



ETHICS & MEDICS

A COMMENTARY OF THE NATIONAL CATHOLIC BIOETHICS CENTER ON
HEALTH CARE AND THE LIFE SCIENCES

JUNE 2024 † VOLUME 49, NUMBER 6

Also in this issue: "Risk Does Not Make a Mother 'Dead Enough' to Directly Abort Her Child," by Colten P. Maertens-Pizzo

UNPACKING THE *DOBBS* DECISION

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The Supreme Court reviews laws to determine whether they violate the US Constitution, a process called judicial review. In cases presented to the Court, the justices must analyze the constitutionality of the laws in question, not write new laws. Justice Alito's majority opinion in the *Dobbs v. Jackson Women's Health* case is well crafted, highly informative, and compelling.¹ He provides a detailed description of how fundamentally flawed the *Roe* and *Casey* decisions were from the beginning.² The *Roe* decision, according to Justice Alito, reads like a law, not a court decision. Justice Alito examines the *Roe* and *Casey* decisions based on constitutionality, then analyzes the litigants' claim that those decisions must be upheld as precedent. He also discusses the arguments posed in the dissenting opinion in *Dobbs*.

We are presented with a history lesson in the *Dobbs* decision. In the case of *Roe v. Wade*, the law in question was the Texas law that criminalized abortion. Equating abortion to a woman's right to privacy, in 1973 the Supreme Court ruled in a 7-2 decision that laws banning abortion before the third trimester were unconstitutional. Privacy is not guaranteed in the Constitution, but it is recognized as implied in the right to due process, guaranteed by the Fourteenth Amendment. In *Planned Parenthood v. Casey*, plaintiffs challenged several provisions of the Pennsylvania Abortion Control Act. This time the Court was divided on how to handle the precedent set by *Roe*. Two justices voted to leave *Roe* as-is, four wanted to overrule *Roe* completely, and three who signed the controlling opinion acknowledged the flaws in the *Roe* argument but declared that it should not be overturned because the judicial precedent was just too important. However, the *Casey* decision did not stop there. It did away with the trimester specifications and adopted a new rule. Laws that imposed an "undue burden" on a woman's ability to obtain an abortion were unconstitutional, thus eliminating the constitutionality of laws that prohibited third trimester abortions.

Justice Alito systematically dismantles these arguments in his majority opinion in *Dobbs v. Jackson Women's Health*, the case concerning the Mississippi law that outlaws abortion after 15 weeks' gestation. By bringing the case forward, the State was asking the Supreme Court to reconsider *Roe* and *Casey* and allow each state to decide how its legislature would regulate abortion. Justice Alito begins by examining the decisions based on constitutionality of the laws in question. He informs us when something is not specifically mentioned by the Constitution, the claimants must demonstrate the right is somehow implied. He argues that *Roe* was "remarkably loose

in its treatment of the constitutional text" (*Dobbs*, at 9), stating that the right to abortion was part of the right to privacy, which is also not actually mentioned in the Constitution. Neither the *Roe* nor the *Casey* decisions made any attempt to define exactly where in the Constitution this right to abortion was secured, citing the First, Fourth, Fifth, and Fourteenth amendments, with the message "that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance" (*Dobbs*, at 10). However, Justice Alito reminds us that this determination is precisely the job of the Court.

The Court must next examine if the right "is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as 'ordered liberty'" (*Dobbs*, at 9). Rather than a clearly protected constitutional right, abortion was a crime in most states prior to the passage of the Fourteenth Amendment. Up until the time of the *Roe* decision, abortion was either restricted or prohibited in all but four states—hardly a right rooted in history and tradition. In the *Casey* decision, justices claimed abortion was included in the right to "make intimate and personal choices that are central to personal dignity and autonomy" (*Dobbs*, at 30), and the case law used to uphold this argument included interracial marriage and the right to make decisions on the education of one's own children. These cases do not uphold the right to destroy another human life and are therefore inappropriate as precedent according to Justice Alito.

Workability proved to be another impossible hurdle for *Roe* and *Casey*. In considering whether to overturn a precedent, the Court must consider "whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner" (*Dobbs*, at 56). The Opinion cites numerous issues with the "substantial obstacle" and "undue burden" rules. From the moment they were passed, these ambiguous terms caused conflict and disagreements between courts and appellate courts.

The Court must also consider the effect a decision has on other areas of law. Alito argues that the Court's previous abortion case decisions have had a disruptive effect and "have diluted the strict standard for facial constitutional challenges" (*Dobbs*, at 63). Before hearing a case, the Court must first decide if the parties who are bringing a case forward meet the standards for interested parties. The abortion clinic does not meet this standard, since it is not guaranteed personal rights under the Constitution and therefore should not be allowed to argue that a law has violated its right to privacy or intimate personal choices. Even though the plaintiffs in *Casey* argued that the Pennsylvania law violated loosely defined rights guaranteed under the Constitution, those violations impacted non-litigant third-party patients, not the clinic itself. The case was allowed to proceed in the Court, despite Alito's position that the Court's abortion cases "have ignored the Court's third-party standing doctrine" (*Dobbs*, at 63).