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## THE LEGAL EFFECTS OF DOBBS IN HOPES OF AN ABORTION-FREE AMERICA

Natalee Geerts



Following the fall of *Roe v. Wade*, many are wondering how the states and federal government will handle the issue of abortion. The *Dobbs v. Jackson* decision did not outlaw abortion but said that “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.”<sup>1</sup> Justice Kavanaugh in his concurrence explains further that “[o]n the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.”<sup>2</sup> According to the *Dobbs* decision, there is neither a federal right to abortion nor a federal right of life for the fetus found within the Constitution. This has many important implications that Americans need to understand. In stating that the Constitution is neutral on the issue of abortion, the Supreme Court has said the federal government has no power to regulate abortion. To understand how to draw this conclusion, one needs to understand the structure of the American government.

The Founding Fathers of America were terrified of a federal government with too much power. This fear came from the colonists’ relationship with England and their frustration with their lack of representation. As a result of this fear, the Founders wanted the federal government to have severely restricted power so as not to be tyrannical. This led to the ratification of the Articles of Confederation, which ultimately failed because the federal government was given so little power, it was essentially useless.<sup>3</sup> The Articles of Confederation were replaced with the Constitution, which delegated specific powers to the federal government. The Constitution represents a compromise between a federal government with too much power and a federal government with no power at all. The Constitution grants the federal government a limited field in which three branches can exercise power. Shortly after the Constitution was ratified, the Founding Fathers amended the Constitution to include what we refer to today as the Bill of Rights. One of the amendments in the Bill of Rights, Amendment X, states, “The powers not delegated to

the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>4</sup> This Amendment means that the federal government can act only within the scope of the powers it is given by the Constitution.

The Constitution’s limiting of the federal government’s powers is important because if an issue is not listed in the Constitution, the federal government has no power to regulate that issue. Since the majority in the *Dobbs* decision states that the Constitution is silent on abortion, the federal government has no power to make *any* laws regulating the legality of abortions, whether pro-life or pro-abortion. This decision binds all branches of the federal government including Congress, the presidency, and the Supreme Court.

Before continuing, it is worth noting that some may doubt whether the Constitution is actually silent on the matter of abortion. They may argue that several of the amendments in the Bill of Rights cannot be protected without the right to life being protected. For example, they may look to the First Amendment, which gives the right to free speech and freedom of religion. Surely everyone can agree these rights cannot possibly be granted if the person is denied life and therefore denied the ability to speak or exercise religion. While this is a tempting argument to make, it may not be the most effective method to guarantee a right to life from the moment of conception. First, this method could take another fifty years to implement. To make this type of change would require a case on abortion to get all the way back to the Supreme Court. The Court would also need to be sympathetic to this argument and willing to partially overrule the *Dobbs* decision.<sup>5</sup> However, the biggest setback with this approach is that even if the Supreme Court did implement a new rationale, stating that life is protected from the moment of conception, such a decision could still be overruled by the Court in the future; there is no guarantee that the decision is permanent. Instead of a change in the Court’s rationale, Americans should work towards a lasting change in the law: an amendment to the United States Constitution.

Constitutional amendments are notoriously hard to achieve and with good reason. Once something is in the Constitution, it is law and assumed it will not change. However, an amendment is ultimately the best way to make America abortion-free. Unlike passing a law that would allow or prohibit abortions, Congress does have the right to make an amendment according to Article V of the Constitution. An Amendment “may be proposed either by the Congress, through a joint resolution passed by a two-thirds vote, or by a convention called by Congress in response to applications from two-thirds of the state legislatures.”<sup>6</sup> Therefore, the best way to make America abortion-free is to slowly turn each state pro-life until there is enough of a majority to achieve an amendment to the Constitution.<sup>7</sup>

There are movements on both sides of the abortion issue that have misunderstood *Dobbs*’s limitation on the federal government’s