# Women's Rights: Roe v. Wade Reversal Signals the High Court's Crackdown on Civil Liberties

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*The United States Supreme Court on June 24, 2022 handed down its decision in Dobbs v. Jackson Women's Health Organization that reversed the landmark US Supreme Court Roe v. Wade (1973) decision that granted the right to abortion for women in all states and US territories.*

*Roe was the most important US Supreme Court case since Brown v. Board of Education (1954) if measured by the numbers of Americans it impacted. The Court held in Roe that protected "privacy" included the basic right of a woman to procure an abortion from a doctor in the first trimester of pregnancy. "Privacy" replaced "freedom of contract." This demonstrated that the Court was willing to interpret the Constitution as containing rights not obvious from reading the text. [Emphasis added] (McCloskey 2000, 172; Carter 2022).*

*Dobbs* also reversed *Planned Parenthood v. Casey* (1992) where the Rehnquist Court ruled that laws requiring awareness of a spousal abortion were invalid because they placed an undue burden on a woman seeking an abortion of a "nonviable fetus." In short, *Planned Parenthood v. Casey* upheld *Roe*, but abandoned privacy as the foundation for the ruling. On May 2, Justice Samuel Alito's draft ruling for *Dobbs v. Jackson Women's Health Organization* was leaked and published in *Politico*. US Supreme Court Chief Justice John Roberts confirmed the draft's authenticity and called for an investigation to reveal the leaker. The *Dobbs* ruling abolished the right to abortion for 175 million women (Carter 2022).

*Dobbs* declares that it is the states' prerogative to prohibit or regulate abortion and therefore this right is "returned" to the state governments. This decision paves the way for state and local jurisdictions to institute restrictive laws that prohibit abortions outright and to bar women from traveling to obtain an abortion. Additionally, draconian laws would allow jail sentences and fines for doctors, nurses, friends, and family members who "aid and abet" an abortion. At least thirteen states have already passed so-called trigger laws that went into effect when the US Supreme Court handed down its decision. Twenty-six states as of

April 2022 are certain or likely to ban abortion subsequent the Court's decision (Carter 2022; Nash and Cross 2022).

The *Dobbs* ruling ignored the primary task of juris prudence to respect the right of "Precedent." Since 1973, High Court Justices examined *Roe v. Wade* and upheld the decision. The Roberts Court fails to address the concerns that led those Justices to their decisions. Indeed, it ignores their predecessors' conclusions and reasoning. The Roberts Court in *Dobbs*(and the majority's opinion) flies in the face of centuries of judicial tradition. The Court's omission must be stressed in light of the testimonies of Justices in the majority opinion who during their Senate confirmation hearings emphasized the importance of "settled law" (Tigar 2022).

Immediately following the leaked *Dobbs* decision, legal scholars warned ominously that the majority opinion challenges the fundamental rights that stem from the Fourteenth Amendment that lays the foundation for citizens' rights, "due process of law," and "equal protection of the laws." The *Dobbs* ruling also opens the door for further restrictions on the elementary principle of personal privacy—same sex or interracial marriage, LGBT rights, and legal contraception (Against the Current 2022; Ziegler 2022).

The High Court rationalized its ruling in *Dobbs* to end the 50-year-old *Roe v. Wade* decision by asserting that it was egregiously wrong from the beginning. The majority stated that *Roe was* a badly reasoned decision by even the most ardent supporters of abortion rights including the late Justice Ruth Bader Ginsberg. The majority suggested that *Plessy v. Ferguson*(1896) that instituted the "separate but equal" doctrine that legitimized racial segregation as constitutional is the best comparison to *Roe* (and *Planned Parenthood v. Casey*, the ruling that saved abortion rights in 1992) (Ziegler 2022).

Mary Ziegler, a law professor at the University of California, Davis warned: "If this decision signals anything bigger than its direct consequences, it is this: "No one should get used to their rights.… With *Dobbs v. Jackson Women's Organization* is a stark reminder that this can happen. Rights can vanish.… They [the majority] tell us that the right to abortion is unlike other privacy rights, such as the right to marry whom you wish or to use whatever contraception you choose. Abortion in their view is distinct from these because it puts someone else's life on the line. And, so, if we believe the Court's conservative justices, this is a reckoning about abortion and nothing more" (Ziegler 2022).

Notwithstanding the Court's assurances that no other rights will be forfeited—convincingly or not— the majority normalizes striking down with questionable logic a 50-year-old US Supreme Court decision that allowed for women to control their own bodies.

The *Roe v. Wade* decision spawned "a consensus around a woman's right to choose has broadened and strengthened in the years since *Roe* was decided," Tigar said. In contrast, Justice Alito's argument is that the Constitution is silent on abortion; he then cobbles together a string of laws dating from the sixteenth century that limited women's rights (Tigar 2022; Ziegler 2022).

The *Dobbs* decision establishes a new legal test that any constitutional rights previously upheld by precedent can be erased without warning. *Dobbs* mandates that rights not listed verbatim in the Constitution are unenforceable. Any rights not widely recognized after December 1791 when the Bill of Rights was ratified are not guaranteed. The High Court's

new legal test could be applied to all "fundamental Rights" that are not mentioned anywhere in the Constitution. It also calls all "unenumerated rights" into question by referring to them as "putative rights," i.e., rights that are assumed to exist but that might not exist in reality (London 2022; Carter 2022).

While the majority argued that they could find no tangible support in the *Roe v. Wade* decision to affirm its constitutionality, the Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The founders were cognizant that lists can deceive people into believing that any right not specifically mentioned implies that the right is unimportant or does not exist at all. Alito's logic could be turned to render the conclusion that abortion is a right because the Constitution does not specifically grant the government any right to prohibit it. The Ninth Amendment serves as a safety valve to account for future generations' new understandings (Tigar 2022; Carter 2022).

Michael E. Tigar, Professor Emeritus of Law at Duke University scorned Alito's "originalist" analysis as "one of the stupidest and most ahistorical bits of writing in Supreme Court history that includes, one must recall, the *Dred Scott* [1857] case dictum that African Americans have 'no rights that a white man is bound to respect.'"

Thomas Jefferson observed in 1816: "Some men look at the Constitutions with sanctimonious reverence, and then deem them, like the ark of the covenant, too sacred to be touched." Finally, there was little discussion in the Alito narrative that considered the damage that reversing *Roe v. Wade*will inflict upon the most vulnerable women and children in US society (Tigar 2022; Ziegler 2022; Carter 2022).

*Dobbs* denounces the landmark decision *Obergefell v. Hodges* (2015) that legalized gay marriage throughout the United States. *Dobbs* also criticized *Griswold v. Connecticut* (1965) that struck down legislation that prohibited the use of contraceptives based upon in part on the "right of privacy"—even though it is not mentioned specifically in the Constitution.

Writing for the majority, Justice William O. Douglas wrote the text in the Bill of Rights contained "penumbras and emanations" that protected marital privacy. The notion that the Constitution is a document that is subject to interpretation in accordance with changes in social, economic, political, and technology must be acknowledged as having a firm basis in law. The Roberts Court ignores this foundation and attempts to define modern law based on assumed doctrines of more than two centuries ago. The repudiations of settled law delivered in the Roberts Court are frightening and dangerous in their scope of laying the foundations for potential attacks on the private lives of individuals (London 2022; McCloskey 2000).

There are six ultraconservative Justices who came down as a bloc against *Roe*: John Roberts, Samuel Alito, Neil Gorsuch, Clarence Thomas, Brett Kavanaugh, and Amy Coney Barrett. Republicans nominated them all. President Donald Trump named three of the six during his single term in the Oval Office: Gorsuch, Kavanaugh, and Barrett.

Democrats nominated the remaining three "liberal" Justices who opposed *Dobbs.* Sonia Sotomayor, Elena Kagan, and Stephen Breyer, who retired on June 30. On February 25, 2022, President Joseph Biden nominated Ketanji Brown Jackson to take the bench upon Justice Breyer's retirement. The Senate confirmed Jackson on April 7, and Chief Justice John Roberts swore her into office on June 30.

Both major political parties with the Republicans acting aggressively and the Democrats passively acquiescing to their every whim brought the US Supreme Court to the point where settled law is no longer the foundation of the law.  Instead, six of the nine Justices on the Court hold a super majority whereby they act in concert to further a reactionary ideology based on religious beliefs and the erosion of democratic rights.

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