

OLLI Talk: The POST Dobbs Landscape September 12, 2023

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The Case

- Use of language
 - Potential life -> fetal life -> unborn person or unborn human being
 - Patient -> woman -> mother
- Justice Alito relies on *Washington v. Glucksberg* (1997)
 - The Constitution does not mention abortion. The right is neither deeply rooted in the nation's history nor an essential component of "ordered liberty."
 - repeatedly cites the fact that the Constitution doesn't explicitly reference a right to abortion.
- Overrule Roe and Casey
 - "We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision"
- "Roe was egregiously wrong from the start. Its reasoning was exceptionally weak and decision has had damaging consequences. Roe and Casey have enflamed debate and deepened division"

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Breaking down the decision

- Rejects Equal Protection Clause (originally discussed by RBG)
 - Abortion regulation is not a sex-based classification and thus not subject to strict scrutiny or any heightened scrutiny
- Rejects Substantive Due Process
 - Those rights explicit in Bill of Rights – Relies on *McDonald v. Chicago*
- Relies on *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997)
 - Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," (*Snyder v. Massachusetts* (1934) "so rooted in the traditions and conscience of our people as to be ranked as fundamental", and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut* (1937)
- There is no broader right to autonomy or to define one's "concept of existence" here.
- Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like: None of these rights has any claim to being deeply rooted in history

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Reasons to overturn here

- critical moral question posed by abortion
- Some of our most important constitutional decisions have overruled prior precedents.
- *Brown v. Board of Education* -> *Plessy v. Ferguson*
- *West Coast Hotel Co. v. Parrish* -> *Adkins v. Children's Hospital of D.C. (minimum wages for women)*
- *West Virginia Bd. of Ed. v. Barnette* -> *Minersville School Dist. v. Gogitis*
- Abortion is distinguishable from rights in cases the precedent relies on
 - both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being."
 - None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite

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Rational Basis?

- A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity."
- It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.
- These legitimate interests include
 - respect for and preservation of prenatal life at all stages of development;
 - the protection of maternal health and safety;
 - the elimination of particularly gruesome or barbaric medical procedures;
 - the preservation of the integrity of the medical profession;
 - the mitigation of fetal pain;
 - the prevention of discrimination on the basis of race, sex, or disability.

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Alito's Opinion did not consider consequences

- Rejects that changes in society require the recognition of a constitutional right to obtain an abortion.
- Rejects unavailability of abortion will inhibit from exercising freedom to choose relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.
- He explains that anti-abortion arguments include:
 - attitudes about the pregnancy of unmarried, women have changed drastically;
 - federal and state laws ban discrimination on the basis of pregnancy,
 - Leave for pregnancy and childbirth are now guaranteed by law in many cases, (Family and Medical Leave Act of 1993)
 - costs of medical care associated with pregnancy are covered by insurance or government assistance; (The Affordable Care Act requires non-grandfathered health plans in the individual and small group markets to cover certain essential health benefits, which includes maternity and newborn care and State Medicaid plans must provide coverage for pregnancy-related services-including, but not limited to, prenatal care, delivery, and postpartum care-as well as services for other conditions that might complicate the pregnancy)
- States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously;⁴⁵ and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home

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Potential Problems for other areas of law

- Claims only regards abortion but see Justice Thomas concurrence
- logic could extend to contraception, sodomy & same-sex marriage.
- Statutes today do not include IUD and birth control BUT increasingly, medication abortion is described as "abortion-inducing drugs," could extend to Plan B, the morning-after pill.
- The liberty as deeply rooted argument is the same he used in Obergefell dissent:
 - The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are " 'deeply rooted in this Nation's history and tradition.' " *Washington v. Glucksberg*, 521 U. S. 701–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States v. Windsor*, 570 U. S. ___, ___ (2013) (Alito, J., dissenting) (slip op., at 7)
- <https://www.guttmacher.org/>
- [Washington Post Legislation Tracker](#)

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Bans since Dobbs

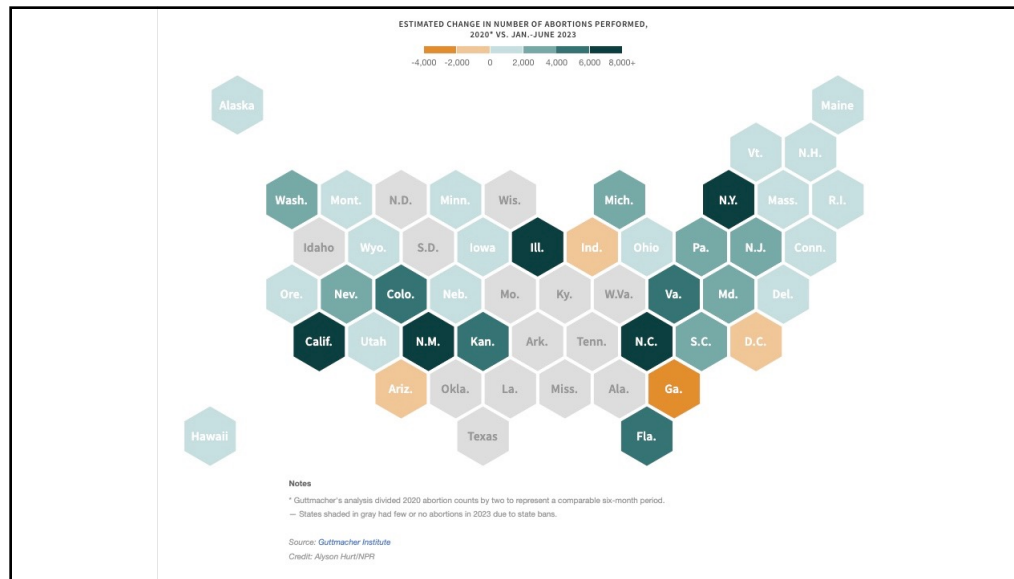
- [22 US States Have Banned Abortion](#)
- Travel bans
 - People seeking an abortion are "highly motivated" to travel if they can't get abortions where they live (Guttmacher Institute)
 - Idaho criminalizes assisting minors from traveling out of state for abortion
 - Missouri is considering for all residents
- Bans on medication abortion (See slide)

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Bans: The result

- 2023 v. 2020
- Texas about four abortions on average each month — in 2020, about 4,800 per month.
- legal uncertainty forced providers to stop offering care in Wisconsin.
- 2020, more than 113,000 abortions (about 12% of all US abortions that year) were provided in these same states
- Women with complications are forced to carry pregnancy to term or face life threatening complications that would trigger medical assistance

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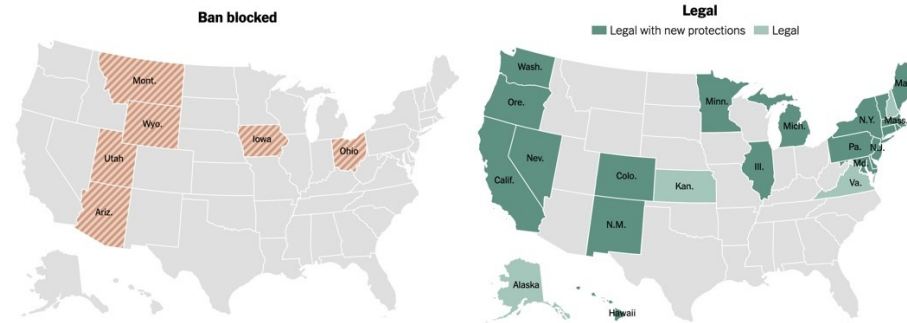
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Where abortion is legal

In several states that have enacted bans or restrictions, abortion remains legal for now as courts determine whether these laws can take effect. Abortion is legal in the rest of the country, and many states have added new protections since Dobbs.



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Decision will likely increase litigation

- Texas State District Judge Jessica Mangrum granted temporary injunction preventing Texas from enforcing a ban against physicians who in their “good faith judgment” end a pregnancy because of complications, creates a risk of infection or is otherwise unsafe for the woman to continue.
 - The injunction also applies to women who have a condition “exacerbated by pregnancy” who can’t be effectively treated during their term. It also covers cases where the fetus has a condition that makes it unlikely to survive after birth.
- Challenge to FDA’s approval of Mifepristone, medication abortion
 - Amarillo District Court Judge Matthew J. Kacsmaryk halted FDA approval from 20 years ago
 - But see Washington State Federal District Court
 - 5th Circuit allowed some of his decision and reversed some: up to 7 weeks approval, not more
 - Supreme Court stayed both decisions pending review

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Aftermath: Legal Abortions offered

- Legal abortions most likely increased in the United States in the first six months of the year compared with 2020 ([New York Times](#))
- New Mexico and Illinois have enacted laws to protect access to abortion
 - In Illinois, there were 18,300 more this year
 - New Mexico, 220% jump in the number of abortions.
- Wisconsin Supreme Court flipped a conservative seat
- Ohio's effort to make it more difficult to amend Ohio's Constitution

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Some thoughts ...

- Polls poorly —Americans favor upholding Roe and allowing abortion in some circumstances
- Has led to increased protections in some states, election of pro-choice candidates in others and protected Democrats in 2022 in some states
- Gallup's May 2023
 - 34% believe abortion should be legal "under any circumstances,"
 - 51% say it should be legal "only under certain circumstances,"
 - 13% say it should be illegal in all circumstances.
 - 63% favor allowing the abortion pill mifepristone to be available in the U.S. as a prescription drug
 - 55% now identify as pro-choice, the highest percentage since 1995
 - For first time, majority of Americans say abortion is morally acceptable
 - Democrats drive most of the attitudinal shifts supporting abortion rights

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