



## A Supreme Court Driven by Doctrine

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William Taylor III, of Zuckerman Spaeder. (Photo: Diego M. Radzinski/ALM)

By William W. Taylor, III | October 10, 2022 at 10:00 AM

COMMENTARY

The Supreme Court has a majority of conservative Catholic justices selected by a man whose mission is to impose his version of Catholic doctrine on the American people. That may sound extreme, but it happens to be true—and it is undermining the credibility upon which the court's role in our democracy depends.

In *Dobbs v. Jackson Women's Health Organization*, the dissenting justices attacked not only the majority's reasoning but its motives, writing: "The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them." That is strong language, even for a dissent, but there are persuasive reasons to believe it is true.

The simple reality is that, years ago, The Federalist Society and its de facto leader, Leonard Leo, set out to create a court which would overrule *Roe*. And they succeeded.

In 1991, Leo helped his friend Clarence Thomas get nominated and he went on to assist with the nominations of John Roberts and Samuel Alito. By the time Trump was elected, Leo was effectively the gatekeeper for any Supreme Court hopeful and, while Trump took credit for *Dobbs*, it was really Leo who orchestrated it. He was lucky to have a president

willing to delegate court appointments to his White House Counsel and a White House Counsel, who was himself a member of the Federalist Society, willing to let Leo make the Supreme Court choices.

For Leo, overruling *Roe* was a personal mission, deeply embedded in his Catholic faith. It has been widely reported that he belongs to the most radical wing of the church: the Knights of Malta and Opus Dei, secret lay groups whose members take an oath to follow and enforce church doctrine. He made the court's current Catholic majority—a group that indeed despised *Roe*—and, in the process, guaranteed that the court would act as it did.

Original intent and textual fidelity are the majority's explanation for overruling *Roe*, which they say was "egregiously wrong." But its explanation is contrived—an analytical fig leaf that is little more than a pretext for the result—and it gives force to the dissent's assertion that the majority just wanted to do away with *Roe*.

The majority framed the question as whether the right to abortion was found in the Constitution's text and whether the reproductive right recognized in *Roe* and *Casey* was recognized in 1868, the year the Fourteenth Amendment was ratified. But the justices ignored entirely that women had no rights at all in 1868 and for long after. The framers in the eighteenth century and the authors of the Fourteenth Amendment in the nineteenth would have scoffed at the notion of equality for women. Women could not assert a right to abortion. They could not even vote. To claim that these texts' silence on abortion is proof that no such right is protected today is ludicrous.

The majority posed an easy question—put up to be taken down. But it forces the next obvious question. What about contraception, privacy of sexual practices, same sex unions, or marriage to a member of a different race? None of these were recognized at the times the *Dobbs* majority considered historically critical and some were flatly prohibited. Yet the Court has found that all of them enjoy constitutional protection.

The *Dobbs* majority says these rights are not affected because they are distinguishable. *Roe* may be distinguishable theologically, since the Catholic church and Leonard Leo consider abortion to be an abomination. Constitutionally, however, it is

impossible to meaningfully distinguish abortion from the other personal decisions now long recognized as entitled to constitutional protection. If the majority is not prepared to overrule those decisions, it can only be because it knows they are important to the American people, and the dissent was right: the justices in the majority overruled *Roe* and *Casey* solely because they despised them.

This is the result of a court packed with justices chosen because they will vote to overrule a precedent. Presidents have historically picked justices not only because of their qualifications but also because of their views. What is different here is that presidential candidate Trump put a “slate” of prospective justices before the voters with a promise that they would overrule *Roe*. When he took office, he made good on his pledge and the justices he picked, endorsed by Leo, did what he said they would.

Members of the court repeatedly claim that decisions about which cases to decide and how to decide them are unaffected by politics. Justice Roberts said in his confirmation hearing that he is like an umpire, not a batter, while Justice Barrett assured us that justices are not “partisan hacks.” But the frightening truth is that the majority opinion overruling *Roe* is the result of candidate Trump’s promise to nominate justices to overrule *Roe* (alongside Leonard Leo’s radical brand of Catholicism).

Because of this, the court has lost credibility and the public acceptance of its work is threatened. To quote the court’s distinguished observer, Professor Laurence Tribe, “(T)he dangers, when the court becomes so headstrong and so out of touch with modern reality and so unwilling to listen effectively to counterargument and so agenda-driven...is that at some point people will start defying what it says.”

Making this problem even more troubling the fact that Justices seem to believe there is no problem. A few weeks back, Chief Justice Roberts said, “simply because people disagree with an opinion is not a basis for criticizing the legitimacy of the court.” Roberts was speaking out in defense of the court, but his unwillingness to address the true reasons why the court is facing such criticism only serves to further undermine its credibility.

Fixing this begins with not returning to power those leaders who enabled the demeaning of the court. But progress won't come easy: in August, it was reported that Leo received \$1.6 billion in tax-free dollars from a sympathetic contributor, giving him almost unlimited wealth to advance his political and legal causes. Not only does Leo have the ear of Republican leaders, he now has the money to elect conservatives and further shape the judiciary according to his religious beliefs. That is truly bad for justice.

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