Dobbs v. Jackson Women's Health – Oral Arguments

by Paul Engel

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- Recent oral arguments at the Supreme Court have brought to the public's attention not only the Dobbs v. Jackson Women's Health, but Roe v. Wade and the "right" to abortion itself.
- The heart of this case is much more than abortion. The willingness of the Supreme Court to abandon previous opinions that they recognize are wrong and the supremacy of precedent above the law and the Constitution is also on trial.
- Some on the court are concerned with what will happen to their reputation if they overturn Roe. No one seems to be concerned with the reputation of the Court should they be unwilling to review the validity of that decision.

The Supreme Court opinions in Roe v Wade (Roe) and Planned Parenthood vs Casey (Casey) have been political footballs since the day they were decided. A recent Mississippi law placed restrictions on abortions within the state that contradict the standards set by Roe and Casey. Not surprisingly, a lawsuit was filed challenging the Mississippi law. Recently, oral arguments in this case were heard at the Supreme Court. I found a number of arguments that I believe anyone interested in what the Constitution actually says would find worth their time.

The plaintiff, Thomas E. Dobbs, is the State Health Officer of the Mississippi Department of Health. In 2018, Mississippi enacted the Gestational Age Act, which prohibited abortions after 15 weeks gestation except in medical emergencies or where severe fetal abnormalities were found. Jackson Women's Health sued in federal District Court and won. The case was appealed to the Fifth Circuit, which agreed with the District Court. Mr. Dobbs then petitioned the Supreme Court for review of the case. Arguing for the petitioner, Scott Steward, Solicitor General of Mississippi went first. And he started out with a bang.

1. *STEWART: Mr. Chief Justice, and may it please the Court: Roe versus Wade and Planned Parenthood versus Casey haunt our country. They have no basis in the Constitution. They have no home in our history or traditions. They've damaged the democratic process. They've poisoned the law. They've choked off compromise.*

For 50 years, they've kept this Court at the center of a political battle that it can never resolve. And 50 years on, they stand alone. Nowhere else does this Court recognize a right to end a human life.

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I've talked before about the Roe opinion, but I believe Mr. Stewart is just as correct about Casey. Both claim that a woman's right to liberty supersedes the right to life of the child in the womb, at least until the point of viability. As I understand it, the main difference between Roe and Casey is Roe used an arbitrary "trimester" approach while Casey used an arbitrary "undue burden" one. Roe divided a woman's pregnancy into three "trimesters" and set conditions and exceptions on that schedule while Casey looked to see if the state law imposed an undue burden on the exercise of a woman's liberty to terminate her pregnancy. Both found this right to abortion in the Fourteen Amendment's Due Process Clause, specifically

the right not to be deprived of liberty without due process of law.

For 50 years, Roe and Casey have been at the center of a political battle, and the court has been a willing participant. When was the last time the confirmation of a federal judge did not include the question of whether or not they support Roe? How long has the Senate used stare decisis as a sword of Damocles above the heads of nominated judges, requiring a demonstration of fealty to the right of abortion.

Consider this case: The Mississippi law here prohibits abortions after 15 weeks.
The law includes robust exceptions for a woman's life and health. It leaves months to obtain an abortion. Yet, the courts below struck the law down. It didn't matter that the law apply – that the law applies when an unborn child is undeniably human, when risks to women surge, and when the common abortion procedure is brutal. The lower courts held that because the law prohibits abortions before viability, it is unconstitutional no matter what.

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To me, the law in question seems more than reasonable, even if 15 weeks is just another arbitrary timeframe. However, Justice Breyer points out the crux of the question.

JUSTICE BREYER: … what stare decisis principles should be used to overrule a case like Roe. And they say Roe is special. What's special about it? They say it's rare. They call it a watershed. Why? Because the country is divided. Because feelings run high. And yet the country, for better or for worse, decided to resolve their differences by this Court laying down a constitutional principle, in this case, women's choice. All right. That's what makes it rare.

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While oral arguments discussed many questions about the Mississippi law, the big question revolves around stare decisis, latin for “let the decision stand”. Justice Breyer says “they” claim Roe is special because it is rare. But how rare is it? Sure, there aren’t many cases about abortion that get to the Supreme Court, but there are plenty of cases where the court has “found” a right that isn’t in the language of the Constitution. Breyer says people claim Roe is special because the country is divided, but the country is divided over many things, not just abortion. Then Justice Breyer claims the country decided to resolve these difference by having the court lay down a constitutional principle. However, the country did not ask the court to decide the issue, a small group of activists did. The country did not consent to the court’s “laying down” constitutional principles, but the court did. Justice Breyer went on:

That’s not what I’m asking about. I want your reaction to what they said follows from that. What the Court said follows from that is that it should be more unwilling to overrule a prior case, far more unwilling we should be, whether that case is right or wrong, than the ordinary case.

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That, to me, is the crux of the matter, because that is what really makes Roe and Casey “rare” and dangerous: The court’s unwillingness to change its mind, even when it’s wrong. Of course, according to Justice Breyer, it’s not the court’s fault.

And why? Well, they have a lot of words there, but I’ll give you about 10 or 20. There will be inevitable efforts to overturn it. Of course, there will. Feelings run high. And it is particularly important to show what we do in overturning a case is grounded in principle and not social pressure, not political pressure.

Only "the most convincing justification can show that a later decision overruling," if that's what we do, "was anything but a surrender to political pressures or new members." And that is an unjustified repudiation of principles on which the Court stakes its authority.

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The reason the Roe and Casey decisions are wrong is not because feelings run high. And the reason to overturn it has nothing to do with political pressure. In fact, I would say it is political pressure that has kept these bad opinions around for so long. So why Does Justice Breyer believe the court should be so reluctant to overturn precident?

Overruling unnecessarily and under pressure would lead to condemnation, the Court's loss of confidence in the judiciary, the ability of the Court to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law.

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Isn't it the fact the courts are so reticent to change their minds on a wrong opinion that truly causes the lack of confidence in the judiciary? How can a member of the court claim it is the court of a nation dedicated to the rule of law if they place previous opinions above the law? Apparently, it's not enough for the court's decision to be wrong, it must be really, really wrong. It seems the court is more concerned with their reputation than upholding their oath of office.

Justice Breyer wasn't the only one to bring up politicization. Justice Sotomayor took a slightly different angle:

JUSTICE SOTOMAYOR: – what hasn't been at issue in the last 30 years is the line that Casey drew of viability. There has been some difference of opinion with respect to undue burden, but the right of a woman to choose, the right to control her own

body, has been clearly set for – since Casey and never challenged.

You want us to reject that line of viability and adopt something different. Fifteen justices over 50 years have – or I should say 30 since Casey have reaffirmed that basic viability line. Four have said no, two of them members of this Court. But 15 justices have said yes, of varying political backgrounds.

Now the sponsors of this bill, the House bill, in Mississippi, said we're doing it because we have new justices. The newest ban that Mississippi has put in place, the six-week ban, the Senate sponsors said we're doing it because we have new justices on the Supreme Court.

Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?

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The question of when a child in the womb receives legal protection has been the central issue since Roe was decided in 1973, almost 50 years ago. While the Roe case, later reaffirmed by Casey, set that milestone at the point of viability, that only settled the controversy in the minds of the justices. Every year since the Roe decision thousands of people per year have demonstrated on the steps of the Supreme Court their unwillingness to accept the court's decision. Justice Sotomayor asks if the court will survive the stench of the perception that their interpretation of the Constitution is merely a political act. Since everyone currently on the court had to pledge fidelity to Roe v. Wade as part of their confirmation in the Senate, I would say they have been living under that stench for almost 50 years. The question I have is, will this country survive the stench of denying constitutionally protected rights to the most vulnerable among

us simply to appease a political party?

JUSTICE SOTOMAYOR: Virtually every state defines a brain death as death. Yet, the literature is filled with episodes of people who are completely and utterly brain dead responding to stimuli. There's about 40 percent of dead people who, if you touch their feet, the foot will recoil. There are spontaneous acts by dead brain people. So I don't think that a response to — by a fetus necessarily proves that there's a sensation of pain or that there's consciousness.

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Justice Sotomayor has received some very harsh criticism for this question, but I think it's an important one. If the Constitution says you cannot be deprived of life without due process, which happens to be my legal argument against abortion, figuring out when life begins would be an important step. Sotomayor claims that 40 percent of brain dead people react to stimuli and have spontaneous acts. Does that statement hold up? Merriam-Webster defines brain death as:

final cessation of activity in the central nervous system especially as indicated by a flat electroencephalogram for a predetermined length of time

Brain Death — Merriam Webster

If there is no activity in the central nervous system, then there can be no spontaneous actions. Since a flat electroencephalogram may not rule out reflexive movements similar to the touching of a foot, Justice Sotomayor seems to have a point. So I searched federal law for a definition of "brain death", but could not find one. This makes sense, since the power to define medical conditions was never delegated to the United States. However, I did find it in the Mississippi Code Annotated:

An individual who has sustained either (a) irreversible

cessation of circulatory and respiratory functions or (b) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.

Determination of Death – Miss. Code Ann. § 41-36-3

There has been medical evidence that children in the womb react to stimuli, but is that enough to prove life? If the reactions are merely reflexive, such as flinching from pain, proof of life might be questionable. According to the Mayo Clinic, by 16 weeks gestation the baby's eyes and limbs move on their own. This spontaneous movement shows activity in the baby's brain. Furthermore, according to the Charlotte Lozier Institute:

A recent review of the evidence concludes that from the 15th week of gestation onward, "the fetus is extremely sensitive to painful stimuli, and that this fact should be taken into account when performing invasive medical procedures on the fetus. It is necessary to apply adequate analgesia to prevent the suffering of the fetus."

Fact Sheet: Science of Fetal Pain – Charlotte Lozier Institute

If, at 15 weeks gestation, it is necessary to protect the baby from suffering, then doesn't the baby also deserve the protection of their life? There have even been reports of the baby in the womb attempting to get away from the abortionists tools. If the child in the womb has the consciousness to attempt to escape from danger, can we not agree that it is alive and deserving of our protection?

Conclusion

There was so much more in these oral arguments that I do not have the space to deal with them here. The question of undue burden, is the opposition to abortion merely a religious view, the relative safety of abortions compared to giving birth,

even the assertion of Justice Sotomayor that the supreme court has the final word on what is constitutional, are all worthy of further study. Whether I cover those topics in another article or not, I will certainly review the court's decision when it is released. Regardless of where you stand on the topic, it is clear that the question of abortion will not be leaving the social discussion any time soon.

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[Paul Engel founded The Constitution Study in 2014 to help everyday Americans read and study the Constitution. Author and speaker, Paul has spent more than 20 years studying and teaching about both the Bible and the U.S. Constitution. Freely admitting that he "learned more about our Constitution from School House Rock than in 12 years of public school" he proves that anyone can be a constitutional scholar. You can find his books on Amazon and Apple Books. You can also find his books, classes and other products at the Constitution Study website (https://constitutionstudy.com).]