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Should Constitutional Rights Reflect Popular Opinion? Interpreting *Dobbs v. Jackson Women's Health Organization*

Mary Ziegler

School of Law, University of California, Davis, Davis, CA, USA

In June 2022, the Supreme Court handed down a decision, *Dobbs v. Jackson Women's Health Organization*, which dismantled a fundamental right to choose abortion. A line of Supreme Court decisions dating back to the 1920s recognized unenumerated liberties related to parenting, marriage, and contraception tied to the constitutional right to privacy. Almost half a century ago, in *Roe v. Wade*, the Supreme Court declared that this constitutional right to privacy was broad enough to encompass the right to terminate a pregnancy. The *Dobbs* decision reversed *Roe* and disparaged the right to abortion in the strongest terms: the decision recognizing it was "egregiously wrong" and "on a collision course with the Constitution."[1]

One of the justices in the *Dobbs* majority, Brett Kavanaugh, criticized *Roe* for having "destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level." But *Dobbs* hardly began an era of middle-ground solutions. Conservative states have not only banned abortions but also considered strategies to prevent people from purchasing abortion pills online or prohibiting them from traveling out of state to seek abortion. Questions emerged about the fate of chemical contraceptives and infertility treatments; clashes began between the federal and state governments, between various states, and even between cities and states. Abortion opponents have pointed to a federal statute, the Comstock Act, arguing that the 1873 law bans the mailing of any device or drug adapted for use in abortion.[2]

The *Dobbs* decision, together with the chaos it has produced, raises critical questions about how other constitutional rights could be dismantled. The justices themselves debated what the decision meant for the fate of rights to same-sex marriage, individual intimacy, or contraception. It makes sense to consider how the doctrinal approach in *Dobbs* naturally leads to the destruction of other constitutional liberties.[3]

But the history that produced *Dobbs* tells a more complex story about the creation (and destruction) of constitutional rights. Movements for and against abortion rights have often embraced the idea that rights should be independent from majoritarian politics, and those clashing about abortion generally presented the federal courts as the primary source of constitutional protections. At the same time, neither movement behaved as if rights were really

[1]See *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2264–2265 (2022).

[2]See, for example, Errin Haines, "It's Been 100 Days Since the *Dobbs* Decision. What Has Changed?" *The Nineteenth*, Sept. 30, 2022, https://19thnews.org/2022/09/100-days-since-dobbs-decision/ (accessed Oct. 14, 2022); and Selena Simmons-Duffin, "66 Clinics Stopped Providing Abortions in the 100 Days Since *Roe* Fell," *NPR*, Oct. 6, 2022, https://www.npr.org/sections/health-shots/2022/10/06/1127105378/66-clinics-stopped-providing-abortions-in-the-100-days-since-roe-fell (accessed Oct. 14, 2022). For Kavanaugh's statement, see *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2310 (2022) (Kavanaugh, J., concurring).

[3]See *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2280–2285, 2318–2319 (2022).

removed from popular politics, making constitutional liberties (and judicial selections) central to state and federal elections. In this way, the abortion debate both reflected and reinforced a contradictory attitude about the courts: voters demanded that the justices be both apolitical and in step with popular preferences. The history of the abortion struggle in the decades after *Roe* also serves as a reminder of the complexity of rights culture in the twentieth- and twenty-first-century United States. While movements and even voters expected the federal courts to safeguard rights, they hardly acted as if rights came exclusively from the judiciary, looking to Congress, state legislatures, state courts, and state ballot measures to articulate different visions of the Constitution.

Prior to the mid-nineteenth century, abortion in the United States had been broadly available until quickening, the point at which fetal movement could be detected. Beginning in the 1850s, the American Medical Association (AMA) led a campaign to criminalize abortion throughout pregnancy. The AMA's campaign achieved significant results, but the physicians leading it did not present their cause as a struggle for constitutional rights, instead arguing that abortion was morally wrong, allowed women to forsake their natural role as mothers, and damaged the nation's racial stock.[4]

It was not until the 1960s, when states considered reforming nineteenth-century criminal abortion laws, that movements for or against legal abortion presented themselves as champions of constitutional rights. States looked to a proposal offered by the American Law Institute (ALI), an elite group of judges, lawyers, and legal academics, that allowed abortion in cases of rape, incest, health threats, and fetal abnormalities. A group of antiabortion lawyers and activists mobilized to defeat these ALI bills. At first, abortion opponents suggested that there was no medical need for legal abortion, but it soon became apparent that those backing reform might pursue it regardless of arguments about medical justification. Antiabortion activists responded by tapping into an emerging constitutional culture and suggesting that liberal abortion laws were unconstitutional. Seeking to be named guardians for unborn children, antiabortion activists suggested that the word "person" applied before birth—and that fetal persons had rights to due process and equal protection. These arguments did not carry the day for long, and by the mid-1960s, states began passing reform laws. But these laws did not meaningfully expand access to abortion, and those backing reform, including feminists, advocates of population control, and physicians, demanded the full repeal of criminal abortion laws. Repeal proponents, too, turned to constitutional rights. They responded that the Constitution protected a right to abortion, rooted in concerns about autonomy and equality. While both movements sought to convince voters, they embraced the idea that rights were often independent from majoritarian politics.[5]

This idea was hardly unique. Civil rights lawyers, feminists, those defending the concerns of children born out of wedlock, welfare rights lawyers, rightwing consumer protection activists—these actors and many more in the 1960s and 1970s suggested that courts would have to defend certain rights regardless of what voters wanted.[6] This idea of rights was inextricably tied to shifting ideas of equality and discrimination. Starting in the 1960s, the Court began holding

[4]See James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* (New York, 1979), 45–136; and Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973* (Berkeley, CA, 1997), 23–47.

[5]On the constitutional turn in the pre-*Roe* struggle over abortion, see David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Berkeley, CA, 1998); and Daniel K. Williams, *Defenders of the Unborn: The Pro-Life Movement Before Roe v. Wade* (New York, 2016).

[6]Recent manuscripts that examine rights-claiming in the 1960s and 1970s include Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York, 2012); Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (Cambridge, MA, 2011); and Kenneth Kersch, *Conservatives and the Constitution: Imagining Constitutional Restoration in the Heyday of American Liberalism* (New York, 2019).

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that laws that classified people on the basis of characteristics like race or sex were constitutionally suspect. Emphasizing the history of discrimination faced by these groups, the Court suggested that the Constitution protected vulnerable minorities from the excesses of majority rule. This court-centered vision of rights and equality suggested either that some rights counted for more than majoritarian politics—or that a healthy democracy must protect certain rights.[7]

But neither movement in the abortion conflict behaved as if courts ignored the will of voters. When the Court decided *Roe*, antiabortion activists sought to win supermajority support for a constitutional human life amendment (HLA) recognizing fetal personhood. Abortion-rights groups sought to transform the right recognized in *Roe* in popular politics from one centered on the rights of physicians to a liberty belonging to women. Antiabortion activists fighting to pass a HLA desperately sought political allies, eventually aligning with a Republican Party looking to win over socially conservative Protestants and Catholics. Abortion-rights supporters, in turn, forged a partnership with the Democratic Party by framing abortion as an issue of equal treatment and self-determination for women.[8]

Between 1973 and 1983, the campaign for a HLA fell short, and Ronald Reagan's first nominee to the Supreme Court, Sandra Day O'Connor, dissented from a 1983 Supreme Court ruling that invalidated an Ohio antiabortion ordinance. That 1983 case, *City of Akron v. Akron Reproductive Health Center*, launched a new era. Rather than securing a constitutional amendment, antiabortion organizations hoped for a judicial decision reversing *Roe*. Other movements seeking constitutional change likewise abandoned amendment campaigns and refocused on the courts. For example, feminists' fight for an Equal Right Amendment prohibiting sex discrimination failed, and feminist attorneys looked to the courts to strike down sex classifications that were constitutionally suspect. Similarly, abortion-rights attorneys asked courts to invalidate abortion regulations, while antiabortion activists hoped that the GOP would eventually transform the Court. But focusing on constitutional change through the courts did not mean that anyone contesting the abortion wars focused any less on popular politics. Antiabortion activists invested more in national elections because they recognized that presidents and senators could nominate and confirm justices. Abortion-rights advocates argued that the Supreme Court responded to political pressure and urged their supporters to demonstrate the existence of a "pro-choice majority."[9]

The politicization of the Supreme Court pursued by antiabortion activists did not begin with *Roe*, and for at least a decade, abortion did not figure centrally in nomination hearings. But by the time Ronald Reagan nominated Robert Bork, the fate of abortion rights became a preoccupation for the press, grassroots activists, and politicians following confirmation hearings. The spectacle of Supreme Court nominations reinforced the idea that Americans had to look to judges to protect their rights. At the same time, however, the more engaged that voters became regarding the Court's composition, the harder it was to see any separation between the courts and popular politics.[10]

In 1992, when the Supreme Court's conservative majority declined to reverse *Roe v. Wade*, antiabortion leaders attributed their loss to the fact that the Court believed that voters would rebel if abortion rights were gone. To reverse their fortunes, antiabortion activists hoped to find justices who would be indifferent to popular opinion and the risk of backlash. Some activists, like those in the National Right to Life Committee, sought to change the way elections

[7]See Mary Ziegler, *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment* (New Haven, CT, 2022), 3–12, 42–88.

[8]See Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (Cambridge, MA, 2015), 42–64, 121–40.

[9]On the struggle for an Equal Rights Amendment, see Julie Suk, *We the Women: The Unstoppable Mothers of the Equal Rights Amendment* (New York, 2020). On the rise of a court-centered strategy, see Mary Ziegler, *Abortion and the Law in America: Roe v. Wade to the Present* (New York, 2020), 54–72.

[10]On the history of Supreme Court confirmation battles in the late twentieth century, see Laura Kalman, *The Long Reach of the Sixties: LBJ, Nixon, and the Making of the Supreme Court* (New York, 2017).

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operated, battling any limit on campaign spending. This effort led to a series of decisions that saw more outside spending—money not controlled by parties—pour into federal elections, giving political action committees and interest groups more pull and making it harder for the Republican Party to sideline extreme candidates.[11]

This campaign dovetailed with broader changes to the culture of rights claiming. In the 1990s, conservative Christians, some of them funded by the Alliance Defense Fund (ADF, later Alliance Defending Freedom), framed a campaign for protections against sexual orientation discrimination as a war on Christianity that unconstitutionally abridged the rights of believers. ADF funded litigation to protect the speech or religious exercise of conservative Christians. Since 1973, conservative lawyers had railed against judicial activism and argued that more issues, including abortion, should be left to the states to decide. ADF and its allies began to move away from this demand, instead asking the Court to recognize broad religious liberties seemingly rejected by popular majorities.

Antiabortion lawyers followed a similar path. Rather than simply framing *Roe* as an antidemocratic decision, antiabortion lawyers started returning to arguments about fetal rights. At the same time, conservative rights-claiming in the 1990s and beyond presupposed a different idea of constitutional equality. Conservative Christians told a story about what had once been a Christian nation pushing people of faith out of the public square. This idea of discrimination, unlike the one articulated by the Supreme Court in the 1960s, did not require proof that a group had been historically subordinated. Personhood arguments followed a similar trajectory: antiabortion leaders suggested that courts should protect vulnerable minorities, but defined those groups as ones with physical dependencies rather than a history of oppression.[12]

The *Dobbs* decision came after decades of rights-focused organizing. *Dobbs* vindicated antiabortion activists and conservative lawyers who had hoped to create a Court that would care more about interpretive method and political ideology than about popular opinion. Reaction to the decision was equally revealing. The Court's popularity dropped dramatically in the decision's wake. Polls capture two reasons for this decline: Americans increasingly saw the Court as a partisan institution, and Americans were surprised that the Court discounted the will of the people in reaching a decision. It seems that, for the first time, many saw the Court as a political actor, but the emotion produced by *Dobbs* revealed the power of the myth that courts alone recognize rights. Those opposed to the decision see *Dobbs* as illegitimate both because they see the Court as partisan and because they expect the Court to pay some attention to popular preferences. At the same time, even as they behave as if constitutional rights in the United States do not come only from the courts, many experience *Dobbs* as a devastating loss partly because movements for and against abortion have reinforced a court-centered image of constitutional protections.[13]

The aftermath of *Dobbs* has again exposed these contradictions in voters' attitudes. Polls document a sharp increase in the number of voters who believe that the Court is partisan and question its legitimacy. And yet while chastising the Court for being partisan, ongoing marches and protests against *Dobbs* express anger that the Court disregarded the will of the people in reaching a decision.[14]

[11]See Ziegler, *Dollars for Life*, 82–134.

[12]See Andrew Lewis, *The Rights Turn in Conservative Christian Politics: How Abortion Reshaped the Culture Wars* (New York, 2017). For a representative personhood argument, see Robert Byrn, "Abortion in Perspective," *Duquesne Law Review* 5 (1966): 125–34.

[13]On public views of the Court after *Dobbs*, see Pew Forum, "Positive Views of Supreme Court Decline Sharply Following Abortion Ruling," Sep. 1, 2022, https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ (accessed Oct. 14, 2022); and Jeffrey M. Jones, "Supreme Court Approval, Trust, at All Time Low," *Gallup*, Sept. 29, 2022, https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx (accessed Oct. 14, 2022).

[14]On perceptions of the Court's partisanship, see Pew Forum, "Positive Views"; and Jones, "Supreme Court Approval." On protests against the Court, see "Abortion Rights Protestors Briefly Interrupt Supreme Court,"

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Finally, voters have become increasingly aware of the disconnect between the existence of a right and the ability to exercise it. Well before *Roe* was overturned, abortion was inaccessible in parts of the southern and midwestern United States, where the law created significant obstacles to accessing the procedure and only one or two providers covered a large geographical area. Conversely, after *Dobbs*, abortion-rights supporters have looked for ways to preserve access, even though there is no right to abortion by facilitating travel to states that protect abortion and expanding telehealth options.[15]

The history of struggles over abortion before and after *Dobbs* reveal contradictory attitudes about where constitutional rights ought to come from. Between 1973 and 2022, movements on either side of the abortion question framed rights as something that depended on the courts, even as they acted as if those rights also emerged from popular politics. Voters both expected the Court to rise above politics and criticized the judges when they strayed too far from popular opinion.

In the post-*Dobbs* era, there are signs that both movements are openly articulating rights that do not rely on the federal courts. Activists are looking to ballot initiatives, state legislatures, state courts, and even federal legislation to define them. Perhaps a new chapter in rights-claiming is already underway, one that abortion law and politics will help to define.

NBC News, Nov. 2, 2022, https://www.nbcnews.com/politics/supreme-court/abortion-rights-protesters-briefly-interrupt-supreme-court-rcna55260 (accessed Feb. 20, 2023); and "Thousands Protest End of Constitutional Right to Abortion," *New York Times*, Jun. 24, 2022, https://www.nytimes.com/live/2022/06/24/us/roe-wade-abortion-supreme-court (accessed Feb. 20, 2023).

[15]On the lack of access in some parts of the country before *Roe*, see Jennifer Weiss-Wolf, "Why *Roe* Was Never Enough—and What Comes Next," May 3, 2022, https://www.brennancenter.org/our-work/analysis-opinion/why-roe-was-never-enough-and-what-comes-next (accessed Feb. 20, 2022). On strategy to circumvent *Dobbs*, see Antoine Gara and Hannah Murphy, "Democrats Create 'Sanctuary States' for Abortion as Legal Battles Loom," *Financial Times*, Jun. 24, 2022, https://www.ft.com/content/eb3ff442-7151-4b74-ac45-d5a264128599 (accessed Feb. 20, 2022); and Emily Bazelon, "Risking Everything to Deliver Abortions Across State Lines," *New York Times*, Oct. 4, 2022, https://www.ft.com/content/eb3ff442-7151-4b74-ac45-d5a264128599 (accessed Feb. 20, 2023).

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