
Understanding *Dobbs v Jackson Women's Health* and Its Aftermath

Hello!

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Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority. The Court overrules those decisions and returns that authority to the people and their elected representatives.

Justice Samuel Alito

Dobbs v Jackson Women's Health Organization, 6/24/22



What We Will Cover

- How did we get here?
- What the opinion does - and doesn't - say
- What it means for women in California
- What the post-*Dobbs* landscape looks like
- What can - and can't - be done

How Did We Get Here?

A Brief Historical Review



The 14th Amendment to the United States Constitution

- 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 [substantive due process], without due process of law [procedural due process];
- nor deny to any person within its jurisdiction the equal protection of the laws.

Griswold v Connecticut, 1965

- A Connecticut statute made it a crime for any person to use birth control
- The Executive Director of the Planned Parenthood League of Connecticut (Griswold), and its medical director, a licensed physician, were convicted as accessories for giving married persons information and medical advice on how to prevent conception and prescribing birth control for the wife's use
- Griswold claimed that the statute violated the Fourteenth Amendment.
- Court's Analysis:
 - [A review of prior cases] suggests that specific guarantees in the Bill of Rights have penumbras, ... that help give them life and substance.
 - The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
 - The Fourth Amendment created a "right to privacy" in one's home.
 - *HELD*: The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights [assembly, property].

Roe v Wade, 1973

- Texas had a statute making abortion a crime
- Jane Roe was an unmarried Texas woman who wanted an abortion
- Wade was the District Attorney of Dallas County, charged with enforcing the statute
- Court's Analysis
 - *Griswold* finds a right of personal privacy in the penumbras of the enumerated rights.
 - Other cases establish that the concept of “liberty” in the 14th Amendment encompasses the right to “generally enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”
 - However, only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty” are included in this guarantee of personal privacy.
 - The states may also have compelling reasons to regulate abortion, such as to protect the mother's health.

Held:

- (1) The right to privacy encompasses a woman's decision whether or not to terminate her pregnancy;
- (2) However, the right is not absolute; states have legitimate interests in seeing to it that abortions are performed safely.
- (3) Court balanced these interests and concluded:
 - (a) prior to the end of the first trimester of pregnancy, the state may not interfere with or regulate a physician's decision that the patient's pregnancy should be terminated.
 - (b) after the end of the first trimester, and until the point in time when the fetus becomes viable, the state may regulate the abortion procedure only to the extent that such regulation relates to the preservation and protection of maternal health.
 - (c) from and after the point in time when the fetus becomes viable, the state may prohibit abortions altogether, except those necessary to preserve the life or health of mother.
- (4) The court specifically stated that “the unborn are not included within the definition of ‘person’ as used in the Fourteenth Amendment.”

Planned Parenthood v Casey, 1992

- The Abortion Control Act of Pennsylvania required that
 - A woman be provided pro-birth information at least 24 hours before the surgery.
 - A married woman must sign a form saying she has informed her husband.
- Planned Parenthood argued that the statute was unconstitutional.
- Court's Analysis
 - Roe determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment.
 - The adjudication of substantive due process claims requires the Court to determine the boundaries between the individual's liberty and the demands of organized society.

Casey Analysis, cont'd

- *Roe's* central holding properly invoked the reasoning and tradition of the precedents upon which it relied to establish a woman's right to terminate her pregnancy.
- Although *Roe* has engendered opposition, it has in no sense proven unworkable.
- For two decades, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.
- The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.
- No change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for its overruling.

Analysis - Stare Decisis

- Overruling *Roe*'s central holding would 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.
- Where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in *Roe*, its decision has a dimension not present in normal cases and is entitled to rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation.
- Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure.
- Without it the country would suffer a loss of confidence in the Judiciary.
- A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law.

Held:

- Roe's essential holding be retained and reaffirmed as to each of its three parts: (1) a recognition of a woman's right to choose to have an abortion before fetal viability (2) a confirmation of the State's power to restrict abortions after viability, and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.
- In balancing the right of woman to make her own decision against the legitimate interests of the state, the undue burden standard should be employed, i.e., does it place substantial obstacles?
- Roe's rigid trimester framework is rejected - the key is viability.
- It's okay to require counseling when the purpose is to persuade the woman to choose childbirth over abortion, or when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus.
- The husband notification provision constitutes an undue burden and is therefore invalid.

QUESTIONS?

(Section 1 Only)

Dobbs v Jackson Women's Health Organization

What it does - and doesn't say

What *Dobbs* Doesn't Say

Dobbs does NOT say it's
illegal for women to get
an abortion.

FACTS

- 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."
- Jackson Women's Health Organization, an abortion clinic, challenged the Act alleging that it violated *Roe v. Wade* and *Planned Parenthood v. Casey*.
- Petitioners appeal on the grounds that *Roe* and *Casey* were wrongly decided and that the Act is constitutional because it satisfies rational-basis review.

Holding

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

Analysis

- 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.

1. The right to an abortion is not a fundamental right
 - An un-enumerated right enjoys 14th Amendment protection only if “it is deeply rooted in [our] history and tradition” and if it is essential to this Nation’s “scheme of ordered liberty.”
 - In interpreting what is meant by “liberty,” the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court’s own ardent views about the liberty that Americans should enjoy.

- Not rooted in our history

- 18th Century legal scholars wrote that “post-quickening” abortion was a crime.
- By the time the Fourteenth Amendment was adopted [1868], three-quarters of the States had made abortion a crime at any stage of pregnancy. This consensus endured until the day Roe was decided. [In 1973, 30 states had anti-abortion laws; $\frac{3}{4}$ of 50 = 38]
- Roe either ignored or misstated this history, and Casey declined to reconsider Roe’s faulty historical analysis.

- Not part of “ordered liberty”
- 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.

2. Not supported by precedents

- What sharply distinguishes the abortion right from the rights recognized in the cases on which Roe and Casey rely is this: Abortion is different because it destroys what Roe termed “potential life” and what the law challenged in this case calls an “unborn human being.”
- None of the other decisions cited by Roe and Casey involved the critical **moral question** posed by abortion.
- Accordingly, those cases do not support the right to obtain an abortion

3. Stare Decisis Should Not Hold Sway - 5 Factors

- Nature of the Court's error
 - Egregious here because those who seek to protect fetal life no longer have a say
- Quality of the reasoning
 - Roe has no grounding in the constitutional text, history, or precedent.
- Workability
 - Casey's "undue burden" test has generated too much litigation.
- Effect on other areas of law
 - Roe and Casey have led to the distortion of many important but unrelated legal doctrines.
- Reliance interests
 - Overruling Roe and Casey will not upend concrete reliance interests like those that develop in "cases involving property and contract rights."
 - Roe and Casey failed to consider the effects of the ruling on the "status of the fetus."

Justice Thomas' Concurring Opinion

- All support for his positions come from his previous dissents.
- “Substantive due process” is an oxymoron that “lack[s] any basis in the Constitution.”
- In future cases, we should reconsider all of this Court’s substantive due process precedents, including Griswold (right to birth control), Lawrence (right to private consensual sexual activity), and Obergefell (same sex marriage)- [where’s Loving - interracial marriage?]

Justice Kavanaugh Concurring Opinion

On the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Loving v. Virginia*, and *Obergefell v. Hodges*, I emphasize what the Court today states: Overruling Roe does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.

WHY NOT? If Roe/Casey reasoning is flawed, why not these?

Justice Roberts Concurring Opinion

Would uphold Roe/Casey and affirm a woman's right to choose, and only address the question raised by Mississippi: should the “viability” test be abandoned? [Agrees that it should be]

Dissenting Opinion Part 1

(Authored by J. Sotomayor)

“One result of today’s decision is certain: the curtailment of women’s rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman’s reproductive freedom, the Constitution also protected ‘[t]he ability of women to participate equally in [this Nation’s] economic and social life.’

But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare.”

Dissenting Opinion Part 2

“No one should be confident that this majority is done with its work. 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. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold v. Connecticut*, *Eisenstadt v. Baird*. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence v. Texas*, *Obergefell v. Hodges*. They are all part of the same constitutional fabric, protecting autonomous decision-making over the most personal of life decisions.

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.”

Dissenting Opinion (conclusion)

“The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, “contributes to the actual and perceived integrity of the judicial process” by ensuring that decisions are “founded in the law rather than in the proclivities of individuals.” Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.”

QUESTIONS?

(Section 2 only)

What Does it Mean for Women in California?

Current Law

CA Health & Safety Code § 123462 (2002):

“The state may not deny or interfere with a woman’s right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman.”

Effect of *Dobbs*

- Does *Dobbs* overrule this statute?
NO - it leaves it to states to legalize or outlaw.
- Can a future SCOTUS case invalidate our law?
Maybe - it's complicated.
- Can Congress pass a law that would invalidate our law?
Probably Not - no Constitutional basis

The Post-*Dobbs* Landscape

Other States

ABORTION LAWS BY STATE



Various State Positions

Trigger laws: Previously enacted with provision that they would become effective “upon the overruling of *Roe v Wade*”

- Some states immediate, some with time periods

Pre-Roe bans that were never repealed - re-enacted?

State Courts blocking enforcement (FLA, KY, LA)

Restrictions

Civil Enforcement (TX)

Other Potential Ramifications & Questions in *Dobbs* Wake

- Women in marginalized demographics the most severely impacted
- Despite J. Kavanaugh's assurances, all SCOTUS-approved rights flowing from the 14th Amendment now in danger of being eliminated
- Laws in most states are all over the place, leading to increased litigation and uncertainty for patients and medical professionals alike
- Women's medical information on the internet - mail-order abortion medication, period-tracking app, e-mail/text exchanges - being subject to subpoena
- Husbands agreeing to wife's out-of-state abortion being charged with conspiracy to commit a crime

Questions?

(Sections 3 & 4 only)

What Can- and Can't - Be Done

Federal Level - Executive (President)

- Executive orders? Limited - generally can't make laws
- Main obstacle - the *Hyde* Amendment (can't use Federal funds to support abortion services)
- 12/21 FDA approved abortion pill via mail
- US Postal Service has declared it will not “assist” states in enforcing its laws
- Use Fed'l lands to set up clinics? - President Biden has said he won't approve, also *Hyde* issue

Federal Level - Legislative (Congress)

- Pass the Women's Health Protection Act
 - Codifies *Roe's* protections
 - Passed House, failed in Senate in May
 - Likely to be found unconstitutional
- Could, via Commerce Clause, pass law prohibiting states from preventing mail-order contraceptives and abortion pills
- ERA? "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." - **Probably not**

State Level - What California is doing

The California Future of Abortion Council (CFAB)

- Formed in September 2021
- Response to TX SB8, and pending demise of *Roe*
- Coalition of 40 reproductive health organizations, led by Senate Pro-Tem Toni Atkins
- Proclaimed CA a “Reproductive Freedom State”
- Developed “Recommendations to Protect, Strengthen, and Expand Abortion Services in CA”

Led to Introduction of Eight Bills

AB1666 - Prevents enforcement in CA of civil judgments against patients, providers, & those who assist women getting abortions in CA

- AAUW California co-sponsor
- Signed into law 6/24

AB1918 - Helps providers obtain liability coverage

AB2134 - Establishes fund to assist women without abortion-care coverage

More Bills

AB2223 - Deletes the requirement that a coroner hold inquests for deaths related to or following a known or suspected abortion (passed the House, in Senate; AAUW California supports)

AB2529 - Certification of nurse midwives

SB245 - Eliminates cost-sharing for abortion and abortion services

Senate Bills

SB1142 - Budget measure, three provisions

- Helps fund abortion-fund organizations and providers
- Develops information center for out-of-state patients
- Funds infrastructure support systems

SB1375 - Authorizes nurse practitioners to perform certain types of abortions

- AAUW California high priority
- Passed Senate, in Assembly (hrg 8/2)

Other California Efforts

Introduction of Constitutional Amendment to appear on the November ballot (SCA10):

“The state shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.”

- AAUW California supports at highest priority level
- Legislature has passed, will be on the ballot
- CA Constitution Sect 24: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.”

AAUW Efforts

AAUW National - working in coalition with The Center for Reproductive Freedom and others to get the Women's Health Protection Act (WHPA) passed in the Senate

AAUW California - supporting four abortion-related bills in CA legislature, co-sponsor of one and supporter of state Constitutional Amendment

Other Suggestions for AAUW CA

- Work to overturn the *Dobbs* decision
 - This is not possible - SCOTUS is the final say on constitutional issues; there is no other body to appeal to.
- Organize a list of homes where out-of-state women can stay.
 - Other organizations are doing this; Legislature is seeking funding to assist
 - Public Policy Committee may consider

AAUW Branch Level

- 501(c)(3) status does NOT prohibit us from engaging in pro-choice political activities - we can support causes, just not politicians, or 1 party over another generally
- Branches may organize a local network to host out-of-state patients
- Contact your local Planned Parenthood agency
 - What are they doing?
 - How can your members help?
 - Invite a representative as your program speaker
- Participate in GOTV campaign this Fall
 - Prepare a comparison of pro and anti-choice candidates

Individual Members

Get Engaged! Participate in the process!

- Educate yourself re your Reps' stance on abortion rights
- Participate in your branch's GOTV campaigns
- Support SCA10 and support AAUW CA efforts to spread the word and get others to vote for it
- Offer to be a speaker to other organizations you belong to on these issues
- Volunteer for GOTV efforts in abortion-restrictive states - help them change the make-up of their legislatures

THANKS for LISTENING!

Send me any follow-up questions
publicpolicy@aauw-ca.org

Some Resources

Article on Congress authority to make laws binding on states - William Hurd, esq

<https://news.bloomberglaw.com/us-law-week/does-congress-have-the-constitutional-authority-to-codify-roe>

Article on WHPA

[Efforts to Advance Women's Health Protection Act Continue After Bill Falls Short of Passage in Historic Senate Vote | Center for Reproductive Rights](#)

Article on mailed abortion pills

<https://www.govexec.com/management/2022/06/usps-its-mailers-comply-state-laws-abortion-pills/368799/>

More Resources

Excellent review of plethora of legal questions:

“Dobbs: The Immediate Aftermath and the Coming Legal Morass,”
commonwealthfund.org [warning: no answers!]

<https://www.commonwealthfund.org/blog/2022/dobbs-immediate-aftermath-and-coming-legal-morass>

Article on the uncertainty facing the medical profession post-Dobbs

<https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients>