Dobbs v. Jackson Women's Health Organization:

"The Roar of a Wave that Could Drown the Whole World"

Principal Speaker: **James E. Fleming**, The Honorable Paul J. Liacos Professor of Law

Commentators: **Aziza Ahmed**, Professor of Law and R. Gordon Butler Scholar in International Law

Gary Lawson, William Fairfield Warren Distinguished Professor & Associate Dean for Intellectual Life

Thursday, September 15, 2022, in Barristers Hall, Ground Floor

12:45 p.m.-2:00 p.m. with **lunch** beginning at 12:15 at the back of Barristers Hall

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey*, which had protected the constitutional right of pregnant persons to decide whether to terminate their pregnancies. Justice Alito's 5-4 majority opinion in *Dobbs* denied that it "cast doubt" on any other precedents. But Justice Thomas's concurring opinion said the quiet part out loud: that all of the substantive due process decisions protecting personal autonomy and bodily integrity—including the rights to use contraceptives, to "same-sex" intimacy, and to "same-sex" marriage—were "demonstrably erroneous" and should be overruled. Are these rights next? Is the Supreme Court just getting started? Many liberals and progressives (including feminists, queer theorists, and critical race theorists) have feared so. Many conservatives have hoped so. Others have tried to draw lines.

To discuss these issues, we have invited three distinguished BU Law professors. Their discussion will center on James E. Fleming's timely new book, *Constructing Basic Liberties: A Defense of Substantive Due Process* (University of Chicago Press, 2022). Professor Fleming will begin by arguing—in terms of Bob Dylan's prophetic "A Hard Rain's A-Gonna Fall"—that in *Dobbs* we can hear "the roar of a wave that could drown the whole world" of personal autonomy and bodily integrity that should be protected through the doctrine of substantive due process. These basic liberties, he argues in his book, are necessary to extend ordered liberty and the status of equal membership in our political community to all.

Professor Aziza Ahmed—a prominent reproductive justice scholar who signed the Reproductive Justice Scholars' Amicus Brief in *Dobbs*—and Professor Gary Lawson, a prominent originalist and critic of substantive due process—will comment on Professor Fleming's book and opening remarks.

To spur questions, Professor Fleming has provided the enclosed brief packet of selected readings concerning *Dobbs*.

To give students an opportunity to discuss these issues further with Professor Fleming, he will hold a session on Friday, September 16, 12:00 p.m.-1:00 p.m., in Redstone 410.

Co-sponsored by the American Constitution Society & the Federalist Society

Dobbs v. Jackson Women's Health Organization:
"The Roar of a Wave that Could Drown the Whole World"

James E. Fleming

"I heard the roar of a wave that could drown the whole world." These lines from Bob Dylan's prophetic "A Hard Rain's A-Gonna Fall" express what we heard from the Supreme Court last term: the roar of a wave that could drown the whole world of constitutional law built up over the past half-century. The new conservative majority, including three nominees of President Donald Trump, aggressively used its power to shatter longstanding precedents protecting the right of pregnant persons to personal autonomy and bodily integrity; expand the rights of gun owners to carry firearms in public despite the epidemic of gun violence in the U.S.; further erode the separation of church and state by increasing the role of religion in public life; and ramp up the never-ending assault on the administrative state through sharply limiting the power of the federal government to combat climate change and to curb the spread of the coronavirus pandemic. It was the most conservative term in a century. What is worse, there is every reason to believe that the Court is just getting started.

Dobbs v. Jackson Women's Health Organization dominated the term and exemplifies several recurring characteristics of the disruptive conservative majority: its elevation of the significance of the unjust historical practices as of 1791 or 1868 over the significant achievements of our constitutional practice since the New Deal in extending ordered liberty and the status of equal citizenship to all; its rejection of incremental steps in favor of hard-right maximalist turns; its decreeing that precedents have established frameworks which the precedents in fact have repudiated; its acting like counterrevolutionaries overthrowing an "egregious" regime and restoring an old order rather than like judges deciding one case at a time, building out doctrines with coherence and integrity.

In *Dobbs*, the Court held that the right to abortion is not "deeply rooted in this nation's history and tradition" or essential to "ordered liberty"—the balance our nation has struck between personal freedom and the demands of organized society. More ominously, the Court ruled that *Washington v. Glucksberg* provides the proper test for deciding what basic liberties the Due Process Clause protects: only those specific liberties protected in the *concrete historical practices* as of 1868, when the Fourteenth Amendment was adopted. *Glucksberg* rejected the approach of *Planned Parenthood v. Casey*, which had interpreted our traditions instead as *abstract aspirational principles* whose meaning is built out over time. For example, "all persons are created equal" is part of our tradition, despite concrete historical practices of inequality, including slavery, Jim Crow, and gender discrimination. Therefore, being faithful to the Fourteenth Amendment requires breaking from historical practices because of commitments to aspirational principles of liberty and equality.

In dissent in *Obergefell v. Hodges*, which extended the right to marry to same-sex couples, Chief Justice Roberts protested that the case "effectively overrules" *Glucksberg*, which he called the "leading modern case" interpreting the Due Process Clause. But, as I demonstrate in my new book, *Constructing Basic Liberties: A Defense of Substantive Due Process*, *Glucksberg* is the leading modern case only for justices who stand *against* protecting rights of personal autonomy and bodily integrity. Indeed, *Obergefell* is inconsistent with *Glucksberg*. So are *Lawrence v. Texas*, which extended the right to sexual intimacy to same-sex persons, and *Griswold v. Connecticut*, which recognized the right to use contraceptives. In fact, every decision in the past century that has protected a basic personal liberty under the Due Process Clause is inconsistent with *Glucksberg*. None would have come out as it did had the Court applied *Glucksberg*'s framework. Before *Dobbs*, the *Glucksberg* test was the conservative justices'

method of damage control: to argue against recognizing rights and limit prior cases to their specific holdings, given that they did not have the votes to overrule them. Now conservative justices have the votes to do so, even though Alito's majority opinion in *Dobbs* denies that it casts doubt on any cases besides *Roe* and *Casey*.

Senator Lindsey Graham praised Alito's opinion in *Dobbs* for "setting the right tone" by assuring that it would not endanger other rights. But Justice Thomas's concurring opinion said the quiet part out loud: if the Court applies Justice Alito's approach, it will conclude that all of the due process decisions protecting personal autonomy and bodily integrity—including *Griswold*, *Lawrence*, and *Obergefell*—were "demonstrably erroneous" and should be overruled.

In truth, the *Glucksberg* test would find that contraception, same-sex intimacy, and same-sex marriage—not to mention interracial marriage, which Thomas rather conveniently overlooked—are *not* protected liberties for the same reason that abortion is not: none of those rights, any more than abortion, was protected specifically in the concrete historical practices as of 1868. Moreover, Alito in 2020 joined Thomas's statement in Kentucky clerk Kim Davis's case calling for overruling *Obergefell*. If this Court does not overrule precedents like *Obergefell*, *Lawrence*, and *Griswold*, it will be because of political judgments (like Senator Graham's) about Republican Party politics, not because of their legal framework.

The *Dobbs* dissenters rightly called out this "hypocrisy," warning that *Roe* and *Casey* were "part of the same constitutional fabric" as these other precedents. All prior cases protecting personal autonomy and bodily integrity have rejected the hidebound historical practices framework Alito adopts in *Dobbs* in favor of the abstract aspirational principles framework.

Many have worried that the Court's haste to overrule precedents cherished by liberals has provoked a crisis of legitimacy. Increasingly, people perceive the Court's decisions as mostly

political and see the Court as little more than an arm of the Republican Party rather than a principled legal institution. There is much to this perspective: it is imperative that liberals and progressives recognize that for the next generation or longer, they will have to pursue constitutional justice through legislatures, executives, and state courts. Furthermore, the Court has brought upon itself an even deeper, more pervasive crisis of legitimacy stemming from its embrace of originalism. Instead of being faithful to our nation's ideals and aspirations embodied in the Constitution and developed over time by deciding cases on the basis of reasoned judgment and experience, their originalism would enshrine a hidebound Constitution that does not deserve our fidelity. It would cast out the most significant achievements of our constitutional law: decisions that have criticized concrete historical practices as of 1868 in seeking to be faithful to aspirational principles of liberty and equality.

Many conservatives, to the contrary, have celebrated *Dobbs* as a restoration of constitutional legitimacy. It is a restoration only in the sense that a counterrevolution restores an old, oppressive order—the concrete historical practices as of 1868—over and against a constitutional amendment and a modern practice of aspiring to extend ordered liberty and the status of equal citizenship to all.

James E. Fleming is the Honorable Paul J. Liacos Professor at Boston University School of Law. He is the author of a number of books in constitutional law, including *Constructing Basic Liberties: A Defense of Substantive Due Process* (University of Chicago Press, 2022) and *Ordered Liberty: Rights, Responsibilities, and Virtues* (Harvard University Press, 2013) (with BU Law's Linda C. McClain, the Robert Kent Professor)

The New York Times https://www.nytimes.com/2022/06/24/us/roe-wade-overturned-supreme-court.html

Supreme Court Rules on Abortion ›

In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights

June 24, 2022
Adam Liptak

Follow the latest abortion news and the Supreme Court's decision to overturn Roe v. Wade.

WASHINGTON — The Supreme Court on Friday overturned Roe v. Wade, eliminating the constitutional right to abortion after almost 50 years in a decision that will transform American life, reshape the nation's politics and lead to all but total bans on the procedure in about half of the states.

"Roe was egregiously wrong from the start," Justice Samuel A. Alito Jr. wrote for the majority in the 6-to-3 decision, one of the most momentous from the court in decades.

Bans in at least eight states swiftly took effect after they enacted laws meant to be enforced immediately after Roe fell. More states are expected to follow in the coming days, reflecting the main holding in the decision, that states are free to end the practice if they choose to do so.

The decision, which closely tracked a leaked draft opinion, prompted celebrations and outcries across the country, underlining how divisive the topic of abortion remains after decades of uncompromising ideological and moral battles between those who see making the choice to terminate a pregnancy as a right and those who see it as taking a life.

The outcome, while telegraphed both by the leaked draft opinion and positions taken by the justices during arguments in the case, nonetheless produced political shock waves, energizing conservatives who are increasingly focused on state-by-state-fights and generating new resolve among Democrats to make restoring abortion rights a central element of the midterm elections.

Protests swelled across the country on Friday evening. Outside the Supreme Court, thousands of abortion rights supporters demonstrated alongside small groups of celebrating anti-abortion activists, who blew bubbles. Throngs spilled into the streets in large cities like Los Angeles, Chicago and Philadelphia, and smaller crowds gathered in places like Louisville, Ky., and Tallahassee, Fla.

Speakers at some rallies exhorted abortion rights supporters to take their anger to the polls during the midterm elections in November, a point echoed by President Biden, who said the court's decision would jeopardize the health of millions of women.

"It is the realization of extreme ideology and a tragic error by the Supreme Court," Mr. Biden said.

Anti-abortion activists celebrated in front of the Supreme Court after the ruling. Shuran Huang for The New York Times

The ruling will test the legitimacy of the court and vindicate a decades-long Republican project of installing conservative justices prepared to reject the precedent, which had been repeatedly reaffirmed by earlier courts. It will also be one of the signal legacies of President Donald J. Trump, who vowed to name justices who would overrule Roe. All three of his appointees were in the majority in the ruling.

Chief Justice John G. Roberts Jr. voted with the majority but said he would have taken "a more measured course," stopping short of overruling Roe outright. The court's three liberal members dissented.

The case, Dobbs v. Jackson Women's Health Organization, No. 19-1392, concerned a law enacted in 2018 by the Republican-dominated Mississippi Legislature that banned abortions if "the probable gestational age of the unborn human" was determined to be more than 15 weeks. The statute, a calculated challenge to Roe, included narrow exceptions for medical emergencies or "a severe fetal abnormality."

Justice Alito's majority opinion not only sustained the Mississippi law but also said that Roe and Planned Parenthood v. Casey, the 1992 decision that affirmed Roe's core holding, should be overruled.

The reasoning in Roe "was exceptionally weak, and the decision has had damaging consequences," Justice Alito wrote. "And far from bringing about a national settlement of the abortion issue, Roe and Casey have enflamed debate and deepened division. It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."

Six justices voted with the majority, while three dissented. Erin Schaff/The New York Times

Justices Clarence Thomas, Neil M. Gorsuch, Brett M. Kavanaugh and Amy Coney Barrett joined the majority opinion.

In an anguished joint dissent, Justices Stephen G. Breyer, Sonia Sotomayor and Elena Kagan wrote that the court had done grave damage to women's equality and its own legitimacy.

"A new and bare majority of this court — acting at practically the first moment possible — overrules Roe and Casey," they wrote, adding that the majority had issued "a decision greenlighting even total abortion bans."

The dissent concluded: "With sorrow — for this court, but more, for the many millions of American women who have today lost a fundamental constitutional protection — we dissent."

The decision left important questions unanswered and revealed tensions among the five justices in the majority.

One open question was whether the Constitution required exceptions to abortion bans for the life or health of the mother, for victims of rape or incest or for fetal disabilities. The majority opinion noted that Mississippi law made exceptions for medical emergencies and fetal abnormalities, but it did not say that those exceptions were required.

In a concurring opinion, Justice Kavanaugh indicated that an exception for the life of the mother may be required, but he did not say so in so many words. "Abortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother," he wrote. "Some statutes also provide other exceptions."

But some of the recent state laws were close to categorical, the dissenters wrote.

"Some states have enacted laws extending to all forms of abortion procedure, including taking medication in one's own home," the dissenting opinion said. "They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's — no matter if doing so will destroy her life."

Another open question is whether other precedents are now at risk.

Justice Alito said the court's ruling was limited.

“To ensure that our decision is not misunderstood or mischaracterized,” he wrote, “we emphasize that our decision concerns the constitutional right to abortion and no other right.”

But Justice Thomas, a member of the majority, issued a concurring opinion that sent a different message. He wrote that it was strictly true that the majority opinion addressed only abortion, but he said that its logic required the court to reconsider decisions about contraception, gay sex and same-sex marriage.

“We have a duty to ‘correct the error’ established in those precedents,” he wrote, quoting an earlier opinion.

Justice Kavanaugh took the opposite approach in his concurring opinion, saying the precedents identified by Justice Thomas were secure.

The dissenters, noting that Justice Thomas “is not with the program,” said that “no one should be confident that his majority is done with its work.”

Promises, the dissenters said, were pointless.

“The future significance of today’s opinion will be decided in the future,” they wrote. “And law often has a way of evolving.”

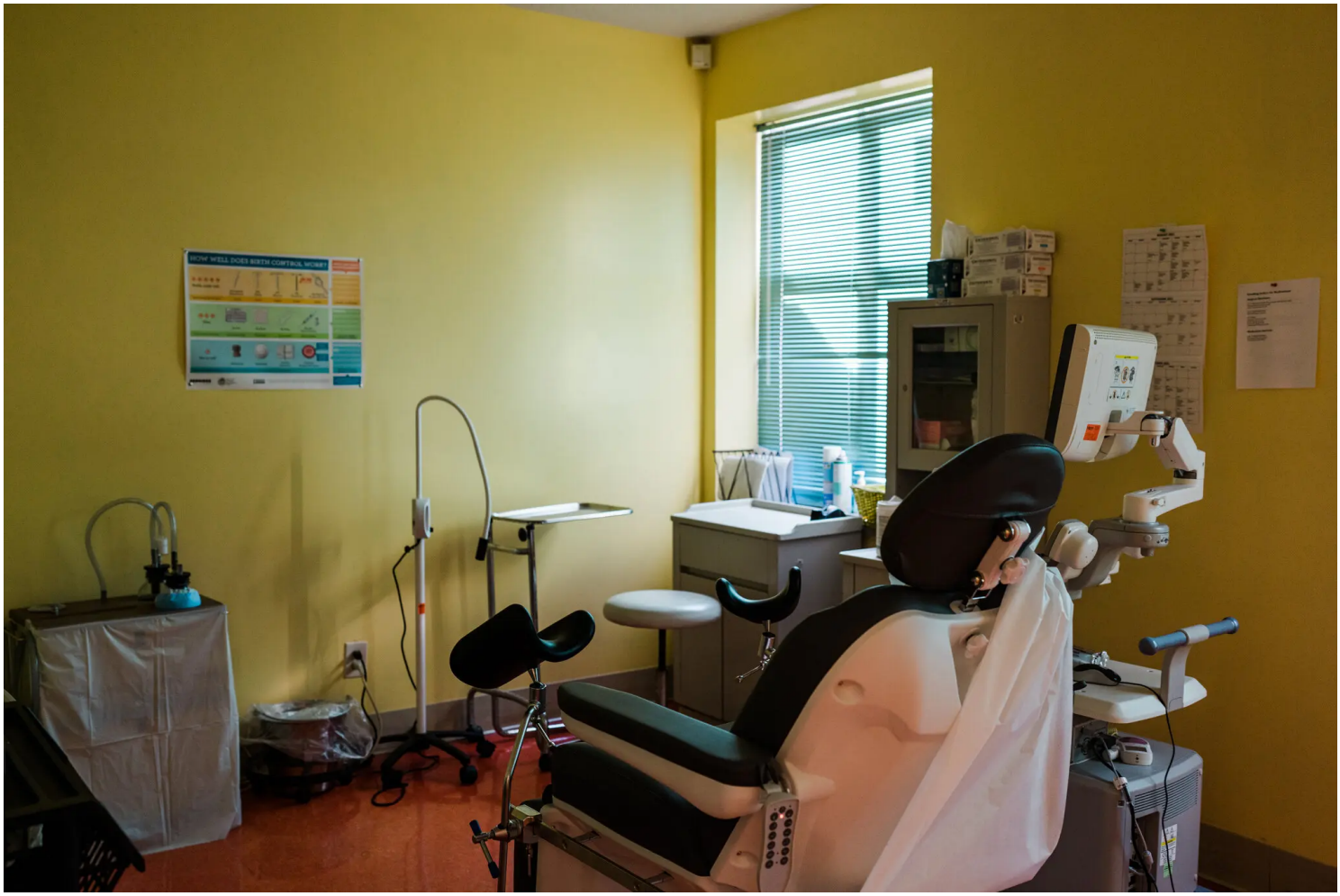
Chief Justice Roberts, who voted with the majority but did not embrace its reasoning, said he would have discarded only one element of Roe: its prohibition of abortion bans before fetal viability.

The right to abortion, he wrote, should “extend far enough to ensure a reasonable opportunity to choose, but need not extend any further — certainly not all the way to viability.”

The chief justice added: “The court’s decision to overrule Roe and Casey is a serious jolt to the legal system — regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.”

Justice Alito, once a close ally of the chief justice, said that was a recipe for turmoil.

“If we held only that Mississippi’s 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all,” he wrote.



Jackson Women's Health Organization is the only remaining abortion clinic in Mississippi. Gabriela Bhaskar/The New York Times

In challenging the law, Mississippi's sole abortion clinic focused on the 14th Amendment, which says that states may not "deprive any person of life, liberty or property without due process of law." Justice Alito wrote that the amendment, adopted in 1868, had not been understood to address abortion, which he said was at the time a crime in most states.

The joint dissent responded that only men had participated in the adoption of the amendment. "So it is perhaps not so surprising," they wrote, "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."

These days, Justice Alito wrote, women have political clout. "In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots," he wrote.

In his concurring opinion, Justice Kavanaugh wrote that states could not forbid their residents from traveling to other states to obtain abortions. That was scant comfort for women too poor to travel, the dissenters responded.

They added that the majority had left open the possibility that Congress could enact a nationwide ban. Were that to happen, "the challenge for a woman will be to finance a trip not to New York [or] California but to Toronto."

When the court decided Roe in 1973, it established a framework to govern abortion regulation based on the trimesters of pregnancy. In the first trimester, it allowed almost no regulations. In the second, it allowed regulations to protect women's health. In the third, it allowed states to ban abortions so long as exceptions were made to protect the life and health of the mother.

The court discarded the trimester framework in 1992 in the Casey decision but retained what it called Roe's "essential holding" — that women have a constitutional right to terminate their pregnancies until fetal viability.

Two years ago, in June 2020, the Supreme Court struck down a restrictive Louisiana abortion law by a 5-to-4 margin, with Chief Justice Roberts providing the decisive vote. His concurring opinion, which expressed respect for precedent but proposed a relatively relaxed standard for evaluating restrictions, signaled an incremental approach to cutting back on abortion rights.

But that was before Justice Ruth Bader Ginsburg died that September. Her replacement by Justice Amy Coney Barrett, a conservative who has spoken out against "abortion on demand," changed the dynamic at the court.

The New York Times https://www.nytimes.com/2022/06/24/us/abortion-supreme-court-roberts.html

NEWS ANALYSIS

June 24, 2022: The Day Chief Justice Roberts Lost His Court

Outflanked by five impatient and ambitious justices to his right, the chief justice has become powerless to pursue his incremental approach.

By Adam Liptak

June 24, 2022

WASHINGTON — In the most important case of his 17-year tenure, Chief Justice John G. Roberts Jr. found himself entirely alone.

He had worked for seven months to persuade his colleagues to join him in merely chipping away at Roe v. Wade, the 1973 decision that established a constitutional right to abortion. But he was outflanked by the five justices to his right, who instead reduced Roe to rubble.

In the process, they humiliated the nominal leader of the court and rejected major elements of his jurisprudence.

The moment was a turning point for the chief justice. Just two years ago, after the retirement of Justice Anthony M. Kennedy made him the new swing justice, he commanded a kind of influence that sent experts hunting for historical comparisons. Not since 1937 had the chief justice also been the court's fulcrum, able to cast the decisive vote in closely divided cases.

Chief Justice Roberts mostly used that power to nudge the court to the right in measured steps, understanding himself to be the custodian of the court's prestige and authority. He avoided what he called jolts to the legal system, and he tried to decide cases narrowly.

But that was before a crucial switch. When Justice Amy Coney Barrett, a conservative appointed by President Donald J. Trump, succeeded Justice Ruth Bader Ginsburg, the liberal icon, after her death in 2020, Chief Justice Roberts's power fizzled.

"This is no longer John Roberts's court," Mary Ziegler, a law professor and historian at the University of California, Davis, said on Friday.

The chief justice is now in many ways a marginal figure. The five other conservatives are impatient and ambitious, and they do not need his vote to achieve their goals. Voting with the court's three liberals cannot be a particularly appealing alternative for the chief justice, not least because it generally means losing.

Chief Justice Roberts's concurring opinion in Friday's decision, Dobbs v. Jackson Women's Health Organization, illustrated his present and perhaps future unhappy lot. He had tried for seven months to persuade a single colleague to join his incremental approach in the case, starting with carefully planned questioning when the case was argued in December. He failed utterly.

In the end, the chief justice filed a concurring opinion in which he spoke for no one but himself.

"It leaves one to wonder whether he is still running the show," said Allison Orr Larsen, a law professor at the College of William & Mary.

The chief justice will face other challenges. Though Justice Samuel A. Alito Jr., writing for the majority, said that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion," both liberal and conservative members of the court expressed doubts.

Justice Clarence Thomas, for instance, wrote in a concurring opinion that the court should go on to overrule three "demonstrably erroneous decisions" — on same-sex marriage, gay intimacy and contraception — based on the logic of Friday's opinion.

In Friday's abortion decision, Chief Justice Roberts wrote that he was ready to sustain the Mississippi law at issue in the case, one that banned most abortions after 15 weeks of pregnancy. The only question before the court was whether that law was constitutional, and he said it was.

Demonstrators gathered outside the Supreme Court on Friday. Shuran Huang for The New York Times

"But that is all I would say," he wrote, "out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."

He chastised his colleagues on both sides of the issue for possessing unwarranted self-confidence.

"Both the court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share," he wrote. "I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after 15 weeks."

Chief Justice Roberts was sworn in in 2005. Doug Mills/ The New York Times

The failure of his proposed approach was telling, Professor Larsen said.

"It sounds like the justices are talking past each other," she said. "There is very little evidence of moderation or narrowing grounds to accommodate another's point of view."

The chief justice acknowledged that his proposed ruling was at odds with the part of Roe v. Wade that said states may not ban abortions before fetal viability, around 23 weeks. He was prepared to discard that line. "The court rightly rejects the arbitrary viability rule today," he wrote, noting that many developed nations use a 12-week cutoff.

But there was more to Roe than the viability line, Chief Justice Roberts wrote. The court should have stopped short, he wrote, of taking "the dramatic step of altogether eliminating the abortion right first recognized in Roe."

Justice Alito rejected that approach.

"If we held only that Mississippi's 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all," he wrote. "The 'measured course' charted by the concurrence would be fraught with turmoil until the court answered the question that the concurrence seeks to defer."

The chief justice's proposal was characteristic of his cautious style, one that has fallen out of favor at the court.

"It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional decision should be overturned," he wrote on Friday, citing his opinion in a 2007 campaign finance decision that planted the seeds that blossomed into the Citizens United ruling in 2010.

That two-step approach was typical of Chief Justice Roberts.

The first step of the approach in 2007 frustrated Justice Antonin Scalia, who accused him in a concurrence of effectively overruling a major precedent "without saying so."

"This faux judicial restraint is judicial obfuscation," Justice Scalia, who died in 2016, wrote at the time. But Justice Scalia did not have the votes to insist on speed. Chief Justice Roberts's current colleagues do.

At his confirmation hearing in 2005, Chief Justice Roberts said the Supreme Court should be wary of overturning precedents, in part because doing so threatens the court's legitimacy.

"It is a jolt to the legal system when you overrule a precedent," he said. "Precedent plays an important role in promoting stability and evenhandedness."

He used similar language in criticizing the majority on Friday.

"The court's decision to overrule Roe and Casey is a serious jolt to the legal system — regardless of how you view those cases," he wrote. "A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case."

There are, to be sure, areas in which there is little or no daylight between Chief Justice Roberts and his more conservative colleagues, including race, religion, voting rights and campaign finance. In other areas, as in a death penalty decision on Thursday, he may be able to forge a coalition with the three liberals and Justice Brett M. Kavanaugh.

But Chief Justice Roberts, 67, may have a hard time protecting the institutional values he prizes. The court has been buffeted by plummeting approval ratings, by the leaked draft of Friday's majority opinion, by revelations about the efforts of Virginia Thomas, the wife of Justice Thomas, to overturn the 2020 election, and by Justice Thomas's failure to recuse himself from a related case.

Tensions are so high that federal officials arrested an armed man this month outside Justice Kavanaugh's home and charged him with trying to kill the justice. There have been protests outside the justices' homes in anticipation of the Roe ruling. Ten days ago, Congress approved legislation extending police protection to the justices' immediate families.

The climate — and a court that routinely divides along partisan lines in major cases — has increasingly undercut Chief Justice Roberts's public assertions that the court is not political.

"We don't work as Democrats or Republicans," he said in 2016. Two years later, he reiterated that position in an extraordinary rebuke of President Donald J. Trump after Mr. Trump responded to an administration loss in a lower court by criticizing the judge who issued it as an "Obama judge."

"We do not have Obama judges or Trump judges, Bush judges or Clinton judges," Chief Justice Roberts said in a sharp public statement that nonetheless went against substantial evidence to the contrary even then.

On Friday, all three Democratic appointees voted to strike down the Mississippi law and all six Republican ones voted to uphold it.

His concurring opinion and his institutionalist impulses notwithstanding, Chief Justice Roberts may have a hard time convincing the public that party affiliations say nothing about how the justices conduct their work.

The New York Times https://www.nytimes.com/2022/05/05/opinion/abortion-alito-discrimination.html

GUEST ESSAY

Justice Alito's Invisible Women

May 5, 2022

By Linda Greenhouse
Ms. Greenhouse, the winner of a 1998 Pulitzer Prize, reported on the Supreme Court for The Times from 1978 to 2008 and was a contributing Opinion writer from 2009 through 2021.

Yes, the leak of the draft opinion that would overturn Roe v. Wade was a shock. And it was shocking to read Justice Samuel Alito's airy dismissal of a decision the Supreme Court has reaffirmed numerous times in the past 49 years as "egregiously wrong from the start." That was on Page 6 of the draft opinion that Politico published last Monday, and Justice Alito spent the next 61 pages explaining why, in his view and perhaps ultimately in the view of four other justices, the court needs to overturn Roe now.

But the real shock to me was not what those 67 pages contain — mostly warmed-over stock phrases from the anti-abortion playbook that read like a law clerk's cut-and-paste job — but rather who is missing: women.

Women were largely absent from Roe v. Wade too. While Roe exists in the culture as some kind of feminist screed about the right to abortion, it was anything but that. If people set preconceptions aside and actually read Justice Harry Blackmun's opinion, they would see that Roe was really a decision about the right of doctors to exercise their judgment about a patient's best interest without risking prosecution and prison. How else to interpret this summary sentence from near the end of the opinion? "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention."

Women at best had a walk-on role in Roe v. Wade, but at least Justice Blackmun and the six other members of his majority had an excuse. When it came to the rights of women, the justices had very little to draw on. The court had yet to build a jurisprudence of sex equality; that came later, in the series of cases that the young Ruth Bader Ginsburg would argue during the remainder of the 1970s.

By the time Roe was argued, first in late 1971 and again the next year, the court had only just begun, ever so tentatively, to recognize that the 14th Amendment's guarantee of equal protection might have something to say about women. To be sure, feminist lawyers filed friend-of-the-court briefs in Roe arguing that the right to terminate a pregnancy was essential to women's equality, but these were neither voices nor arguments that the nine male justices were ready to hear, and they went unacknowledged.

That was then. Forty-nine years later, we live in a different constitutional universe — or thought we did. Mississippi, defending a ban on virtually all abortions after 15 weeks of pregnancy that is flatly unconstitutional under current Supreme Court precedents, is asking the court to overturn those precedents. Granted that the young Samuel Alito, as a recent Princeton graduate, joined an organization of conservatives who sought to limit the inclusion of women at his alma mater. Granted that he has made clear his desire to overturn Roe since even before his days on the court. It is still astonishing that in 2022 he would use his power to erase the right to abortion without in any way meaningfully acknowledging the impact both on women and on the constitutional understanding of sex equality as it has evolved in the past half-century.

His draft opinion takes aim not only at Roe but also at Planned Parenthood v. Casey, the 1992 decision that reaffirmed the right to abortion and notably added equality as one of the right's foundations. Three Republican-appointed justices, Anthony Kennedy, Sandra Day O'Connor and David Souter, wrote in Casey's unusual joint opinion that women's ability to "participate equally in the economic and social life of the nation" depended on "their ability to control their reproductive lives."

Failing to acknowledge that insight, the Alito draft instead attacks Casey as "unworkable," as shown by "a long list of circuit conflicts" among federal appeals courts that have disagreed over how to apply the "undue burden" test that the decision established. The Casey undue-burden test invalidates a regulation that places a "substantial obstacle" in the path of a woman seeking to terminate her pregnancy before fetal viability. A major reason for judicial disagreements over how to apply this standard is not its unworkability but the unwillingness of some Republican-appointed judges to accept the fact that there is still a constitutional right to abortion; for these judges, no burden is ever great enough to be "undue." As judges appointed by President Donald Trump have populated the lower courts (he named more than 200), the ideologically driven judicial resistance has escalated.

The Alito draft whitewashes decades of progress on women's rights. It fails, for example, even to cite Justice Ginsburg's landmark 1996 majority opinion in United States v. Virginia that rejected the exclusion of women from the state-supported Virginia Military Institute.

Virginia had defended the men-only admission policy on the ground that women were ill suited for the college's physically and emotionally demanding culture. Justice Ginsburg's answer was that physical differences between the sexes cannot be used to justify sex-based stereotypes or to place "artificial constraints on an individual's opportunity." Her analysis made clear that neither can laws regulating pregnancy be based on stereotyped assumptions about women's roles or capacities. Any distinction on the basis of sex had to be supported by an "exceedingly persuasive justification," the court held.

This was a sharp distinction from a decision early in the Roe era, Geduldig v. Aiello, in which the court held in 1974 that because pregnancy is a condition unique to women, a state could withhold equal benefits from pregnant women without violating the Equal Protection Clause. Pregnancy discrimination, in other words, was not sex discrimination as a constitutional matter. While the court has never formally overruled Geduldig, it has not cited it to address a claim of sex discrimination since the 1970s. A friend-of-the-court brief filed by three scholars of constitutional equality, Serena Mayeri, Melissa Murray and Reva Siegel, argues in the case now before the court that the Geduldig decision was effectively superseded by the Virginia decision and other modern sex-discrimination cases, and that the right to abortion should be understood as an equality right.

The argument got Justice Alito's attention but not his agreement. "The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny" unless the regulation is just a pretext for discrimination, he wrote. For that proposition, breaking with decades of Supreme Court practice, he cited Geduldig.

In the wake of the mortifying breach that the leak represents, there has been much talk of the Supreme Court's "legitimacy." The court has a problem, no doubt, one that barriers of unscalable height around its building won't solve. But if a half-century of progress toward a more equal society, painstakingly achieved across many fronts by many actors, can be so easily jettisoned with the wave of a few judicial hands, the problem to worry about isn't the court's. It's democracy's. It's ours.

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The New York Times https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html

GUEST ESSAY

No, Justice Alito, Reproductive Justice Is in the Constitution

June 26, 2022

By Michele Goodwin
Ms. Goodwin is a chancellor's professor of law at the University of California, Irvine, and the author of "Policing the Womb: Invisible Women and the Criminalization of Motherhood."

Black women's sexual subordination and forced pregnancies were foundational to slavery. If cotton was euphemistically king, Black women's wealth-maximizing forced reproduction was queen.

Ending the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the 13th and 14th Amendments. The overturning of Roe v. Wade reveals the Supreme Court's neglectful reading of the amendments that abolished slavery and guaranteed all people equal protection under the law. It means the erasure of Black women from the Constitution.

Mandated, forced or compulsory pregnancy contravenes enumerated rights in the Constitution, namely the 13th Amendment's prohibition against involuntary servitude and protection of bodily autonomy, as well as the 14th Amendment's defense of privacy and freedom.

This Supreme Court demonstrates a selective and opportunistic interpretation of the Constitution and legal history, which ignores the intent of the 13th and 14th Amendments, especially as related to Black women's bodily autonomy, liberty and privacy which extended beyond freeing them from labor in cotton fields to shielding them from rape and forced reproduction. The horrors inflicted on Black women during slavery, especially sexual violations and forced pregnancies, have been all but wiped from cultural and legal memory. Ultimately, this failure disserves all women.

Overturning the right to abortion reveals the court's indefensible disregard for the lives of women, girls and people capable of pregnancy, given the possible side effects and consequences of pregnancy, including gestational diabetes, pre-eclampsia, hemorrhaging, gestational hypertension, ectopic pregnancy and death. State-mandated pregnancy will exacerbate what are already alarming health and dignity harms, especially in states with horrific records of maternal mortality and morbidity.

To understand the gravity of what is at stake, one need only turn to the Supreme Court's own recent history. In 2016, Justice Stephen Breyer noted in Whole Woman's Health v. Hellerstedt that women are 14 times more likely to die by carrying a pregnancy to term than by having an abortion. The United States bears the chilling distinction of being the most dangerous place in the industrialized world to give birth, ranking 55th overall in the world.

Disproportionately, those who will suffer most are poor women, especially Black and brown women. Black women are over three times as likely to die by carrying a pregnancy to term as white women. In Mississippi, a Black woman is 118 times as likely to die by carrying a pregnancy to term as by having an abortion. According to the Mississippi Maternal Mortality Report, from 2013 to 2016, Black women accounted for "nearly 80 percent of pregnancy-related cardiac deaths" in that state. At present, there is only one clinic in the entire state of Mississippi to serve hundreds of thousands of women that might need to terminate a pregnancy.

In 1942, in a unanimous decision delivered by Justice William Douglas in Skinner v. Oklahoma, the court explained that "This case touches a sensitive and important area of human rights," because Oklahoma sought to sterilize a man who committed petty crimes, including stealing chickens, under its "Habitual Criminal Sterilization Act."

Justice Douglas wrote that reproductive autonomy and privacy, associated with "marriage and procreation," are "fundamental," and a state's interference with such rights "may have subtle, far-reaching and devastating effects." The justices were concerned about the inequality at the heart of the law, which singled out poor and vulnerable classes of American men.

Now, 80 years later, Mississippi has already made a "clear, pointed, unmistakable discrimination," as if it has "selected a particular race or nationality for oppressive treatment," which the court specifically struck down and condemned in Skinner.

What today's Supreme Court strategically overlooks, legal history reminds us with stunning clarity, specifically the terrifying practices of American slavery, including the stalking, kidnapping, confinement, coercion, rape and torture of Black women and girls. In a commentary reprinted in The New York Times on Jan. 18, 1860, slavery was described as an enterprise that "treats" a Black person "as a chattel, breeds from him with as little regard for marriage ties as if he were an animal, is a moral outlaw."

Such observations were hardly unique or rare; the Library of Congress offers a comprehensive collection of newspapers, almanacs, daguerreotypes, illustrations, and other materials that comprise the "African-American Mosaic: Influence of Prominent Abolitionists." Laws that date back to the 1600s expose the sexual depravity and inhumanity of American slavery. In 1662, the Virginia Grand Assembly

enacted one of its first "slave laws" to settle this point, expressing, "Whereas some doubts have arisen whether children got by any Englishman upon a Negro woman should be slave or free, be it therefore enacted and declared by this present Grand Assembly, that all children born in this country shall be held bond or free only according to the condition of the mother."

Thomas Jefferson kept copious receipts and documents related to the births of enslaved children at his Monticello plantation, including those who were ultimately discovered to be his own. Not surprising, at the heart of abolishing slavery and involuntary servitude in the 13th Amendment was the forced sexual and reproductive servitude of Black girls and women. Senator Charles Sumner of Massachusetts, who led the effort to prohibit slavery and enact the 13th Amendment, was nearly beaten to death in the halls of Congress two days after giving a speech that included the condemning of the culture of sexual violence that dominated slavery.

Black women also spoke out about their reproductive bondage. In 1851, in her compelling speech known as "Ain't I a Woman," Sojourner Truth implored the crowd of men and women gathered at the Women's Rights Convention in Akron, Ohio, to understand the gravity and depravity of American slavery on Black women's reproductive autonomy and privacy. Reported by newspapers and recorded through history, Ms. Truth stated that she had borne 13 children and seen nearly each one ripped from her arms, with no appeal to law or courts. Wasn't she a woman, too? By the accounts of those gathered, including famed feminist abolitionist Frances Gage, the room stood still and then erupted in applause.

Similarly, in "Incidents In The Life of A Slave Girl," published in 1861, Harriet Jacobs describes the herculean efforts made to avoid the inevitable sexual assault and rape by her captor. She wrote, "I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things."

And yet, slavery's vestiges persisted in Southern states, including within the domains of privacy, child rearing and marriage. The Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the "Freedmen's Bureau," founded March 1865, collected letters written by Black mothers despairing over vile "apprenticeships" whereby their children were kidnapped and returned to bondage under the guise of traineeships.

Congress followed in 1868 with the ratification of the 14th Amendment, which further secured the interests of Black women who had been subjected to cruelties inflicted on them physically, reproductively, and psychologically.

The 14th Amendment opens with the sentence, "All persons born or naturalized in the United States … are citizens of the United States and of the State wherein they reside" and as such would be protected by the laws of the United States. Such language applied to infants born to Black women, changing the provisions of law that had long denied Black children citizenship and the protection of laws. Lawmakers were understandably concerned about overturning states laws that had denied children the dignity of personhood.

Justice Samuel Alito's claim, that there is no enumeration and original meaning in the Constitution related to involuntary sexual subordination and reproduction, misreads and misunderstands American slavery, the social conditions of that enterprise and legal history. It misinterprets how slavery was abolished, ignores the deliberation and debates within Congress, and craftily renders Black women and their bondage invisible.

It is no hyperbole to say that the Supreme Court's decision in the Dobbs case is in league with some of the darkest rulings — Plessy v. Ferguson, which opened the floodgates to "separate but equal" laws that ushered in Jim Crow, and Buck v. Bell, which sanctioned states' eugenics laws permitting forced sterilization of poor women.

The court's central role — and sadly its complicity — in the harms that predictably will result from this decision cannot be overlooked. The court will be giving its imprimatur to states set to "trigger" laws that will criminally and civilly punish girls and women who want and need to end pregnancies, including victims of rape and incest, while ignoring the deadly traps in which most of those states have historically placed Black women.

Michele Goodwin is a chancellor's professor of law at the University of California, Irvine, and the author of "Policing the Womb: Invisible Women and the Criminalization of Motherhood."

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The New York Times https://www.nytimes.com/2022/06/30/opinion/same-sex-marriage-supreme-court.html

GUEST ESSAY

Is the Right to Same-Sex Marriage Next?

June 30, 2022

By Kenji Yoshino
Kenji Yoshino is the Chief Justice Earl Warren professor of constitutional law at N.Y.U. School of Law.

While the Supreme Court's opinion in Dobbs v. Jackson Women's Health Organization is already catastrophic in its effects on reproductive rights and the equal treatment of women in this country, it has also led to speculation that the court's conservative supermajority is just getting started in rolling back fundamental rights. To be sure, Justice Samuel Alito's majority opinion is at pains to say that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." Yet that statement rings false.

Unenumerated rights are those not explicitly set forth in the Constitution but inferred from its text, structure, ethos and history. The majority opinion, quoting an earlier, contested opinion, states that unenumerated rights will not be recognized unless they are "deeply rooted in this nation's history and tradition." The court, however, previously recognized many rights other than abortion that are not so rooted. In his concurrence in Dobbs, Justice Clarence Thomas urges the court to follow its own logic, contending that "in future cases, we should reconsider all of this court's substantive due process precedents." He names three cases protecting the rights to contraception, same-sex sexual intimacy and same-sex marriage.

Constitutional scholars and advocates are now pressed to do the previously unimaginable work of defending those precedents. Grounds exist to distinguish Roe from all the precedents Justice Thomas mentions, though the current court is so unpredictable that there's no guarantee it will honor those distinctions. What we need now are the best arguments for why the court should not overrule those cases.

The critical part of the right to same-sex marriage secured by the Obergefell v. Hodges decision in 2015 is that it rested not only on the due process clause but also on the equal protection clause. These two clauses can be found in the 14th Amendment — the 1868 provision seen as the keystone of Reconstruction in ushering in a new birth of freedom for this country. As interpreted by the courts, the due process clause safeguards unwritten rights that individuals possess from infringement by the states (just as the Fifth Amendment's due process clause offers the same protection against the federal government). The equal protection clause, in contrast, focuses on groups, noting that states cannot treat historically subordinated groups on unequal terms.

In Obergefell, the court found a fundamental right to same-sex marriage under its due process analysis. Yet it also found under its equal protection analysis that if straight people could get married, gay people must be able to get married as well. In adopting this double-barreled approach, Obergefell mimicked the 1967 decision in Loving v. Virginia, which recognized the right to interracial marriage. (For whatever reason, Justice Thomas does not mention Loving as a case he would like the court to reconsider.)

The court could revisit Obergefell and decide that its due process holding should be overruled because the right to same-sex marriage is not "deeply rooted in the nation's history." However, it would not be able to dispense with the equal protection argument so easily, for at least two reasons.

First, the equal protection clause focuses on groups, not on rights. The clause has restricted states from making invidious distinctions among people based on classifications such as race, national origin and sex. It's completely implausible that the court will eliminate marriage for different-sex couples, as that right has a deep historical provenance. So the question becomes whether gay people must also be afforded the right to marry without regard to their sex or sexual orientation. And the court's equal protection jurisprudence has stringently protected individuals against sex discrimination and, to a lesser extent, sexual orientation discrimination.

Second and relatedly, the equal protection clause is not as beholden to history as the due process clause. The point of the equal protection clause has never been to safeguard historical traditions. To the contrary, the equal protection jurisprudence has attempted to upend traditions that have led to the subordination of particular groups — whether in abolishing a long tradition of barring racial minorities from serving on juries, a long tradition of excluding women from state-funded universities or a long tradition of subordinating gay, lesbian and bisexual people. Under Dobbs's problematic "deeply rooted in the nation's history" formulation, the long history of anti-gay discrimination undermines many gay-rights arguments. But the same history bolsters the equal protection argument because the purpose of this clause is to undo our nation's worst traditions.

This defense is a limited one. It is primarily available to preserve decisions — like those protecting same-sex marriage and interracial marriage — in which the opinion formally rested on an equal protection ground as well as a due process ground. So this equal protection defense should be regarded as but one of several firewalls needed to limit the damage Dobbs could do to other unenumerated rights.

Progressive constitutionalists should be developing every defense that they can find. The right to same-sex sexual intimacy and the right to contraception, for instance, might be deemed more workable — a criterion the Dobbs court finds important — than the abortion right, which, in that court's view, presented a particularly vexing line-drawing issue.

Yet this equal protection argument may not work even for same-sex marriage. Given the recent barrage of opinions that have radically revised the constitutional landscape with regard to the religion clauses and the Second Amendment, we should not assume the court will preserve the ground rules of equal protection analysis. It could decide, for instance, that the equal protection clause should similarly be limited by history to protect only against race-based discrimination. That would be a downright apocalyptic result for the nation and the Constitution. The equal protection clause is the most viable updating mechanism in our hard-to-amend Constitution; it ensures the expansion of who counts as part of "we, the people." If the current court hollows out this clause as well, the mismatch between the centuries-old document and the 21st-century society it serves and structures will become even more devastatingly apparent.

Kenji Yoshino is the Chief Justice Earl Warren professor of constitutional law at N.Y.U. School of Law and a co-author of the forthcoming book "Say the Right Thing: How to Talk About Identity, Diversity and Justice."

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The New York Times https://www.nytimes.com/2022/07/06/opinion/dobbs-griswold-abortion-rights-conformity.html

GUEST ESSAY

Americans Are Losing Their Right to Not Conform

July 6, 2022

By Melissa Murray
Ms. Murray is a professor of law at New York University.

On June 24 the Supreme Court laid waste to Roe v. Wade and Planned Parenthood v. Casey on the grounds that the right to an abortion is not enumerated in the Constitution and is not deeply rooted in the history and traditions of the United States. As many commentators have noted, similar objections could be lodged against precedents like Griswold v. Connecticut, Lawrence v. Texas and Obergefell v. Hodges, which recognize constitutional protections for contraception, sex and marriage.

It is curious, then, to see today's conservatives celebrating the prospect of overruling privacy rights. Such rights have for years protected Americans who have chosen the path less traveled — those who have bucked traditional ideas about sex and family. Without those rights, it would be much harder for Americans to make choices about some of the most intimate aspects of their lives, like whether and when to have children and with whom to partner and make a family.

There is something profoundly un-American about challenging these cases and the principles that underlie them, at least according to the American ideals that liberals and conservatives alike used to profess. In a 1928 presidential campaign speech, for instance, Herbert Hoover, a Republican, invoked "the American system of rugged individualism" — the notion that America was a place of free markets, individual thought and a dogged skepticism of state-imposed conformity.

It's obvious that many of those on today's right do not think of L.G.B.T.Q. rights and abortion protections as a matter of individualism, in the old-school conservative mold. They see departures from the traditional heterosexual family and traditional gender roles as aberrant and wrong. But that's odd, because the freedom to define oneself — to not conform — has deep roots in the American traditions of pluralism, independence and resistance to the prospect of government compulsion.

The right to privacy was established in Griswold — the contraception case — in 1965. In that decision, the court referred to two 1920s parental rights cases, as well as more recent cases in which the court recognized constitutional protections for those espousing unpopular political views. The message was clear: The Constitution makes room in our society for those who do not conform to traditional norms, whether politically or in the conduct of their intimate lives.

Justice Harry Blackmun, who wrote the majority opinion in Roe, underscored this view in his dissent in Bowers v. Hardwick, a 1986 case upholding a Georgia law criminalizing sodomy. The decision was widely regarded as a blow to the growing L.G.B.T.Q. rights movement. Justice Blackmun looked askance at the prospect of laws that would evince the state's preference for heterosexuality by criminalizing the private sexual conduct of gay men and women. He explained that in our diverse nation, "there may be many 'right' ways" of conducting relationships and that "much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds."

Three years later, in response to a decision denying an unmarried father's paternal rights, Justice William Brennan, who joined Blackmun's dissent in Bowers, made the point about diversity and pluralism more emphatically. The court denied the father's claim in large part because the child was the product of an adulterous relationship. Writing for the court, Justice Antonin Scalia framed the denial as a defense of "the unitary family." Justice Brennan resisted this crabbed vision of family: "We are not an assimilative, homogeneous society, but a facilitative, pluralistic one in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies."

Brennan's dissenting view, and its defense of constitutional protection for nonconformity, eventually prevailed. In 2003's Lawrence v. Texas, the court struck down laws criminalizing sodomy. In so doing, it favorably cited Planned Parenthood v. Casey, the abortion case overruled alongside Roe last month, for the view that decisions "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the 14th Amendment." The Constitution, it seemed, made room for nonconformity.

Conservatives have not always resisted the impulse toward nonconformity. Take the First Amendment, a particular favorite of the court's conservative bloc. Not only does it protect dissenting voices; it begins by discrediting the prospect of state-mandated religious conformity. (Though it is noteworthy that this court's defense of the First Amendment is often deployed in favor of Christian evangelicals rather than minority religious sects.)

The court's stalwart defense of the Second Amendment bears all of the hallmarks of the rugged individualism that Republicans once lauded. In the New York gun rights case decided the day before the decision undoing Roe v. Wade, Justice Clarence Thomas, who wrote for the majority, recounted a history in which the denial of the right to bear arms left newly freed African Americans uniquely vulnerable to racialized violence. His point was clear: The right to bear arms could be a critical equalizer for those who, by virtue of race, did not conform to the traditional vision of white male citizenship.

To be sure, the Constitution's defense of nonconformity is not sweeping. There is no unfettered right to do what you want when you want. But there is a long American tradition of defending pluralism and protecting those who seek the road less traveled. Why, then, do contemporary conservatives insist on protections primarily for those who are against liberal access to abortion and contraception, same-sex marriage and sensible gun restrictions, as supported by a majority of Americans? Why is it nonconformity for me but not for thee? Some would argue that a stalwart vision of the Constitution rooted in the 1780s compels the conservative approach to these questions. Others maintain that these disjunctions are simply about power — about crafting a society in which everyone must conform to the vision of American life that contemporary conservatives desire.

Either way, the loss of the right to not conform makes it harder for this country to continue as a multiracial, multiethnic, multifaith democracy. And perhaps that is the point.

Melissa Murray is a professor of law at New York University and a co-host of the "Strict Scrutiny" podcast.

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Abortion, Constitutional Law, Human Dignity, Supreme Court

The Magnificence of *Dobbs*

June 26, 2022 By Michael Stokes Paulsen

Dobbs may be the most important, magnificent, rightly decided Supreme Court case of all time. It is restorative of constitutional principle. It upholds the values of representative, democratic self-government, and the rule of law, at the same time that it supports the protection of fundamental human rights. It is literally a matter of life and death. It is potentially transformative of American society, for the better. It is a rare act of judicial courage and principle. In every way, *Dobbs* is a truly great decision.

In the annals of Supreme Court history, there are surprisingly few truly "great" cases—hugely significant, magnificently correct, principled, courageous decisions vindicating the Constitution. One thinks, of course, of

Brown v. *Board of Education*, the 1954 decision unanimously repudiating *Plessy* v. *Ferguson*'s longstanding but atrocious constitutional doctrine of "separate but equal" that endorsed racial apartheid. *Brown* restored the Constitution's original meaning of equal protection of the laws—that government may not classify, segregate, or discriminate among classes of citizens on the basis of race, ever. *Brown* rejected segregation, launched the civil rights era, and transformed American society.

Almost equally magnificent is *Youngstown Sheet & Tube Co.* v. *Sawyer*, the Court's 1952 decision invalidating President Harry Truman's unconstitutional seizure of the nation's steel mills during the Korean War. *Youngstown* vindicated the fundamental principle that the President, even during time of war, is not a dictator or lawmaker, but is instead constrained by the rule of law. The significance of that holding can be measured by the consequences had the decision gone the other way. Imagine if, since 1952, American presidents had been conceded the power to impose binding legal commands affecting private rights, by simple executive decree. Yet the case presented that risk. The 6–3 majority rose to the challenge and ruled against the President, setting a vital, correct, and enduring precedent.

Then there's *West Virginia State Board of Education* v. *Barnette*, the Court's inspirational 1943 decision upholding the right of public schoolchildren not to be compelled, on pain of expulsion, to salute the flag or recite the Pledge of Allegiance against their religious beliefs and consciences. *Barnette*, like *Brown*, overruled a prior atrocious precedent that had betrayed the Constitution (*Minersville School District* v. *Gobitis*, decided 8–1 in 1940). The Court vindicated, in spectacular fashion, the fundamental constitutional rights to dissent, freedom of expression, and freedom from government-compelled affirmation. It is difficult to imagine modern America without *Barnette*'s repudiation of *Gobitis*. *Barnette* is arguably the greatest First Amendment decision of the Supreme Court of all time.

Brown, *Youngstown*, and *Barnette* rank among the few, true, great Supreme Court decisions of our nation's history. Some early decisions of the Marshall Court, like *McCulloch v. Maryland* (1819), are foundational and important, but involved no heroic bravery or contested restoration of constitutional principle. There have been other crucial, correct cases through the years. (One thinks of *The Prize Cases*, the Court's important 1863 decision upholding Lincoln's exercise of Commander-in-Chief powers during the Civil War, presaging the lawfulness of the Emancipation Proclamation.)

But such moments of Supreme Court greatness are truly rare. It is far easier to tick off, rapidly, a list of the Supreme Court's truly horrific, atrocious decisions—*Dred Scott* (1857), *Bradwell v. Illinois* (1873), *Plessy* (1896), *Giles v. Harris* (1903), *Lochner v. New York* (1905), *Berea College v. Kentucky* (1908), *Debs v. United States* (1919), *Buck v. Bell* (1927), *Korematsu v. United States* (1944), *Roe v. Wade* (1973), *Planned Parenthood v. Casey* (1992) and many more—than to identify moments of extraordinary Supreme Court courage, conviction, and correctness in vindicating the Constitution and rescuing our nation's fundamental law from those who would betray it, including prior generations of judicial Judases. (It is instructive that some of the Court's greatest decisions involved overruling some of its worst decisions.)

The Greatest Supreme Court Decision of All Time?

Enter *Dobbs v. Jackson Women's Health Organization*, decided by the Supreme Court Friday. *Dobbs* overruled *Roe* v. *Wade*'s constitutionally indefensible and morally atrocious creation of a nonexistent constitutional right to abortion of the life of a human fetus throughout pregnancy—a "constitutional right" of some human beings to kill other human beings (to describe the holding of *Roe* bluntly but not unfairly). *Dobbs* overruled *Planned Parenthood* v. *Casey*'s even more pernicious decision reaffirming *Roe* not on the basis that it was right but on the basis of a perverted

version of the judicial doctrine of "*stare decisis*" and the Court's desire to preserve its imagined image of infallibility, supremacy, and prestige.

> *Dobbs* overruled *Roe* v. *Wade*'s constitutionally indefensible and morally atrocious creation of a nonexistent constitutional right to abortion of the life of a human fetus throughout pregnancy.

Though we are too close to the *Dobbs* decision to evaluate it truly dispassionately, and though the decision's full potential consequences have not yet been achieved (and may never be), it remains possible to make an immediate judgment: *Dobbs* may be the most important, magnificent, rightly decided Supreme Court case of all time. It is as important as *Brown* v. *Board of Education*. It is as fundamental to the Constitution as *Youngstown Sheet & Tube*. It is as beautiful, in its own way, as *Barnette*. It is restorative of constitutional principle. It upholds the values of representative, democratic self-government, and the rule of law, at the same time that it supports the protection of fundamental human rights. It is literally a matter of life and death. It is potentially transformative of American society, for the better. It is a rare act of judicial courage and principle. In every way, *Dobbs* is a truly great decision.

Dobbs's Significance and Magnificence, Point by Point

Last month, I wrote in praise of Justice Samuel Alito's leaked draft majority opinion for the Court in *Dobbs*. Little of substance appears to have changed in the majority opinion, from February's first draft to Friday's final product

—a few new passages responding to dissenters' arguments, some elaborations.

All of what I said in May applies to the opinion issued Friday: the Alito majority opinion is a masterpiece of judicial craft, uniting and bridging small differences among the Court's five solid judicial conservatives (Alito, Thomas, Gorsuch, Kavanaugh, and Barrett). It works to an extent within existing judicial doctrine, powerfully and overwhelmingly refuting *Roe*'s and *Casey*'s holdings establishing a right to abortion even if one were to accept the premises of the dubious (to put it mildly) doctrine of "substantive due process." It thoroughly thrashes the notion that "*stare decisis*" requires the Court to adhere even to demonstrably, monstrously erroneous precedent for its own sake, for reasons of imagined fidelity to the "rule of law," or, even worse, for the sake of the Court's or justices' images or prestige. (If it were true that *stare decisis* required the Court to adhere to precedents radically at odds with the Constitution, *Brown* and *Barnette*, and many more decisions, would be wrongly decided.)

The majority opinion in *Dobbs*, true to the draft, persuasively refutes every legitimate constitutional argument (and more than a few illegitimate ones) for the results in *Roe* and *Casey*. It rules narrowly, focusing on the unique question of *abortion*—the question presented—and leaving other matters untouched as presenting different issues. None of those other matters involved life or death, "the critical moral question posed by abortion," the Court wrote. The opinion is narrow in another sense: it does not reach out to decide whether the Constitution's guarantee of the "equal protection of the laws" to every "person" includes the unborn as human persons and thus bestows an affirmative constitutional right to life for the unborn. That would render most abortions not only *prohibitable* but outright *prohibited* by the Constitution. Such a question was not presented by the case and the Court was right not to decide it, even as it did not entirely foreclose the possibility of such an issue being presented and decided in a future case. The Court in *Dobbs* simply returned the issue of abortion to the democratic

process—to "We the People"—and ended *Roe*'s regime of judicial usurpation.

What is new as of Friday is the concurrences and dissents, and the majority's responses to them. (I will discuss those, briefly, in a moment.) One can quibble over certain points, premises, precedents—things said, and things left unsaid—and critics certainly will. But one should not lose the constitutional forest for the technical trees. It is worth pausing to catalogue, and reflect upon, exactly what *Dobbs* accomplished, point by magnificent point. The leaker may have stolen some of the decision's thunder, but thunderous it remains.

First and foremost, *Dobbs* concludes, rightly, that *the U.S. Constitution contains no constitutional right to abortion.* There is no constitutional freedom to kill living human beings by abortion. This is huge. It is no exaggeration to say that this is the greatest victory for human rights in the Supreme Court's history. *Roe* had consigned an entire category of living human beings to the essentially plenary right of others to kill them. And kill them we did, on an almost unimaginable scale: approximately sixty-two million human lives have been lost to legal abortion since *Roe* was decided in 1973. *Roe* created a legal basis for an abortion holocaust. *Dobbs* does not end abortion. But it ends *Roe*. Overruling *Roe* is a giant, historic leap for humanity.

Dobbs concludes that there is no constitutional freedom to kill living human beings by abortion. It is no exaggeration to say that this is the greatest victory for human rights in the Supreme Court's history.

Second, *Dobbs* is a *triumph for restoring faithful constitutionalism*. This is significant in its own right and would be in any context. *Roe* and *Casey* were perhaps the most emblematic, lawless anti-constitutional decisions of our era—perhaps of any era. (*Dred Scott* is the nearest rival, and the decision most closely resembling *Roe* in methodology and, by analogy, in its outcome.) *Dobbs* rejects that path in favor of one marked by fidelity to the text, structure, and history of the Constitution. It is fundamentally consonant with the Constitution in a way that is the complete opposite of *Roe.* The *Dobbs* majority opinion might not be the constitutional purist's pristine picture of perfection. (I could write that opinion, but few would join it. And the same criticism could be made of *Brown*.) But it comes darned close or is at least very, *very* good—as good as it gets in the real world.

Third, *Dobbs* is a *triumph of judicial courage and principle*. The political pressure, even the legal pressure, to cave to certain segments of public opinion and defer to erroneous precedent, can be enormous. (The 5–4 majority in *Casey* succumbed to such pressure, cravenly.) The justices are human beings and, as recent weeks have shown, are vulnerable to threats and plots of violence. *Dobbs* is a profile in judicial courage. The Court overruled two of the worst precedents in its history—precedents beloved by some (just as *Plessy* was). This takes fortitude, as it took fortitude for *Brown* to overrule *Plessy* in the face of determined opposition and insistence upon the perverted power of precedent. There will be resistance to *Dobbs*—some vehement, certainly; some violent, possibly—just as there was to *Brown*. For the Court's majority to adhere to principle in the face of such expected consequences is notable and rare.

Fourth, *Dobbs* is, potentially, a *positive, transformative moment for American society*. Just as *Brown* propelled the civil rights movement, *Dobbs* lays the legal groundwork for social and moral change. And that is what ultimately

will be needed to protect human life. Judicial decisions are meaningful, but they have limitations. Laws protecting life are vital, but they only maintain vitality when hearts and minds change, too. As Abraham Lincoln put it, "public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions."

It is our job to change hearts and minds, to mold public sentiment, to persuade. *Dobbs* opens a door and opens a challenge. Can the pro-life movement, with the political and legal opportunities opened by *Dobbs*, work to create a pervasive national culture in which the unborn are not only protected by law but welcomed and supported in life? Can we support and encourage pregnant women in crisis pregnancies, as mothers; support adoption; and support families in general? Can we form a new civil-rights social justice movement that supports a genuine right to life?

The Concurrences, the Dissent, the Future

A word about the concurrences and the dissent. Clarence Thomas, concurring, made the expected point that "substantive due process" is oxymoronic gibberish in its entirety but agreed with the majority's analysis that a right to abortion could not be sustained even on that basis. Justice Kavanaugh, also concurring in the majority opinion, elaborated his own thoughts about *stare decisis* and emphasized the limited nature of the Court's ruling. It did not affect areas other than abortion, where different legal considerations might apply. Kavanaugh also stated that the Constitution does not itself prohibit abortion.

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Chief Justice Roberts concurred in the judgment only, making six votes to uphold Mississippi's ban on abortion after fifteen weeks. But the rest of his opinion is bizarre. Obsessed with a desire to rule as narrowly as possible, Roberts would have overruled *Roe* and *Casey* insofar as they invented a plenary right to abortion up the point of viability—that much is all to the good, and important. But, on the ground that it was not necessary to decide anything more, Roberts would have preserved *Roe*'s "right to choose" abortion so long as there was some "reasonable" opportunity to have exercised that choice at some (unspecified) earlier point in pregnancy—or at least left that question open for now. This is contrived. It is the fetish of restraint, without common sense. Taken seriously, it would invent (or preserve) a judicial abortion right and draw a brand new, arbitrary, ad hoc, unspecified line—exactly what Roberts condemned *Roe* and *Casey* for doing—on the ground that "judicial restraint" requires it. It is as if an Olympic sprinter determined that he should always run races taking only two-inch strides, as a matter of his own practice. Little wonder that he was left behind in the dust and that no one followed him. I have long resisted the common criticism of Roberts as not being fully principled. He has done some great work. But not here. This opinion is out to lunch.

The three pro-abortion dissenters—Breyer, Sotomayor, and Kagan—were no surprise. They joined together in a single opinion. What is striking about the dissent is what a surprisingly weak effort it was. It is badly written. It wanders all over the place. It fails to make a coherent legal argument of any kind. It is a hodge-podge of invective, illogic, and irrelevancy: it

repeatedly argues about cases and issues not before the Court in *Dobbs* (like same-sex marriage and contraception); it re-argues, strangely and irrelevantly, the Court's controversial gun decision from the day before (which presents entirely different issues); it seems more concerned to take potshots at individual justices in the majority and to score political points than to make any sort of persuasive *constitutional* argument that the text, structure, or history of the document in any way supports a legal right to abortion of a human fetus. Indeed, the dissent *conceded* the indefensibility of a right to abortion as a matter of historical understanding. The very feebleness of the dissent's arguments provided fuel for, even supported, the majority's conclusion. If there is a theme lurking in the dissent's pudding, it is *Casey* recycled: that women are not full and equal citizens if they cannot abort their unborn children. That is an extreme, lamentable, anti-feminist political premise. It is not a legal argument. If the dissenters were looking to persuade anyone about the law, or write with a view to the future, they failed miserably.

That future lies ahead. As noted, *Dobbs* does not end the violence of abortion. Not by a long stretch. There is much work to be done. But for now, this is a moment for celebration. The Supreme Court has rendered one of the most significant, magnificent decisions in its history.

About the Author

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Opinion | The pro-life movement can't stop at the unborn

By O. Carter Snead and Mary Ann Glendon

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The Supreme Court's decision to return abortion regulation to our legislative branches is welcome and long overdue. For the culture of life movement, it is also just the beginning. After decades of arguing that our society must do a better job of caring for women, children and families, we now have the opportunity and obligation to prove this advocacy is more than just talk.

Abortion is a gruesome symptom of our collective failure to take care of one another. This means that, alongside our efforts to protect the unborn, we must act decisively to address the wide range of issues — from poverty to lack of support from fathers — that lead women to choose abortion in the first place.

This will require action in both the public and private spheres. Of course, pro-life nonprofits have been caring for women, babies and families since before *Roe v. Wade* was decided. But *Dobbs v. Jackson Women's Health Organization* has given new leverage to pro-life voters whom the Republican Party can no longer take for granted. These voters should use their newfound clout to demand public commitments to supporting pregnant women and their children. Republicans who fail to meet these commitments should be disciplined at the ballot box — especially since, with the balance of the Supreme Court no longer a deciding issue, pro-life voters may now be attracted to moderate Democratic politicians who are serious about expanding the social safety net and do not seek to promote abortion.

One upside of *Dobbs* is that it makes possible broad coalitions of people of goodwill who, despite their disagreement on the fundamental question of abortion, agree that we must all work to provide for the needs of mothers, children and families in crisis. But building these coalitions will require conservatives and liberals alike to let go of any preconceived political dogmas regarding the role and size of government and focus on what works. The right answer might very well require new government programs and increased spending, greater support for and delegation to nonprofit care providers, or some combination of these approaches.

There are promising signs and models to build on, including recent efforts in conservative states to extend direct services to those in need. For example, in September, Texas increased its Medicaid coverage period for new mothers from 60 days after birth to six months. Idaho and Oklahoma have recently moved to offer state-level child tax credits, joining a growing roster of states working to support families in need.

At the federal level, Republican Sens. Marco Rubio of Florida and Mike Lee of Utah have just announced the Providing for Life Act. This legislation would help women through a variety of measures — including paid parental leave, increased child tax credits, enhanced federal nutrition programs, anti-discrimination protections for pregnant college students, expanded child-support enforcement and support for adoption.

These last two provisions, aimed at addressing the burdens of unwanted *parenthood,* deserve special attention. *Roe* and its progeny provided a permissive structure for any male who wished to abandon his children and their mother: "Her body, her choice, her problem." It is long past time to increase penalties and enforcement for those men who walk away from their responsibilities.

Moreover, there are an estimated 2 million American couples waiting to adopt children and only 18,000 babies born in the United States voluntarily placed for adoption per year. There is also a strong desire to welcome babies into adoptive families from foster care, should efforts at reunification with biological parents prove impossible. In a post-*Roe* world, we must find ways to make it easier for women who cannot or do not wish to parent to make the courageous choice to place their sons and daughters with loving adoptive families.

We can expand on public-private partnerships such as the Alternatives to Abortion programs across many states, which allocate funding to nonprofit service providers that, in turn, supply direct services to women and families. In 2021, Texas's program helped more than 126,000 people secure counseling, parenting support, financial assistance, health care, food benefits and housing; the state allocated $100 million to this program last year. We should also support promising efforts in the nonprofit space, such as Her Plan, which aggregates information and facilitates access to a variety of services for women in crisis, and our new "Women and Children First" research and service initiative at the de Nicola Center for Ethics and Culture at the University of Notre Dame.

But, as always, the greatest challenge is to transform the culture. This can never be done at a distance. It requires those who would build a culture of life to extend the hand of friendship not only to families in crisis but also to those who disagree with us and are distressed by the court's decision. It is only when we *show* through our actions the goods of unconditional love and radical hospitality at the core of the culture of life movement that we will change hearts and minds. Time to get to work.