

MODERATOR: Please join me in welcoming Professor Murray back to UVA for this evening lecture.

[APPLAUSE]

Thank you.

BERTRALL ROSS: So Professor Murray, it's so wonderful to have you here joining us for this important symposium. I had the privilege of reading an article on *Dobbs* and Democracy that is under submission for you law review editors out there. An extremely incisive, important piece about the opinion and its relationship with democracy, which is perfect in thinking about this particular symposium.

But it's not the first time you've written about reproductive autonomy or abortion rights. You have an extensive line of scholarship. And some of the scholarship in the past, in a sense, predicted the outcome in *Dobbs*. Was there anything particularly surprising about the opinion in light of your thoughts about it in the past?

MELISSA MURRAY: So just for reference, I think I said as early as 2018 that the Supreme Court's composition would change, and with its change in personnel, there would be a majority-- a decisive majority to overrule *Roe versus Wade* and *Planned Parenthood versus Casey*. And at the time, I think a lot of people said I was being hyperbolic and overwrought, hysterical woman. And it turns out I'm right.

And this is not like a fight with my husband. I take no pleasure in being right here.

[LAUGHTER]

So was I surprised by the decision? I wasn't surprised by the outcome. I was surprised by the fact of the leak. And when the formal opinion came out, I was surprised that there wasn't a lot of substantive changes, which, I think, is quite interesting. One of the things the Supreme Court likes to tell us is that they exchange drafts and the exchange of drafts forces them to refine their arguments, maybe change their positions, make things better.

But this draft opinion was substantively the same as what actually was announced. It was almost as though Justice Alito was like, you're perfect. No notes. You're done. So that was a surprising. Also surprising, especially, in light of the leak, with the leak, we only got the draft majority opinion. We didn't get any of the other opinions.

And I thought Justice Kavanaugh's concurring opinion was actually very interesting in terms of its effort to really cleave to a sense of moderation. This is only a state by state settlement, it does not impair other rights, it does not affect interstate travel for reproductive rights. I'm not sure he can necessarily make that claim given that the right to travel, like the right to an abortion is also unenumerated.

But I think he was very much trying to stake out a moderate position for this opinion. To trim back, I think, some of the extremities of the majority opinion. I think Justice Thomas came in as a response, perhaps, to the moderation that Justice Kavanaugh was seeking. Was like, hold my beer. Let's go a little further.

And actually, was not even just surprised by that opinion. I welcomed that concurring opinion, because again, in addition to saying that the court would likely overrule *Roe* and *Casey*, I'd also predicted that any line of reasoning that would topple *Roe* and *Casey* would also imperil other substantive rights in that line of cases.

And again, hysterical women, again, talking. Talking and driving while being hysterical. And I was really glad for that opinion, because he very explicitly invites further consideration of an entire line of substantive due process decisions. And so I was glad to have that on the table. But beyond that, I wasn't, particularly, surprised.

I mean, the tone of the opinion was what I expected. The logic of it, I think, was very much in keeping. I mean, one thing I did predict was, perhaps, they might take a line that overruling *Roe* and *Casey* was necessary to pursue racial justice. This was a line of argument that I pursued in the article that was mentioned in Harvard.

That wasn't necessary. They didn't do that. Although there is a very interesting footnote in the opinion footnote 41 that speaks about this association of abortion with eugenics. And I think that could be laying a foundation for something else, possibly contraception, possibly fetal personhood going forward.

BERTRALL

Well, let's continue with the topic of the symposium. And the topic of symposium is *Dobbs* and democracy. And Justice Samuel Alito made what many found to be a persuasive case about abortion and democracy. Quoting the Justice, he argued, it was time to heed the Constitution and return the issue of abortion to the people's elected representatives.

He notes that women now make up a majority of the voters in the United States, which presumably leaves them well positioned to defend their interest in democratic politics. And like every other shoe in democratic politics, those who support and oppose abortion should have the burden of persuading others to support their views instead of asking courts to intervene and stop the operation of democratic politics. So does Justice Alito have it right? And if not, why not?

And ultimately, what do you think about Justice Alito's vision of democratic deliberation as a better alternative to judicial rights to protection?

MELISSA

So actually, I think it's a really interesting argument, Adam. And the degree to which it relies on this idea of Democratic deliberation is also really profound. It's almost-- I mean, if you read John Hart Ely, it is an Elyan kind of view. This idea that judicial review is only legitimate if it is democracy-enhancing.

MURRAY:

And so on this account, overruling *Roe* and *Casey*, acts that might be viewed as acts of judicial overreach and activism, are suddenly now recast as democracy-enhancing. Because it's restoring democratic deliberation that was, otherwise, disrupted when the court decided *Roe* in 1973 and affirmed it in *Casey* in 1992.

In the paper that we submitted, Kate Shaw and I trace the origins of that democratic deliberation argument. And Justice Alito presents it as always attending *Roe*. This idea that *Roe* always was understood to disrupt democratic deliberation. That's not true. Justice Byron White mentions it in the dissent to *Doe versus Bolton*, which is one of the companion cases to *Roe*.

And then he backs away from it. No one else is talking about this idea of disrupted deliberation. Everyone is talking about the idea that *Roe* has, perhaps, created a fundamental right out of whole cloth. And that's really the critique of *Roe* that takes root in 1973. The court has gotten fundamental rights incorrect. It takes another 10 years for this democratic deliberation argument to really coalesce. And it does so around a lot of different developments in society.

Changes on the court and in the court's personnel, but also changes in movement politics. So one of the things that happens in the intervening period between 1973 and 1981, when it begins to emerge again, is that the pro-life movement has been thwarted in its efforts to have a constitutional amendment that would, basically, abolish abortion.

And so they change tactics and begin a different set of strategies. And the incremental, chipping away at reproductive rights and the abortion rights specifically and a broader movement to dismantle *Roe*. To call into question *Roe*. And part of that movement really depends on blunting the stare decisis effect of *Roe*, the deference that a precedent would be owed. And that's when this democratic deliberation argument really comes to the fore again. It gets resurrected.

And it becomes a really potent way to discuss whether or not this embattled decision is owed deference. And they talk about it as thwarting the will of the people. Like the court imposing its will on the people, but that argument had not been made as forcefully in 1973. One person is talking about it, and he backs away from it very quickly.

So that, by itself, is interesting. Is Justice Alito as he relies on it to frame the court as vindicating the people? Is his vision of democracy one that's sound? I think it depends on what you imagine democracy doing. I think it's a very myopic vision of democracy. It's one that understands democratic deliberation to occur principally in state legislatures.

That might not be surprising. I think it is worthwhile noting that state legislatures right now, due to gerrymandering and a host of other concerns are probably the least representative of our institutions. The opinion also doesn't take account of other constitutional actors that might be involved in the process of democratic deliberation. So there's no discussion of state-level executive officers like attorneys generals or governors.

There's no discussion of state court judges who might also weigh in on the question of reproductive rights. There's no discussion of direct democracy, which we've also seen play a really important role in the post *Dobbs* landscape. It also understands the process of democratic deliberation to work only in one direction.

The further restriction of abortion rights as opposed to the prospect of liberalizing abortion rights, which also is surprising when you take account of the fact that one of the arguments that has been made is that there was this democratic deliberation going on and people were persuading people. And sometimes they were right, and sometimes they were wrong.

This only understands it leading to less as opposed to more and very different from Justice Kavanaugh's concurrence, which explicitly understands that it could move in either direction. Its understanding of political power, I think, is also quite myopic. Political power is reducible in Justice Alito's telling to either voting or possibly holding office without really taking into account the kinds of impediments that might present to those seeking to vote. Like for women who are the principal caregivers in most families.

Going to vote can be an ordeal if you have young children. If you work odd hours, we've seen all of this. Holding office might also be difficult if you are the principal caregiver for young children. And so if that is what political power looks like, I'm not sure that women exercise it in quite the same way as others.

And if we think about other forms of political power, other metrics like campaign contributions or presence in Congress or state legislatures or statehouses, I think the picture of women's political power looks flatter than, perhaps, the opinion gives credit for so. That's on its face, I think. It is a rosy picture of democracy he paints. I don't if it aligns exactly with what it looks like on the ground.

And I also don't that the methodology that undergirds this interest in democracy, this history and tradition, interpretive method is itself democratic. In that it binds our understanding of the Constitution and constitutional rights to an understanding of the Constitution that was in place when many people could not deliberate about the Constitution and could not deliberate about laws passed in furtherance of constitutional guarantees.

And so to the extent, the whole opinion depends on that. I'm not sure it is pro-democratic.

BERTRALL ROSS: Yeah. And just to follow up on that point, Justice Alito made the point that over 50% of the voters are women. But if you look at who comprises state legislatures--

MELISSA MURRAY: In Mississippi, particularly.

BERTRALL ROSS: Yeah. Mississippi in particular. State legislatures, you're looking at numbers around 30%. And the reason is because of the barriers to office holding that exist and also if you look to who are the contributors and donors to campaigns, there's also disproportionality with respect to who's represented there. But let me just turn to a question about judicial role.

A point that Justice Alito made in Davos was that the right to abortion is nowhere contained in the Constitution. The same could be said about the right to reproductive autonomy, if you wanted to generalize [INAUDIBLE].

MELISSA MURRAY: Executive privilege.

BERTRALL ROSS: Yeah. Or the right to privacy, right?

MELISSA MURRAY: I'm just saying, you heard a lot about executive privilege for a long time.

BERTRALL ROSS: So if a right is not enumerated in the Constitution, where is the case that it should be considered a right in Title II judicial protection under the Constitution?

MELISSA MURRAY: So again, this is-- when I talk with folks about-- who disagree with me about this question, that is usually what they say. This is not an enumerated right, it's not the Bill of Rights guarantees. This is the court making up rights. And I think a lot of progressives actually do concede this. Like, yes. It's an unenumerated right. I don't that I'm ready to concede that.

The 14th Amendment speaks of liberty. It was drafted in the wake of the American Civil War where the principle question was, how are we going to move to a post enslavement society? And so when the drafters of the 14th Amendment were constructing this article, they were thinking explicitly about what separated freedom from enslavement. What is liberty versus what is enslavement?

And when they thought about liberty, it was in juxtaposition to slavery. So what is slavery? Well, it is not only the lack of control of your labor, it's also the lack of control over your reproductive labor. And to be very clear, the sexual exploitation of enslaved women was endemic. And everyone knew about it. *Uncle Tom's Cabin* is the most popular book of the age, and it discusses, in explicit terms, the kind of sexual predation to which enslaved women were subject. Everyone knew this.

What else doesn't happen in slavery? You don't have control over your family. Your children can be sold away from you. You can't get into recognized civil marriages. That's why the understanding of liberty responds to this idea of a right to marriage. A right of parents to control the upbringing of their children. And perhaps, even a right to reproductive autonomy.

So to start from the premise that because this isn't enumerated, I don't think that's true. I think it is enumerated. I think it's right there in liberty, and the understanding of liberty was capacious enough, and indeed, was explicitly contemplating these sorts of things. Now, if you disagree with that, I don't why you would. But if you do, and then the question is, just unenumerated versus enumerated.

Well, again, that comes back to this question, like, OK, who enumerates, and who gets to participate in the project of identifying and enumerating rights? The Constitution, as originally drafted, says precious little about individual rights. There's only the ex post facto clause and the clause preventing bills of attainder.

And then there's the Bill of Rights Amendment that are passed as a condition of ratifying the Constitution itself. Not everyone is involved in that project of drafting the Bill of Rights. And not everyone is involved in the project of drafting the reconstruction amendments. The 19th Amendment is hard fought and hard won, and it only speaks to voting. But people argue that it's actually meant to encompass more.

The point is though, not everyone is involved in those moments of democratic deliberation. And the judicial role that *Dobbs* contemplates for the court is only in vindicating those rights that they can see. That they can see with this textual commitment, with this history and tradition. A history and tradition that is necessarily bound to moments of profound democratic deficit.

So if that's the judicial role, what does it mean for other aspects of the judicial role? I mean, if you take *Ely* seriously, *Ely* says that judicial review is legitimate when it is democracy-enhancing, when it's enhancing the prospect of political participation. What it's leaving open the avenues of political participation and when it is vindicating the rights of discrete and insular minorities who, otherwise, could not press their interests in majoritarian politics.

That part of it is entirely absent if you're wedded to this idea of enumeration and history and tradition as your understanding of what the Constitution protects.

**BERTRALL
ROSS:**

Well, I'm going to work start from the premise that the court-- where the court is. Let's start where the court is in terms of not recognizing the right to abortion as an enumerated right contained within liberty and accounting for the persuasive case that you've made. And I'm trying to think about the court's methodology.

You've spoken about the history and tradition methodology a couple of times in your comments. And it's a question of, well, if there are unenumerated rights, how should they be derived? And I think that the court is willing to acknowledge that there are unenumerated rights in certain respects. I think that they're willing to acknowledge, perhaps, parental rights that are set forth in early opinions.

Maybe they're willing to acknowledge the right to opposite sex marriage. Whether that extends to same sex marriage maybe is a different story. Now, what the court seems to rely on is this history of tradition. And maybe one theory of the history and tradition methodology that supports it is that this history and tradition represents the accumulated democratic judgments of the people.

Now, you acknowledge and recognize this democratic deficit that exists with respect to this history and tradition of past judgments. Now, if that is the case and the methodology is problematic from that perspective, what might be the alternative way to derive these unenumerated rights? That might be consistent with the court's notion of objective determinations versus subjective value judgments.

**MELISSA
MURRAY:**

So I think that's the question. What rights should we acknowledge when they aren't specifically enumerated in the text? Again, I will hold to my position that I think the liberty clause in the 14th Amendment is capacious enough to include a wide range of things. And I think some would argue like that's very Lochnerian of you. Would freedom of contract be in there?

And I admit, like that is-- that's where you could go with that. But I do think it is quite capacious. And I think if you're really formally thinking about this idea of enslavement versus liberty, that may sharpen it a bit. But again, it does admit the possibility one of the things that separates the enslaved from those who are free, it is the capacity to control your own labor. What does that mean?

Does that mean can't have maximum hours laws or minimum wage laws? I don't know. That's a different question entirely that may be too broadly drawn. But I want to first-- my position is, I think, the liberty clause could cover a lot of this. Outside of the liberty clause, what non-enumerated principles might undergird rights that are not explicit in the text of the Constitution?

I think Robert Post and Reva Siegel talk a lot about a set of common American values, and that might guide us. I think that's harder to come by at a time of such intense division and polarization. Trying to identify a set of principles that we all agree on, I think, may be more elusive. I think one thing, though, that we do agree on is this idea of a democracy that is fully participatory.

I mean, maybe not everyone agrees that it should be a pluralistic democracy or a multi-faith or a multi-ethnic democracy. Many people have different views of that. But that it should be one in which everyone has an opportunity to participate. And with that in mind, I mean, I think I am of the view that the court's role should be to enhance that. To facilitate that as opposed to impeding it.

And I think right now what concerns me is the court understanding itself to work in favor of democracy is a very limited vision and a selective and itinerant vision. So the court understands itself to be facilitating democracy by withdrawing reproductive rights or by allowing voter referenda that make it harder for minorities to press for race conscious admissions, for example.

This is the [INAUDIBLE] decision. I mean, there are all of these ways in which democracy is what we want but it's usually in a way that allows the majority to override the minority. And really like profound ways. And so I think I'm not opposed to the idea of the court facilitating democracy. I just wish it weren't so selective.

BERTRALL ROSS: Let's think about it from the perspective of the fetus and the Right to Life movement has been focused on protecting the fetus. And what about potential life? Shouldn't there be space and opportunity to protect the fetus or potential life?

MELISSA MURRAY: I think this is, again, I will just start like I was raised in a faith tradition. I continue to be in a faith tradition. I understand that this is a really complicated question. I also think it's why-- it's a complicated question because of the nature of fetal personhood or the potentiality of life. It cannot be the case that *Dobbs* is the end of this. If you believe in the potentiality of life, you can't be OK with California allowing abortion and some other state not. There's a moral absolutism to that. And so this isn't the end.

So I'll just say that about where we're going after *Dobbs*. But I do believe that it is an absolutely acceptable position to have. And I think one of the things that concerns me is that in this country, at least, the interest in a pro-life sensibility is nested within a neoliberal ethic that does not necessarily admit the other ways in which we might be pro-life.

So it seems-- and again, I'm happy to be corrected if I'm misunderstanding this. But the interest in potential life begins and ends with the fetus. I hope that, perhaps, this moment after *Dobbs* will lead to greater protections for family leave, for paid family leave, for pregnant worker protections that respect family choices for the expansion of health care coverage for families-- all families, even those who cannot afford it.

I hope it will lead to greater protections for Black and Brown bodies. I think if you are pro-life, you must ask yourself whether the current state of state violence against certain individuals is acceptable. I haven't seen that thus far. I would like to see it. And so I am, especially, open to the possibilities that this moment might yield.

Recognizing what has been lost. I hope that there are benefits and possibilities for coalition that can come in the future. And I hope we see that. I genuinely hope that we see that. But I haven't seen it thus far. Instead, we have this concern for potential life that is wedded to this understanding of the family as an independent unit that doesn't receive and should not receive any kind of subsidy from the state.

BERTRALL ROSS: Is there anything you find redeeming about the *Dobbs* opinion? So you've had critique of Justice Alito, you've had some positive things to say about Justice Kavanaugh, even Justice Thomas's opinion. But just looking at it as a whole, what might be, if any, some redeeming features from the *Dobbs* majority of concurring opinions in addition to what you might have already said?

MELISSA MURRAY: Well, it certainly fueled my research agenda.

[LAUGHTER]

So it's been a very productive period for me. So thank you, Justice Alito. I appreciate it. Again, I do-- if you take this interest in potential life, and I want to be really clear here. One of the things the opinion is at great pains to make clear is that it is focused solely on abortion. It tries to distinguish abortion from other potential substantive rights on the ground that they do not destroy a potential life. They're different.

Justice Thomas disagree. Well, doesn't disagree, but he was like, we can still talk about those two. But the opinion is very clear. This is just about abortion. I hope that dividing line remains intact. I don't that it will remain intact. I think we're likely to see other developments, but if that is the case, I would welcome that without allowing this to go further.

I don't think that the logic of it necessarily has a limiting principle. I mean, if *Roe* and *Casey* are wrong because they disrupted ongoing democratic deliberation of a sensitive and divisive issue, then that would also implicate *Obergefell*. It would implicate *Griswold*. There are lots of things that would be implicated. So I'm not sure that the majority's line drawing is necessarily as principled as they would have it.

I think we're having a conversation right now about what it means to return things to the state. I think one of the redeeming things that *Dobbs* has done is that there actually has been a fair amount of democratic deliberation and people sort of saying like, this isn't what this majority wants. And where it's more attention to actual majority preferences across the United States.

There's new polling that was out just this week that shows that in every state in the union, there is a majority that believes that there should be a right to abortion. They may disagree about the substance and scope of that right, but they agree that it should be recognized. And that, perhaps, is a redeeming feature or something that we should be interested in. The idea that we're actually focused on what majorities are thinking about and what they want.

But I think there's a lot here that is not redeeming. I mean, this court has consigned this profound question that affects so many people to the democratic process at a time when its own decisions have actively made the electoral landscape less democratic and less likely to yield true majoritarian outcomes. And so in that sense, it's great that you're interested in majoritarianism now that you've made it harder to have majoritarianism.

BERTRALL

I guess the last question before we turn it over to you to ask questions is thinking about-- picks up from what you were just saying, what's the end game? In the sense that in this draft article that's under submission focus on how *Roe* was or how *Dobbs* was justified because *Roe*, in a sense, disrupted the democratic process that was intended to--

ROSS:

That would have-- things would have been hashed out through democracy if *Roe* didn't disrupt it. How does that argument carry forward? What might be the endgame? It relates to the question of, what other rights might be at risk in light of the *Dobbs* opinion and the logic that's underlying the *Dobbs* opinion?

MELISSA

So I think Justice Scalia is the founder of this journal. I think one of my favorite lines of his from an opinion is his dissent in *Lawrence* where he says that when the court takes sides in the culture wars, they tend to place themselves on the side of the Knights Templar as opposed to the losers.

MURRAY:

I think that's probably right, this idea of the court as hero. So one of the things, I think, see very profoundly in the *Dobbs* opinion is this idea of the court as hero vindicating these principles of democratic deliberation. Again, I think if you take the role that democratic deliberation plays in undermining the stare decisis effect that *Roe* and *Casey* are owed, you will have big questions about what other decisions will similarly be subject to reconsideration.

I think *Obergefell* is surely one of them. *Griswold* is likely the other. So I think there's a very real possibility that jurisprudentially, stare decisis analysis might be different going forward. And will now, perhaps, take into account prospects of disrupted democratic deliberation as part of the calculus. The court is also, I think, positioning itself to vindicate another set of interests.

And again, this is, I think, interestingly about the connection between majoritarianism on the one hand and the court's role in protecting discrete insular minorities on the other hand. One of the texts that the *Dobbs* opinion cites repeatedly is John Hart Ely's, the *Wages of Crying Wolf*. Not John Hart Ely, democracy and distrust which talks extensively about the prospect of democratic deliberation and judicial review as democracy-enhancing.

It's surprising, in fact, that it doesn't talk as much about democracy and distrust. It spends a lot of time talking about the wages of crying wolf. Mentions that John Hart Ely understood the logic of *Roe* to be completely wrongheaded that this was a made up that made no pretense of being constitutional law at all.

But the other thing that Ely mentions in the *WAGES of Crying Wolf* is how the *Roe* court was wrong because it failed to properly weigh the competing interests of women on the one hand and fetuses on the other. And there's this very interesting passage in which Ely says, "I recognize that women are less well represented than men in state legislatures."

But you who's never been represented in a state legislature? The fetus. And so there is a rationale, I think-- and I think a lot of the opinions nods to fetal life and potential life and the inclusion of footnote 41 which talks about that abortion as eugenics argument that Justice Thomas's husband did, I think that is laying the foundation for another decision, perhaps, not too long in the future, in which this court may recognize the fetus as a discrete and insular minority whose rights must be recognized in order for democracy to be vindicated.

And so I think that is the endgame. And I said earlier, I don't think the state by state settlement can be the end, because if you take seriously that position, a state by state settlement cannot accommodate that. It has to be something else. And I think this decision brings us to this waystation and begins to husband the ground for going further.

BERTRALL
ROSS:

Well, thank you Melissa for this conversation. I wanted to open-- an uplifting message, I want to-- wait, wait.

[APPLAUSE]