What *Dobbs* Could Mean for the Right to Vote

By Holly Johnson

Since the right to vote is not an expressly enumerated right in the United States Constitution (although the Court has long held it is implied), it is even more at risk after the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*. *Dobbs* overturned *Roe v. Wade*, which previously recognized a woman's' right to an abortion. The Court's analysis (and especially Justice Clarence Thomas' concurrence) in *Dobbs* raise significant concerns for unenumerated rights, including the right to vote. The risk is that the Court will stop protecting the constitutional right to vote and instead leave the right to vote up to each individual state to regulate.

In *Dobbs*, the Supreme Court outlined a three-step analysis for determining the scope of individual rights under the constitution: Step 1 – determine whether the right is enumerated in the constitution; Step 2 – determine whether the right is deeply rooted in history and tradition; and Step 3 – determine whether the right is part of a broader entrenched right supported by case precedent. If a right fails all three steps, then it is left up to the states to regulate on a state-by-state basis.

Applying this three-step approach to the right to an abortion in *Dobbs*, the Court determined that 1) the right to an abortion is not expressly referenced in the Constitution; 2) abortions have been historically considered illegal, and as such, the right to an abortion is not deeply rooted in history and tradition; and 3) the right to an abortion cannot be supported under other broader entrenched rights (e.g., the rti

Rights that fail the *Dobbs*' three-step are only afforded rational basis review, the lowest and almost non-existent level of scrutiny employed by the courts. Under rational basis review, a law or regulation need only have a legitimate state interest and a rational connection between that interest and the law or regulation. Notably, one legitimate interest is enough to uphold the law or regulation even if the actual intent or end result of the law or regulation is discriminatory. As a result, rational basis review is a very low bar, and laws reviewed under rational basis review are almost always upheld as constitutional. For example, a Florida constitutional amendment conditioning the right to vote for ex-felons on completing their sentence and paying any outstanding fines and fees was upheld under rational basis review.

In contrast, strict scrutiny and intermediate scrutiny, the other two forms of review used by the courts when they are evaluating a particular law against an individual's rights under the Constitution, have much more bite. Strict scrutiny, typically applied to enumerated rights like freedom of speech, requires that the law be narrowly tailored to meet a compelling state interest, a high bar. Intermediate scrutiny, typically applied to laws that discriminate based on gender, is a slightly lower bar but still requires that the law further an important government interest and be sufficiently tailored to meet that interest.

So how does the right to vote hold up against *Dobbs'* three-step analysis? Unfortunately, not as well as one would hope.

The right to vote is not expressly enumerated in the Constitution, so it fails step one. The Constitution only references the right to vote in the negative, meaning it lists when the right to vote cannot be denied (e.g., based on race under the 15th Amendment, gender under the 19th Amendment, the failure to pay a poll tax under the 24th Amendment, or age over 18 years under the 26th Amendment).

Step two proves more complicated. It also raises several potential concerns about protecting the right to vote.

As a democracy, the right to vote dates back to the founding of the United States (and even further back to England). However, in the United States, the right to vote was not always open to all, or even most, citizens. Instead, there is a long history of discrimination over who is eligible to vote. At first, only a limited number of people—namely white, property-owning men—were eligible to vote. Some states also had religious restrictions

impose additional rights regarding the right to vote, and they all do so. In fact, 49 states include an explicit right to vote in their state constitutions by providing that each citizen "shall be qualified to vote," is "entitled to vote," or is a "qualified elector." Arizona is the only exception in that it refers to the right to vote in the negative, stating who is unable to vote. Additionally, 30 state constitutions require that elections be "free," "equal," and/or "open" or some combination of the three. Under *Dobbs*' step two, therefore, state constitutions indicate that the right to vote for all citizens is grounded in history and tradition (in *Dobbs*, the Supreme Court specifically noted that the right to an abortion did not appear in any state constitutions).

Although *Dobbs*' step three seems more promising at first glance, in reality, it also presents a risk to the constitutional right to vote. The Supreme Court has repeatedly stated that the right to vote is fundamental and an essential component of democracy. In 1886, in *Yick Wo v. Hopkins*, the Court stated "the political franchise of voting…is regarded as a fundamental political right, because [it is] preservative of all rights." In *Reynolds v. Sims* in 1964, the Court stated, "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." And yet again, in 1966, in *Harper v. Virginia Board of Elections*, they stated that "the right to vote is too precious, too fundamental."

So, it seems that the Court would support the right to vote under these previous case precedents and the broader idea of democracy, right? Maybe not. The Supreme Court has already begun watering down laws that protect the right to vote. And if *Dobbs* stands for anything, it shows that this Supreme Court has limited regard for upholding previous precedents, even those affecting established rights.

Fundamental rights typically receive strict scrutiny review. Yet the Supreme Court has confusingly varied the level of scrutiny applied to burdens on voting, creating more uncertainty

on just how fundamental the right to vote truly is. In general, the Supreme Court has only applied strict scrutiny to a small subset of voting rights cases, i.e., ones that primarily deal with restrictions on who is eligible to vote under the equal protection clause, which requires both state governments (under the 14th Amendment) and the federal government (under the 5th Amendment) to treat all individuals equally. For cases involving election administration, including voter ID requirements, the Court has declined to apply strict scrutiny and instead has used more of a sliding scale analysis, balancing the burden on the right to vote against the reasons for the regulation at issue. As a result, the Court has upheld strict voter ID requirements that in effect limit certain individuals' right to vote.

Additionally, in recent years, the Supreme Court has been shaving away the m,vini011 T.ref,vini011 T.re

harder for people to vote. In 2022, some states have also proposed election interference laws, which present risks to running fair and impartial elections. Challenges to the discriminatory impact of these laws would face a hard uphill battle under rational basis review given that most of them were presented or enacted as a mechanism to combat alleged voter fraud, an interest the Supreme Court has already stated is a "strong and entirely legitimate state interest."

The *Dobbs*' three-step test puts the constitutional right to vote in a precarious position. If the iT."