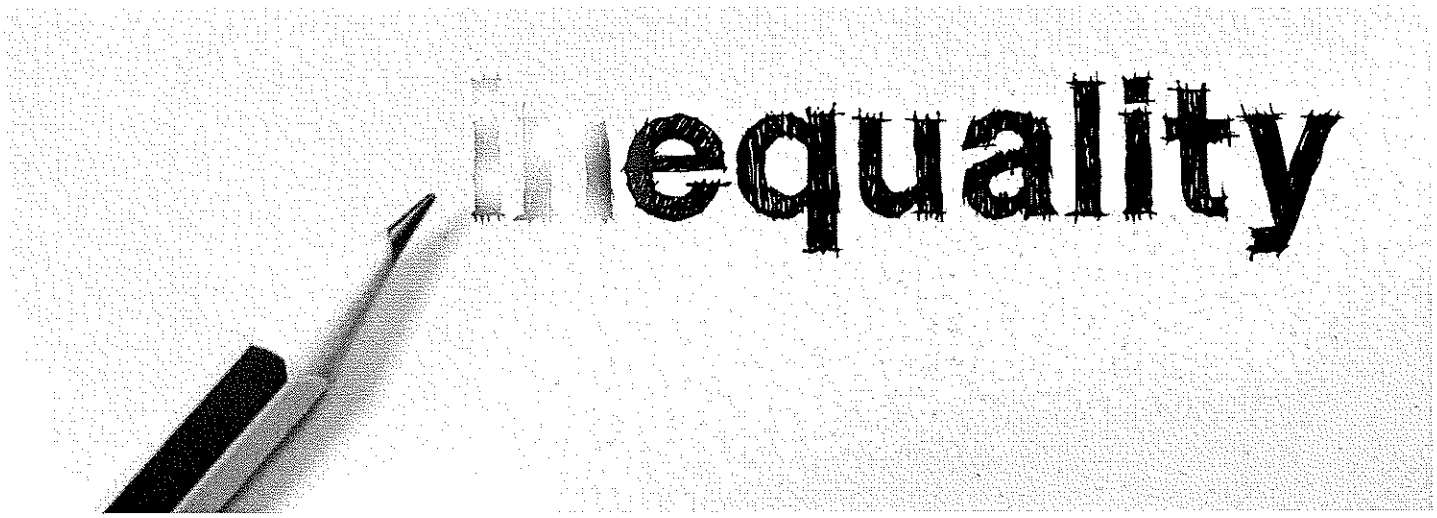
The Evisceration of Fundamental Rights by the United States Supreme Court Is Just Beginning

By Lee Rosenberg, Editor-in-Chief



This commentary was initially slated to address the fallacy of the "speedy trial." That, however, is for another day given the most recent decision of the United States Supreme Court, in *Dobbs v. Jackson Women's Health Organization,*[1] which overturned *Roe v. Wade.*[2] The New York State Bar Association, along with many other similar organizations, has decried the decision in *Dobbs.*[3]

Reproductive rights have been constitutionally protected since the 7-2 decision by the Supreme Court in *Griswold v. Connecticut*[4] in 1965, followed by *Eisenstadt v. Baird* in 1972,[5] and then by the 1973 landmark abortion rights decision in *Roe v. Wade.*[6] Although the decision in *Dobbs*—which also ignored the affirmation of *Roe* as binding precedent in *Planned Parenthood of Southeastern Pa. v. Casey*[7]—in overturning *Roe* and *Casey* asserts flawed reasoning in those long-standing precedents, there was a 50-year history that had protected women's rights of reproductive self-determination on the issue of choice which has now been federally obliterated. Further, the court did so, knowing full well that those rights, on a state-by-state basis—now further undercut by the court's chipping away at separation of church and state in *Kennedy v. Bremerton School District,*[8]—are clearly being eviscerated.

While this commentary will not address detailed Constitutional arguments, per se, using originalist analysis of the Constitution (that the document does not recognize privacy as a fundamental right), in this context is misplaced. The *Dobbs* court does not seek to address the sought recognition of a new, non-originally stated right. To the contrary, it strips away a half-century established fundamental right. It also ignores that guardianship of one's body, although not absolute, is protected, for example, against cruel and unusual punishment or unreasonable search and seizure, etc. Those rights, while specifically recognized in the Constitution—necessarily protect *privacy.* Moreover, that fundamental privacy right, in general, protects men along with women without distinction or separate classification. Since only women can biologically give birth, reproductively, men now remain a singularly protected class, biologically—while women, given *Dobbs*, are not.[9]

That some believe life begins at birth—which clearly underpins the barrage of legislation that brought this issue to the Supreme Court—is a *religious* issue, one which is rooted in biblical teachings—but not by all bibles, not by all religions, not by those who don't believe in religion, and not by accepted science. That is not a judgment against those who fall into any of those categories and have different beliefs, but as a matter of factual accuracy that there is not one universal belief. The long-standing 50-year federal right of reproductive self-determination is a *family law issue* and a *human rights issue.* Some are seeking even to criminalize the right to go to a different state to secure the ability to exercise their freedom to choose, and to implicate civil and criminal penalties if a woman and her medical provider need to address, for example, ectopic or miscarried pregnancy. These are usurpations of fundamental human rights which singularly affect *women* as a different class of human being than men. It poses an inherent danger that men are not subject to. It creates a second, and unequal, class category which is discriminatory.

The concurring opinion in *Dobbs* by Justice Clarence Thomas is honest in its insidiousness—forecasting the upcoming attack on marriage equality (while preserving his own personal marital position previously proscribed by *Loving v. Virginia)*[10]—requires further cause to beware on this addi-

tional family law and human rights front. It is a reminder that our freedoms should not be taken for granted, as those were thought to be franchised, can be disenfranchised as power shifts and is grabbed for by those who want it above all else—as long as it does not adversely affect them and theirs.

The scales of justice are sometimes tipped in one direction or another as equilibrium is sought. It now, however, has six thumbs—many of which are attached to persons who apparently misled to secure their appointments—weighing heavily upon it and which disenfranchises the rights of many.

As we have seen, and continue to see, our freedoms are fragile and too many are willing to subvert them to suit their purposes. This is just the beginning. Marriage equality, as established first by *Obergefell v. Hodges*,[11] is also no longer secure. When facts are no longer facts; when rights are no longer rights; when lines, long demarcated are bent, blurred, skewed and erased for the sake of political expediency and prejudice, we are all in peril.

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Endnotes

1. No. 19-1392, 597 U.S. ___ (2022), argued December 1, 2021 - Decided on June 24, 2022.
2. 410 US 113 (1973).
3. *See* DeSantis S., *New York State Bar Association Rebukes U.S. Supreme Court on Abortion Ruling*, NYSBA, June 24, 2022.See also, *Statement of ABA President Reginald Turner Re: Reproductive Choice and the Dobbs Decision*, ABA June 24, 2022.
4. 381 US 479 (1965).
5. 505 U.S. 833 (1972). Also decided by the Court on a 7-2 basis.
6. Endnote 2.
7. 505 U.S. 833 (1992), herein referred to as "*Casey*."
8. No. 21-418, 597 U.S. ____ (2022), argued April 25, 2022 – Decided June 27, 2022.
9. The author is not herein addressing other arguments as to biology and gender which are not germane to the subject of this editorial.
10. 388 U.S. 1 (1967).
11. 576 U.S. 644 (2015).