WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

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Developments in Constitutional Law: Abortion

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In *Dobbs v. Jackson Women's Health Organization*, a case decided in June 2022, the U.S. Supreme Court overruled prior case law that had established a right to an abortion under the U.S. Constitution. This issue brief summarizes prior legal precedents, the *Dobbs* decision, and the decision's effect on abortion law in Wisconsin.

PRIOR LEGAL PRECEDENTS

The U.S. Supreme Court first recognized a constitutional right to abortion in its 1973 *Roe v. Wade* decision, in which it held that a right of privacy, grounded primarily in the Fourteenth Amendment's Due Process Clause, guarantees the right to an abortion before a fetus is "viable" – i.e., able to survive outside the uterus. [410 U.S. 173 (1973).]

Applying the doctrine of *stare decisis*, which generally directs the Court to follow its prior precedent, the Court reaffirmed *Roe*'s central holding two decades later, in *Planned Parenthood v. Casey*. In *Casey*, the Court also articulated a new "undue burden" standard for evaluating the constitutionality of abortion regulations. Under that standard, a law could not impose a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." [505 U.S. 833 (1992).]

The Court continued to recognize a right to pre-viability abortions in more recent decisions, but with an increasing number of justices expressing skepticism as to that right's constitutional grounding.[1] Also, in recent decisions outside the abortion context, the Court had refined the applicable factors in a *stare decisis* analysis, departing from a five-factor test articulated in *Casey*.[2] Of particular relevance, a 2018 decision by Justice Alito identified five *stare decisis* factors as most important: (1) the quality of the precedent's reasoning; (2) the workability of the rule it established; (3) its consistency with other related decisions; (4) developments since the decision was handed down; and (5) reliance on the decision.[3]

DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

In *Dobbs v. Jackson Women's Health Organization*, the Court overruled *Roe* and *Casey* and held that the U.S. Constitution does not provide a right to abortion. The case involved a challenge to a Mississippi law that generally prohibits abortions after 15 weeks gestation. The plaintiffs in the case argued that Mississippi's law violated the Court's abortion law precedents, which they asked the Court to reaffirm based on the doctrine of *stare decisis*. In contrast, the State of Mississippi argued that *Roe* and *Casey* were "egregiously wrong" and should be overruled, or, at a minimum, that viability should no longer be the constitutional standard.

The Court ruled in favor of the Mississippi law in an opinion authored by Justice Alito and joined by four other justices. The Court concluded that the *Casey* decision had applied the doctrine of *stare decisis* improperly, because it failed to assess the strength of the constitutional grounds for the abortion right conferred in *Roe*. Instead, the *Dobbs* Court applied the five-prong *stare decisis* test that Justice Alito had articulated in the 2018 decision mentioned above, beginning with analyzing *Roe*'s reasoning.

The Court applied a test, known as the "*Glucksberg* test,"[4] to hold that the key constitutional grounds asserted for a right to abortion in *Roe* and *Casey* – namely, a substantive privacy right under the Due Process Clause of the Fourteenth Amendment – protects only those rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Emphasizing that a right to abortion was not recognized in American law until the later part of the 20th century, the Court concluded that abortion is neither a right rooted in history and tradition, nor implicit in the concept of

ordered liberty, and therefore, is not a right guaranteed by the Fourteenth Amendment's Due Process Clause. Instead, the Court held that the "authority to regulate abortion must be returned to the people and their elected representatives."

Several concurring opinions in the case are noteworthy. Justice Thomas issued a separate opinion to argue that, in addition to abortion, all other rights grounded in the concept of "substantive due process" under the Fourteenth Amendment lack constitutional grounding. And Justice Kavanaugh emphasized that he interprets the U.S. Constitution as being "neutral" on the question of abortion, and that it is the role of the states, and not the courts, to decide the difficult question of how abortion should be regulated.

CURRENT STATUS OF ABORTION LAW IN WISCONSIN

Following the U.S. Supreme Court's decision in *Dobbs*, the question of how to regulate abortion rests with Congress and each individual state. Wisconsin law includes various criminal prohibitions against performing abortions. Of particular relevance, s. 940.04, Stats., generally prohibits any person, other than the mother, from intentionally destroying the life of any unborn child or unborn "quick child," with criminal penalties up to a Class E felony.

That statute was unenforceable under *Roe* and *Casey*,[5] but *Dobbs*'s overruling of those decisions means it may be enforced again, with two caveats. First, district attorneys have wide discretion in determining whether to prosecute violations of the law, which may result in varying degrees of enforcement throughout the state.

Second, the statute's enforceability has been challenged by the Attorney General in a complaint filed in the Dane County Circuit Court. The complaint argues that the statute is unenforceable as applied to abortions, because it has been superseded by narrower criminal statutes enacted in Wisconsin after *Roe*, and because of its disuse. Limited case law exists on both of these grounds. However, in a 1994 decision, the Wisconsin Supreme Court held that s. 940.15, Stats. – a criminal statute that generally prohibits post-viability abortions, except when necessary to preserve the pregnant person's life or health – did not impliedly repeal the abortion prohibition under s. 940.04 (2) (a), Stats.[6] With respect to the doctrine of disuse, courts generally disfavor such arguments, applying principles of disuse against a statute's enforcement only in "extreme cases" in which the statute is "notoriously ignored" by both its administrators and the community for an unduly extended period.[7]

In addition, courts in other states have held that their state constitutions protect a right to abortion independently from the U.S. Constitution.[8] In Wisconsin, s. 940.04, Stats., could be challenged as unenforceable based on protections afforded under the Wisconsin Constitution. In other contexts, the Wisconsin Supreme Court has held that its interpretation of the Wisconsin Constitution is "not constrained" by the interpretation of similar provisions of the U.S. Constitution.[9] However, in past cases, the Wisconsin Supreme Court has interpreted Wis. Const. art. I, s. 1 in tandem with the Fourteenth Amendment's Due Process Clause.[10]

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[1] See, e.g., dissenting opinions in *Whole Women's Health v. Hellerstedt,* 579 U.S. 582 (2016) and *June Medical Services v. Russo*, 591 U.S. __ (2020).

[2] In *Casey*, the Court articulated a multi-factor test for applying the doctrine: (a) whether a precedent has proven to be practically unworkable; (b) whether the precedent is subject to a kind of reliance that would create special hardships and inequity; (c) whether related principles of law have so far developed as to have left the precedent no more than a remnant of abandoned doctrine; and (d) whether facts have so changed, or come to be seen so differently, as to have robbed the precedent of significant application or justification. In *Casey*, the Court applied those factors to reaffirm *Roe*. [*Casey*, 505 U.S. at 854-59.]

[3] *Janus v. American Fed'n of State, County, and Mun. Employees*, 585 U.S. ___ (2018).

[4] See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

[5] *Roe* specifically identified s. 940.04, Stats., as a statute similar to the one at issue in that case. [See *Roe*, 410 U.S. at 118 n.2.]

[6] *State v. Black*, 188 Wis. 2d. 639 (1994). However, *Black* also held that s. 940.04 (2) (a), Stats., is "a feticide statute only," though this holding may be rooted in *Roe*'s limitations on pre-viability abortion regulations, thereby raising uncertainty as to this holding's applicability with *Roe* overturned.

[7] See, e.g., *United States v. Jones*, 347 F. Supp. 2d 626 (E.D. Wis. 2004).

[8] See, e.g., *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995).

[9] *State v. Miller*, 202 Wis. 2d 56, 66 (1996).

[10] See, e.g., *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 35.