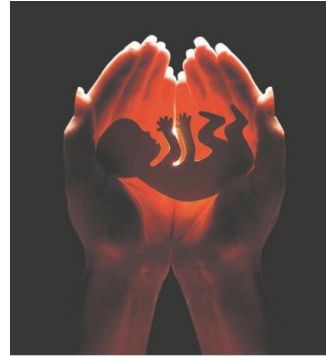


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A pro-life Supreme Court victory: But was there another way?

Steve Bakke  June 29, 2022



Many supporters of “women’s right to choose” believed Roe v. Wade was a poorly constructed opinion. For example:

“As a matter of constitutional interpretation and judicial method, Roe borders on the indefensible.” – Edward Lazarus, former clerk to Harry Blackmun, author of “Roe,” who “loved Roe’s author like a grandfather.”

“As a matter of constitutional interpretation, even most liberal “jurisprudes” – if you administer truth serum – will tell you it is basically indefensible.” – From “Liberals, Don’t Make Her an Icon”, Washington Post, July 10, 2003.

“As constitutional argument, Roe is barely coherent...” – Kermit Roosevelt, (in 2003), professor of constitutional law at the University of Pennsylvania Law School and former clerk for Supreme Court Justice David Souter.

In December, the Supreme Court heard a Mississippi case, Dobbs v. Jackson. The Court’s task was to rule on the Mississippi ban on abortion after 15 weeks, allowing for certain exceptions. It ruled, and the result was the death of Roe v. Wade.

I believe the essence of the “Dobbs” decision was that abortion legislation doesn’t belong at the federal level. It’s been argued for decades that “Roe” relied on an improper interpretation of the 14th Amendment i.e. that it includes an unstated right to privacy, and a woman’s right to terminate her pregnancy before viability was protected by that right.

The late liberal Justice Ginsburg supported abortion constitutionality but criticized the Court’s legal reasoning in Roe. “Some women” Ginsberg declared in 2020, “felt I should have been 100 percent in favor of Roe v. Wade, because I wasn’t.”

Ginsburg’s concern was the fragile basis on which Roe was decided. Abortion wasn’t addressed in the Constitution, and it became a right based on a woman’s right to privacy, another concept not expressed in the constitution. She also believed it would have been

better, back in 1973, to promote abortion rights more slowly through state legislatures. That certainly would have been less divisive. Ironically, future abortion laws will be developed by state legislatures, as she favored.

Unfortunately, stubborn political ideologues created an environment of “irreconcilable differences.” Many politicians from both sides held onto hopes to achieve the extremes of the issue – total prohibition of abortion in all circumstances on the one side, full-term abortion (and even beyond) on the other. The extremes were unyielding. Compromise became impossible.

Fueling the emotion of pro-lifers’ desire for change has been that, under the Roe “regime,” several states eventually approved full term abortions almost on demand. Also, the debate was reduced to “qualities of life,” not the compelling issue of its impact on a human life. And it’s tough to listen to fetuses referred to as “products of conception,” and aborted fetuses as “clusters of cells” – often much worse.

A highly charged argument coming from pro-abortion activists is that the recent demise of Roe affects tens of millions of people, but the decision was made by just a few. I find it ironic that the original Roe decision suffered from that same characteristic. This Dobbs decision moves the debate closer to the people, with future decisions made in state legislatures.

I’m convinced that most Americans, conservative and liberal alike, can accept having restrictions on abortions. And a majority can also accept exceptions to abortion bans that reflect the lack of clarity in extreme and difficult life decisions. Americans have been seeking and finding common ground, but too many politicians refuse to do likewise. This assertion is backed up by polls that ask the right questions.

According to Gallop, almost half of Americans consider abortion morally wrong. A similar percentage considers it morally acceptable. So, neither group can ignore the other. And less than 30% believe abortion should be unrestricted. That indicates that a majority of the population would have accepted compromise legislation. The ideological extremes on both sides prevented that from happening. While I would have supported such a compromise, I’m betting we’ll end up there eventually, “the hard way.”

The abortion debate will now be managed by individual states – our laboratories of democracy. I’m convinced there’s only one thing that will ever bring lasting quiet to this issue. The bottom-line issue has always been “life.” What represents human life? When does it begin? We must directly examine that issue.