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## **Roe v. Wade: its future hinges on Dobbs v. Jackson**

By Steve Bakke  January 10, 2022



*Remember this cartoon from a couple years ago?*

Is abortion a legal issue or a moral issue? It's both, and that's why it's almost impossible to resolve. I've always thought that abortion would divide us well into posterity, but perhaps not! I'm going to put what I consider a realistic spin on the future of this issue.

In December, the Supreme Court heard a Mississippi abortion case, "Dobbs v. Jackson." The Court is being asked to validate the Mississippi ban on abortion after 15 weeks, allowing for certain exceptions. Many pundits predict that if the Mississippi law is upheld, it could be a death blow to Roe V. Wade.

The Constitution is silent on the issue of abortion, so a constitutional ruling like Roe would automatically attract a lot of critical attention. It's been argued for decades that the Roe decision relied on an improper interpretation of the 14<sup>th</sup> Amendment's Due Process Clause. In the Roe ruling, SCOTUS took great liberty by applying a broad interpretation of "due process" – i.e., that it includes the "right to privacy." The Court creatively concluded that a woman's right to terminate her pregnancy before viability was protected by that right to privacy.

Adding fuel to the debate, "Roe" and supporting Supreme Court decisions rely on "viability" as an important benchmark. But many argue that viability is too arbitrary because Constitutional rights can't be tied to the status of everchanging technology, science, and life-saving procedures. And the pro-abortion vs. pro-life battle has been bitterly fought ever since.

Did the Founders have anything to say about abortion? James Wilson signed both the Declaration of Independence and the Constitution. He further distinguished himself as an original Supreme Court Justice. His statements are commonly considered representative of the Founders' collective intentions. Wilson explained: "In the contemplation of law, life begins when the infant is first able to stir in the womb." Apparently, many Founders believed natural rights do attach to the unborn.

More recently, Professor Kermit Roosevelt, a supporter of abortion being a constitutional right, stated this criticism of Roe: "As constitutional argument, Roe is barely coherent..." The late liberal

Justice Ginsburg supported abortion constitutionality but criticized the Court's legal reasoning in Roe. Clearly, the Roe ruling is one of the most controversial in our history, even among those who support its conclusion.

Among the critics of the Roe decision, the late conservative Justice Scalia disagreed with both the legal reasoning used in Roe and its conclusion. And despite his personal beliefs, he stated he could agree to the constitutionality of states individually legalizing abortion. If "Dobbs" is upheld, individual states probably would once again assume the sole responsibility for abortion legislation.

Most Americans aren't comfortable with where Roe has taken us – e.g., full-term abortions in some jurisdictions. Nor are Americans comfortable with prohibiting abortions under any-and-all circumstances. I believe most Americans, conservative and liberal, understand and accept several exceptions to abortion bans that reflect the lack of clarity in extreme and difficult life decisions. Americans are seeking and finding common ground, but the politicians refuse to do likewise.

If Roe is invalidated, the onus of establishing abortion law will return to the states, where I believe it belongs. The result won't precisely reflect what I see as Americans' preferred compromise, but it's probably as close as we'll get right now. American citizens should insist that we take a break from the arguing, even if the mainstream pro-abortion folks and pro-life activists insist on planning future aggressive partisan campaigns.

If the Mississippi law is upheld, the abortion industry will continue, but will be operating under greater restrictions. The best strategy will be to avoid skirmishes for a while and see how the new legal structure works out. At least "Pro-Roe" folks will no longer have the legal permission that has led us to over 62,000,000 fetal deaths in the United States – a real tragedy.

That's probably the best solution we supporters of compromise can hope to achieve in the world of 2022. Let's hope it happens, and then let's borrow the vision expressed by Supreme Court Justice Brandeis when he applauded the value of "the laboratory of the states" for "experimenting" with controversial policies.

We'll probably know the Supreme Court's "Dobbs" decision by late June 2022.