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

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On June 24, 2022, the Supreme Court ended the constitutional right to abortion in Dobbs v. Jackson Women’s Health Organization.¹ The Court’s majority decision authored by Justice Samuel Alito was substantially the same as a draft opinion leaked a month earlier.² The regulation of abortion will now be decided by the states. In this Viewpoint, we explain the Dobbs ruling and what it means for physicians, public health, and society.

The Dobbs Ruling

The Supreme Court majority opinion upheld Mississippi’s ban on abortion at 15 weeks gestational age, but went further to explicitly overrule Roe v. Wade (1973), which recognized the right of a patient, in consultation with her physician, to choose an abortion, and to overrule Planned Parenthood v. Casey (1992), which affirmed Roe’s core holding. Justice Alito reasoned that “Roe was egregiously wrong from the start,” insisting the Court’s reasoning “was exceptionally weak, and the decision has had damaging consequences.”¹
The majority’s difficulties with *Roe* and *Casey* coalesced around 3 principal objections: (1) “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision,” including the Fourteenth Amendment; (2) the right to abortion is not “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty;’” and (3) the “permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”¹ The majority resolved “to heed the Constitution and return the issue of abortion to the people’s elected representatives.”¹

In dissent, the 3 liberal justices (Breyer, Sotomayor, and Kagan) lamented the majority’s casual disregard for *stare decisis*, the principle that courts should follow settled precedents and the rule of law. Chief Justice Roberts’s concurring opinion argued the Court did not need to overrule *Roe* and *Casey*, decisions the Court often reexamined and sustained, and that doing so seriously undermined the Court’s institutional legitimacy. He would have simply ruled that Mississippi’s 15 weeks ban was constitutionally permissible. Justice Kavanaugh’s concurring opinion insisted the Court had returned to a position of “judicial neutrality,” “restoring the people’s authority to resolve the issue of abortion through democratic self-government.”¹

The most immediate effects of the *Dobbs* ruling will be the shuttering of abortion clinics in approximately half the states, with “trigger laws” that took effect immediately after the reversal of *Roe v. Wade*. Other states had “zombie” laws banning abortions that were enacted before *Roe* but never repealed. This rapidly diminishing landscape for abortion access will not
change the reality that many women will still seek to end their pregnancies, and 2 avenues raise serious legal questions—medication abortion and traveling to states that permit abortions.

Medication Abortions: FDA Preemption

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

The Food, Drug and Cosmetic Act empowered FDA to ensure drugs and devices are safe and effective for their intended use. Under the constitution’s Supremacy Clause, when state and federal law clash, federal law supersedes. That is, federal law “preempts” conflicting state laws. Attorney General Merrick Garland recently announced that “states may not ban mifepristone based on disagreement with the FDA’s expert judgment.” FDA preemption is based on the agency having power to set a national uniform standard for approved medications across the
country. We are likely to see litigation over whether state attempts to restrict medical abortion are preempted by FDA’s approval of mifepristone. The issue may ultimately come before the Supreme Court. It is difficult to predict how the Justices would decide since the Court has reached divergent conclusions in prior cases concerning FDA preemption of state tort law.4

**Restricting Travel to States that Permit Abortions**

Women who wish to seek abortion services but live in states that ban or restrict abortions will travel to other states that permit abortions. For many this will be a major hardship, including those who cannot afford to travel for long distances or cannot take time off from work or childcare, persons with disabilities, and those subject to partner abuse.6 Could a state restrict or eliminate the right to travel to another state for abortion or make it a crime for a state’s residents to achieve an abortion in another state? No state has yet adopted an explicit ban on travel, but at least one state has proposed doing so.4

In his separate concurrence, Justice Kavanaugh considered the issue directly: “May a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”1 Attorney General Garland agreed: The Constitution “restricts states’ authority to ban reproductive services provided outside their borders... Under bedrock constitutional principles, women who reside in states that have banned access to comprehensive reproductive care must remain free to seek that care in states where it is legal.”5 Garland also stated that physicians have a First Amendment
right “to inform and counsel each other about the reproductive care that is available in other states.” Although the constitutional right to travel has been widely recognized, like the right to abortion, it is nowhere explicit in the Constitution’s text, and the 3 dissenting justices highlighted the right to travel as a vexing issue the Court will likely face.

Constitutional Rights At Risk

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

**Contraception.** *Griswold v. Connecticut* in 1965 established a constitutional right of married couples to buy and use contraceptives without government restriction. Yet, many abortion restrictions state that “personhood” or being an “unborn child” begins at fertilization,
which raises concerns about access to certain contraception methods, including intrauterine devices and Plan B®, an emergency contraception taken up to 72 hours after unprotected sex.

In *Burwell v. Hobby Lobby* (2003), Justice Alito said that some FDA approved contraceptions “may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.”

Oklahoma’s recent abortion ban recognized the rights of “a human fetus or embryo in any stage of gestation from fertilization until birth,” but explicitly excluded “contraception or emergency contraception.” Other states may not be as permissive of all contraceptive devices.

**Assisted Reproductive Technologies (ART).** Physicians and clinics that provide ART services could similarly face criminal penalties. In vitro fertilization (IVF) extracts and fertilizes a woman’s eggs, and then transfers the embryos into the uterus to grow and develop.

Approximately 2 percent of all infants born in the United States every year are conceived using ART. In the U.S, many embryos created as part of IVF are ultimately destroyed for medical or other reasons. The *Dobbs* opinion includes numerous references to “the unborn human being,” “potential life,” and “the life of the unborn,” which many state anti-abortion statutes declare begin at the point of fertilization. That same logic may encompass prohibiting the destruction of embryos. As the dissenting justices warn, “law often has a way of evolving without regard to original intentions—a way of actually following where logic leads... Rights can expand in that way.”
In a single day the Court has not only undone 50 years of constitutional protections for abortion, but has thrown into doubt whether the Constitution protects a wide range of medical and familial decisions.