Dobbs v. Jackson Women's Health Org. – Analysis of Competing Constitutional Standards

By Hon. Michael A. Strom (Ret.)

The recent U.S. Supreme Court decision overruling *Roe v. Wade*'s restrictions on States' power to regulate or ban abortions resolves some issues while creating others. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. *2228 (2022). *Dobbs* concerns a constitutional challenge to the Mississippi Gestational Age Act, Miss. Code Ann. § 41-41-191 (2018). The central provision at issue states: "Except 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 weeks." § 4(b).14. *Roe* held that state bans and impermissible restrictions on first trimester abortions were unconstitutional invasions of rights of personal privacy.

Dobbs held that there is no explicit or implicit constitutional right to an abortion. Accordingly, States may regulate abortion for legitimate reasons. Such laws are entitled to a strong presumption of validity and cannot be held unconstitutional if there is a rational basis on which the legislature could have found legitimate state interests were served. *Id*. at *2242. Legitimate interests include "respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." [internal citations omitted] *Id*. at *2283-84.

The Supreme Court's opinions, including concurrences and dissents, comprise over 200 pages. Thorough analyses of all contested issues and bases could far exceed the voluminous case materials. This article aspires to provide a concise overview of some major disputes among the Justices.

Constitutional Rights Alleged

The two main sources claimed for abortion rights are the Fourteenth Amendment and the Ninth Amendment. The Fourteenth Amendment, ratified in 1868, states: "All persons born or naturalized in the United States … are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Pursuant to *Roe* and *Casey,* a woman's decision to terminate her pregnancy is part of the right of personal privacy that the substantive component of the Fourteenth Amendment's Due Process Clause protects against State interference. *Roe, supra*, *Planned Parenthood v. Casey*, 505 U. S. 833. (1992). Neither the Bill of Rights nor the States' specific practices at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of such "liberty." Supreme Court adjudication of such claims may require exercise of reasoned judgment in determining the boundaries between an individual's liberty and the demands of organized society. The Court's decisions have afforded constitutional protection from unwarranted state governmental intrusion to personal decisions relating to interracial marriage, *see, e. g., Loving v. Virginia*, 388 U.S. 1 (1967), procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), contraception, *Griswold v. Connecticut*, 381 U.S. 47 (1967), and whether to bear a child, *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Griswold articulated a right of privacy created by the aggregate ("penumbra") effect of zones of privacy from several constitutional guarantees related to the First Amendment (freedom of association and speech), Third Amendment (prohibition of quartering soldiers in private homes), Fourth Amendment (protection of persons, homes, papers, and effects against unreasonable searches and seizures), Fifth Amendment (right against self-incrimination), and Ninth Amendment (constitutional enumeration of certain rights does not deny other rights retained by the people).

Before *Dobbs*, the right of personal privacy recognized in *Roe* (including "the abortion decision") was deemed fundamental, subject to consideration against important State interests in regulation. *Roe v. Wade*, 410 U.S. 113 (1973).

Majority Opinion Bases

Justice Alito's majority opinion cited the following bases for overruling *Roe* and *Casey.* I will defer commentary to a separate section of this article.

The Constitution makes no reference to abortion, and no constitutional provision implicitly protects the right to abortion, including 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 (1997). Dobbs, *supra* at *2242.

When the country adopted the Fourteenth Amendment, three quarters of the states made abortion a crime at all stages of pregnancy. The abortion right is critically different from any other right this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being." *Id*.at *2243.

Roe was remarkably loose in its treatment of the constitutional text. It held that the right to privacy includes the right to an abortion, neither right mentioned in the Constitution. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text. *Id*. at *2245.

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various states may evaluate those interests differently. Voters in other states may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." Miss. Code Ann. § 41-41-191(4)(b).

There is ample evidence that a sincere belief that abortion kills a human being spurred passage of the law at issue. One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests). *Dobbs*, 142 S. Ct. at *2256.

The right to an abortion has no sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving, supra*; right to marry while in prison, *Turner v. Safley*, 107 S. Ct. 2254 (1987); right to obtain contraceptives, *Griswold, supra*; right to reside with relatives, *Moore v. East Cleveland*, 97 S. Ct. 1932 (1997); right to make decisions about the education of one's children, *Pierce, supra; Meyer, supra*; right to refuse involuntary sterilization, *Skinner, supra*; the right in certain circumstances to refuse involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Winston v. Lee*, 105 S. Ct. 1611 (1985); *Washington v. Harper*, 110 S. Ct. 1028 (1990), *Rochin v. California*, 72 S. Ct. 205 (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas*, 539 U. S. 558 (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U. S. 644 (2015) (right to marry a person of the same sex). *Dobbs*, 142 S. Ct. at *2257-58.

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. *Casey,* 142 S. Ct. at 851. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. *See, e.g., Compassion in Dying v. Washington*, 85 F.3d 1440, 1444 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of rehearing *en banc*). None of these rights has any claim to being deeply rooted in history. *Id.* at 1440, 1445. Dobbs, 142 S. Ct. at *2258.

> [T]he dissent suggests that the majority decision calls into question *Griswold, Eisenstadt, Lawrence*, and *Obergefell*. But we have stated unequivocally that nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion. … [R]ights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter … uniquely involves what *Roe* and *Casey* termed potential life. *Roe, Casey, supra.* Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by appeals to a broader right to autonomy. It is hard to see how we could be clearer."

[internal quotation marks omitted] *Dobbs, supra* at *2280-81.

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance. *Id*. at *2265. *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. *Id*. at *2267.

Analysis

The *Dobbs* majority opinion is based in large part upon originalism/textualism Constitutional interpretation methods:

- Historical analysis of how the voters understood the meaning and scope of the wording when the Constitution or amendment was ratified.
- Claimed rights that are not mentioned in the Constitution must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."
- Reluctance to recognize rights that are not specifically mentioned in the Constitution.

Applying these methods is more complicated when there are multiple ratification dates spanning 132 years, with very different compositions of eligible voters.

- 1788-1791: The Constitution and Bill of Rights (including the Ninth Amendment) were ratified. At that time, women were not eligible to vote, slavery was legal in half the country, and only white male citizens meeting property requirements were eligible to vote.
- 1868: The Fourteenth Amendment was ratified. Women were still not eligible to vote, and U.S. Supreme Court cases in the 1870s declined to interpret the Fourteenth Amendment as applicable to women's rights to vote or practice law. S*ee Minor v. Happersett*, 88 U.S. 162 (1874); and *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873). As of 1910, only five states allowed women to vote.
- 1920: The 19th Amendment was ratified, granting women the right to vote. No other rights or subjects were included. Until ratification, twenty-one states did not allow women to vote.

The *Dobbs* dissent addressed interpretation of the Ninth Amendment and Fourteenth Amendment in this context:

> We referred [above] to the 'people' who ratified the Fourteenth Amendment: What rights did those 'people' have in their heads at the time? But, of course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase 'We the People.' In 1868 . . . Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification … it consigns women to second-class citizenship." *Dobbs* at *2324-25.

Historical analysis would indicate that voters did not understand Constitutional rights applied equally to women citizens as of 1788 or 1868. Notwithstanding state legislatures' failure to ratify the Equal Rights Amendment (passed by Congress in 1972) to date, it is fair to say that the Supreme Court now generally applies applicable Constitutional rights equally to men and women. The *Dobbs* majority does not claim women's rights must be strictly construed to the status of "1868 + voting rights" since nothing further would be "deeply rooted in this Nation's history and tradition." Changes in society, not the Constitution, led to Supreme Court recognition of women's rights.

Questions remain on the extent to which the Court will overrule or revise several precedents based on the "right of privacy" protected against State interference via the Fourteenth Amendment "liberty" guaranteed by the substantive component of the Due Process Clause. The majority opinion insists the effect of its ruling only relates to abortion cases. However, comments in *Dobbs* about the effect on future cases are just *obiter dicta*, as conceded in the *Dobbs* opinion: "Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence." *Id*. at *2281.

The dissent criticized the majority opinion's reliance upon privacy and abortion rights not being mentioned in the Constitution, deeply rooted in this Nation's history and tradition or implicit in the concept of ordered liberty while repeatedly denying any effect on other privacy rights, noting: "The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. … The same could be said … of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, there was no support in American law for a constitutional right to obtain [contraceptives]. So, one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other. [internal quotation marks omitted]" *Id*. at *2319.

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