


Short Communication

Since the US Supreme Court 2022 Decision on Abortion

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The Preamble to the US Constitution says, “We the people of the United States, in order to form a more perfect Union, ... establish this Constitution for the United States of America.” The meaning of these lines, with regard to what is and is not included in the constitution, has evolved over time while we have inexorably expanded individual freedom, increased equity and equality, and striven to ensure equal voting rights for all.

The people who devised the original details of the Constitution were all white men of property. Some of them were wealthy. Some owned other people. They restricted voting rights to property-owning white men like themselves. Indeed, it was not until 1856 that white men without property were permitted to vote in every state. Until the election of Abraham Lincoln, more than half of Supreme Court appointees were slaveowners, and all were white men. Not until 1981 was a woman appointed to the Court. When the Constitution was written, there were only thirteen states. Technology and logistics were far more primitive than they are today. The economy was integrated only loosely, while limited communications and mobility between states ensured that society was considerably less integrated.

Historically, the Supreme Court, Congress, and the American people have always moved toward increasing individual freedoms, increasing voting equality, and ensuring that the federal government has power over the states in legislating on issues that affect all Americans. In 1987, Justice Thurgood Marshall observed that when the founders wrote “we the people” in the Preamble, “they did not have in mind the majority of America’s citizens.” America has nonetheless committed itself to carrying forward the unintended soul of the Preamble, working to build a better future for everyone in our country. The Civil War was vital in igniting this commitment.

In its 1973 landmark decision, *Roe v. Wade*, the US Supreme Court ruled that the constitution protects a pregnant woman’s right to have an abortion. The decision abolished many anti-abortion laws. But the country continued to debate the morality of allowing women to have abortions, with (often religious) arguments for the rights of the fetus on one side and arguments for the rights of women, particularly to exercise autonomy over their own bodies, on the other.

In June of 2022, the Supreme Court decided *Dobbs v. Jackson Women’s Health Organization*, overturning *Roe v. Wade*. The court stated that, “*Roe* was on a collision course with the Constitution from the day it was decided.” This claim was mystifying given that the constitution makes no mention of abortion, or indeed of women, fetuses, or pregnancy. The court also said, “the (1973) Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.” If that is so, surely the current Court should have heeded the people, 70 percent of whom believe that decisions about abortion should be made by women with the advice of their doctors. If the court truly

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respected the will of the people, all that remained was for it to reaffirm the 1973 ruling.

Instead, the court leaped artfully from “people” to “people’s elected representatives,” saying, “It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.” This statement suggests that the court should have left it to Congress to pass a constitutional amendment protecting or prohibiting abortion. But again, the majority of US senators and representatives are on record saying that they support *Roe*. Surely every human’s right to exercise control over their own body exists unless and until Congress and the states jointly decide otherwise. Just like the right to breathe!

The court’s decision to instead leave abortion legislation to the states thus makes a mockery of the Constitution and the American legal system while blatantly exacerbating economic inequality. An act classified as murder in one state is not even a crime in another. Meanwhile, an affluent woman can easily travel to another state for an abortion while a woman living in poverty cannot and will suffer either the legal consequences of having an abortion or the financial, personal, and medical consequences of having a child.

There is nothing local about abortion, no reason for it to be legislated state by state. Making abortion a local issue is as untenable as the 1883 Supreme Court’s decision that made civil rights a local issue.

The court cites three examples of important constitutional decisions that overruled prior precedents: *Brown v. Board of Education*, *West Coast Hotel Co. v. Parrish*, and *West Virginia State Board of Education v. Barnette*. All three of these decisions expanded individual freedom. Overturning *Roe* savagely curtailed it.

Citing *Glucksberg* (1997), the court stated that any right not mentioned in the Constitution must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” The justices who wrote the *Dobbs* decision seem to have forgotten that *Roe* has been this nation’s history and tradition for half a century. In all that time, the Supreme Court has not struck it down, nor has Congress passed a constitutional amendment banning abortions. The claim that the 1973 court usurped power it clearly disingenuous given that all subsequent courts endorsed *Roe* by not overturning it.

The 2022 court would also have done well to consider that this nation’s history and traditions long denied women and non-white people the right to vote, made slavery legal and interracial marriage illegal, declared Black people to be “so far inferior that they might justly and lawfully be reduced to slavery” for their own benefit (1857), legitimized Jim Crow laws by calling segregation equality (1896 *Plessy v. Ferguson*), upheld the forced sterilization of the disabled (1927), interned Japanese Americans without cause or due process (1944), and, far too recently, upheld anti-sodomy laws (1986). Over the course of two centuries, all of these

“national traditions” were gradually abandoned in response to a Civil War that killed 8 percent of all white men aged 13 to 43, along with nearly 40,000 Black men; waves of social unrest; several constitutional amendments; and a bevy of Supreme Court decisions.

To appreciate why some traditions must not be allowed to shape or constrain our future, the court had only to consider the history of interracial marriage in the United States, a subject which, like abortion, is not mentioned in the constitution. In 1858, Abraham Lincoln stated, “I am not, nor ever have been, in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people.” In 1924, 29 states still had bans on interracial marriage. As recently as 1958, more than 92 percent of Americans were opposed to interracial marriages.

Yet, in *Loving v. Virginia* (1967), the Court unanimously jettisoned tradition and ruled that interracial marriages were legal. Is the current Court, then, ready to apply its “history and tradition” rationale to overrule *Loving*? Will it now annul all interracial marriages?

The judgment speaks of the “profound moral and social importance” of the court’s decisions on abortion. Indeed, the court seems intensely concerned with morality whenever it is faced with decisions that revolve around people’s reproductive systems, fretting over subjects like abortion, same sex marriage, and LGBTQ (lesbian, gay, bisexual, transgender, and queer) rights. Yet there is no viable rationale by which it is moral for anyone to impose their reproductive or sexual values on other consenting adults. This abhorrent obsession with other people’s reproductive systems and private decisions violates the personal sovereignty of American citizens. It is tearing American society apart.

If one person’s feelings, religious or otherwise, are bruised because another person has individual freedom and equality, it is entirely the problem of that first person. It is not the responsibility of either Congress or the courts to help them feel better, and certainly not by curtailing the rights of the second person. And it is telling that such concerns often involve not only reproductive systems, but also sex, gender, or race.

Indeed, the court’s claims of morality, far beyond the abortion decision, are often rooted in a persistent ignorance about nature which denies countless natural phenomena, classifying anything that individual justices find distasteful as ‘unnatural.’ The court applies this ignorance to human sexuality in order to declare that only two groups, heterosexual cisgender females and heterosexual cisgender males, are ‘normal’ and therefore must account for most of the population. It then creates a third group composed of all other people and labels them ‘not normal.’ Yet there is ample evidence that, despite the Court’s discomfiture, those it labels ‘not normal’ are just as natural as the ‘normal’ group. Branding them as unnatural is central to the Court’s

ignorance and bigotry about sexual matters. If their education has not been sufficient to allow some justices to understand this point, they should perhaps seek professional counseling.

Justice Alito believes that *Bostock v. Clayton County* (2020) should not have extended the Civil Rights Act of 1964, which prohibits sex-based discrimination in the workplace, to protect gay and transgender workers. His thinking betrays Justice Alito's ignorance of the rich diversity created by nature or by God (for those who believe in Her existence). Rightly or not, the Supreme Court may consider itself omnipotent, but it cannot make itself omniscient. Its members should avail themselves of opportunities to learn more about scientific facts as they pertain to nature.

The court's recent history raises other fundamental questions: If the Civil Rights Act of 1964 had not existed, should the 2020 Supreme Court have ruled discrimination against women and non-white people to be legal? If the court strives to abide by the Preamble to the Constitution, why should any court rule any form of discrimination to be legal?

The nation's history and traditions may well be relevant to some decisions. They are clearly not relevant to decisions that involve the reproductive system, sex, gender, and race, particularly in light of the history and tradition by which one group of people has persistently imposed its values and its mere will on others, even on subjects that do not materially affect its members. It is past time to consign that part of the nation's history and tradition to the dustbin.

Instead of seeking to salve the bruised feelings of the few, these justices should have educated themselves about abortion, the reasons for having one, and the pros and cons of banning the procedure. They might then have then found their way to the common ground on which almost all Americans stand.

Abortion is a serious decision for any woman, and one which affects her entire subsequent life. Regardless of her choice, she is likely to endure mental and physical stress and incur lasting consequences. Women do not undertake this decision lightly. Most choose abortion because they cannot afford pregnancy, childbirth, and child rearing or because they choose to continue their own education or career or the life they value. Some choose it to safeguard their physical or mental health or because their pregnancy is the result of serious crimes committed against them.

Although the US constitution gives the Supreme Court authority over all decisions regardless of the sex of those affected, the men on the court are unlikely to grasp the full implications of this issue. Only one woman justice voted to overturn *Roe* while two opposed the overturning. Justice Jackson, who later joined the court, also opposes the overturning. Surely the men of the court should have taken

this opportunity to carefully consider the views of their learned and honorable women colleagues.

The availability of both birth control and legal abortions fueled a sea change in women's access to higher education, meaningful work, economic independence, and social equity. It increased women's participation in the workforce such that their contributions now constitute a sizable part of our economy. Ending *Roe* has turned back the clock on all of these counts.

And banning abortion will not end abortion. What it will do, according to one study, is increase the number of pregnancy-related deaths by over 20 percent. Childbirth in the US is 14 times as deadly for women as abortion. Data show that about 25 percent of US women have had an abortion. Of those, about 60 percent were in their 20s, about 62 percent were religious, and about 59 percent were already parents.

Overturning *Roe* has done unprecedented damage. It has deprived roughly half of US citizens of their right to bodily sovereignty and fundamental medical care, allowing economic circumstances and state legislators to force them into reproductive slavery. It is contrary to the heretofore continual expansion of individual rights and to the uniformity of federal laws covering issues that affect all Americans. It is in blatant defiance of the will of 70 percent of the American people. It is progressively eliminating the economic gains that women and the nation have made since *Roe*. It exacerbates socioeconomic inequality. And it is contrary to the will of the people's elected representatives, as evidenced by the widespread support for *Roe* in Congress and by that body's continuing decision not to pass a constitutional amendment forbidding abortion.

And at the end of the day, overturning *Roe* is not even the best way to ensure that Americans have fewer abortions. The easiest way to reduce the incidence of abortion would be to bring US policies closer to those of European countries, where abortion rates are considerably lower than those of the US. These changes would provide sex education; subsidized and readily available birth control; universal health care, including all medical expenses associated with pregnancy and childbirth; paid daycare; a subsidy to provide roughly half of the cost of a child's first five years to women or families with incomes lower than three times the poverty line; and public education through the university level. This approach would have the advantage of being considerably more effective than depriving women of their rights, while enriching the US in myriad other ways.

Make no mistake, over the next decade the June 2022 decision, which swims against the currents of history, will touch off a peaceful civil war at the ballot box that will eventually restore laws protecting women's right to govern their own bodies and to have safe and legal abortions.



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