5-1-2023

Abortion Law in a Time of Judicial Adventurism

Michael Boucai
University at Buffalo School of Law, mboucai@buffalo.edu

May 2023

Buffalo Health Law Society

MEDICOLEGAL NEWSLETTER

Dobbs v. Jackson

Surgeon/ Law Student

Medical-Legal Partnerships

THE BUFFALO HEALTH LAW SOCIETY

LAW-BHLS@BUFFALO.EDU

DOBBS V. JACKSON WOMEN'S HEALTH ORG. UB LAW PROFESSOR MICHAEL BOUCAI JD

Abortion Law in a Time of Judicial Adventurism

The Supreme Court's overruling of Roe v. Wade[1] depended on new judicial personnel, not new legal principles. The seats that Anthony Kennedy and Ruth Bader Ginsburg occupied when the Court decided Whole Women's Health v. Hellerstedt[2]in 2016 were filled by Brett Kavanagh and Amy Coney Barrett, respectively, when the Court decided Dobbs v. Jackson Women's Health in 2022.[3] New judges, not new ideas.

Arguably excepting certain elements of its stare decisis analysis, Dobbs's main legal arguments were the conventional refrains of a half-century of anti-Roe advocacy—arguments about the "treacherous" field of substantive due process; about the abortion right's nonexistence in "the long sweep" of American "history and tradition"; and about the impropriety of judicial rather than legislative control over a "profound moral issue on which Americans hold sharply conflicting views."[4]

In other contexts, however, the current Court has shown remarkable solicitude toward arguments that, if not literally novel, are new to mainstream legal discourse. Take the claim, accepted in NY State Rifle Association v. Bruen (2022), that the Second Amendment no longer tolerates a century-old requirement that private citizens show "proper cause" to carry a concealed firearm in public;[5] or the notion, accepted in West Virginia v. EPA (2022), that Congress must "speak with particular clarity when it authorizes executive agencies to address major political and economic questions";[6] or the theory, now pending before the Court in Moore v. Harper, that state legislatures' regulation of federal elections is wholly immune from state-court review.[7]

Soon, no doubt, cases will arise in which the Supreme Court's appetite for doctrinal innovation has occasion to mingle with its revulsion at abortion rights. As the Dobbs dissenters predicted, Roe's reversal "will give rise to a host of new . . . questions," constitutional and otherwise: whether and at what point in pregnancy the Fourteenth Amendment's protection of "life" compels states to permit abortions to protect a mother's life or health; how abortion restrictions apply to other kinds of health care, like the morning-after pill, intrauterine devices, miscarriage treatment, and in vitro fertilization; by what obstacles, if any, a state may impede a woman from traveling out of state for an abortion; whether and how states may meddle with postal and other shipments of abortifacient medications; etc. You might think that at least one of those questions has a relatively straightforward answers under longstanding precedent. Presumably, the constitutional right to travel absolutely shields a woman who crosses state lines to terminate her pregnancy. Or does it? Cases like Bruen and West Virginia v. EPA caution us not to take anything for granted.

Consider Alliance for Hippocratic Medicine ["AHM"] v. FDA. Filed a few months ago in the carefully chosen Amarillo Division of the Northern District of Texas—the bailiwick of Judge Matthew Kacsmaryk, "a Trump appointee with longstanding affiliations with the religious right"[8]—the AHM case is but one salvo in a multifront campaign to eradicate use of "abortion pills . . . by any means necessary."[9] Why such a massive effort? Because medication abortions account for the majority of all abortions in this country;[10] and because medication abortion's relative prevalence is bound to increase most dramatically, albeit illegally, in jurisdictions whose laws prohibit all abortion methods.[11]AHM v. FDA seeks to drastically dampen that increase by suppressing one of the most common drugs used for this purpose: Mefipristone, FDA-approved in 2000 as an effective abortifacient when used 24 to 47 hours before another drug called Misoprostol, FDA-approved in 1988 to treat stomach ulcers.[12]

Under existing statutes and case law, the AHM's legal claims are weak if not risible. (Of course readers can draw their own conclusions, perhaps—at this early stage in the litigation—by comparing the AHM's brief supporting and the FDA's brief opposing a preliminary injunction to compel FDA rescission of its Mefipristone approval.) It will have to suffice for present purposes to say that, if the AHM is successful, this case would mark the first time a court nullifies an FDA drug approval over the FDA's objection, a substitution of scientific for legal-political judgment not easily cabined to the abortion context, where its effects would be bad enough.[13]

Experts warn that, despite its many infirmities under existing doctrine, the AHM case "has the potential to succeed" in federal district court given the Trump-appointed, anti-abortion trial judge now hearing it.[14] Do we have any reason to expect a different result from the anti-abortion Justices, three of them Trump-appointed, who decided Dobbs?

[1] 410 U.S. 113 (1973)
[2] 579 U.S. 582 (2016).
[3] 142 S. Ct. 2228 (2022).
[4] Id. at 2240, 2247, 2260 (2022).
[5] 142 S.Ct. 2111 (2022).
[6] 142 S.Ct. 2587 (2022).
[7] See Michael Wines, Supreme Court to Hear Arguments on Far-Reaching Elections Case, N.Y. Times, Dec. 7, 2022. Fortunately, oral argument in Moore did not presage a Supreme Court majority in favor of the most extreme form of the "independent state legislature" theory. See Adam Liptak, Supreme Court Seems Split Over Case That Could Transform Federal Elections, N.Y. Times, Dec. 8, 2022. But even if the Court rejects the theory entirely, it's scary that such a wackadoo notion moved from (in Jack Balkin's terms) "off the wall" to "on the wall" at this exceptionally dangerous moment for American democracy. See Jack M. Balkin, From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream, Atlantic, June 4, 2012.
[8] Sarah McCammon, A Trump-Appointed Texas Judge Could Force a Major Abortion Pill Off the Market, NPR, Feb. 10, 2023.
[9] David S. Cohen, Greer Donley, & Rachel Rebouché, Abortion Pills (draft), at i.
Cite to Cohen et al.
[10] Rachel K. Jones, Medication Abortion Now Accounts for More Than Half of All US Abortions, Guttmacher Inst. (Mar. 2, 2022).
[11] See Cohen, Donley, & Rebouché at 3 ("[M]ailed abortion pills, grassroots distribution networks, and online sources make abortion pills relatively accessible and very difficult to control.").
[12] See Complaint, Alliance for Hippocratic Medicine et al. v. U.S. Food & Drug Admin. Et al. (No. 2:22-cv-00223-Z) (N. Dist. Tex., Nov. 18, 2022).
[13] Cohen, Donley, & Rebouché at 14-15.
[14] Id. at 14.