What Would Justice Blackmun Say? A Response to *Dobbs*

Radhika Rao[1]

1: UC LAW SF, SAN FRANCISCO, CA, USA.

Keywords: Abortion, *Dobbs*, *Roe*, Blackmun, History

Abstract: *Dobbs* appears more extreme when juxtaposed against *Roe*'s hidden history. Justice Blackmun was the author of *Roe*, but the opinion was the product of a remarkable collaboration that incorporated the suggestions of many Justices. Thus, *Roe*'s medical framing embodied the vision of the Court as a whole, not one individual.

"Author of *Roe*," my old boss, Justice Harry A. Blackmun, used to say. "I'll carry that label with me to the grave."[1] Justice Blackmun was not only the author of *Roe v. Wade*, but also the paradigmatic "health law" attorney before health law existed as a distinct discipline. He served as chief legal counsel for the Mayo Clinic in Minnesota, long before he was appointed to be a Justice on the Supreme Court. What would have been his response to *Dobbs v. Jackson Women's Health Organization*?[2]

Justice Blackmun would have been appalled but not shocked by the majority opinions in *Dobbs* because he understood the precariousness of the right to abortion, a right he staunchly fought to defend in his 24 years on the Court. Thirty years ago, in *Planned Parenthood v. Casey*, the Court was on the verge of overturning *Roe*, but one Justice — Anthony Kennedy — switched his vote at the last minute.[3] In *Casey*, three Justices, all appointed by Republican Presidents who openly voiced their opposition to abortion, wrote a joint opinion that retained and reaffirmed the "essential holding" of *Roe*.[4] Justice Blackmun lauded the courage of the Justices in the *Casey* plurality for reaffirming *Roe* but poignantly voiced his fear that *Roe* would ultimately be overruled.[5] "The distance is but a single vote," Justice Blackmun darkly warned.[6]

Justice Kennedy's change of heart in *Casey* provides a plausible explanation and a potent motive for the leak of the *Dobbs* draft opinion. A draft of the entire opinion, dated February 10, was made public on May 2, 2022, in the "worst breach of confidentiality in the Court's history."[7] A subsequent investigation was unable to identify the source of the leak.[8] The leaker may have feared that history would repeat itself and one of the Justices in the *Dobbs* majority would similarly be persuaded to "defect" and join a more modest opinion. The leak could have been intended to freeze

Radhika Rao, A.B., J.D., *is a Harry & Lillian Hastings Chair Professor, UC Law SF, and clerked for Justices Blackmun and Marshall at the Supreme Court.*

The Journal of Law, Medicine & Ethics, 51 (2023): 468-472.
DOI: 10.1017/jme.2023.94

the votes of those who joined the *Dobbs* majority and thereby ensure that *Roe* would finally be overruled. If so, this tactic proved successful.

A half century after *Roe*, a narrow majority of the Court threw moderation to the wind in *Dobbs*, rejecting the plea of Chief Justice Roberts to take a more "measured course," stick to the question presented, and change such a weighty precedent incrementally.[9] The majority not only repudiated *Roe* and *Casey*, but did so in a gratuitously insulting manner, mocking *Roe*'s language and ridiculing its reasoning.[10] Justice Alito's caustic opinion for the Court, which is virtually identical to the May 2 draft that was leaked, resembles an angry dissent rather than a ruling that speaks for a sober majority. Justice Alito characterized *Roe* as "egregiously wrong" and its reasoning as "exceptionally weak,"[11] displaying a profound lack of respect for a precedent that has been part of our constitutional culture for almost half a century. His unduly harsh critique of Roe also dishonored the many Justices who have voted to affirm that precedent since 1973.

Justice Alito's intemperate opinion appears even more extreme when juxtaposed against the hidden history of these rulings, which is remarkably relevant to recent events. Justice Blackmun was the author of *Roe*, but the story of *Roe*'s creation paints a more complicated picture and reveals that the opinion spoke for a broader swath of the Supreme Court. The writing of *Roe* embodied a collegial, almost scholarly endeavor, in which Justice Blackmun was incredibly responsive to suggestions from the other Justices and made great efforts to incorporate their recommendations, perhaps because of his eagerness to garner as many votes as possible to assemble a strong majority.[12] Thus, *Roe*'s reliance upon medical criteria represented the vision of the Court as a whole, not just one individual.

Given his experience at the Mayo Clinic, Blackmun was perhaps the Justice best positioned to predict the politically-charged character of abortion.[13] Yet he did not anticipate the contentiousness of the issue in 1970, when he was sworn in as a Justice. Soon after his arrival at the Court, Justices Black and Harlan retired suddenly due to ill health, so the Court was left "short" of two out of the nine Justices. Chief Justice Warren Burger created a screening subcommittee to select only "noncontroversial" cases for the seven-member Court to hear, in order to avoid situations where a full Court might reach a different result.[14] Burger appointed Blackmun to this screening subcommittee, which was chaired by Justice Potter Stewart and also included Justice Byron White.[15] One of the "noncontroversial" cases selected by the subcommittee was *Roe v. Wade*. "We didn't do a very good job," Justice Blackmun later joked.[16]

Chief Justice Warren Burger created a screening subcommittee to select only "noncontroversial" cases for the seven-member Court to hear, in order to avoid situations where a full Court might reach a different result. Burger appointed Blackmun to this screening subcommittee, which was chaired by Justice Potter Stewart and also included Justice Byron White. One of the "noncontroversial" cases selected by the subcommittee was *Roe v. Wade*. "We didn't do a very good job," Justice Blackmun later joked.

After the Court heard oral argument in *Roe v. Wade*, the Justices met in conference, and a majority of the seven-member Court voted to strike down the Texas abortion statute.[17] Chief Justice Burger assigned his old friend the task of writing an opinion in the case, perhaps because of Justice Blackmun's medical expertise.[18] Justice Blackmun attempted to draft the opinion but ultimately recommended that the case be held over for re-argument the following year, stating: "I believe, on an issue so sensitive and emotional as this one, the country deserves the conclusion of a nine-man, not a seven-man court, whatever the ultimate decision may be."[19] His suggestion was met with consternation by some of the liberal Justices, particularly Justice Douglas, who feared that a full Court might reach a different result, as President Nixon's newly-appointed replacements (Justices Powell and Rehnquist) would probably vote to uphold the abortion law.[20] But a majority of the Justices ultimately agreed to hold *Roe* over for re-argument.[21]

The decision to hold the case over until the following term gave Justice Blackmun the opportunity to retreat to the medical library at the Mayo Clinic over the summer to research the history and practice of abortion. *Roe*'s clinical approach to abortion, with its division of pregnancy into trimesters and the line

The Journal of Law, Medicine & Ethics, 51 (2023): 468-472. © 2023 The Author(s)

drawn at fetal viability, has often been castigated by critics but reflected his medical research, as well as the suggestions of his colleagues.[22] Justice Alito reiterated many of the standard critiques, stating that the opinion incorporated "irrelevant" information and that it "concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature."[23]

Justice Blackmun's original draft would have simply struck down the Texas law as unconstitutionally vague,[24] but several of the other Justices opined that the draft opinion was too narrow and didn't go far enough. They urged him to write a broader decision grounded in privacy and medical criteria.[25] In fact, the initial suggestion to draw the critical line at which the state may proscribe abortion at fetal viability, rather than the end of the first trimester, came from Justice Powell.[26] Justice Blackmun reached out to his colleagues to request their feedback on this point, and he wrote a memo to the other Justices that made the case for viability: "It has logical and biological justifications. There is a practical aspect, too, for I am sure that there are many pregnant women, particularly younger girls, who may refuse to face the fact of pregnancy and who, for one reason or another, do not get around to medical consultation until the end of the first trimester is upon them, or, indeed, has passed."[27]

Justice Marshall welcomed the proposal to push the line later in pregnancy to the point of viability because he was cognizant of the many obstacles that might impede access to abortion, and he favored giving women more time to avail themselves of this right.[28] Justice Marshall also recommended limiting the types of regulations that the state could enact during the second trimester, before fetal viability, to those addressing maternal health.[29] And Justice Brennan recognized that the concept of viability focused upon the status of the fetus rather than the woman, so he proposed linking it directly to the state's interest in protecting the potential life of the fetus.[30] Thus, *Roe*'s medical framing was the product of a remarkable judicial collaboration, a give-and-take among multiple justices.

Roe has been assailed on all sides, criticized by friend as well as foe, not only for what it did but also for what it failed to do. In fact, Justice Ruth Bader Ginsburg famously observed that "*Roe* is weakened by the opinion's concentration on a medically approved autonomy idea to the exclusion of a constitutionally-based sex-equality perspective."[31] Many critics have suggested that it would have been better to ground the abortion right in gender equality rather than substantive due process and privacy. Justice Blackmun was particularly sensitive on this subject, and he would often respond that the equality argument was not even raised in *Roe*. Moreover, even if the equality argument had been raised, it would probably have been rejected[32] because pregnancy discrimination was not seen as sex discrimination by the Court at that time,[33] nor were sex or gender-based classifications entitled to heightened scrutiny. So, even if laws banning abortion had been addressed as sex or gender-based classifications, they would likely have been sustained under the most lenient standard of review — rational basis review.[34]

Justice Blackmun was also aware that overturning *Roe*, which has become deeply embedded in our constitutional canon over the last 50 years, might have far-reaching implications for other rights intertwined with privacy and self-determination, such as sexual intimacy. Indeed, it was not an accident that Justice Blackmun authored the principal dissent in *Bowers v. Hardwick* — which was originally designed to embody the decision of the majority, until Justice Powell reconsidered his choice and voted to uphold the Georgia sodomy statute.[35]

Thus, the *Dobbs* Court's slash-and-burn approach to constitutional law threatens not only *Roe* but many other precedents that are currently protected under the Due Process Clause of the 14th Amendment.[36] *Dobbs* concluded that no right to abortion is protected within the right to privacy because it is not mentioned in the text of the Constitution, nor is it deeply rooted in history and tradition.[37] Yet the same reasoning applies to many other privacy and liberty rights, including rights to contraception[38] and marriage-equality.[39] None of these other rights are explicitly enumerated in the text of the Constitution, and several are of more recent vintage.[40] The majority attempted to distinguish *Roe*, claiming that none of the other substantive due process cases involve the deliberate destruction of human life.[41] But the majority's "logic" cannot be so easily confined — several methods of contraception (such as the IUD and the pill) also operate after conception to prevent implantation of a fertilized embryo, an entity that some states also characterize as a "person."[42]

The deceptiveness ("hypocrisy" says the dissent)[43] of the majority's effort to reassure that its decision is limited to abortion and has nothing to do with those other rights is made clear by Justice Thomas's concurrence: he candidly called for *Griswold*, *Lawrence*, and *Obergefell* to also be overruled.[44] It is now obvious why Justice Thomas (the Senior Justice in the full majority) did not keep the assignment in *Dobbs*. His radical approach would do away with every substantive right protected under the 14th Amendment's Due Process Clause — which includes all the provisions of

The Journal of Law, Medicine & Ethics, 51 (2023): 468-472. © 2023 The Author(s)

the Bill of Rights that have been incorporated to apply to the states — and consign constitutional due process to nothing more than procedural protections. Even the conservative majority Justices did not join this view.

Yet Justice Alito's majority opinion is hardly less extreme. It failed to value the centrality of a right that protects the fundamental freedom of women and people capable of pregnancy to have ownership over their bodies and control over their lives. The majority harkens to "history and tradition" in 1868,[45] when (Justice Alito failed to even note) women were non-voting second-class citizens with no rights or ability to control their lives in almost every respect.[46] Instead, the Court equated a woman's right to freedom and autonomy with ordinary economic liberties, holding that henceforth laws regulating or prohibiting abortion receive the lowest level of constitutional scrutiny, rational basis review.[47] In taking away the fundamental right recognized in *Roe*, the majority relegated women to the second-class status of 150 years ago. Particularly on this point, the silence of the sole woman in the *Dobbs* majority, Justice Amy Coney Barrett, was deafening. As a final coup de grace, the Court dismissed an equal protection argument about gender discrimination that was not even presented,[48] in a brusque single paragraph that relied upon *Geduldig v. Aiello*,[49] a discredited decision that is generally regarded as defunct.[50]

Blind to irony, the majority cast itself in the role of the courageous *unanimous* Court in *Brown v. Board of Education*,[51] one of the most celebrated cases in the pantheon of constitutional law,[52] and suggested that *Dobbs* should similarly be celebrated as a judicial triumph.[53] But unlike *Brown*, the Court's decision in *Dobbs* does not further equality.[54] Instead, it undoubtedly exacerbates existing gender, [55] as well as racial and economic, disparities.[56]

Justice Alito's opinion for the Court portrays itself as an act of judicial diplomacy that will end our nation's polarization by returning the issue of abortion to the states.[57] To the contrary, the *Dobbs* opinion resembles the infamous ruling in *Dred Scott*,[58] by reaching out to decide an equal protection argument that was not even presented in the case and further fanning the flames of civil war controversy. Overturning *Roe* will not keep the Court out of the abortion arena. Instead, it has already exacerbated the political polarization of the nation. Several states have enacted increasingly draconian laws that not only prohibit abortion within their jurisdictions, but also attempt to reach across borders and control actions that occur elsewhere.[59] Other states have passed laws to assist those traveling from out of state to obtain abortions.[60] Without doubt, the Court will be forced to continue to intervene in the resulting "interjurisdictional abortion wars."[61]

Let us mourn *Roe*'s passing and grieve the consequences for the Court, the country, and particularly for those who lack the privilege and power to evade the draconian laws that are now in effect. As Justice Blackmun presciently stated in his dissent in *Webster*: "I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court."[62] Justice Blackmun's hopes have been ended, but his fears loom large.

Note

The author reports support from UC Law San Francisco for attending meetings and travel and honorariums for speaking from DePaul Law School, Southern Illinois, University, and San Francisco State University. The author serves on the CA Human Stem Cell Research Advisory Committee.

References

1. R. Rao, "The Author of Roe," *Hastings Constitutional Law Quarterly* 26, no. 1 (1998): 21-40, at 22.
2. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022).
3. See L. Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (New York: Times Books, 2005): at 203-204.
4. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (joint opinion of O'Connor, Kennedy, Souter).
5. See *id*., at 923 (Blackmun, J, concurring and dissenting).
6. *Id*. at 943.
7. See A. de Vogue, T. Sneed, and D. Cole, "Supreme Court Issues Report on Dobbs Leak but Says it Hasn't Identified the Leaker," CNN Politics, January 19, 2023, *available at* <https://edition.cnn.com/2023/01/19/politics/supreme-courtdobbsreportleak/index.html#:~:text=The%20leak%20%20the%20worst%20breach,a%20constitutional%20right%20to%20abortion> (last visited July 31, 2023).
8. See *id*.
9. *Dobbs*, 142 S.Ct., at 2310 (opinion of Roberts, C.J., concurring in the judgment).
10. *Id*. at 2241-2242 (opinion of J. Alito for the Court).
11. *Id*. at 2243.
12. See N. Hunter, "Justice Blackmun, Abortion, and the Myth of Medical Independence," *Brooklyn Law Review* 72, no. 1 (2006): 147-197, at 186.
13. See Greenhouse, *supra* note 3, at 74.
14. See *id*., at 80.
15. See Hunter, *supra* note 12, at 170-171.
16. See Greenhouse, *supra* note 3, at 80.
17. See *id*. at 80-81.
18. See *id*. at 82.
19. *Id*. at 89.
20. See D. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Los Angeles: University of California Press, 1994): at 553-555.
21. See *id*., at 555.
22. See Hunter, *supra* note 12, at 147.
23. *Dobbs*, 142 S.Ct. at 2240.
24. See Garrow, *supra* note 20, at 547-548.
25. See Greenhouse, *supra* note 3, at 93-94.
26. See Hunter, *supra* note 12, at 184.
27. Greenhouse, *supra* note 3, at 97.

The Journal of Law, Medicine & Ethics, 51 (2023): 468-472. © 2023 The Author(s)

28. See Garrow, *supra* note 20, at 583-584.
29. See Hunter, *supra* note 12, at 183.
30. See Hunter, *supra* note 12, at 183.
31. R. Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review* 63, no. 2 (1985): 375-386, at 386.
32. J. E. Fleming, *Constructing Basic Liberties: A Defense of Substantive Due Process* (Chicago: University of Chicago Press, 2022): at 176-179.
33. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that the failure of a state disability insurance system to cover pregnancy did not constitute sex-discrimination because the classification distinguished between pregnant women and non-pregnant persons, not women and men).
34. A majority of the Court did not rule that sex or gender-based classifications merit heightened scrutiny until several years after *Roe* was decided, in *Craig v. Boren*, 429 U.S. 190 (1976).
35. See Garrow, *supra* note 20, at 659-661.
36. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, at 2245 (opinion of Alito for the Court).
37. *Id.* at 2242.
38. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).
39. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).
40. *Obergefell* was decided only eight years ago.
41. *Dobbs,* 142 S.Ct., at 2260.
42. See, e.g., Ark. Code Ann. §20-16-1302 (2013) ("fetus" means the human offspring developing during pregnancy from the moment of fertilization and includes the embryonic stage of development); Ohio Rev. Code Ann. §2919.19(A)(5)(2013) (using language similar to Arkansas). See also Ariz. Rev. Stat. §36-2321(5)(2022); ; S.C. Code Ann. § 44-41-430(11) (2016).
43. *Dobbs,* 142 S.Ct., at 2319 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).
44. *Id*., at 2301 (Thomas, concurring).
45. *Id*., at 2259-2260 (opinion of J. Alito for the Court).
46. See *Frontiero v. Richardson*, 411 U.S. 677, at 685 (1973) (opinion of Brennan) (comparing the status of women in the 19th century to that of African-Americans under pre-Civil-War slave codes).
47. *Dobbs,* 142 S. Ct. at 2245-2246.
48. *Id.* at 2245-2246.
49. *Geduldig v. Aiello*, 417 U.S. 484 (1974).
50. See L. Greenhouse, "Justice Alito's Invisible Women," *New York Times*, May 5, 2022; R. Siegel, "The Pregnant Citizen, from Suffrage to the Present," *Georgetown Law Journal* 108 (2020): 167-230, at 172 ("The Supreme Court has not cited Geduldig in an equal protection decision since the 1970's.")
51. *Brown v. Board of Education*, 347 U.S. 483 (1954).
52. See S. G. Breyer, "Opinion: 50 Years After Brown," *New York Times*, May 17, 2004; A. Liptak, "The Abortion Decision: Haunted by *Brown v. Board of Education*," *New York Times*, August 1, 2022.
53. *Dobbs,* 142 S.Ct., at 2265 (comparing Roe to the infamous decision in *Plessy v. Ferguson*, which was later overruled by *Brown v. Board of Education*).
54. See M. Manian, "Dobbs and the Undue Burdens of Pre-Viability Abortion Bans," *SCOTUSblog* (Nov. 30, 2021), *available at* <https://www.scotusblog.com/2021/11/dobbs-and-the-undue-burdens-of-pre-viability-abortion-bans/> (last visited Sept. 22, 2023).
55. See D. Greene Foster, "What Happens When It's Too Late to get an Abortion," *New York Times*, Nov. 22, 2021; D. Greene Foster, *The Turnaway Study: Ten Years, a Thousand Women, and the Consequences of Having – or Being Denied – an Abortion* (New York: Scribner, 2020).
56. See K. Bridges and D. Roberts, Brief of Amicus Curiae Reproductive Justice Scholars Supporting Respondents in *Dobbs v. Jackson Women's Health* (No. 19-1392).
57. *Dobbs,* 142 S.Ct., at 279.
58. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).
59. See C. Kitchener and D. Barrett, "Antiabortion Lawmakers Want to Block Patients from Crossing State Lines," *Washington Post* (Jun. 29, 2022), *available at* <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/> (last visited July 31, 2023) (explaining that national antiabortion groups, such as the Thomas More Society and the National Association of Christian Lawmakers, are creating model legislation modeled after Texas's antiabortion bill to criminalize out of state abortions); Center for Reproductive Rights, *After Roe Fell: Abortion Laws by State*, Center for Reproductive Rights (2023), *available at* <https://reproductiverights.org/maps/abortion-laws-by-state> (last visited July 31, 2023); Kaiser Family Foundation, *Abortion Policy Tracker*, KFF (Apr. 25, 2023), *available at* <https://www.kff.org/other/state-indicator/abortion-policy-tracker/?activeTab=map&currentTimeframe=0&selectedDistributions=status-of abortion&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited July 31, 2023).
60. See S. Shah, "What Abortion Safe Haven States Can Do," *Time,* June 27, 2022, *available at* <https://time.com/6191581/abortion-safe-haven-states/#:~:text=Several%20of%20those%20states%E2%80%93California,-of-state%20for%20care> (last visited July 31, 2023) (explaining that states such as California, Connecticut, Delaware, Hawaii, Maryland, New Jersey, New York, Oregon, and Washington have been strengthening abortion protections to help those in and out of state maintain access to abortion).
61. D. S. Cohen, G. Donley, and R. Rebouche, "The New Abortion Battleground," *Columbia Law Review* 123, no. 1 (2023): 1-100, at 3 (warning that "the interjurisdictional abortion wars are coming").
62. *Webster v. Reproductive Health Services*, 492 U.S. 490, 538 (1989) (Blackmun, J. dissenting).

The Journal of Law, Medicine & Ethics, 51 (2023): 468-472. © 2023 The Author(s)