

Does Women’s Liberty Matter?

By: Hayly Mickles

“Without justification the law is unconstitutional. With justification that meets constitutional standards, the restriction on liberty does not violate the Constitution.”¹

In its most recent term, the Supreme Court heard oral argument in *Dobbs v. Jackson Women’s Health Org.*,² and issued a pair of unsigned opinions³ in *Missouri v. Biden*,⁴ and *Nat’l Fed’n of Indep. Bus. V. OSHA*.⁵ Though there were many different arguments made in these cases, a common thread was the concept of bodily autonomy, protected by the right to privacy, and applied to the states via the Fourteenth Amendment. In this pair of cases, the Court spoke from both sides of its mouth. On the one hand, it reasoned that women’s interest in bodily autonomy and privacy is subordinate to the state’s interest in “protecting the potential for life.”⁶ From the other, it spoke of the right of bodily autonomy as superior to the federal government’s interest in public health during “pressure of great dangers” to the “safety of the general public”⁷ during the COVID-19 pandemic.

It is a trick of logic to use the concept of bodily autonomy for both vaccine mandate and abortion rights analyses when the bodies in question are being invaded for very different reasons and in completely different ways. What value do we assign to the liberty rights of different classes

¹ Wendy K. Mariner, George J. Annas & Leonard H. Glantz, *Jacobson v. Massachusetts: It’s Not Your Great-Grandfather’s Public Health Law*, 95 Am. J. Pub. H. 581, 583 (2005).

² *Dobbs v. Jackson Women’s Health Org.*, cert. granted (May 17, 2021) (No. 19-1932).

³ Adam Liptak, *Supreme Court Blocks Biden’s Virus Mandate for Large Employers*, NY TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/us/politics/supreme-court-biden-vaccine-mandate.html>; Brian Farrington, *The Supreme Court Upholds Stay of President Biden’s OSHA Vaccination Mandate; Overturns Stay of Healthcare Workers Mandate—Where Do Things Stand Now?*, COWLES THOMPSON ATTORNEYS (Jan. 14, 2022), <https://www.cowlesthompson.com/resources/practice/the-supreme-court-upholds-stay-of-president-bidens-oshavaccination-mandate-overturns-stay-of-healthcare-workers-mandate-where-do-things-stand-now/>.

⁴ *Missouri v. Biden*, 595 U.S. ____ (2022) (per curiam).

⁵ *Nat’l Fed’n of Indep. Bus. V. OSHA*, 595 U.S. ____ (2022) (per curiam).

⁶ Transcript of Oral Argument at 34:10–11, *Dobbs v. Jackson Women’s Health Org.*, (2021) (No. 19-1932).

⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

of people, and how does the value of human life play into our Constitutional conceptions of those rights? If one reads these three cases together, it is not a stretch of the imagination to argue that women are considered less important than workers at companies with more than 100 employees, Medicare & Medicaid recipients, and fetuses.

The Abortion Analysis

Abortion is an invasion of bodily autonomy; even conservative Catholic Associate Justice Amy Coney Barrett admitted as much in *Dobbs*.⁸ *Roe v. Wade*⁹ held that the woman's liberty interest outweighed the interest of the state, up to a viability line. *Planned Parenthood v. Casey* fully discussed and disposed of dissenting opinions from *Roe*, and ultimately shifted our nation's "line" from a *trimester* to a *viability* demarcation. But the logic was clear: A woman has a liberty interest in making her own choices about her body and her family planning, and the state's interest is too insignificant until she reaches considerable progression in her gestational period. Implicit in these precedential decisions is the argument that even though that potential life is not yet part of the "public," the state may intervene to preserve it at the expense of the individual who already forms a part of the "public" for whose protection the state is expected and empowered to regulate. More simply, human life has value, and the state can protect it.

Inherent in the abortion cases is a weighing of interests. Undergirding those interests is the value we assign to human life. Logically then, only when a fetus crosses the viability line to become to an unborn baby does its interest in state protection from harm become more important than the mother's liberty interest.

⁸ *Dobbs*, at 57:3, No. 19-1332.

⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

How, then, can Mississippi prevail in a case like *Dobbs*, where the state seeks to claim control before the fetus transitions to an unborn baby? It argued that the line was blurry at best, wrong at worst, and that fetal “girls”¹⁰ need state protection.¹¹ Conversely, the respondent argued that protecting a woman’s choice to terminate pregnancy up until viability protects her liberty interests while logically balancing the other interests at stake, and that state control of a woman’s body is a fundamental deprivation of her liberty.¹²

The Court, should it rule in Mississippi’s favor, would be jackknifing into cramped, house-of-cards logic so it may rubber-stamp its complaints about the viability line. It will travel down a jurisprudential path where women’s bodily integrity is nearly immaterial in comparison to professed state interests.

The Vaccine and Masking Mandate Analyses

On the other hand, in *Missouri* and *Nat’l Fed’n*, the Court held that mandates for healthcare workers meet the threshold of compelling state interest narrowly tailored, but vaccine and mask mandates for private sector employees do not. In *Nat’l Fed’n*, the Court seemed to be saying that the vaccine mandate was too oppressive to be mandated outside of congressional legislation; that OSHA cannot regulate American citizens simply because they encounter a health threat in everyday life that spills over into their workplace. Rather, that the Major Questions doctrine dictates that the laws that govern us “must at least be . . . trace[able] . . . to a clear grant of authority

¹⁰ Transcript of Oral Argument at 5:11, *Dobbs v. Jackson Women’s Health Org.*, (2021) (No. 19-1932).

¹¹ See Amicus with Dahlia Lithwick, *Inside the Arguments in Dobbs v. Jackson Women’s Health*, SLATE, at 48:30 (Dec. 2021), <https://open.spotify.com/episode/426tS3OUIXEU699iJMDpAX?si=35Wths0tSmKJzWy8A9zkmw> (featuring Columbia Law School professor Catherine Franke discussing the proposition that religious viewpoints are being repackaged as agnostic principles).

¹² Transcript of oral argument at 48:14–17, *Dobbs* (U.S. May 17, 2021) (No. 19-1932).

from Congress.”¹³ Meanwhile, the Court held in *Biden v. Missouri* that the statistically more vulnerable citizens who receive Medicaid and Medicare require important protection in the form of vaccinated health care workers at hospitals that receive federal funding.

Consistency or Partisanship?

In the vaccination cases, the Court came to the right conclusion when considering the liberty/autonomy framework. Individuals do have a liberty interest in their bodily autonomy, and forced vaccinations because of an administrative rule, when the workplace danger is merely derivative of everyday life, is violative of that interest. It is also not how our separation of powers and Article I of the Constitution work. Even common childhood vaccines in this country—colloquially considered compulsory—are mandated at a state level,¹⁴ and only as a prerequisite to public education. It is certainly up for debate whether that is a wise method for compelling basic vaccinations for American citizens. However, if OSHA were allowed to mandate vaccinations, the standard of review for any appeal would be that of an administrative decision. This standard defers to ALJs, unlike a garden variety constitutional rights challenge. That would be unprecedented territory as it pertains to violations of bodily autonomy by an agency that is not directly responsive to the electoral demands of a constituency. In short, because OSHA was the means through which Biden wanted to compel vaccination, the Court needed not even reach an inquiry into bodily liberty.

On the other hand, holding that healthcare workers at hospitals that receive federal funding via Medicare and Medicaid must be vaccinated against COVID-19 is consistent with the case law

¹³ *Nat'l Fed'n*, 595 U. S. ____, at *4 (2022) (Gorsuch, J., concurring)

¹⁴ The caveat to this non-requirement is the Immigration and Nationality Act, 8 U.S.C. § 212(a)(1)(A)(ii), which mandates several compulsory vaccines that immigrants must receive before naturalizing to the United States.

and the Appropriations Clause.¹⁵ As such, an equal protection analysis is appropriate, and the Court wisely weighed the liberty interests of healthcare workers against public health and the increased risk of death to which Medicare and Medicaid recipients are statistically subject.

Conclusion

Though the vaccine cases were correctly decided and consistent with *Roe* and *Casey*, *Dobbs* seems set to depart. It gave greater weight to religious arguments couched as secular philosophical concerns than it did to those concerning the welfare of women as a group (precedent) and as individuals (autonomy/liberty). This means the outcome was pre-determined: Because Religious Right Justices that now comprise the Court's conservative majority value fetal rights so absolutely, women's liberty interests must fail. If there is to be any protection of women's right to pre-viability abortion in this country, the arguments should center on the value of women as individuals. The value of a living, breathing, American woman should be unassailable.

¹⁵ U.S. CONST. art. I, § 9, cl. 7.