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Roe vs. Wade: Self-Determination Has Been Wrenched Away from Half the US Population

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Global Research, June 28, 2022
Truthout 27 June 2022

Region: USA
Theme: Law and Justice, Women's Rights

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For the first time in U.S. history, the Supreme Court has retracted a fundamental constitutional right. "We hold that Roe and Casey must be overruled," Samuel Alito wrote for the majority of five right-wing zealots on the court in Dobbs v. Jackson Women's Health Organization. They held that "procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."

Since the day *Roe v. Wade* was decided nearly 50 years ago, its opponents have executed a methodical campaign to overturn it. There is no reason, in fact or in law, to erase the constitutional right to abortion. The Constitution still protects abortion, and there have been no factual changes since 1973 that would support abolishing it. The only thing that has changed is the composition of the court. It is now packed with radical Christian fanatics who have no qualms about imposing their religious beliefs on the bodies of women and trans people, notwithstanding the Constitution's unequivocal separation of church and state.

Alito was joined by Clarence Thomas, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett in stripping protection of the right to self-determination from half the country's population.

In their collective dissent, Stephen Breyer, Sonia Sotomayor and Elena Kagan said the majority "has wrenched this choice from women and given it to the States." They wrote that the court is "rescinding an individual right in its entirety and conferring it on the State, an action the Court takes for the first time in history."

Noting,

> "After today, young women will come of age with fewer rights than their mothers and grandmothers had," the dissenters conclude: "With sorrow — for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection — we dissent."

During the December oral argument, Sonia Sotomayor expressed concern about how the Supreme Court would "survive the stench" of the overtly ideological overruling of *Roe*. It will show, she said, that the Court's rulings are "just political acts."

By overturning *Roe* and *Planned Parenthood v. Casey*, the court's majority confirmed the significance of Sotomayor's query. While purporting to shift the restriction or abolition of abortion to the states, the court has engaged in a political act. It delegated the fate of a right that had been moored in the Constitution to the political process.

"This conservative court defers to the political process when it agrees with its results," Berkeley Law School Dean Erwin Chemerinsky wrote in the *Los Angeles Times*, "but the deference vanishes when the conservative justices dislike the states laws."

As Chemerinsky notes, "there was no deference to the political process earlier this week when the conservatives on the court declared unconstitutional a New York law limiting concealed weapons that had been on the books since 1911 or struck down a Maine law that limited financial aid to religious schools."

Brett Kavanaugh insisted in his concurrence that the Constitution is "neither pro-life nor pro-choice." Arguing that it is "neutral" on abortion, he claimed that the issue should be left to the states and "the democratic process." But partisan gerrymandering and the Supreme Court's evisceration of the Voting Rights Act to the detriment of Democrats and people of color belie the court's purportedly "democratic" and "neutral" delegation of abortion to the states.

The court held in *Roe* that abortion was a "fundamental right" for a woman's "life and future." It said that states could not ban abortion until after viability (when a fetus is able to survive outside the womb), which generally occurs around 23 weeks. Nineteen years later, the court reaffirmed the "essential holding" of *Roe* in *Casey*, saying that states could only place restrictions on abortions if they don't impose an "undue burden" on the right to a pre-viability abortion.

Alito wrote in *Dobbs* that since abortion is no longer a fundamental constitutional right, restrictions on it will be judged under the most lenient standard of review — the "rational basis" test. That means a law banning or restricting abortion will be upheld if there is a "rational basis on which the legislature could have thought that it would serve legitimate state interests."

At issue in *Dobbs* was Mississippi's 2018 Gestational Age Act, which outlaws nearly all abortions after 15 weeks of pregnancy, well before viability. The law contains exceptions for medical emergencies and cases of "severe fetal abnormality," but no exception for rape or incest.

The majority said that Mississippi's interest in "protecting the life of the unborn" and preventing the "barbaric practice" of dilation and evacuation satisfied the rational basis test so its law would be upheld. The court accepts the notion of protecting "fetal life" but nowhere mentions what the dissenters call "the life-altering consequences" of reversing *Roe* and *Casey*.

In both *Roe* and *Casey*, the court grounded the right to abortion in the liberty section of the Due Process Clause of the 14th Amendment, which says that states shall not "deprive any

person of life, liberty, or property, without due process of law." The court in *Roe* relied on several precedents saying that the right of personal liberty prohibits the government from interfering with personal decisions about contraception, marriage, procreation, family relationships, child-rearing and children's education.

The *Dobbs* majority said the Constitution contains no reference to abortion and no constitutional provision implicitly protects it. In order to be protected by the Due Process Clause, a right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." According to the majority, there is no liberty interest because the law didn't protect the right to abortion in the 19th century.

To his credit, John Roberts did not vote to overturn *Roe* and *Casey*, writing that the majority's "dramatic and consequential ruling is unnecessary to decide the case before us." Mindful of the threat this "serious jolt to the legal system" will pose to the legitimacy of the Roberts Court, the chief justice sought to split the baby, so to speak. He discarded the viability test and upheld the Mississippi law, leaving the issue of the constitutionality of abortion to a future case. Purporting to be a supporter of abortion rights, Roberts said women in Mississippi could choose to have an abortion before 15 weeks of pregnancy.

In order to justify their rejection of *stare decisis* (respect for the court's precedent) to which the members in the majority had pledged fealty during their confirmation hearings, Alito wrote that *Roe* was "egregiously wrong." He and the others in the majority had the nerve to compare abortion to racial segregation, drawing an analogy between the court's overruling of *Roe* and its rejection of *Plessy v. Ferguson* in *Brown v. Board of Education.*

Nearly half the states have laws banning or severely restricting abortion. Almost one in five pregnancies (not counting miscarriages) end in abortion, which is one of the most frequent medical procedures performed today. Twenty-five percent of American women will end a pregnancy in their lifetime. Now that *Roe* has been overturned, it is estimated that 36 million women and others who can become pregnantwill be denied the fundamental right to choose whether to continue a pregnancy.

The dissenters observed that under laws in some states (like Mississippi) that don't offer exceptions for victims of rape or incest, "a woman will have to bear her rapist's child or a young girl her father's — no matter if doing so will destroy her life."

Alito wrote, "The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."

But the dissenters were not convinced. "No one should be confident that this majority is done with its work," they warned. The dissent noted that the right to abortion enshrined in *Roe* is "part of the same constitutional fabric" as the rights to contraception and same-sex marriage and intimacy. "Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."

Thomas didn't pull any punches in his concurrence. He said that the court "should reconsider" other precedents based on substantive due process, including *Griswold v. Connecticut* (the right to contraception), *Lawrence v. Texas* (the right to same-sex sexual conduct) and *Obergefell v. Hodges* (the right to same-sex marriage).

In Alito's draft opinion, which was leaked to *Politico* in May, he wrote that the rights protected by *Lawrence* and *Obergefell* are not "deeply rooted in history." But the final majority opinion didn't go that far. Kavanaugh would not have signed onto it. He wrote in his concurrence, "Overruling Roe does not mean the overruling of [*Griswold*, *Obergefell*, *Loving v. Virginia* (right to interracial marriage)], and does not threaten or cast doubt on those precedents."

The dissenters frame the *Dobbs v. Jackson Women's Health Organization*ruling as a gross attack on the right to self-determination: "The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven — all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination."

It is that right to self-determination that the five ultraconservative members of the court have wrenched away from half of the people in the United States.

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