The End of Roe v Wade and New Legal Frontiers on the Constitutional Right to Abortion

On June 24, 2022, the US Supreme Court ended the constitutional right to abortion in Dobbs v Jackson Women’s Health Organization. The Court’s majority decision authored by Justice Samuel Alito was substantially the same as a draft opinion leaked a month earlier. The regulation of abortion will now be decided by the states. In this Viewpoint, we explain the Dobbs ruling and what it means for physicians, public health, and society.

The Dobbs Ruling

The Supreme Court majority opinion upheld Mississippi’s ban on abortion at 15 weeks’ gestational age, but went further to explicitly overrule Roe v Wade (1973), which recognized the right of a patient, in consultation with their physician, to choose an abortion, and also to overrule Planned Parenthood v Casey (1992), which affirmed Roe’s core holding. Justice Alito reasoned that “Roe was egregiously wrong from the start,” insisting the Court’s reasoning “was exceptionally weak, and the decision has had damaging consequences.”

The majority’s concerns with Roe and Casey coalesced around 3 principal objections: (1) “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision;” including the Fourteenth Amendment; (2) the right to abortion is implicitly protected by any constitutional provision,

Medication Abortions: FDA Preemption

Currently, more than half of all abortions are managed through a 2-drug regimen of mifepristone followed by misoprostol within 70 days (10 weeks) of gestation, and it is likely more women will rely on medication abortions. In 2000, the Food and Drug Administration (FDA) approved mifepristone (Mifeprex) with an accompanying Risk Evaluation and Mitigation Strategy (REMS), a safety program to ensure the drug’s benefits outweigh its risks. Reproductive rights groups have urged FDA to liberalize the REMS parameters to ensure broader access. Many states have already restricted access to mifepristone; for example, Mississippi requires the drug be taken only in the presence of a physician, making telemedicine prescriptions difficult. Abortion laws after Dobbs likely will conflict even more directly with FDA’s approval of mifepristone.

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Restricting Travel to States That Permit Abortions

Pregnant individuals who wish to seek abortion services but live in states that ban or restrict abortions may travel to other states that permit abortions. For many this will be a major hardship, including those who cannot afford to travel for long distances or cannot take time off from work or child care, persons with disabilities, and those subject to partner abuse. Could a state restrict or eliminate the right to travel to another state for abortion or make it a crime for a state’s residents to achieve an abortion in another state? No state has yet adopted an explicit ban on travel, but at least 1 state has proposed doing so.

In his separate concurrence, Justice Kavanaugh considered the issue directly: "May a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel." Attorney General Garland agreed: The Constitution ‘restricts states’ authority to ban reproductive services provided outside their borders....Under bedrock constitutional principles, women who reside in states that have banned access to comprehensive reproductive care must remain free to seek that care in states where it is legal.” Garland also stated that physicians have a First Amendment right "to inform and counsel each other about the reproductive care that is available in other states." Under some state laws that proscribe “aiding or abetting” an abortion, physicians could risk legal sanctions for informing patients about abortion availability in other states. Although the constitutional right to travel has been widely recognized, like the right to abortion, it is nowhere explicit in the Constitution’s text, and the 3 dissenting justices highlighted the right to travel as a vexing issue the Court will likely face.

Constitutional Rights at Risk

The Court’s opinion potentially places at risk other rights, including Griswold v Connecticut (right to contraception), Lawrence v Texas (right to engage in same-sex sex), and Obergefell v Hodges (right to same-sex marriage). Justice Alito’s majority opinion stated, “To ensure that our decision concerns the constitutional right to abortion and our decision is not misunderstood or mischaracterized, we emphasize that the decision concerns the constitutional right to abortion and no other right.” Justice Kavanaugh agreed: “Overruling Roe does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.” These assurances rang hollow in light of Justice Clarence Thomas’ concurrence, urging fellow justices to “reconsider all of this Court’s substantive due process precedents,” including Griswold, Lawrence, and Obergefell, which like Roe and Casey were “demonstrably erroneous.” He insisted the Court has “a duty to ‘correct the error’ established in those precedents.”

Contraception

Griswold v Connecticut in 1965 established a constitutional right of married couples to buy and use contraceptives without government restriction. Yet many abortion restrictions state that “personhood” or being an “unborn child” begins at fertilization, which raises concerns about access to certain contraception methods, including intrauterine devices and Plan B (levonorgestrel), an emergency contraception taken up to 72 hours after unprotected sex. In Burwell v Hobby Lobby (2003), Justice Alito said that some FDA-approved contraceptives “may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.” Oklahoma’s recent abortion ban recognized the rights of “a human fetus or embryo in any stage of gestation from fertilization until birth,” but explicitly excluded “contraception or emergency contraception.” Other states may not be as permissive of all contraceptive devices.

Assisted Reproductive Technologies

Physicians and clinics that provide assisted reproductive technology (ART) services, such as vitro fertilization (IVF), could similarly be subject to criminal penalties. Approximately 2% of all infants born in the US every year are conceived using ART. In the US many embryos created as part of IVF are ultimately destroyed for medical or other reasons. The Dobbs opinion includes numerous references to “the unborn human being,” “potential life,” and “the life of the unborn,” which many state antiabortion statutes declare begins at the point of fertilization. That same logic may encompass prohibiting the destruction of embryos. As the dissenting justices warn, “law often has a way of evolving without regard to original intentions—a way of actually following where logic leads.... Rights can expand in that way.”

Conclusions

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