Court overturns *Roe*; these are called "trigger laws.") At the extreme, some states have moved to ban abortion from conception, even in cases of rape and incest, and even without meaningful exceptions for the life or health of the woman. These bans have already caused untold emotional and physical harm, for example, in the case of a 10-year-old rape victim who had to travel from Ohio to Indiana to get an abortion, or the case of a Texas woman who had to demonstrate that her pregnancy caused her acute physical harm before she could end it.

In addition to severe abortion restrictions and bans, some states are considering restricting or regulating travel to obtain an abortion in a state that still allows it. These efforts effectively seek to apply state law across state boundaries in a way that not only restricts abortion, but also restricts the fundamental right to travel. While the Court has protected the right to travel against similar encroachments, after *Dobbs* and the Court's ruling on Texas's S.B. 8 (mentioned above), it seems, all bets are off with regard to abortion. (The Guttmacher Institute tracks state activity here, **www.guttmacher.org/state-policy/explore/overview-abortion-laws**.)

Outside of abortion, the *Dobbs* ruling could have sweeping implications in other areas of life and law. For example, the logic of the opinion suggests that unborn fetuses may have independent rights. This could impact everything from in vitro fertilization procedures to criminal law. (We've even seen a case where a pregnant woman argued that she could drive in a high-occupancy-vehicle lane because of, well, her fetus.)

Finally, the ruling could dramatically affect other fundamental rights that we now take for granted. As I suggest above, the Court's analysis directly threatens the right to contraception, the right to consensual adult sexual intimacy, the right to same-sex marriage, and more. The Court's crude and clumsy history and *stare decisis* analysis in *Dobbs* only adds

Dobbs in the Classroom

There are significant legal concepts in the *Dobbs* decision that are worth discussing with students. Obviously the topic of abortion is sensitive, so discussion options depend on teachers, students, and the school community. Here are a few nonpartisan ideas.

- **Street Law offers a comprehensive exploration of *stare decisis*. Visit: www.landmarkcases.org/cases/roe-v-wade**
- **iCivics offers relevant engaging lessons on judicial activism and restraint (high school) and sources of law (middle school). Visit: www.icivics.org/curriculum/judicial-branch**
- **For a go-to resource displaying state policy on abortion that students could use to explore laws in their own state, consider the Guttmacher Institute's research and chart. Visit: www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe#**
- **The *New York Times* assembled an activity to explore current events, state laws, and student attitudes in May 2022, before the *Dobbs* decision was announced, but the concepts and explorations are easily adapted.**

  Visit: www.nytimes.com/2022/05/03/learning/lesson-plans/lesson-of-the-day-what-would-the-end-of-roe-mean-key-questions-and-answers.html
- **There are many political cartoons that have emerged since the *Dobbs* decision. Resources like the Cagle cartoon index will have downloadable examples. Visit: www.cagle.com**
- **The *Washington Post* also assembled several cartoons in June 2022 with statements from the cartoonists. Visit: www.washingtonpost.com/comics/2022/06/27/cartoons-abortion-supreme-court-dobbs**

to this worry. To many observers, the court seems bent on restricting rights that it doesn't like. And it doesn't seem to let precedent stand in its way.

At the same time, though, many states are moving to protect and expand the right to abortion and other unenumerated fundamental rights. Some state constitutions already protect a fundamental right to abortion. State constitutions can provide greater individual rights than the U.S. Constitution, in effect, expanding rights for its residents. (Indeed, the Kansas Supreme Court did just that. It ruled in 2019 that the state constitution protected a right to abortion independent of *Roe*. And in August 2022, in a surprising vote that may be a bellwether in the abortion debates to come, Kansas voters rejected a ballot initiative that would have overturned and rejected a proposed amendment to the state constitution that specifically said that abortion is *not* a fundamental right.) Some state legislatures are considering and enacting laws that protect abortion and other unenumerated fundamental rights. Some states are considering and adopting policies to expand abortion access for their own citizens and others who might be traveling to the state to access procedures.

Congress, which has the power to enact laws at the federal level, is also considering legislation. President Biden issued an executive order to federal agencies, as well.

In other words, when it comes to abortion, the *United* States will look more like a *Patchwork* of States, often pitted against each other. Only time and politics will tell how deep these divisions will cut and how long this period will last.

But with all the uncertainties, make no mistake: the *Dobbs* decision wrought this. Anti-choice activists at every level worked for decades to overturn *Roe* and *Casey*. They finally succeeded. As I tell my own students: Maybe you like this result, or maybe you don't. If you like it, by all means, celebrate a long and hard-fought political and judicial victory. But if you don't, roll up your sleeves, and get to work. If advocates can achieve this kind of seismic change through a careful, patient, and well-planned political and judicial campaign, so can you.

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