Two Momentous Supreme Court Decisions and the Road Ahead

Glory Hallelujah—Victory Won

For forty-nine years, Catholics and other pro-life Americans worked to overturn *Roe v. Wade*, a decision untethered to the Constitution. On June 24, their dedication—and courage in the face of an increasingly hostile culture—bore fruit when the Supreme Court overturned *Roe* in *Dobbs v. Jackson Women's Health*.

That decision will be analyzed in detail below, but first, it is important to emphasize that pro-life Americans should be thankful for this victory and should celebrate it. In response to the ruling, Archbishop Jose Gomez, the president of the U.S. Conference of Catholic Bishops, and Archbishop William Lori, chair of the Committee on Pro-Life Activities, issued the following statement: "This is an historic day in the life of our country, one that stirs our thoughts, emotions and prayers. … We thank God today that the Court has now overturned this decision. … Over these long years, millions of our fellow citizens have worked together peacefully to educate and persuade their neighbors about the injustice of abortion, to offer care and counseling to women, and to work for alternatives to abortion, including adoption, foster care, and public policies that truly support families. We share their joy today and we are grateful to them."[1]

The victory is a result of practical politics. It was achieved, first of all, because pro-life Americans worked to elect politicians who pledged to nominate justices to

1. US Conference of Catholic Bishops, "USCCB Statement on U.S. Supreme Court Ruling in *Dobbs v. Jackson*," news release, June 24, 2022, https://www.usccb.org/news/2022/usccb-statement-us-supreme-court-ruling-dobbs-v-jackson.

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the Court who understood that *Roe* was not tethered to the Constitution but rather was the result of the Court's usurping the policy-making role of the legislature. As I have discussed in prior columns, these justices are, essentially, originalists. That is, they seek to apply the words in the text of the Constitution as straightforwardly as possible rather than interpret those words in light of their own understanding of contemporary views.

These lessons are clear when one considers the Court's decision in *Planned Parenthood v. Casey*, which was also overturned by *Dobbs*. In that case, decided in 1994 and upholding *Roe*'s so-called abortion right, the Court interpreted *liberty* in the Fourteenth Amendment in light of its own (i.e., non-textual) definition that "liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[2] This definition is obviously imprecise and malleable and did not pretend to be the meaning the Framers of the Constitution intended. Thus, until there was a majority of justices on the Court who rejected the approach these justices took, *Roe* would not be overturned. So, it was essential that, through practical politics, justices were confirmed who sought to apply the original meaning of the Constitution (i.e., originalists). When those justices constituted a majority, it could be confidently expected that *Roe* and *Casey* would be overturned. With the confirmation of Amy Barrett on September 29, 2020, that majority was achieved.

Again, it needs to be emphasized that the inevitable overturning of *Roe* was achieved by the efforts of pro-life Americans to elect the politicians who nominated these justices. As Gomez and Lori said, the effort of "countless ordinary Americans from every walk of life … reflects all that is good in our democracy, and the pro-life movement deserves to be numbered among the great movements for social change and civil rights in our nation's history."[3] The only thing I would amend in that statement is that it is a great movement not only in US history but also in world history (more on that below).

I hope readers will take a moment to celebrate it and to give thanks.

Dobbs v. Jackson Women's Health

The decision in *Dobbs* was 6 to 3 to uphold Mississippi's ban on abortion after fifteen weeks. The three justices nominated by Democratic presidents—Stephen Breyer, Sonia Sotomayor, and Elena Kagan—dissented and would have overturned Mississippi's ban. Among the six justices in the majority, one—Chief Justice John Roberts—would have upheld Mississippi's ban but would have gone no further. However, the other five, constituting a majority—Amy Barrett, Brett Kavanaugh, Neil Gorsuch, Samuel Alito, and Clarence Thomas—reasoned that Mississippi's ban should be upheld because the foundation of abortion rights, that is, *Roe* and *Casey*, was not tethered to the Constitution.

Before going into other aspects of the decision, it is important to emphasize the central holding of the opinion: "The Constitution makes no reference to abortion,

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2. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992). The Fourteen Amendment reads: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."
3. USCCB, "Statement on *Dobbs v. Jackson*."

and *no such right is implicitly protected by any constitutional provision*, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment."[4] Note that means that not only does the *liberty* of the Fourteenth Amendment not include a right to abortion, but *no other provision*—such as the antislavery provision of the Thirteenth Amendment or the religious freedom guarantee of the First Amendment—gives such a right either.[5] In short, *there is no right to abortion under the Constitution*. If abortion advocates want it, they will have to amend the Constitution to provide it.

What standard will now apply to state laws restricting abortion? Before *Dobbs*, the standard was the substantial burden test imposed by *Casey* when it reinterpreted *Roe*'s trimester framework. In other words, if a state law placed a substantial burden on a woman's right to abortion, it was struck down. *Dobbs*, in overruling *Roe* and *Casey*, replaced that standard with the rational basis test. That is, if a state law has a rational basis, it will be upheld. It cannot be overemphasized what a consequential change this is. Since *Dobbs* found there was no right to abortion in the Constitution, under our system of federalism, each state is free whether to limit or ban abortion. Any state laws doing so are almost certain to be upheld in the courts. The only requirement is that the legislators must have had a rational basis for passing the law. Given all the sociological evidence of the ill effects of abortion on women and the importance of respecting unborn life,[6] this should be easy to do.

In other words, the rational basis test (*a test that is usually applied when a court is reviewing a state law*) is fairly easy to pass because it respects the legislature's judgment and does not seek to substitute that of the courts. By contrast, the undefined substantial burden test applied under *Roe* and *Casey* effectively assumed *against the legislature*, placing a burden on state legislatures that they could never satisfy. (Any abortion restriction places some burden on the right to get an abortion; there was no way to know if it is substantial. In practice this worked out to the Court's striking down all restrictions.) The freewheeling liberty test of *Casey* exalted the role of judges at the expense of the people and their elected representatives, contrary to the allocation of power under the Constitution.[7]

The Court rejected the freewheeling approach to implying a right under Fourteenth Amendment liberty, but it acknowledged that a Constitutional right may properly be implied in some circumstances—that is, if it was "deeply rooted in this nation's history and tradition and implicit in the concept of ordered liberty."[8] This is a stringent standard, which seems proper when we are considering whether to imply

4. Dobbs v. Jackson Women's Health Organization, No. 19-1392, 597 U.S. ___ (June 24, 2022), slip op. at 5 (Alito, J.) emphasis added.
5. The Thirteen Amendment reads, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Establishment and Free Exercise Clause of the First Amendment read, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."
6. These two state interests were recognized as relevant even under *Roe*.
7. Compare the extensive powers of the Congress under U.S. Const. art. I, sec. 8, with the limited power of the Supreme Court under art. III, sec. 2.
8. *Dobbs*, 597 U.S. ___, slip op. at 5 (Alito, J.), internal citations omitted.

a right not specified in the words of the Constitution. The Court easily showed that abortion failed this test: when the Fourteenth Amendment was adopted in 1868, three fourths of the states not only did not provide a right to abortion but criminalized it.[9] (Likewise, when *Roe* was decided, thirty states prohibited all abortions.)

There are a couple of things to emphasize about this test. First, it was not created by the *Dobbs* majority. Instead, it echoes the test the Court used in a prior case, *Washington v. Glucksberg*. That case was decided in 1997. The issue was whether there is an implied liberty right to assisted suicide. The Court ruled there was not, applying the "history and tradition" test repeated in *Dobbs*. The second thing to note is that *Glucksberg* would surely have been eventually overturned under *Roe* and *Casey*'s freewheeling liberty approach if the composition of the Court had not changed—William Rehnquist, Antonin Scalia, and Clarence Thomas had joined the Court—and that would have meant that *every state would have been required* to permit assisted suicide.

Readers are likely familiar with the argument that *stare decisis* required that *Roe* be upheld. In other words, since the Court once found a right to abortion, that right *must be affirmed* in all subsequent decisions. As Alito demonstrates, there has never been such a rule, and many opinions of the Court have overturned prior decisions, such as *Plessy v. Ferguson* that upheld racial segregation.[10] According to Alito, "In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[11]

The first refers to the fact that *Roe* purported to interpret the actual words *of the Constitution*, where an error is much more serious than if the Court were interpreting a federal or state *law*. As to the second, I refer the reader to my prior columns; let it suffice to say that even legal scholars who favor a right to abortion, such as John Hart Ely of Stanford, disparage the reasoning in *Roe*. As to the third, the continuing litigation over abortion shows the standards of *Roe* and *Casey* do not work. The fourth is demonstrated by the fact that special rules had been created to apply to abortion, thereby distorting other areas of law. For instance, as noted above, the usual deference to the legislature did not apply. As to the fifth, even the Court in *Casey* admitted there was no actual reliance, since abortion is usually unplanned in advance; rather it created a new kind of reliance that "depends on an empirical question that is hard for anyone—in particular, for a court—to assess, namely the effect of the abortion right on society and in particular on the lives of women."[12]

Readers will be familiar with the criticism of the *Dobbs* opinion that other rights implied under Fourteenth Amendment liberty, such as the right to marry and the right to purchase contraception, are similarly at risk. Indeed, Thomas, in a concurring opinion, said, "In future cases, we should reconsider all of this Court's

9. *Dobbs*, 597 U.S. ___, slip op. at 16 (Alito, J.).
10. For a partial list of other Supreme Court decisions that were overturned, see *Dobbs*, 597 U.S. ___, slip op. at 41n48 (Alito, J.).
11. *Dobbs*, 597 U.S. ___, slip op. at 43 (Alito J.).
12. *Dobbs*, 597 U.S. ___, slip op. at 65 (Alito J.).

substantive due process precedents, including *Griswold* [contraception], *Lawrence* [striking down anti-sodomy laws], and *Obergefell* [same-sex marriage]."[13] However, Alito, writing for the majority, ruled out any similarity of abortion to "rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage." Rather, "abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called 'fetal life.'"[14] (Note that this disagreement between Alito and Thomas indicates there is not a majority among the originalists on the Court to reconsider those decisions. Both Justices note that the doctrine of substantive due process—that is, implying rights under the Due Process Clause of the Fourteenth Amendment—must be very limited else it distorts the powers allocated in the Constitution.)

In addition, readers may be familiar with the argument that abortion was a right at common law, and thus, a right to abortion is rooted in America's history. Alito demolishes this argument in an extensive discussion of English and American law. Here are excerpts: "English cases dating all the way back to the 13th century corroborate the [law] treatises' statements that abortion was a crime"; "Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law";. "Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy."[15]

Before and After Dobbs

As noted above, with five originalists on the Court, it was certain *Roe* would be overturned once the Court granted review in *Dobbs*, unless one of the originalists acted contrary to his or her judicial philosophy.

For the first time, and in what seems to have been an attempt to change that outcome by scaring a Justice into changing his or her vote, a draft of the *Dobbs* opinion was leaked to the press in May.[16] This sparked an uproar among pro-abortion groups, including an immense increase in anti-Catholic rhetoric. One pro-abortion group, Ruth Sent Us, published the home addresses of the Justices. Pro-abortion groups began protesting at the homes and churches of Justices.[17] Scandalously, the FBI and the Department of Justice did nothing to deter these protests. Pro-abortion

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13. *Dobbs*, 597 U.S. ___, slip op. at 3 (Thomas, J., concurring).
14. *Dobbs*, 597 U.S. ___, slip op. at 5 (Alito, J.).
15. *Dobbs*, 597 U.S. ___, slip op. at 17, 18, 20 (Alito, J.), emphasis original.
16. Josh Gerstein and Alexander Ward, "Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows," *Politico*, updated May 3, 2022, https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.
17. See Bill Donohue, "Anti-Catholic Invective Spawns Violence," CNS News, June 14, 2022, https://www.cnsnews.com/commentary/bill-donohue/anti-catholic-invective-spawns-violence; Andrew Kerr, "Abortion Rights Group Denies Doxxing Kavanaugh, Shuts Down Website," *Washington Examiner*, June 9, 2022, https://www.washingtonexaminer.com/news/crime/brett-kavanaugh-attack-ruth-sent-us-website; and Tyler O'Neil, "Pro-Abortion Groups Target Churches for Mother's Day Protests," Fox News, May 6, 2022, https://www.foxnews.com/politics/pro-abortion-groups-target-churches-for-mothers-day-protests.

groups launched attacks against pro-life organizations. President Joe Biden refused to condemn the protests and merely condemned the violence through a statement by his press secretary. On June 8, police arrested an armed man outside Kavanaugh's home who had planned to kill the justice. Only then did the Democratic-controlled House of Representatives approve a bill, already approved in the Senate, to increase security at justices' homes.[18]

After the decision, Biden released an executive order to "protect access to reproductive health care,"[19] and he sought in every way imaginable to secure abortion in every state. For instance, language in existing law is being reinterpreted to include abortion. These actions are being challenged in court. In Congress, Senator Lindsey Graham introduced a nationwide ban on abortion after fifteen weeks, though it has no chance of passage while Democrats control the Congress.

Since the Court did not hold that the Constitution prohibited abortion (technically that issue was not before it for decision), the abortion battle moved into the states. Some states activated existing laws conditioned on the overthrow of *Roe* or passed new bans. Other states sought to extend abortion rights. Efforts also proceed in the states to either entrench or prohibit abortion under *state constitutions*. The first post-*Dobbs* referendum, which sought to reverse a *state supreme court* holding that the state constitution gave a right to abortion, failed in Kansas in August.[20]

In sum, *Dobbs* hardly means the end of the politics of abortion. However, of crucial importance, it ends the notion—the lesson "taught" to generations of Americans—that the Constitution provides for a right to abortion. Further, it ends the patina of legitimacy that *Roe* gave to abortion rights around the world. The US Supreme Court is often seen as a sort of "world court" of human rights. Its decisions have huge implications in other nations. Its endorsement of abortion as a basic human right, thus, gave strength to demands for abortion around the world. That ended on June 24.

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18. Sam Faddis, "Jane's Revenge—Violence and Revolution Right Here at Home," *AND Magazine*, June 14, 2022, https://andmagazine.substack.com/p/janes-revenge-violence-and-revolution; Kathleen Parker, "A Wave of Violence as the Court Prepares to Rule," *Washington Post*, June 14, 2022, https://www.washingtonpost.com/opinions/2022/06/14/bombings-churches-brett-kavanaugh-abortion/; Adam Sabes, "President Bident 'Strongly Condemns' Molotov Cocktail Attack on Wisconsin Anti-Abortion Group," Fox News, May 9, 2022, https://www.foxnews.com/politics/biden-condemns-molotov-cocktail-attack-wisconsin-anti-abortion-group; Jonathan Turley, "Arrest Outside Justice Kavanaugh's Home Is Shocking. But, Sadly, Not Surprising," *USA Today*, June 9, 2022, https://www.usatoday.com/story/opinion/2022/06/09/threat-against-justice-kavanaugh-sobering/7557278001/; and Ronn Blitzer, "House Passes Senate Bill Providing Security to Supreme Court Justices' Families," Fox News, June 14, 2022, https://www.foxnews.com/politics/house-passes-supreme-court-protection-bill.
19. White House, "Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services," news release, July 8, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/08/fact-sheet-president-biden-to-sign-executive-order-protecting-access-to-reproductive-health-care-services/.
20. See, for example, Elizabeth Kirk, "The Meaning of Kansas: Lessons from a Pro-Life Defeat," *Public Discourse*, August 11, 2022, https://www.thepublicdiscourse.com/2022/08/83956/.

A Second Momentous Supreme Court Decision

The past year saw significant victories for religious freedom in the Supreme Court. The most important was *Kennedy v. Bremerton School District*. I will return to it below. First, I would like to discuss two other important decisions.

Shurtleff v. Boston concerned the City of Boston's practice of allowing organizations to fly their flags on the flagpole outside city hall. Nearly three hundred organizations had been permitted to fly their flags between 2005 and 2017. That year, the city denied a Christian organization permission to fly its "Christian flag," saying that permitting that would violate the Establishment Clause of the First Amendment because of the religious nature of the flag. In a 9-to-0 opinion, the Court unanimously concluded that the city could not refuse to fly the flag.[21]

Carson v. Makin concerned Maine's program of tuition assistance for parents who live in school districts that neither operate a secondary school nor contract with a particular school in another district. However, Maine did not allow parents to receive such assistance if they wished to send their children to *religious schools*. In a 6-to-3 decision, with the so-called conservatives in the majority and the so-called liberals in dissent, the Court held that this violated the Free Exercise Clause of the First Amendment: "Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise."[22]

The dispute between the majority (Roberts, Kavanaugh, Barrett, Alito, Thomas, Gorsuch) and the dissent (Breyer, Kagan, Sotomayor) was over whether the test from a prior case, *Locke v. Davey*, governed the outcome in this case. *Locke* upheld a state law that provided scholarships to assist academically gifted students in post-secondary education but excluded only training to be a minister. The majority found *Locke* inapposite here: "*Locke*'s reasoning expressly turned on what it identified as the historic and substantial state interest against using taxpayer funds to support church leaders. But … it is clear that there is no historic and substantial tradition against aiding private religious schools comparable to the tradition against state-supported clergy invoked by *Locke*. *Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."[23]

As noted, the true blockbuster decision, however, came in *Kennedy*. It involved the practice by a high school coach of praying at midfield following the conclusion of a football game. The opinion broke down into the familiar 6-to-3, conservative-liberal split. The dissent saw the case as another example of the majority giving too much emphasis to the Free Exercise Clause at the expense of the Establishment Clause, finding the coach's conduct to be a species of "official-led prayer" that is precluded by the latter.[24]

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21. Shurtleff v. Boston, No. 20-1800, 596 U.S. ___ (May 2, 2022), slip op. at 4.
22. Carson v. Makin, No. 20-1088, 596 U.S. ___ (June 2, 2022), slip op. at 18 (Roboerts, C. J.).
23. *Carson*, 596 U.S. ___, slip op. at 18 (Roberts, C. J.), internal citations omitted.
24. Kennedy v. Bremerton School District, No. 21-418, 597 U.S. ___ (June 27, 2022), slip op. at 1 (Sotomayor, J., dissenting).

However, while the majority agreed that the case concerned a proper understanding of the Establishment Clause in light of the Free Exercise Clause, it held that the balance clearly favored free exercise: "Respect for religious expressions is indispensable to life in a free and diverse Republic. … Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination."[25]

However, what made this a blockbuster decision is that the Court noted that the *Lemon* test no longer governed these kinds of cases. *Lemon v. Kurtzman* governed whether state action improperly "establishes" religion. It created a three-pronged test: does the state action have the *purpose* or *effect* of establishing religion? If not, does it, nonetheless, "entangle" the state and religion?[26] This is obviously a complicated test, as conflicting outcomes in subsequent cases demonstrated. One of these, in fact, added an additional factor: whether the state was "endorsing" religion.[27] All in all, this created what amounted to a presumption that state action that touched religion established it and was unconstitutional.

However, the Court held that *Lemon* as well as the endorsement test no longer apply and have been replaced with an "original meaning and history" test:

> What the [lower courts] overlooked … is that the shortcomings associated with this ambiguous, abstract, and ahistorical approach to the Establishment Clause became so apparent that this Court long ago abandoned *Lemon* and its endorsement test offshoot. The Court has explained that these tests invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators. This Court has since made plain, too, that the Establishment Clause does not include anything like a modified heckler's veto, in which religious activity can be proscribed based on perceptions or discomfort [of a third party]. …
>
> In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings. The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers.[28]

In short, this is a welcome change that permits greater space for religious freedom.

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25. *Kennedy*, 597 U.S. ___, slip op. at 31–32 (Gorsuch, J.).
26. Lemon v. Kurtzman, 403 U.S. 602, 612–613 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"
27. County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989).
28. *Kennedy*, 597 U.S. ___, slip op. at 22–23 (Gorsuch, J.), internal citations omitted.