



No Constitutional Authority for a National Abortion Law

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The Biden administration seems to have acknowledged that the executive branch cannot unilaterally subvert the Supreme Court's landmark decision in *Dobbs v. Jackson Women's Health Organization*. Accordingly, the president has passed the buck to Congress, which, so he claims, is empowered to codify a nationwide legal framework that would protect a woman's right to abortion. Of course, enactment of such a law would require 60 votes in the Senate. Undaunted, President Biden is now a born-again advocate for circumventing the filibuster rules.

To the president's dismay, Democratic Sens. Joe Manchin (W.Va.) and Kyrsten Sinema (Ariz.) are not inclined to cooperate. The obvious solution: an expanded congressional majority in 2023. Hence, unprecedented attacks by the political branches on the Supreme Court — an aggressive attempt by Democrats to use abortion as their *raison d'être* for congressional advances. Never mind that the latest eruptions questioning the legitimacy of the court are unseemly, unwarranted, and reckless; and never mind the cynicism in demanding a federal legislative solution when the court has already opted for a legislative solution in all 50 states.

Put bluntly, it won't work. Congress is not constitutionally authorized to prescribe a national abortion regimen. First, there is the Tenth Amendment, which mandates that all powers not enumerated and delegated to the federal government are reserved to the states. Yes, Congress has an expansive power to regulate interstate commerce. But the court has held that the Commerce Clause covers only those activities that are economic in nature and have a substantial effect on interstate markets. In United States v. Lopez, federal prohibition on possession of guns near schools was ruled unconstitutional because gun possession is not an economic activity. In United States v. Morrison, the court struck down parts of the Violence Against Women Act because "Gender-motivated crimes of violence are not, in any sense, economic activity." Ditto for abortion; it is *not* an economic act. Nor do *intrastate* abortions have significant *interstate* effects. At most, Congress could regulate abortions involving women or doctors traveling across state lines.

Then, there's the 14th Amendment, under which Congress can intervene to stop a state from violating constitutionally guaranteed rights. But the Dobbs decision declared unequivocally that there is no constitutional right to abortion. And Congress has no veto power over court decisions that apply the Constitution to the states. In *City of Boerne v. Flores*, the court held that Congress's authority under the 14th Amendment is "corrective or preventive, not definitional." In other words, if the court denies that there's a constitutional right to abortion, Congress can't create such a right and compel the states to enforce it. No 14th Amendment right means no state remedy for non-enforcement.

Moreover, the Democrats' abortion bill — the Women's Health Protection Act (WHPA) — goes much further than *Roe v. Wade*. The WHPA puts health care providers at risk, even if they reject abortions for religious reasons. It conflicts with Supreme Court decisions that have upheld state laws requiring informed consent, waiting periods, and parental notification, as well as laws barring gender-preference abortions and post-viability abortions. Essentially, the Act would legalize nearly all abortions, thus contradicting the rules established under *Roe* and its progeny. Even if the 14th Amendment authorized congressional action, the Supreme Court insisted in *City of Boerne* that federal remedies must be congruent and proportional to alleged state violations. Plainly, the WHPA goes far beyond "proportional."

So, does that mean the federal government is powerless? Not quite. Federal intervention might be constitutionally justified if, for example, a state's abortion-related regulations barred cross-border shipment of drugs; or punished victims of rape or incest; or discriminated against members of a protected class; or banned operations that might save a mother's life. Additionally, the federal government could protect the privacy of reproductive health data and pre-empt state laws that restrict use of the U.S. mails.

Some legal pundits have suggested other permissible federal actions — e.g., invalidate burdensome licensure rules directed at abortion providers; lease federal property to providers; and override the Hyde Amendment to permit funding for less affluent persons seeking interstate abortions. Those are much tougher cases.

In any event, targeted federal responses to Dobbs can be addressed ad hoc, if and when the underlying facts allow. To the contrary, Congress may not proceed, without constitutional authorization, to establish a generalized, national right to abortion.

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