



Showdown on Abortion

The showdown on abortion is coming in the Supreme Court and is bound to spill into the political arena. What can we expect in the coming months?

On December 1 the U.S. Supreme Court heard oral arguments for *Dobbs v. Jackson Women's Health Organization*. This case involves a Mississippi law that outlaws abortions after 15 weeks—far earlier than allowed by the Supreme Court precedents of *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), which guarantee the right to abortion at least until the point of fetal viability. (The age of fetal viability—the ability of the fetus to survive outside the womb—is debated and has evolved over time, but many sources now place it at 24 weeks' gestation.) The spectacle of only three of the nine justices signaling their opposition to the Mississippi law alarmed the pro-abortion left, which wants everyone to know it will not abide any decision that overturns *Roe*.

The left's first countermove came on December 16, when the U.S. Food and Drug Administration (FDA) moved to make permanent a temporary pandemic rule allowing an abortion pill, mifepristone, to be ordered for delivery by mail. At the same time, the left is preparing to mobilize on the political front in the 2022 midterm and 2024 presidential elections. The pro-life movement is prepared for this battle.

The U.S. abortion rate has fallen approximately in half since its peak in 1980, according to data from the Guttmacher Institute. The absolute number of abortions has also fallen to about half of its 1990 peak. *These drops in abortion statistics, plus the likelihood that the Supreme Court will uphold the Mississippi law, are good news to the pro-life movement. The rising use of chemical abortions through pills, however, represents a concerning trend.*

Abortion pills now account for about 39 percent of all U.S. abortions, according to the Centers for Disease Control and Prevention. Available only in the first 10 weeks of pregnancy, abortion pills pose their own underreported

risks to women's health, described later in this essay. The Supreme Court's decision in *Dobbs* will have no direct effect on abortion pills, because the Mississippi law at issue in *Dobbs* involves a prohibition of abortion after 15 weeks' gestation, which is too late in pregnancy for abortion pills.

In deciding *Dobbs*, the Supreme Court could overrule *Roe* by returning abortion policy to the states. Most legal scholars, even those who are pro-abortion, believe that *Roe* was not a well-grounded decision. The late pro-abortion Justice Ruth Bader Ginsburg was highly critical of *Roe*,¹ saying that "My criticism of *Roe* is that it seemed to have stopped the momentum on the side of change." She criticized *Roe* as being not about a woman's choice, but about the doctor's freedom to practice medicine: "It wasn't woman-centered, it was physician-centered."²

Looking at *Roe*

The *Roe* decision relied heavily on a constitutional theory of privacy based very loosely on the 14th Amendment's due process clause. Privacy as a constitutional right had been used in the Court's decision in *Griswold v. Connecticut* (1965), which held unconstitutional a Connecticut statute criminalizing contraception. The Court stated, "The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights."³ This decision based on a "penumbra" of rights allegedly embodied in the Bill of Rights proved problematic from the outset.

The 14th Amendment was adopted in 1868 with the express intention of providing citizenship to recently freed black slaves. The first section of the amendment reads, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without*

due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” Needless to say, neither the 14th Amendment nor the Bill of Rights to the Constitution mentions sexual privacy or abortion.

In deciding *Roe* by a 7-2 vote, the Court sought to balance a woman’s constitutional right to abortion with the state’s interest in protecting life. The Court’s decision came after two hearings—unusual in itself—and a review of then-current medical technology. *Roe* set a trimester standard: In the first three months of pregnancy the woman’s right to abortion is nearly absolute; in the second trimester, the state could require reasonable health regulations of the attending physician; and in the last trimester, the state’s interest in prenatal life becomes paramount and the state may regulate or prohibit abortion subject to exceptions to protect the woman’s life or health.

Although the language of fetal viability was not used by the Court, it was understood by the justices that in the last trimester a fetus was viable outside the mother’s womb. The subsequent *Casey* decision abandoned the trimester standard, but adhered to a viability standard.

In the little-discussed companion case to *Roe*, *Doe v. Bolton* (1973), the Supreme Court also guaranteed the right to abortion even after viability if necessary to protect the woman’s “health,” including “emotional” and “psychological” health.

Will the Court Overturn *Roe*?

The *Dobbs v. Jackson Women’s Health Organization* case is about a 2018 Mississippi law, the Gestational Age Act, that prohibits abortions after 15 weeks’ gestation. Some 4 percent of U.S. abortions occur after 15 weeks.⁴ A suit against the law was filed by the Jackson Women’s Health Organization, the only licensed abortion facility in Mississippi. The district court granted the clinic’s motion for summary judgment and enjoined the state from enforcing the law. The district court ruled that the state had not provided evidence that a fetus would be viable at 15 weeks. This court decision was upheld by the Fifth Circuit of the U.S. Court of Appeals, and then the state of Mississippi appealed to the Supreme Court.

In oral arguments, the issue of viability was directly addressed. Mississippi Solicitor General Scott G. Stewart argued that medical science has greatly advanced in the last thirty years and has imparted new knowledge to Americans as to whether an unborn child is “fully human,” including medical science’s understanding of pain experienced by fetuses in the womb.

Justice Sonia Sotomayor’s response to Stewart showed an ignorance of medical advances. She asked Stewart, “What advances in medicine?” She went on to compare a fetus to a “brain-dead person whose foot jerks when tapped,” suggesting that a fetus’s response is only a reflex, not evidence of pain.⁵ A physician critic was quick to note that medical science has made “tremendous” strides in understanding fetal development including awareness of pain.⁶

What We Know of Fetal Stages

Progress in medical knowledge of fetal development since *Roe* is indeed tremendous. Ultrasound was in its infancy when *Roe* was decided. Today through ultrasound expectant parents see their babies moving, stretching, yawning and sucking their thumbs. Physicians undertake medical intervention for keeping babies healthy, including drug therapy and, when needed, complex fetal surgery performed in the second trimester. Fetal surgery may involve removing the fetus from the uterus. The baby is anesthetized before the operation because of fetal pain. There is evidence that a fetus can experience pain without a fully developed cortex. After surgery the baby is returned to the mother’s womb to finish growing.

Furthermore, DNA research has made huge advances since 1973. DNA research confirms that the embryo is alive from the moment of conception, and the DNA imparted at conception remains the child’s unique DNA through his or her life.

We know that at 15 weeks’ gestation a baby’s organs are fully formed, the baby’s heart pumps 26 quarts of blood a day and the lungs are practicing breathing. Based on medical research we can follow closely the development of a fetus from conception onward. Within the first week after conception the fertilized egg rapidly divides into many cells that move and implant themselves in the mother’s uterus. In the third week, the fertilized egg becomes an embryo, as arms, eyes and ears develop. By four weeks after conception the embryo’s cardiac pulse may be detected. By the fifth and sixth weeks, the baby’s brain, face and fingers are growing. In the ninth to twelfth weeks, red blood cells are formed in the liver, genitalia and intestines are developing, and arms, hands, fingers and toes are fully formed.

By the 23rd week a premature baby can survive outside the womb through intensive care. This baby might be only 12 inches long and weigh less than 2 pounds.⁷

This is the miracle of God’s gift of human life.

Also noteworthy in the *Dobbs* oral arguments was Chief Justice John Roberts's observation that "the vast majority of other countries" restrict abortions after 15 weeks, and the more permissive standard of fetal viability currently used in the U.S. is shared with "the People's Republic of China and North Korea"—hardly models of human rights.

Supreme Court justices are hesitant to overrule prior Court decisions. The legal principle for this is a Latin term, *stare decisis*, which means, in plain English, "to stand by things decided." Pro-abortion advocates are insisting that *Roe* not be overruled, based on *stare decisis*. These concerns about overturning a longstanding Court decision such as *Roe* were raised by Sotomayor at the *Dobbs* oral arguments.

In response, Justice Brett Kavanaugh cited many decisions in which the Court has overturned previous decisions, including *Brown v. Board of Education* (racial segregation in public schools); *Baker v. Carr* (redistricting); *West Coast Hotel v. Parrish* (state regulation of business); *Miranda v. Arizona* (rights of criminal suspects); *Mapp v. Ohio* (search warrants); *Lawrence v. Texas* (homosexual sodomy); *Gideon v. Wainwright* (criminal defendants' right to legal counsel); and *Obergefell v. Hodges* (same-sex marriage). Justice Kavanaugh urged the Court to think about the right answer to *Dobbs* and not about legal precedent.

Yes, *Roe* May Be Overruled

That progressives, who for decades have spoken of the Constitution as a "living" document and advocated judicial activism, should now insist on adhering to legal precedent, is rich indeed. Abortion advocates now declare themselves institutionalists wanting to preserve the integrity of the Court. They warn that if *Roe* is overturned it will ignite political war. They act as though *Roe* did not create political upheaval and somehow the Court in *Roe* settled the issue.⁸ Such an adverse decision, they warn, can only jeopardize the standing of the Court in the eyes of the public. It is an argument for institutional stability and an appeal specifically to Chief Justice John Roberts, an institutionalist at heart. Justice Roberts is concerned that the Court not appear politicized and is troubled by Democratic Party talk of "court packing" by expanding justices on the court, term limits, and forced retirement.

Pro-abortion activists fear that if *Roe* is overturned, the legal foundation for "privacy rights"—the basis for allowing same-sex marriage in *Obergefell*—might be challenged. Justices Clarence Thomas and Samuel Alito have made it clear they want to revisit marriage equality. Abortion and LGBTQ+ rights are different issues, but for

many activists they are one and the same since they both relate to the sexual revolution. In oral argument for *Dobbs*, Mississippi Solicitor General Stewart sought to allay these concerns by maintaining that what was at issue was the Court's standard of fetal viability, not other issues.

The pro-abortion left is drawing a line in the sand, vowing that they will fiercely resist any decision that overturns *Roe/Casey*. Before the *Dobbs* oral arguments took place, Senator Jeanne Shaheen (D-NH) warned that there would be a "revolution" if the court overturned *Roe*. During oral arguments in *Dobbs*, Vice President Kamala Harris told the press that the right to abortion is "non-negotiable." Meanwhile, a far more restrictive abortion ban than Mississippi's, Texas's novel Heartbeat Act (barring abortions after about six weeks' gestation), is undergoing a separate court challenge.

The FDA and Abortion Pills

After oral arguments in *Dobbs*, the Biden administration fanned the flames over abortion when the FDA announced that it was making permanent a rule that an in-person meeting with a physician is not required to receive the abortion pill, mifepristone. Instead, women may acquire this pill through a telehealth (online) consultation with an abortion provider and receive the pills by mail. This reversed a policy that the pills needed in-person dispensing, a policy that had been maintained by the Trump administration. In April 2021 the FDA had allowed online consultation as a response to the Covid-19 pandemic, which impeded easy access to physician consultations for women seeking a medication abortion.

Mifepristone is a drug prescribed to abort unborn babies up to about 10 weeks of pregnancy. It blocks the hormone progesterone, essentially starving the baby to death. Typically, following mifepristone, women are prescribed a second drug, misoprostol, that induces labor and expels the baby. In support of the FDA's decision, the pro-abortion lobby pointed to a recent University of British Columbia study published in the *New England Journal of Medicine* that claimed mifepristone is safe. There are a few other studies suggesting the abortion drug is safe for women—but there are many other studies that show this drug is dangerous to women's health.

The FDA itself has linked the abortion drug to at least 26 women's deaths and 4,000 serious complications. These numbers might even be higher because under the Obama administration the FDA stopped requiring non-fatal complications from mifepristone to be reported to the government.

Health data from the United Kingdom show large-scale harm due to abortion drugs after that government allowed mail-order abortion drugs in 2020. These recent data reveal that more than 10,000 (about 1 in 17) women who received abortion drugs by mail needed hospital treatment in 2020. A 2009 study, “Immediate Complications After Medical Compared With Surgical Termination of Pregnancy” in *Obstetrics and Gynecology*, found a complication rate of approximately 20 percent for the abortion drugs compared to 5.6 percent for surgical abortions.

Hemorrhages and incomplete abortions were among the common complications. An incomplete abortion occurs when part of the baby or placenta remains in the womb, causing infection. This often occurs with a missed ectopic pregnancy.⁹ Without adequate screening by an in-person physician, allergies or ectopic pregnancy may be overlooked.

When the FDA first approved mifepristone in 2000, the agency warned that it was a medication with serious safety concerns. Nevertheless, in 2016 the FDA extended the allowed time of its use from 7 to 10 weeks of pregnancy, lowered the required dosage, expanded types of prescribers, and reduced the number of office visits required.¹⁰

The pro-life Charlotte Lozier Institute released a study a month prior to the FDA’s December announcement, concluding that years of Medicaid data show that *abortion-related emergency room visits increased dramatically due to the rising use of abortion pills*. This confirmed a 2009 study from Finland that looked at 42,000 women and showed a four-fold higher rate of adverse events compared to surgical procedures.¹¹

The Battle Just Beginning

However *Dobbs* is decided, the struggle over abortion is not going away. If *Roe* and *Casey* are overruled, deep red states are likely to severely restrict abortion, while deep blue states will likely continue to expand abortion rights for late-term abortions.

The fight to protect unborn human life has been waged now for more than a half century. Those who have fought for life should feel encouraged, because real gains have been made in public opinion concerning when life begins—and in reducing the rate and number of abortions. The opposition persists in arguing, less and less persuasively, that the unborn child is merely a disposable blob of tissue to be eliminated when inconvenient. Stay tuned for the Supreme Court decision on *Dobbs*, expected in late June, and its consequences.

¹ https://www.washingtonpost.com/politics/courts_law/abortion-roe-v-wade-ruth-bader-ginsburg/2021/08/06/e5156ed2-f6bc-11eb-9068-bf463c8c74de_story.html.

² <https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>.

³ <https://supreme.justia.com/cases/federal/us/381/479/>.

⁴ *New York Times* correction to “Who Gets Abortions in America,” December 14, 2021.

⁵ Donald T. Critchlow, “Roe v Wade: Abortion Showdown,” *NewsMax Magazine* (February 2022); <https://www.catholicnewsagency.com/news/249754/physician-blasts-sotomayor-for-dead-brain-people-comment-about-fetal-pain>.

⁶ <https://www.americanthinker.com/blog/2021/sotomayors-intellectual-limitations-on-display-in-the-oral-arguments-over-emdobbs-v-jackson-womens-healthem.html>.

⁷ https://www.babycenter.com/pregnancy/your-baby/fetal-development-week-by-week_10406730; <https://my.clevelandclinic.org/health/articles/7247-fetal-development-stages-of-growth>; <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/prenatal-care/art-20045302>; <https://www.webmd.com/baby/interactive-pregnancy-tool-fetal-development>.

⁸ This was the argument made by a group of historians in an *amici curiae* brief filed in the *Dobbs* case, https://www.supremecourt.gov/DocketPDF/19/19-1392/193000/20210920150703691_19-1392_Amici%20Brief.pdf.

⁹ <https://www.lifenews.com/2021/12/14/the-abortion-pill-is-dangerous-for-womens-health-killing-dozens-of-women-injuring-thousands-more/>;

<https://www.nrlc.org/communications/fda-allows-abortion-by-mail/>.

¹⁰ <https://www.nrlc.org/communications/fda-allows-abortion-by-mail/>.

¹¹ <https://www.foxnews.com/politics/fda-medication-abortion-telemedicine>.

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The Mindszenty Report is published monthly by

Cardinal Mindszenty Foundation

7800 Bonhomme Ave.

St. Louis, MO 63105

Phone 314-727-6279 Fax 314-727-5897

Subscription rate: \$25 per year

Outside the U.S.A. \$35

We accept credit card payments.

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Contributions to the Cardinal Mindszenty Foundation are

Tax-deductible to the extent allowed by law.

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