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An Era of Rights Retractions: *Dobbs* as a Case in Point

By Seema Mohapatra



In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court threw out almost 50 years of precedent when it overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, two cases that had established and protected the right to abortion care. Justice Samuel Alito stated that *Roe* was “egregiously wrong” because “the Constitution makes no reference to abortion” and “no such right is implicitly protected by any constitutional provision,” including the due process clause of the Fourteenth Amendment. Justice Alito, writing for the majority, took great pains to try to cabin his majority opinion to abortion only. He pointed out that abortion is different

from other issues because it involves potential life. He also noted that abortion was not in the history and tradition of the United States. Justice Alito's reassurance that *Dobbs* does not affect issues other than abortion seems disingenuous. In fact, Justice Clarence Thomas, who has long been a critic of any unenumerated rights impliedly protected by the Constitution, suggested that the Supreme Court “should reconsider all of (its) substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*” in his concurrence in the *Dobbs* case. The cases mentioned involve contraception (*Griswold*), bans against consensual sexual relations between gay men (*Lawrence*),

and marriage equality (*Obergefell*). Given how easily the Supreme Court set aside the principle of stare decisis and Thomas's concurrence, there is reason to worry that *Dobbs* is the first of many rights retractions.

The parade of horrors that may lie ahead is terrifying—any existing law related to privacy, contraception, same-sex marriage, and interracial marriage is at risk, as are protections for anything that may rely on substantive due process for its protection. The whole point of stare decisis is to bring some predictability and stability to our case law. When the Supreme Court demonstrates that it is voting more on ideological lines rather

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than adherence to its past decisions as it did in *Dobbs*, there is reason to question whether rights, such as the right to marriage equality, may be taken away. *Obergefell v. Hodges*, the case that established the right for couples to marry regardless of sexual orientation, was decided only eight years ago, which makes it much more unsettled compared with almost 50 years of precedent for *Roe*.

While it looks like birth control pills may soon be available over the counter, we could see a ban on certain other types of contraception. Contraception has been a hot-button issue for many years. Some claim that certain types of contraception like Plan B or IUDs are akin to abortion. Although that is scientifically false, in recent years, the Supreme Court has sided with employers (in *Burwell v. Hobby Lobby*) and religious organizations (in *Zubik v. Burwell*) that object to providing or facilitating such contraceptive access to their employees. Justice Thomas's concurrence seems to be an invitation for states and other actors to question the right to contraception.

Additionally, states are taking the opportunity to use *Dobbs* to advance their own political agendas. For example, just days after the *Dobbs* opinion, the Alabama attorney general argued in a brief that gender-affirming medical treatments are not "deeply rooted in our history or traditions," and cited *Dobbs* as giving Alabama the authority to ban such treatments. Alabama falsely asserts that such care is experimental and harmful, which is a view not backed by science or medical organizations.

FETAL PERSONHOOD: THE NEXT STEP?

One of the most worrisome consequences after the *Dobbs* decision is the likelihood that states will pass laws granting fetuses and even embryos the same rights as a person. *Roe*, which was overturned by *Dobbs*, rejected the concept of fetal personhood. Justice Harry Blackmun stated in *Roe* that "The word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Thus, one of *Roe*'s holdings was that a pre-viability fetus is not a person in the eyes of the Constitution. *Roe* stood as a backstop against the legal recognition of fetal personhood. However, such protection no longer exists. The majority in *Dobbs* specifically states that they do not make any kind of declaration about the merits of

fetal personhood. Thus, the Court leaves the issue of fetal personhood to the states.

This could lead to laws being passed ascribing personhood status to a fetus. Many such bills have been proposed in numerous states, and if passed, such laws would have far-reaching consequences. If a fetus is given personhood status, the pregnant person could be held criminally liable if they have an abortion or endanger the fetus during pregnancy. Additionally, fetal personhood would render all abortions akin to murder, even very early abortions. A pregnant woman would lose complete autonomy over her body, as the fetus would have more rights than her. If fetuses are seen as preborn children who should have the same or more rights than the pregnant person hosting them, there will be horrific circumstances. Federal recognition of fetal personhood could lead to a nationwide abortion ban. Such a ban would mean forced pregnancies. This can be seen as a death sentence for some groups, such as Black women, who nationwide are three times more likely to die in childbirth.

Another consequence of fetal personhood is its impact on the practice of assisted reproduction. This is particularly relevant given Thomas's concurrence, which suggests that LGBTQ+ people may lose the right to marriage equality. For many people in the LGBTQ+ community, assisted reproduction, whether the acquisition of donor gametes, in vitro fertilization (IVF), or surrogacy, is often a key means to having a child. Fetal personhood laws would impact those who create, use, and freeze embryos and those who need access to IVF due to medical and social infertility.

IVF, a common method of assisted reproduction, involves the creation of several embryos outside the womb. Often, such embryos are destroyed or used for research if genetic testing has determined that they are unlikely to lead to a healthy pregnancy. Some proposed fetal personhood laws grant an embryo personhood rights from the moment of fertilization. That could leave physicians and clinics open to criminal or civil liability if they destroy an embryo. Families with embryos may lose the right to make decisions about whether to use, store, discard, or freeze an embryo. In the months after *Dobbs* was decided, fertility clinics in

abortion-protective states reported getting inquiries about how to transfer their embryos due to fear that those embryos may be ascribed legal rights in anti-abortion states.

Additionally, same-sex couples are more likely to use IVF or surrogacy to expand their family. Often in surrogacy contracts, intended parents include clauses that allow the intended parents to dictate whether the surrogate can have an abortion (such as in cases of fetal anomaly). Fetal personhood recognition would lead a state to complete abortion bans, which would mean that intended parents would have less autonomy about how to build their family.

Under *Roe*, no legal personhood could be ascribed to an embryo. After the overturning of *Roe* in *Dobbs*, the conservative majority of the Supreme Court seems open to that possibility. Lower courts are already referring to a fetus as an unborn or preborn child in some opinions, which seems purposeful to confer personhood to the fetus. For example, in the *Alliance for Hippocratic Medicine v. FDA* case (which questions the Federal Drug Administration approval of the drug mifepristone), the decision uses language trying to give personhood status to a fetus. The judge in that case uses the word "unborn human" and "unborn child" throughout the opinion to describe a fetus. States are also beginning to use such language in proposed bills.

It is difficult to predict what right will be next taken away by the Supreme Court's action or inaction, but *Dobbs* (and Justice Thomas's concurrence in *Dobbs*) suggests that we are in an era of rights retraction.

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