Council for Life

Reversing Course

Roe, Dobbs and the new landscape for abortion in the USA: an Irish perspective

On 24 June 2022, after 49 years, some 63 million abortions, and numerous legal challenges over the decades, a majority of the judges of the United States Supreme Court reversed the controversial abortion decision taken in *Roe v. Wade.* The eagerly awaited judgment in *Dobbs v. Jackson Women's Health Organization* has been welcomed by those who have campaigned and litigated against the *Roe* decision and the court's subsequent abortion jurisprudence. The *Roe* judgment and the related decisions based on *Roe*, (such as *Planned Parenthood v. Casey* [1992] and *Stenberg v. Carhart* [2000]) introduced an abortion regime that was irredeemably flawed and unjust, as well as being extreme. This latter point was alluded to by Justice Samuel Alito in *Dobbs*, where he noted that *Roe* ushered in an abortion regime that put the US on par with only 8 other countries (Canada, China, the Netherlands, North Korea, Singapore, Iceland, Guinea-Bissau, and Vietnam) to allow purely elective abortions after 20 weeks gestational age. The step that the Supreme Court took in *Dobbs* was at once both radical and mundane, in that it broke with decades of inconsistent and controversial case law and simply returned the abortion issue in the U.S. to the American people and their 50 state level democracies. *Dobbs* ended a prolonged period where, in effect, federal judges were legislating from the bench on the issue of abortion. Now, the Supreme Court has recognised the right of each American state to determine its own abortion laws, in accordance with state level democratic processes.

Roe v. Wade: 'an exercise of raw judicial power'

The *Roe* judgment was released in January 1973. The Supreme Court, in a majority of 7-1, decided that a Texas law prohibiting abortion was contrary to the Due Process Clause of the Fourteenth Amendment to the US Constitution , which the Court stated provides a fundamental 'right to privacy that protects a pregnant woman's liberty to abort her fetus.' In his dissent to *Roe*, Justice Byron White criticised the decision as the 'exercise of raw judicial power', this description was echoed in the subsequent academic and political criticism of the *Roe* decision as a prime example of judicial activism. In the decades following *Roe*, efforts were made to challenge the precedent. For example in 1989 Democratic Governor of Pennsylvania Bob Casey introduced a law that restricted abortion, the abortion provider Planned Parenthood sued and the case made its way to the Supreme Court. In the *Planned Parenthood v. Casey* (1992) judgment, the court decided that abortion was no longer a 'fundamental' right, but it was still protected.

The court held that laws restricting abortion would be unconstitutional when they were enacted for 'the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.' Applying this new standard of review, the Court upheld four provisions of the Pennsylvania law (including informed consent requirements and record keeping rules) but invalidated the requirement of spousal notification.

Notwithstanding the court's attempt to modify the impact of *Roe*, in the intervening 20 years from *Casey*, the judicial control of the abortion issue continued to be a major source of political controversy. Due in no small part to the courts decision to site itself as the ultimate authority on abortion law, the composition of the Supreme Court became a matter for political manoeuvring with various presidential candidates promising to nominate judges who would either uphold or overturn *Roe*. In this context the *Dobbs* case arrived at the court after the addition of three new judges during Donald Trump's presidency.

Dobbs v Jackson Womens Health Organisation

In March 2018, the Mississippi Legislature passed the 'Gestational Age Act', which banned any abortion operation after the first 15 weeks of pregnancy, with certain exceptions. Within one day of the law's passage, the Jackson's Womens Health Organisation (an abortion clinic), in Jackson, Mississippi sued Thomas E. Dobbs, the state health officer with the Mississippi State Department of Health.

After the law was injuncted by the lower federal courts, the case reached the Supreme Court. The Court heard oral arguments in December 2021. In May 2022, a leaked draft majority opinion by Justice Alito was widely discussed in the media, and prompted protests and attacks on prolife counselling centres. Undeterred, the court proceeded to release the final decision on June 24. Justice Alito for the 5-4 majority wrote, 'abortion couldn't be constitutionally protected ... until the latter part of the

20th century, such a right was entirely unknown in American law.' He continued, 'Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, Roe and Casey have enflamed debate and deepened division.'

The court's majority held that it was not possible to discern a 'right' to abortion in the text of the US Constitution nor in any appeal to historical precedent, as abortion was 'not deeply rooted in this Nation's history or tradition', nor was it considered a right when the Due Process Clause was ratified in 1868, and was unknown in US law until *Roe* was decided in 1973. It is worth noting the point made by Professors Robert P. George and John M. Finnis, who in their *amicus curiae* brief challenged findings made in Roe that abortion was permitted in the US prior to the 20th century. George and Finnis argued, *inter alia*, that by the late 1860s laws prohibiting abortion were adopted because 'science had shown that a distinct human being begins at conception.' Moreover, when the Fourteenth Amendment was passed in 1868, fetuses were understood as deserving protection, and by 1900 every state in the Union had an anti-abortion laws. *Dobbs* addresses the principal methodological criticism of *Roe* and *Casey*, to wit they represent a significant 'exercise of raw judicial power', as Justice White stated in 1973.

There is a long-standing debate over the propensity of judges to use the 14th Amendment provisions of the US Constitution to engage in judicial activism. As noted jurist Oliver Wendal Holmes remarked in 1930, 'I cannot believe that the [14th] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.' More recently Justice Scalia reiterated these criticisms of judicial activism, stating that the US system of government makes the democratically accountable branches primarily responsible for lawmaking, thus the federal judiciary should not seek to make 'an end run' around the democratic process by exercising discretion 'to make the law' This point was explicitly acknowledged by Justice Kavanaugh in his concurring judgment to *Dobbs* where he held that the Supreme Court in *Roe* 'erroneously assigned itself the authority to decide a critically important moral and

policy issue that the Constitution does not grant this Court the authority to decide.'

Immediately following the *Dobbs* decision, 13 states had so-called 'trigger laws' (triggered by the repeal of *Roe*) that that automatically ban or significantly restrict abortion . Other States are now enacting much-needed limitations on abortion. On the opposite end of the spectrum, States such as California, Oregon and Washington issued a joint statement pledging 'to defend access to abortion on the West Coast' and allow residents of other states to access abortion there.

The *Dobbs* decision provoked an unprecedented chorus of criticism from world leaders; Justin Trudeau and Emanuel Macron both framed their criticisms of the court in terms of rights, with Macron commenting 'abortion is a fundamental right for all women. We must protect it.' However using the language of 'human rights' to defend abortion lacks any basis in international law. The United Nations Convention on the Rights of the Child calls for protection for children's rights both before and after birth, additionally Article 6(5) of the International Covenant on Civil and Political Rights prohibits carrying out of the death penalty against pregnant women based on concerns for the unborn child. The European Court of Human Rights has held in cases such as *A.B.C. v. Ireland* (2010) that there is no 'right' to abortion in human rights law and states are entitled to restrict access to abortion. For both the United States and internationally, the *Dobbs* decision will stand as a landmark on the legal landscape, it recognises that abortion has no claim to human rights, no basis in history or legal tradition. Abortion causes pain and harm to women and their unborn children.

The *Dobbs* judgment rightly focused on the illegitimacy of judges setting policy on abortion, however as we know in Ireland, removing judicial interference from abortion law this is not the end of the matter. When our political leaders, academics and media commentators as well as others setting the parameters of the public discussion disregard the humanity of the unborn child we end up with the referendum decision of 2018 - the first time we in Ireland saw a vote to strip an entire group of human beings of their right to life. Yet, the rejection of abortion as a 'right' in *Dobbs* shows that with time and persistence a society can reverse course and that true justice can prevail.

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