Legal Hysteria Spreads as the Court Revisits

It is hard to keep a straight face while reading the hysteria over the United States Supreme Court agreeing to hear *Dobson* v. *Jackson Women's Health Organization*, the Mississippi case challenging the state statute prohibiting nearly all abortions after the 15th week of pregnancy. For those in the legal establishment, the greatest fear seems to be that this case will sound the death knell for *stare decisis*, the judiciary's duty to follow legal precedent. Nothing could be further from the truth.

In this case from Mississippi, the court will decide whether all restrictions on abortion before the fetus is viable (able to live outside the womb, albeit with technology—now about 22 weeks at the earliest) are unconstitutional. The Fifth Circuit Court of Appeals, reading the U.S Supreme Court's rulings on this matter, concluded the restrictions clearly violate the U.S. Constitution based on the court's 1973 *Roe* v. *Wade* ruling and its subsequent tweaks, which declared abortion a fundamental constitutional right.

It should be noted that *Roe* v. *Wade* was greeted with raspberries by much of the legal establishment in 1973, most famously by Yale law professor John Hart Ely in the *Yale Law Journal* five months after the decision. A few years later, my constitutional law professor taught *Roe* as an abuse of judicial power. Curiously, while *Roe* invalidated the abortion laws of every state and resulted in many deaths, no progressive today calls it an assault on democracy. Instead, criticism of *Roe* is now seen as disqualifying for a judicial position, though not because of the decision's intellectual heft.

Thus, it's no surprise that the court's acceptance of this

appeal threw the American legal world into a frenzy, concerned it will mean the death of *stare decisis*. *Stare decisis* affords stability, giving the public faith that the law is based on solid legal tenets and not on the whims of judges. Reaffirming bad rulings is often seen as preferable to overruling them for this reason. Even now-Associate Justice Brett Kavanaugh during his 2018 confirmation hearing declared *Roe* "settled law."

Yet, to put it mildly, critics of the current court embrace *stare decisis* inconsistently. When federal appellate judges considered same-sex marriage cases—before the Supreme Court declared such marriages a constitutional right in *Obergefell* v. *Hodges* in 2015—only a Sixth Circuit Court of Appeals panel followed the 1972 Supreme Court holding of *Baker* v. *Nelson*, in which the court dismissed an appeal from a Minnesota homosexual couple who claimed their ability to marry was protected by the Constitution. The court dismissed it "for want of substantial federal question." In other words, the court ruled on the merits of the case that defining marriage was not an area of federal power. To reach its decision in *Obergefell*, however, the Supreme Court abandoned *stare decisis*, holding that "*Baker v. Nelson* must be and now is overruled." And *Baker* v. *Nelson* is even older than *Roe* v. *Wade*!

Only about 5 percent of mothers—excuse me, aborting parents—seeking to terminate pregnancies do so after 15 weeks. Thus, the Mississippi law does not have much effect on the practice of abortion. No, the gravitas of the Supreme Court taking the Mississippi case is the stability of a nonsensical, but by now sacrosanct, ruling from 1973. But as the court's current critics have taught us, maybe the stability of bad laws isn't very important.

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