Anti-Abortion Exceptionalism after *Dobbs*

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Abstract: The end of the constitutional right to abortion with *Dobbs v. Jackson Women's Health* stands to generate massive conflict between abortion regulation and the First Amendment. Abortion exceptionalism within constitutional doctrine -- which both treats abortion differently than other areas and favors anti-abortion over pro-choice viewpoints -- will not retreat but advance, unless confronted by the courts.

Introduction

Over the last thirty years, courts frequently twisted or ignored relevant constitutional doctrine where abortion was involved.[1] Perhaps nowhere was this "abortion exceptionalism" more extreme than under the First Amendment's speech and religion clauses.[2] As the Court grew near-absolutist in its protection of speech, states were permitted to impose increasingly ideological speech mandates on abortion providers.[3] Free speech and religious liberty claims from anti-abortion actors, by contrast, enjoyed extreme solicitude from the Court.[4]

In *Dobbs v. Jackson Women's Health Organization*, Justice Alito lamented that the right to abortion had distorted other areas of constitutional law — including the First Amendment.[5] Overturning *Roe v. Wade* and *Planned Parenthood v. Casey*, he suggested, would remedy that distortion. Abortion would withdraw from the realm of constitutional law. Other justices seemed equally naïve. For example, even as he concurred to reassure the public that constitutional rights to travel and due process would not be undermined by anti-abortion politics, Justice Kavanaugh failed to mention whether the Court's "position of neutrality" on abortion would lead to even-handedness toward First Amendment protections.[6]

This essay argues that the end of the abortion right will not solve the problem of abortion exceptionalism in First Amendment jurisprudence. The double divergence — between abortion and other areas, and between pro-choice and anti-abortion speakers — is deeply entrenched in the doctrine. The post-*Dobbs* era moreover will see the passage of many abortion-related laws that tread on the First Amendment. Courts will be squarely confronted with a choice: do

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they undo the distortions of speech and religious liberty doctrines or do they further aggravate them?

I. First Amendment Abortion Exceptionalism under *Roe* and *Casey*

Planned Parenthood of Southeastern Pennsylvania v. Casey is often identified as the root of the distortion of First Amendment doctrine.[7] Best known for moving from the trimester framework of *Roe* to the undue burden standard for restrictions on abortion, the joint opinion also considered a state law requiring doctors to give patients information about, among other things, likely fetal age, description of the fetus, and state support for pregnancy and childbearing. This statute differed from the general obligation of physicians to secure informed consent from patients because it mandated the content of that process for all patients and encouraged a particular medical choice.[8]

Normal speech doctrine would have required heightened scrutiny for this content-based requirement. Just a few years prior, the Supreme Court had struck down a similar law as "nothing less than an outright attempt to wedge the [state]'s message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician."[9] But the Court upheld the law, concluding that the woman's rights were not unduly burdened and that "the physician's First Amendment rights not to speak are implicated … but only as part of the practice of medicine, subject to reasonable licensing and regulation."[10] With a mere three sentences devoted to the speech claim, *Casey* failed to clarify the relevant standard of review.[11]

Over time, states required physicians to produce and describe images and to speak ever-more politically freighted messages. Appeals courts generally permitted mandatory abortion scripts and ultrasounds.[12] Several displaced speech claims with the undue burden standard;[13] any speech regulation that did not unduly burden abortion could stand. Even though "compelling someone to articulate the government's ideology is anathema in free speech jurisprudence,"[14] courts upheld material stating, for example, that the "life of each human being begins at conception" and an "[a]bortion will terminate the life of a separate, unique, living human being."[15]

Yet, it is near impossible to imagine courts upholding a mandate to speak a different view of personhood, for example that the "life of each human being begins at birth" and "abortion will merely end a pregnancy." Nor does it seem likely that federal courts would allow states to mandate that ob-gyns display and describe photos of pregnancy tissue (distinctly un-babylike at the stage most abortions occur).[16]

This essay argues that the end of the abortion right will not solve the problem of abortion exceptionalism in First Amendment jurisprudence. The double divergence — between abortion and other areas, and between pro-choice and anti-abortion speakers — is deeply entrenched in the doctrine. The post-*Dobbs* era moreover will see the passage of many abortion-related laws that tread on the First Amendment. Courts will be squarely confronted with a choice: do they undo the distortions of speech and religious liberty doctrines or do they further aggravate them?

The unique and lopsided treatment of abortion-related speech has only become more apparent as free speech doctrine otherwise has grown more absolutist. Courts have transformed laws once understood to regulate conduct into compelled speech—holding, for example, that laws requiring nondiscriminatory service to customers compel speech from businesses.[17] Once considered eligible for broad regulation, commercial speech now often receives heightened scrutiny.[18] And the Supreme Court has gone so far as to intimate that compelling speech might constitute an even greater First Amendment harm than restricting speech.[19]

At one point, commentators might have pointed to caselaw related to clinic protestors as showing that abortion-related speech generally receives less-favorable treatment. Indeed, as its only example, the *Dobbs* Court identified *Hill v. Colorado*, a case upholding a time-place-manner restriction that prohibited coming near a person within 100 feet of a healthcare facility to protest or pass leaflets.[20] Whether or not *Hill* was a distortion, the Court dramatically culled it back nearly

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a decade ago and now disfavors restrictions on health clinic protests.[21]

Today, the Supreme Court shows unusual deference to speech claims from anti-abortion actors, even as it refuses to apply standard doctrine to abortion providers. *National Institute of Family & Life Advocates ("NIFLA") v. Becerra* epitomizes this approach. The Court struck down a California law requiring licensed crisis pregnancy centers to post notice that the state offers abortion services and unlicensed centers to disclose that they are not licensed.[22] The law seemed to merit a low level of scrutiny under *Casey* or doctrine governing factual disclosures by professionals.[23] Instead, the Court determined that the regulation of professional speech was content-based and due heightened scrutiny.[24] But it insisted that laws that "facilitate informed consent" were distinct.[25] As the dissent noted, "a Constitution that allows States to insist that medical providers tell women about the possibility of adoption should also allow States similarly to insist that medical providers tell women about the possibility of abortion."[26] Yet, *NIFLA*'s reasoning seemed abortion-specific, because if applied generally, it would mean virtually all disclosure laws could be subject to heightened scrutiny.[27]

In recent years, religious liberty doctrine has begun a similar trajectory. As Caroline Corbin argues, the contraceptive mandate litigation demonstrated courts' willingness to radically alter religious liberty doctrine where claims were linked to abortion.[28] Contending that requiring their insurance plans to cover contraceptives violated the Religious Freedom Restoration Act (RFRA), employers portrayed emergency contraception and IUDs as "abortifacients" — a framing the Supreme Court adopted.[29] The Court then stretched the doctrine, changing each step in the analysis of RFRA in order to side with plaintiffs. It emphasized that its reasoning might not apply to vaccine mandates or blood transfusions; purported "abortifacients" were different.[30]

In sum, where abortion is involved, courts have contorted First Amendment doctrine in opposite directions, stripping abortion providers of the usual protections and safeguarding anti-abortion activists in unusual ways.

First Amendment Controversies After *Dobbs*

In short order, courts will have to confront a wave of First Amendment lawsuits related to abortion. New bills are poised to compel and prohibit abortion-related speech directly. Free exercise claims from pro- and anti-abortion faiths multiply. This part sketches a few emerging areas of controversy.

A. Free Speech

Efforts of abortion-friendly states may touch on speech. For example, some have legislated that hospitals reveal the reproductive services they offer (and do not).[31] States might take up *NIFLA*'s suggestion that they may mandate materials about abortion services be delivered to pregnant patients through the informed consent process. But courts would need to apply doctrine evenhandedly for this reading to hold.

The bulk of speech regulation, however, will come from anti-abortion states. The proliferation of medication abortion and the possibility of self-managed abortion present serious obstacles to the anti-abortion project. And information fuels access. Already, the Mississippi attorney general has subpoenaed a group that put up billboards with information about ordering abortion pills online.[32] Texas abortion funds have faced demands to produce lists of donors. In Idaho, public institutions have warned employees not to speak or teach about abortion and removed student artwork favoring abortion rights from display.[33]

Draconian criminal bans on the performance of abortion have also chilled speech to the point of freezing. Many physicians hesitate to inform patients about the possibility of abortion and its availability out-of-state. Genetic counselors engage in self-censorship and find that their patients do too, refraining from disclosing previous abortions or miscarriages.[34]

Express bans on speech are likely. It is entirely imaginable, for example, that a state might restrict doctor-patient conversations about abortion. Dissemination of information to the general public also is under threat. Take the National Right to Life Committee's "Post-*Roe* Model Abortion Law," which would criminalize giving information about self-administered abortions to a pregnant person or hosting abortion-related information on a website.[35] Its language seems to reach speech about legal out-of-state abortions and even media coverage of abortion. Texas has proposed a bill that would require internet service providers to block any website with information about abortion medication, listing by name Aid Access, Plan C Pills, and others.[36] It would also permit prosecution of abortion funds or anyone who raises money for abortion.

Activists also hope to deploy the nineteenth-century Comstock Act to ban information about abortion (legal or not). Comstock once prohibited a range of writings about contraception and abortion. But in modern times, all three branches of federal government have understood the Free Speech Clause to significantly limit Comstock's reach.[37]

Speech of course can form the basis for criminal charges (think, for example, of conspiracy), but the

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First Amendment normally protects speech abstractly advocating criminal activity.[38] As the Court wrote in *Brandenburg*, states cannot "proscribe advocacy of … law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[39] The First Amendment thus has shielded physicians' liberty to discuss and advise their patients about illegal treatments (like marijuana).[40]

Some abortion-related restrictions seem to strike at the core of political speech and association. State pursuit of the donor lists of abortion funds hews closely to the landmark 1958 case *NAACP v. Alabama*.[41] In a climate of public hostility to Black civil rights, the Supreme Court held that a state could not compel the NAACP to disclose its members. More recently, the Court extended the right of anonymous association to situations devoid of such hostility[42] — giving further indication that abortion funds operating in antagonistic states should be shielded. Likewise, criminalizing abortion funding would seem to fly in the face of the Supreme Court's campaign finance cases that treat restrictions on expenditures as violative of speech.[43]

As these bills become law and threats become prosecutions, courts will face a choice whether to categorize abortion-related speech as political, professional, commercial, or criminal. To the extent courts perceive new regulation as targeting speech in the public interest, history indicates the speech claims should succeed. Pre-*Roe*, some states prohibited information that encouraged or prompted procurement of abortion, but in an early commercial speech case, the Supreme Court struck down one such law. An advertisement for legal out-of-state abortions, it said, addressed topics of "clear 'public interest,'" not only commercial gain.[44] Placing abortion in a broader political context allowed the Court to afford more expansive protection than the commercial speech doctrine of the day would have required.[45] *NIFLA* similarly can be seen as characterizing abortion as primarily political rather than medical. Abortion-related speech and its regulation, however, often cross boundaries of professional and ideological, physician and patient, public and private in ways that are likely to become messier now that constitutional protection for abortion is gone.

B. Free Exercise

Religion will soon present questions of distortion as well. It is no secret that the Supreme Court has turbocharged religious liberty rights in recent years. Beginning with *Burwell v. Hobby Lobby*, the Court introduced a new category of litigants, became deferential to claims of substantial burden, and heightened scrutiny of regulation.[46] Objectors now bear a much lighter burden to win exemption under RFRA.

More recently, the Court has begun to shift the constitutional standard. A majority of the justices have expressed dissatisfaction with *Employment Division v. Smith*, which largely did away with heightened scrutiny under the Free Exercise Clause.[47] A series of decisions has widened exceptions to this rule.[48] Most notably, presented with churches resisting public health precautions against Covid-19, *Tandon v. Newsom* endorsed a different approach. Laws now "trigger strict scrutiny, whenever they treat any comparable secular activity more favorably than religious exercise."[49] A single exception may require religious exemption.

The million-dollar question is: will courts apply these precedents evenhandedly when people of faith resist abortion bans? Religious liberty challenges related to abortion already have been filed. Under state laws, women facing risky pregnancies and religious leaders seeking to counsel them argue that their ability to exercise religion is substantially burdened by laws banning abortions in situations where their religions require or permit it.[50] For example, plaintiffs from a variety of Jewish denominations explain that Jewish law does not treat the fetus as a person, permits abortion in a variety of circumstances, and sometimes requires it to save the life and health of the pregnant person. Already in the summer of 2022, a series of state courts expressed concerns about the impact of abortion bans on religious liberty.[51] An Indiana trial court subsequently ruled in favor of plaintiffs' RFRA claims.[52]

If criminally charged, physicians too may raise their religious convictions.[53] Simultaneously, hospital-based providers now are fighting longstanding duties to render emergency abortions for pregnancy complications.[54] Courts will not be able to duck the issue of (a)symmetrical application of religious liberty doctrine to abortion.

III. Options and Opportunities

Some abortion exceptionalism necessarily dies with *Roe* and *Casey*. No longer can courts subsume First Amendment issues within undue burden analysis. But courts will face temptation to maintain or deepen contortions of the First Amendment in an anti-abortion direction. This Part describes three possibilities.

First, exceptionalism may remain fixed. Abortion providers must speak ideological scripts and create imagery. Crisis pregnancy centers by contrast need not disclose information. *Dobbs* neither invited nor encouraged lower courts to undo this disparity.

So, courts may invoke the ghost of abortion's past. Indeed, in fall 2022, the Seventh Circuit cited *Casey*

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to uphold a requirement that physicians inform patients about statutory requirements to cremate or bury fetal remains.[55] It indicated that *Dobbs* had not overruled *Casey* as to "truthful notices," but for that proposition, it could only cite the portion of Casey that considered whether such requirements unduly burdened women's right to abortion — not its discussion of the speech of patients or providers. Other courts may instead cite *NIFLA* as approving *Casey*-style informed consent laws, essentially laundering citation to an overturned case.[56]

Second, courts may resist some distortions. The Fourth Circuit's approach to North Carolina's ultrasound display-and-describe law offers an example. That court found that the law unconstitutionally required "quintessential compelled speech" that is "ideological in intent and in kind."[57] Other circuits, it said, "read too much into *Casey*" whose single speech-related paragraph "does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions."[58] If courts engaged in this more-evenhanded application of First Amendment doctrine, some mandates would stand, others fall. Disclosure mandates could govern abortion clinics and anti-abortion institutions equally. Speech values could prevail over anti-abortion lawmaking.

In the near term, religious liberty doctrine seems fertile ground for this trend line. The Supreme Court's deferential approach should allow any sincere religious claimant to make out their initial showing for exemption under RFRA.[59] Bans prevent some believers from engaging in religiously motivated abortions, and any compelling interest is undermined by various exemptions. Lower courts may also conclude that federal or state constitutional provisions require exemption. Under the rule in *Smith v. Employment Division*, courts could conclude that requiring a woman to comply with abortion-related restrictions — forcing conduct her religion forbade — was "neutral and generally applicable" and justified by a legitimate purpose.[60] But the any-secular-exemption approach of *Tandon* instead leads rather straightforwardly to mandatory religious exemption under the Constitution, because bans permit abortions for secular reasons like rape, incest, or emergency but not religion.[61] Over time, equal treatment might lead not to exemptions across the board, but to a return to less rigorous free exercise doctrine — leveling down, rather than up.

Third and finally, courts may further contort free speech and religion doctrine to favor anti-abortion activists and disfavor pro-choice actors. In the medium to long term, such divergence seems likely in religious liberty cases. These distortions moreover may not remain exceptional to abortion. Rather, abortion may be the crucible for a First Amendment jurisprudence that systematically privileges conservative speech and religion — whether about reproductive healthcare or same-sex wedding services — over other viewpoints. The result would be the very insider-outsider dynamic that is the central concern of the First Amendment speech and religion clauses. Some perspectives and religions would find constitutional favor, while others receive none.

Conclusion

In overruling *Roe* and *Casey*, *Dobbs* fails to resolve the myriad First Amendment issues related to abortion. What is clear is that abortion regulations will push the constitutional envelope. They will require courts, litigants, and scholars to consider: what would it mean to develop First Amendment doctrine that didn't treat abortion as exceptional? The absence of the abortion right provides no answers to this question and it may ultimately make the Court's distortions of the First Amendment more severe, evident, and damaging to the Court and the country.

Note

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