
The Supreme Court and Abortion

By: Dr Toscano



**PART 1: The
Majority's
Argument in
Dobbs**

The Argument the Majority Used to Justify Overruling Roe v. Wade

- The court said in Dobbs: Roe was so wrong when it was decided in 1973 that it is ok to overturn it now even though it is an important legal precedent that has been relied on for 50 years.
- If the court fails to show this then as a matter of constitutional jurisprudence then overruling ROE is an obvious exercise of raw judicial power – something that all of the supposedly conservative justices who supported the decision in Dobbs claim to be against.



The Argument the Majority Used to Justify Overruling Roe v. Wade

- This robs the supreme court of its legitimacy as a neutral arbiter of the Constitution.
- The justices must follow law and precedent and not their own political agendas for our system to function.
- They cannot substitute their judgment for the Court that existed at the time of Roe.
- The stakes of this case to the healthy functioning of our very democracy then cannot be overstated.





Roe v. Wade

Roe's opinion found that women have the right to decide whether to stay pregnant until the point at which the fetus could survive on its own with medical care if removed (point of viability).

Even after viability, abortion had to be allowed to protect a woman's life or health.

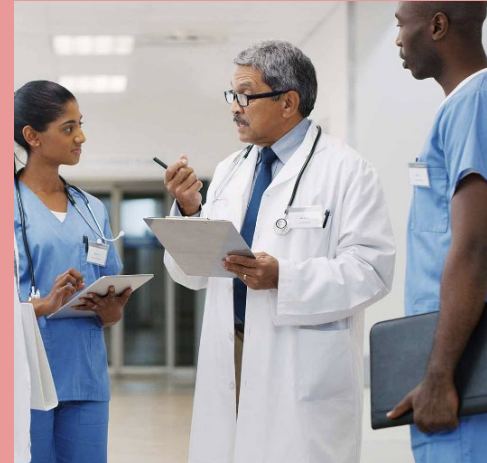
The Decision

- In Roe, (7 to 2 decision) Blackmun writing for the majority, recognized that the abortion decision should be protected by the Constitution under citizen's fundamental rights to privacy (and later this right was placed in the 14th amendment due process clause).
- In 1973, the Court understood the stakes to women of forced pregnancy and recognized women could not be free without the ability to end an unwanted pregnancy until viability. Dobb's majority purposely chose to ignore this reality as we will see.



The Court recognized in Roe that Abortion is Healthcare

- Blackmun in Roe stated: “The decision vindicates the right of the physician to administer medical treatment according to his professional judgment ... the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician (Roe p.165-66)”.
- This recognition that abortion is also about health and health care is entirely missing from the Dobb’s



In Dobbs the Court held it could overrule Roe v Wade because it was egregiously wrong when decided? So how did they argue this?

- The majority could only conclude this by using an analysis of the Constitution that has never been accepted until this case.
- The Dobb's majority opinion declares that abortion is not mentioned in the Constitution (which itself is simply a distraction as so many of the fundamental rights are not) and then they argue that the right to abortion was not recognized at the time of the ratification of the 14th amendment either.
- The whole of the argument was that Roe was so egregiously wrongly decided that it could be cast aside after 50 years.
- They appear to be arguing that the only rights which should be deemed fundamental and protected from government intrusion by the 14th amendment are the ones that were recognized at the time the 14th amendment was ratified.
- This is not the constitutional standard we use, this has never been the constitutional standard we use, and yet the majority of the Court saw fit to throw away over a hundred years of court precedents and use an entirely new standard of their own devising.

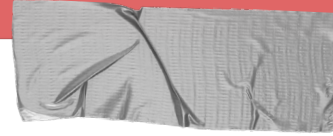
In Dobbs the Court held it could overrule Roe v Wade because it was egregiously wrong when decided? So how did they argue this?

- This new test devised by the majority in Dobb's is a MONUMENTAL change to the way we have understood the operation of the Constitution and the 14th amendment due process clause.
- This Court has frozen us in time – in 1868 – to be exact. Whatever concept of equality and women's rights the law had in 1868 is all we can expect the Court to protect in 2022.
- The idea of a living constitution – that the founders purposely created a document that was meant to be interpreted through reason and through the growing wisdom of different ages – is rendered dead by the Dobbs court.
- The dissent in Dobb's says, "those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification ... it consigns women to second-class citizenship."



Bradwell v State

- In 1872 the Court held that women do not have a right to practice law.
- In an infamous concurrence, Justice Bradley told us why. He said, in part: “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life ... [t]he domestic sphere ... properly belongs to [women].... The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator”



- It is to these times and these men's views of women that the majority in Dobb's has us look to determine what rights may be protected by the Constitution in 2022.
- This view of Constitutional interpretation is both out of step with the entirety of our history and damaging to equality and justice.

Dobbs

- This new constitutional standard if applied uniformly will undermine all of the other rights the Court has long held to be part of our Constitution: the right to interracial marriage, the right to use of contraceptives, and the right to same sex marriage, to name a few.
- None of these exist in the Constitution by name nor were they rights accepted when the fourteenth amendment was ratified.
- While the majority argue that this decision will not impact those other settled precedents, the reasoning they use does not bear this out.



How Does the Majority in Dobb's Distinguish Roe from These Other Cases?

The argument made by the majority is:

“What sharply distinguishes the abortion right from the rights recognized in the cases on which Roe.. relies is something that both those decisions acknowledged: Abortion destroys what those decisions call “potential life” and what the law at issue in this case regards as the life of an “unborn human being.” None of the other decisions cited by Roe.. involved the critical moral question posed by abortion.”



There is a Tricky Maneuver Going on in This Argument

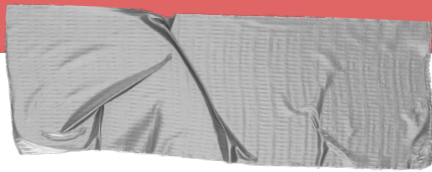
One key question raised by the legal status of abortion is the legal and moral status of the fetus. And who gets to decide its status:

Here is the way I would phrase this question:

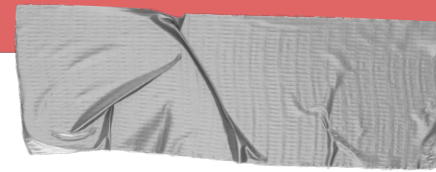
Is it the pregnant woman who gets to decide about this deeply moral and/or religious question – the person who will be bearing that life in her body for 9 months and who will have to undergo the discomforts, the dangers, the lifelong impacts of this relationship?

OR

Is it the will of the majority that is allowed to force their views upon the pregnant woman such that if they believe that the fetus deserves protection from the moment of conception, they may commandeer her body to protect the fetus?



→ Blackmun in Roe said women get to decide until the fetus could have a meaningful life outside the womb. He created a balance there between potential life and women's rights.



→ The majority in Dobb's view is saying that it is ok for the majority to impose its will on the pregnant woman regarding their view of fetal life and in effect take control of a woman's body in a way that would be seen as patently unconstitutional if done under any other circumstances.

In Conclusion....



- **The Court in Dobbs is saying it is egregiously wrong to think that pregnant persons have any fundamental rights to bodily autonomy protected by the constitution.**
 - **For many of us, this decision in Dobbs seems to relegate women back to second class citizens by erasing our control over our body, over our health, and over the course of our lives.**
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PART 2:
What
Happens
Now?

Currently as of October 2022

- Many states have passed laws to ban abortion in ways that would not have been allowed under Roe v Wade.
- The most draconian of these laws bans abortion at conception with no exceptions except perhaps when the pregnant woman's life is in danger, some ban abortion at 6 weeks (a time when many women may not know they are pregnant), some like Florida and the Mississippi law at issue in Dobbs ban abortion at 15 weeks.
- While some states include exceptions to allow abortions for pregnancy in cases of rape/incest, or when lethal fetal abnormality is present, or when pregnant women's life or health is in danger, not all states do.
- Many states rules about these exceptions are vague and unclear.
 - In these state laws, criminal liability currently only attaches to health care practitioners who assist in the abortion and not yet to women who have one. Certainly, this could also change in the future and some legislators have already started calling for this.

3 Main Points

Point 1: The problems that Dobbs has caused for healthcare issues and demonstrate this will not be solved as simply as telling women to go to a state that makes abortion legal

Point 2: The wider impact that lack of access to abortion has on women

Point 3: Certain innovations and potential solutions to address the need for access to safe abortion and the issues therein



Point 1:

Some states will and do protect the right to an abortion still but this does not mean all women in the U.S. will have access to safe reproductive care, including abortion care, moving forward for the following six reasons:

- States making abortion illegal may try to prevent women from traveling out of state to receive an abortion.
- It is possible now that Roe is overturned that Congress may try to enact a federal abortion ban.
- The demographics of women who need abortion care speaks to many women's inability to travel long distances to get it.
- The states where abortion is legal will see increased out-of-state demand, which will impact all women's access to timely, safe care.
- State rules regarding what counts as a valid medical reason to grant an abortion are too vague for medical practitioners to be able to anticipate liability in many cases and this may cause harm to women who may have a genuine health need for abortion.
- Other forms of reproductive care besides abortion will be at risk now.

1: States Making Abortion Illegal May Try to Prevent Women from Traveling Out of State to Receive an Abortion

- As of right now, no state has yet made it illegal to do so but this option is obviously on the table.
- While Justice Kavanaugh specifically said in his concurrence that this type of ban on interstate travel would be unconstitutional, others on the Court may not feel the same.
- This is an open legal question.



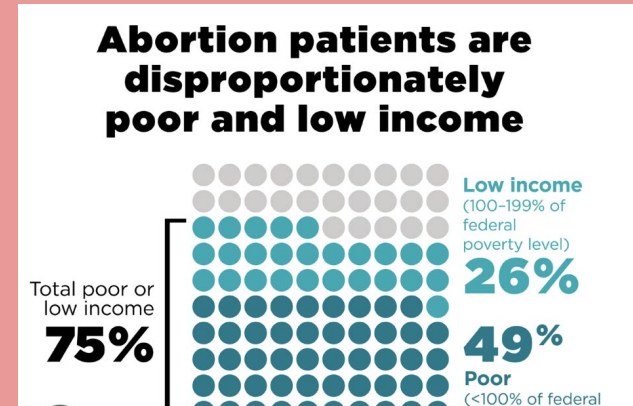
2: It is Possible Now that Roe is Overturned that Congress May Try to Enact a Federal Abortion Ban

- This law, if found to be constitutional, would pre-empt all state laws based on the Supremacy Clause.
- It is possible that a law like this may be found to be Constitutional under the Congress's power to regulate interstate commerce.
- It also might be held to be unconstitutional.
- This is also an **open legal question**.



3: The Demographics of Women Who Need Abortion Care Speaks to Many Women's Inability to Travel Long Distances to Get it

- According to the Guttmacher Institute, half of Americans seeking abortion care live on incomes under the federal poverty level and another 25% live on incomes only one to two times that level, which may make travel for many out of reach.



4: The States Where Abortion is Legal Will See Increased Out-of-State Demand

- This will impact all women's access to timely, safe care.
- We are already starting to see this effect.



5: State Rules Regarding what Counts as a Valid Medical Reason to Grant an Abortion are Too Vague for Medical Practitioners to be able to Anticipate Liability in Many Cases

- This may cause harm to women who may have a genuine health need for abortion.
- Vagueness in the law may intimidate health care practitioners that could lead to harm for women's health in other ways.
- Blanket restrictions on "abortion" procedures and medications may be understood to deprive women of effective treatment for miscarriages, which occur in about 10 to 30 percent of pregnancies.
- Health care practitioners may fear assisting with the completion of a natural miscarriage – especially when the treatment for that is the same as for an abortion and miscarriage through natural means and abortion through self-administered medications are virtually indistinguishable.
 - This lack of clarity will lead to increased maternal mortality.
- The United States already has one of the highest rates of maternal mortality among high-income countries.

6: Other Forms of Reproductive Care Besides Abortion will be at Risk Now

- Do abortion bans effectively also ban the morning after pill or the use of IUD's? **This is an open question.**
- Further, with abortions banned, live births will increase and many places in the country already have maternity care deserts.
- IVF treatments will be impacted.
- The overturn of Roe will affect medical education.



For all of these reasons, all people who may become pregnant are imperiled by the current state of the law.



Point 2:

What are the actual effects on women when safe abortion is not available? Women's reliance on safe abortion is clear and concrete.

- An American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion.
- Experts estimate that a ban on abortion increases maternal mortality by 21 percent.
- We need only look back to see what may happen when safe legal abortions are inaccessible.
- Another effect of banning abortion, is the state diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life.

1: An American Woman is 14 Times More Likely to Die by Carrying a Pregnancy to Term than by Having an Abortion

- See *Whole Woman's Health v. Hellerstedt*, 579 U. S. 582, 618 (2016).
- Black women are now three to four times more likely to die during or after childbirth than white women, often from preventable causes.



2: Experts Estimate that a Ban on Abortion Increases Maternal Mortality by 21 Percent

- White women face a 13 percent increase in mortality while black women face a 33 percent increase.
- These estimates don't account for additional likely increases in mortality from unsafe abortion.



3: We Need Only Look Back to See What May Happen When Safe Legal Abortions are Inaccessible

- “It is a history of women seeking illegal abortions in hotel rooms and home kitchens; of women trying to self-induce abortions by douching with bleach, injecting lye, and penetrating themselves with knitting needles, scissors, and coat hangers. ...It is a history of women dying”



Prior to Roe v Wade

- There were between 1,000- 8,000 deaths annually related to abortion (Joffe 1995, 29; Schoen 2015, 4).
- Of this group, 80% were non-white (Schoen 2015, 4).
- The risk of death as a result of abortion increased from 1951 to 1962, nearly doubling (Reagan 1997, 211).
- Tens of thousands of women were pouring into emergency rooms during this time suffering from serious health problems as a result of illegal abortion.
- Just one urban hospital went from seeing over one thousand women for abortion-related complications in 1939 to more than 2,000 in 1959 to nearly five thousand by 1962 (Reagan 1997, 209).
- There was a problem they called the "Monday morning abortion lineup" (Joffe 1995, 60).

4: The State Diminishes Women's Opportunities to Participate Fully and Equally in the Nation's Political, Social, and Economic Life

- Studies show that abortion availability has “large effects on women's education, labor force participation, occupations, and earnings”.
- Pregnancy and childbirth may themselves impose large-scale financial costs.



State Law Currently in Mississippi

- Women and children's welfare is barely being protected.
- 19 percent of women of reproductive age are uninsured and 60 percent of counties lack a single obstetrician-gynecologist.
- Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use.
- Studies show that abortion availability has "large effects on women's education, labor force participation, occupations, and earnings".
- Pregnancy and childbirth may themselves impose large-scale financial costs.
- The State neither bans pregnancy discrimination nor requires provision of paid parental leave.
 - It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food.



Point 3:

There are potential innovations in medicine and the law that are currently being examined to address the situation.

- **The abortion pill.**
- **The executive orders Biden signed into law can be used.**
- **Congress should pass a federal law codifying Roe.**

1: The Abortion Pill

- One of the biggest changes to medical care since the last time abortion was banned is the existence of medication abortion or the abortion pill, which has been deemed safe and effective to use by the FDA, at home through the 10th week of pregnancy.
- In, 2020, the abortion pill was used in more than 50% of abortions in the U.S.
- The FDA does not require women to have a clinic visit to receive this pill and so telehealth appointments are allowed.
- Many states have already banned this form of abortion as well and it is likely illegal for a provider in a state where abortion is legal to prescribe and send the pill to a state where it is banned.

1: The Abortion Pill Cont.

- Some international organizations are willing to ship the pills to American women illegally.
- Other innovations include setting up mobile clinics in states where abortion is legal that border states where the procedure is banned or severely restricted, setting up virtual telehealth appointments.
- The federal government may be gearing up to argue that the power of the FDA to declare drugs safe and effective should trump the power of the states to ban it.



2: Executive Orders Biden Signed into Law

- While it was an attempt to make a difference with whatever power is in his hands, it is pretty limited in what it can do.



3: Congress Should Pass a Federal Law Codifying Roe

- This also would raise questions of Constitutional authority of Congress to do this.
- It faces political hurdles for passage right now in the form of the filibuster.
- It could be undone the next time the Congress and the President have a republican majority.



Hopefully, this talk has given you an idea of our new legal landscape with regard to abortion and helped to contextualize the coming legal and political battles.

Questions?
