Dobbs v. Jackson Women's Health Organization*: An Overview of Substantive Due Process and the Many Weaknesses in Mississippi's Case for Overturning *Roe* and *Casey

Kelsie Ferris

Since 1973, the United States Supreme Court has recognized a pregnant woman's constitutional right to decide whether to have an abortion before fetal viability.[1] Yet antichoice politicians' unrelenting efforts have made this right exist only in theory for many.[2] Moreover, nationwide constitutional protection of the abortion decision may soon be a thing of the past, depending on the Court's decision in *Dobbs v. Jackson Women's Health Organization*[3]—a direct challenge to *Roe v. Wade*'s central holding. Especially given the countless weaknesses in Mississippi's case, such an unwarranted about-face should be of concern to everyone who believes in the Constitution's promise of securing liberty for all, irrespective of one's personal views on when human life begins.

The Fourteenth Amendment prevents states from depriving people of their liberty without due process of law.[4] Due process has a substantive element that entails judicial review when states infringe on individual rights. Here, courts first identify whether the right is fundamental, then they consider the sufficiency of both the competing state interest and the means the state uses to promote that interest. The nature of the right at stake is an important threshold question because the Constitution largely removes fundamental rights from "public debate and legislative

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[1] *See generally* Roe v. Wade, 410 U.S. 113 (1973).
[2] *See, e.g.*, Sarah Varney, *Long Drives, Costly Flights, and Wearying Waits: What Abortion Requires in the South*, NPR (Aug. 2, 2021), https://www.npr.org/sections/health-shots/2021/08/02/1022860226/long-drives-costly-flights-and-wearying-waits-what-abortion-requires-in-the-sout [https://perma.cc/ZJ7K-5DDC] (discussing impact of antichoice laws on abortion access).
[3] No. 19-1392, 2021 WL 6051127 (U.S. argued Dec. 1, 2021).
[4] U.S. CONST. amend. XIV, § 1.

action."[5]

The Supreme Court has recognized several unenumerated rights as fundamental—that is, rights that the Constitution does not explicitly mention. These include, for example, one's rights to refuse life-sustaining medical care,[6] make parenting decisions,[7] decide whether and whom to marry,[8] engage in private sexual activities,[9] procreate,[10] use contraception,[11] and to choose to have an abortion.[12] Since "liberty" is such an abstract concept, the Court has repeatedly rejected a rigid history-based test for classifying an unenumerated right as fundamental.[13] Instead, the Court considers whether the right is naturally embedded in the concept of liberty, comparing it with other previously recognized rights and using the country's history and legal traditions as a guide.[14] This approach, the Court reasons, "respects our history and learns from it without allowing the past alone to rule the present."[15]

In *Roe v. Wade*, the Court followed this well-reasoned approach in recognizing the right

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[5] *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (noting implications of recognizing new rights).
[6] *See* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 278 (1990).
[7] *See* Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Troxel v. Granville, 530 U.S. 57, 65-66 (2000).
[8] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Turner v. Safley, 482 U.S. 78, 95, 107 (1987); Obergefell v. Hodges, 576 U.S. 644, 664-65 (2015).
[9] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).
[10] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1941).
[11] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977).
[12] *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).
[13] *See, e.g.*, Rochin v. California, 342 U.S. 165, 169-71 (1952) (declining to freeze concept of due process at fixed point in history); *Casey*, 505 U.S. at 848-49 (explaining protected "sphere of liberty" not limited to text or nineteenth century understandings); *Obergefell*, 576 U.S. at 664 (describing nonrigid approach to recognizing fundamental rights).
[14] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720-21, 724-28 (summarizing substantive due process analysis and comparing previously recognized rights); Obergefell v. Hodges, 576 U.S. 644, 664 (2015) (noting "history and tradition" provide guidance).
[15] *See* Obergefell v. Hodges, 576 U.S. 644, 644 (2015).

to choose to have an abortion as fundamental. The Court dedicated several pages to medical and legal history, other previously recognized liberties, and the physical, mental, and financial hardships inherent in forced pregnancy.[16] Balancing the pregnant woman's interests against the state's interest in promoting potential life, the Court acknowledged the many differences in legal, medical, philosophical, and theological theories on when life begins.[17] For logical and science-based reasons, the Court held that a state may not use whichever theory of life it adopts to justify banning abortion outright before viability—the point at which the fetus could realistically survive outside the womb.[18]

Two decades later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed *Roe*'s viability-line holding, clarifying that a state's interests are, categorically, insufficiently strong to justify banning abortion before viability.[19] *Casey* emphasized that the abortion choice is central to a woman's dignity, autonomy, and ability to decide her own destiny, irrespective of traditional understandings that expect her to endure the physical and mental burdens attached to pregnancy.[20] The Court also reiterated its duty to define "liberty" and noted that while state legislatures are free to adopt policy positions, they cannot enforce those positions in a way that infringes on protected liberty interests.[21] As the Court aptly put it, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," and "[b]eliefs about these matters could not define the attributes of

[16] *See Roe*, 410 U.S. at 129-47, 152-53 (noting stricter abortion laws in 1973 than before late-1800s and discussing unenumerated fundamental rights).
[17] *See id.* at 160-62 (summarizing "wide divergence of thinking" on when life begins).
[18] *See* Roe v. Wade, 410 U.S. 113, 162-64 (1973) (explaining Court's viability-line holding).
[19] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (listing three parts of *Roe*'s central holding).
[20] *See id.* at 851-53 (emphasizing uniquely "intimate and personal" nature of abortion decision).
[21] *See id.* at 850-51.

personhood were they formed under the compulsion of the State."[22]

The Court concluded that it could not in good faith overturn *Roe*'s viability-line holding due to *stare decisis*—the principle that the Court should stand by its previous decisions unless there are strong reasons not to.[23] The Court explained that medical developments since *Roe* do not undermine the viability-line and that reproductive autonomy has facilitated women's ability to equally participate in the American economy and society.[24] The Court also stressed its concerns that overturning *Roe* simply due to abortion's divisive nature would significantly weaken the judiciary's legitimacy and ability to properly function.[25] Indeed, "liberty finds no refuge in a jurisprudence of doubt."[26]

In December 2021, the Court heard oral arguments in *Dobbs*—Mississippi's direct challenge of *Roe* and *Casey*'s viability-line holding.[27] In a brief that would surely make a legal writing professor cringe, Mississippi makes the same arguments that the Court shut down in *Casey*, repeatedly quoting precedent without proper context and making irrelevant and conclusory assertions without any factual or legitimate precedential support. Mississippi makes many outrageous claims, but chief among them are that *Roe* and *Casey* are "egregiously wrong" and have significantly damaged the Court and the country, and that "[t]he march of progress" renders unnecessary any constitutional protection of the abortion decision.[28]

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[22] *Id.* at 851.
[23] *See Casey*, 505 U.S. at 854, 860-61 (explaining *stare decisis* duty and concluding it requires affirming *Roe*).
[24] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860-61 (1992) (reviewing *Roe* under "normal *stare decisis* analysis").
[25] *See id.* at 865, 867-69 (stressing imperative of maintaining Court's legitimacy).
[26] *Id.* at 844.
[27] Transcript of Oral Argument at 4-5, Dobbs v. Jackson Women's Health Org., 2021 WL 6051127 (U.S. argued Dec. 1, 2021) (No. 19-1392).
[28] *See* Brief for Petitioners at 1-4, *Dobbs*, 2021 WL 3145936 (No. 19-1392) (providing summary of state's argument for overturning *Roe* and *Casey*).

Mississippi maintains that *Roe* and *Casey* are inconsistent with the Court's precedent because a "right to abortion" lacks grounding in history and tradition, and involves purposely terminating potential life.[29] It bases these arguments on the public's understanding when the Fourteenth Amendment was ratified and on *Washington v. Glucksberg*, a 1997 decision declining to recognize a fundamental right to physician-assisted suicide.[30] First, Mississippi undermines the actual liberty interest at stake—one's *choice* to have a pre-viability abortion—and improperly injects its theory of life into the analysis. Mississippi not only mischaracterizes *Glucksberg* as establishing a rigid approach to recognizing fundamental rights but also ignores *Roe*'s extensive history-and-tradition discussion, which *Glucksberg* itself even acknowledged.[31] Such a rigid approach would forever moor our society to a time when people believed women's "paramount destiny" was "to fulfill the noble and benign offices of wife and mother."[32]

Next, Mississippi claims that *Roe* and *Casey* have irreparably harmed the country by undermining states' self-governance, causing nationwide abortion debates, and damaging the Court's legitimacy.[33] Again, the Constitution does not permit states to promote partisan views by depriving people of their liberty, and *Roe*'s viability-line holding has certainly not prevented

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[29] *See id.* at 14-17 (arguing *Roe* and *Casey* "egregiously wrong").
[30] *See* Brief for Petitioners, *supra* note 28, at 16-17, 28 (suggesting *Glucksberg* conclusively establishes rigid history-and-tradition approach).
[31] *See* Washington v. Glucksberg, 521 U.S. 702, 727 (noting traditions and history). "*Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, *or* so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." *Id.* at 727, 727 n.19 (summarizing *Roe*'s historical findings).
[32] *See* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring); *see also* Rochin v. California, 342 U.S. 165, 170-71 (1952) (noting limitations of judiciary's function). "To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges[.]" *Rochin*, 342 U.S. at 171.
[33] *See* Brief for Petitioners, *supra* note 28, at 23-27 (attempting to show societal damage).

states from enacting hundreds of unnecessary pre-viability abortion restrictions.[34] Further, overturning *Roe* and *Casey* less than two years after Justice Amy Coney Barrett replaced the late Justice Ruth Bader Ginsberg would do much more harm to the Court's perceived legitimacy than *Roe* and *Casey* have.[35]

Mississippi further argues that the Court should overturn *Roe* and *Casey* because of modern developments such as women- and family-friendly laws, increased contraception effectiveness, and other unsubstantiated medical and scientific advances.[36] Mississippi suggest that modern options outside of abortion have limited the concerns which *Roe* rested upon, such as pregnancy discrimination laws, family leave time, childcare tax credits, and "safe haven" laws that allow women to surrender their newborns to the state for adoption.[37] While laws like these should be celebrated, they have absolutely no bearing on the mental and physical burdens of pregnancy and childbirth. Likewise, Mississippi's discussion about contraception ignorantly presumes that most women can use the most effective birth control methods, which themselves

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[34] *See An Overview of Abortion Laws*, GUTTMACHER INST. (Apr. 1, 2022), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/PH5L-Z3BC] (providing overview of state abortion restrictions).

[35] *See, e.g.*, Laura Bassett, *All of Those 'Hysterical' Women Were Right*, ATLANTIC (Sept. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/09/trump-supreme-court-abortion-ban/619963/ [https://perma.cc/VH82-DQ8D] (discussing Justice Barrett's vote to temporarily uphold Texas's unconstitutional six-week abortion ban).

[36] *See* Brief for Petitioners, *supra* note 28, at 29-31 (listing purported developments since *Roe* and *Casey*). *But see* Brief of Amici Curiae Economists in Support of Respondents at 17-23, Dobbs v. Jackson Women's Health Org., 2021 WL 4341729 (U.S. filed Sept. 20, 2021) (No. 19-1392) [hereinafter "Economists Brief"] (refuting several of Mississippi's misleading claims about economic policies and contraception); Brief of Amici Curiae American College of Obstetricians and Gynecologists et al. in Support of Respondents at 14-15, *Dobbs*, 2021 WL 3145936 (No. 19-1392) (identifying "medical consensus" refuting Mississippi's "scientifically unfounded" claims about fetal pain).

[37] *See* Brief for Petitioners, *supra* note 28, at 29. *But see* Economists Brief, *supra* note 36, at 19-23 (providing fact-based evidence refuting Mississippi's "completely unsupported" claims about employment and childcare policies).

come with physical and emotional side effects, and that all abortions are a result of unplanned pregnancy. In any case, the factual developments that Mississippi cites do not so drastically undercut the centrality of the abortion decision to a pregnant woman's autonomy and dignity that they warrant overturning longstanding and well-reasoned precedent.

Despite the complete lack of merit in Mississippi's case for overturning *Roe* and *Casey*, the Court appears ready to do so.[38] Such a decision would permit states to decide that a living, breathing person's liberty is lesser in the eyes of the law than that of a fetus that cannot itself live or breathe outside the womb. This would not be based on fairness, reason, or science. It would be based on an improper understanding of the Court's longstanding precedents, and it would create a new precedential avenue through which states can attack other well-established fundamental rights to promote oppressive policy interests. It would allow states to force their theories of life on pregnant women in ways that completely deprive them of their autonomy and dignity. Ultimately, it would fly in the face of the Constitution's promise of securing liberty for everyone.

> Had those who drew and ratified the Due Process Clause[ ] of . . . the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew that times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the

[38] *See* Sarah Isgur, *How SCOTUS Will Rule on* Dobbs*, in 3 Scenarios*, POLITICO (Dec. 2, 2021), https://www.politico.com/news/magazine/2021/12/02/abortion-supreme-court-dobbs-ruling-scenarios-523692 [https://perma.cc/K48G-KH66] (predicting "5-1-3 decision overturning *Roe* and *Casey*").

Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[39]

[39] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).