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An Analysis of *Dobbs v. Jackson*

SUMMARY:

On May 17, 2021 the Supreme Court agreed to hear the case *Dobbs v. Jackson Women's Health Organization*. The case involves a 2018 Mississippi law that bans abortions 15 weeks after conception, except in cases of "medical emergency or severe fetal abnormality." Lower courts had ruled this law unconstitutional because, as stated in previous Supreme Court cases, states could only regulate abortion after the fetus was viable outside of its mother's womb. *Dobbs* will address "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." The ultimate decision, expected in the spring or summer of 2022, could reaffirm the existing legal framework around abortion, make changes to alleviate some of the contradictions in the existing framework, or do away with it entirely.

ANALYSIS:

In 1973, the Supreme Court issued its landmark *Roe v. Wade* opinion. That case determined, based on the justices' understanding of the medical science at the time, that the legal status of an abortion should depend on the gestational stage of the fetus. According to the Court, the Constitution provided absolute protection for a woman's right to get an abortion during the first trimester of her pregnancy. By contrast, states could ban abortions during the third trimester, on the Court's belief that at that stage the fetus would be viable outside of its mother's womb and the state would have an interest in protecting the child's life. Abortion during the second trimester could be regulated, but not prohibited, in the interests of the woman's health.

The *Roe* trimester framework became increasingly indefensible as medical science pushed viability earlier and earlier in pregnancy. Additionally, states passed new and different laws that tested the limits of what it meant to regulate second trimester abortions in the interest of women's health. In 1992 the Court decided *Planned Parenthood v. Casey*, which shifted the focus from trimesters to fetal viability and whether the law under review presented an "undue burden" to a woman seeking to have an abortion. The questions of "undue burden" and when, if ever, a law can regulate abortion of a fetus that is not viable outside of its mother's womb have spawned a number of seemingly contradictory opinions from the Supreme Court and lower courts alike.

In *Dobbs*, the Court appears to have chosen to take on directly one of the central tenants of *Casey*, namely whether states can regulate abortion before the fetus is viable outside of the womb. The Court could have chosen to address two narrower grounds—one relating to the proper standard to use when considering whether a law

places an “undue burden” on abortion and the other relating to whether abortion clinics have the right to challenge laws that burden the rights of their patients—but chose not to do so. The fact that the court chose not to dispose of this case on much narrower grounds suggests, but does not guarantee, that the ultimate decision will make some meaningful change to abortion jurisprudence. Otherwise, why would the Court have decided to hear the case?

Two additional, related issues are implicated by this case. First is that criticism of *Roe* and *Casey* has as much to do with the fact that it is bad law (and bad law making) as it does that it is bad policy. Many people who are supportive of abortion rights nevertheless think that our country’s abortion jurisprudence is the height of judicial overreach and abuse. Turning abortion from a policy matter to a constitutional matter—without any basis in the text or history of the Constitution—transforms judges into super-legislatures, weighing costs and benefits that rightly should be done by legislatures. It also created a norm outside of the realm of abortion that judges have used to substitute their policy preferences for those of legislatures under the guise of judicial review. This has had the further effect of coarsening our politics and accelerating political polarization, as politics at the national level became less about crafting compromise on thorny policy questions and more about getting as many sympathetic judges as possible on the bench.

Second, even if the court were to overrule *Roe* and *Casey* completely, abortion would still be legal in this country. All that type of ruling would do is return the question of abortion policy to legislatures, both state and federal, to craft compromises around what should and should not be allowed, and when. To paraphrase Churchill, for opponents of abortion, overturning Roe would not be the end, or even the beginning of the end, but the end of the beginning.

Additional Recommended Reading:

- National Review – The Stakes of the Supreme Courts New Abortion Case
- ACLJ – The Case We’ve Been Waiting For