The Dobbs Decision Unleashes Rage and Revisionism

Description

USA: In the aftermath of the historic ruling in *Dobbs v. Jackson Women's Health Organization,* politicians and pundits have denounced the Supreme Court justices and the Court itself for holding opposing views on the interpretation of the Court. Speaker Nancy Pelosi called the justices "right-wing politicians" and many journalists called the Court "activists." Most concerning were legal analysts who fueled misleading accounts of the opinion or the record of this Court. Notably, it is precisely what the Court anticipated in condemning those who would make arguments "designed to stoke unfounded fear."

Vice President Kamala Harris and others repeated the claims that same-sex marriage, contraceptives, and other rights are now in danger. The Court, however, expressly and repeatedly stated that this decision could not be used to undermine those rights: "Abortion is fundamentally different, as both Roe and Casey acknowledged, because it destroys what those decisions called 'fetal life' and what the law now before us describes as an 'unborn human being.'" The Court noted:

> "Perhaps this is designed to stoke unfounded fear that our decision will imperil those other rights, but the dissent's analogy is objectionable for a more important reason: what it reveals about the dissent's views on the protection of what Roe called "potential life." The exercise of the rights at issue in Griswold, Eisenstadt, Lawrence, and Obergefell does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in Roe and Casey, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance."

Indeed, I cannot recall an opinion when the Court was more adamant in prospectively blocking the use of a holding in future cases. Only one justice, Clarence Thomas, suggested that the Court should reexamine the rationale for such rights but also emphasized that the majority of the Court was clearly holding that the opinion could not be used in that way. Thomas wrote:

> "The Court's abortion cases are unique, see ante, at 31–32, 66, 71–72, and no party has

> asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," McDonald, 561 U. S., at 813 (opinion of THOMAS, J.). Thus, I agree that "[n]othing in [the Court's] opinion should be under- stood to cast doubt on precedents that do not concern abortion."

Nevertheless, on CNN, legal analyst Jennifer Rodgers echoed the common claim that this decision could now be used to unravel an array of other rights and "criminalizing every single aspect" of women's reproductive healthcare. However, Rodgers went even further. She suggested that states could ban menstrual cycle tracking: "Are they going to be able to search your apps—you know there's apps that track your menstrual cycle. You know how far are these states going to try and go?"

On ABC, legal analyst Terry Moran declared "We are in a new era where the reaching for the center to keep the court's legitimacy in the eyes of the public, to keep the debate going, is over." I do not want to be unfair to Moran. I understand that Moran was referring to how the Court would be perceived by the public, though many citizens obviously support this ruling.

The comment reflects the view of many that the legitimacy is now lost because a majority follow a narrow constitutional interpretative approach rather than the preferred broad interpretative approach. That sounds a lot like your legitimacy is based entirely on whether I agree with your constitutional views.

Moran said that this reflected a "new era" of the "activist court." However, the Court has actually rendered a high percentage of unanimous or near unanimous cases. I have been writing for a couple years how the Court seems to be speaking through its decisions in issuing such rulings in contradiction to such claims of rigid ideology. Justice Stephen Breyer and other colleagues have swatted back such claims that this is a "conservative court" driven by ideology.

Even ABC itself has recognized this record, writing in an earlier story:

> "An ABC News analysis found 67% of the court's opinions in cases argued during the term that ends this month have been unanimous or near-unanimous with just one justice dissenting.
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> That compares to just 46% of unanimous or near-unanimous decisions during the 2019 term and the 48% average unanimous decision rate of the past decade, according to SCOTUSblog."

None of that has stopped legal analysts from portraying the court as "activist." Of greater concern are the attack on the justices themselves, including the entirely false clam that Justices Kavanaugh and Gorsuch committed perjury in their confirmation hearings.

One can obviously disagree with this interpretation. I have long disagreed with some of these justices on rights like privacy. However, this is a good-faith constitutional view that is shared by many in the legal profession. Of course, few law professors share this view because there are comparably few conservatives left on law faculties. There are even fewer conservative or libertarian legal analysts with mainstream media. That creates a misleading echo chamber as legal experts and media figures dismiss the decision of the Court as "activist" and "political."

During the Trump Administration, many of these same figures denounced former President Donald Trump for his attacks on judges who ruled against his cases. Many of us noted that those judges had good-faith reasons for their rulings and their integrity should not be questioned. Yet, it now seems open season on any justice or judge who follows a more narrow, textual approach to constitutional interpretation.

Media figures and legal experts are not just content with disagreeing with the Court's analysis but want to trash these jurists as craven, unethical people. Politicians like Rep. Cori Bush, D-Mo., called the justices "far-right, racist."

There was a typical exchange on *CNN Tonight* between conservative former Politico reporter Carrie Sheffield and former Rep. Abby Finkenauer (D-IA). Sheffield said:

> "I personally prefer that, but I know that people on the other side don't prefer that. That is the beauty of federalism to say that people will migrate. They will vote with their feet at the end of the day. So, as much as I would like to see a federal ban, I know that is politically unlikely. So, that, I think, is the best compromise. In fact Ruth Bader Ginsburg said …"

Sheffield was then cut off by Finkenauer, who said, "Do not say her name tonight from your mouth."

That is a curious moment since Ginsburg herself criticized the opinion as going too far. At The University of Chicago Law School, Ginsburg stated on the 40th anniversary of *Roe v. Wade* that *Roe* gave

> "the opponents of access to abortion … a target to aim at relentlessly and attributed not to the democratic process, but to nine unelected old men." She added that "the history of the year since then is that the momentum, momentum has been on the other side. The cases that we get now on abortion are all about restrictions on access to abortion and not about expanding the rights of women."

On "The David Rubenstein Show: Peer-to-Peer Conversations" in 2019, Ginsburg noted:

> "The court had an easy target because the Texas law was the most extreme in the nation," she maintained. Ginsburg explained that based on the Texas law at the center of *Roe v. Wade*, "abortion could be had only if necessary to save the woman's life" with no exceptions for rape or incest.
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> I thought that *Roe v. Wade* was an easy case and the Supreme Court could have held that

> most extreme law unconstitutional and put down its pen," she added. "Instead, the court wrote an opinion that made every abortion restriction in the country illegal in one fell swoop and that was not the way that the court ordinarily operates."

Finkenauer's insistence that pro-life advocates could not utter the name of Ginsburg did not apply to pro-choice advocates, even those who blame the late justice for the Roe reversal. I wrote during Ginsburg's service that she was taking a huge risk by declining to retire to guarantee that her seat would be filled by someone appointed by a Democratic president. I specifically noted that Roe could be reversed and her legacy lost due to a desire to remain on the Court for a couple more years. I was criticized for that column. However, now liberals are raising that decision and blaming Ginsburg for Dobbs.

Hollywood Reporter columnist Scott Feinberg tweeted "the terrible irony is that her decision to stay too long at the party helped lead to the destruction of one of the things she cared about the most. Sadly, this will be a big part of her legacy. Journalist Eoin Higgins was more direct "Thanks especially to RBG today for making this possible." In a particularly offensive posting, writer Gabrielle Perry declared "Ruth Bader Ginsberg is slow roasting in hell."

This reckless rhetoric is becoming the norm in our discussions of this and other legal controversies. We are losing a critical mass of mature and sensible voices in discussing such cases. Instead, analysts are expected to reinforce a narrative and amplify the anger in the coverage of such cases. That is a great loss to our profession and only will fuel the unhinged rage of some who only consider the conclusion, and not the analysis, of this opinion.

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