Will Roe v Wade survive? The Mississippi Challenge of December, 2021

This is the text of a podcast by Ron Stockton (Stocktonafterclass)

At the end of the podcast are responses by two former students who are now attorneys.

On December 1, 2021 the Supreme Court heard arguments regarding a Mississippi law that would effectively gut Roe v Wade. This comes at the same time that Mississippi is also leading the way with voter restriction laws. Mississippi has a bad, bad reputation for passing laws that marginalize and oppress people who are already marginalized and oppressed. In Mississippi 19% of all women are not insured and have little access to health care. That includes access to birth control or pre-natal treatment or access to early abortion. In Mississippi, an abortion costs at least $600.00. That does not include travel, recovery time, missed work, or staying in a motel if the site is far away (and Mississippi has only one site in the whole state). Now there would be additional burdens, focusing on getting an abortion in the early weeks when many confused young women are not even certain they are pregnant, or what to do if they are. And there is the issue of perhaps traveling to another state where abortion is legal. Clearly the poor will be most affected by a change in the law.

Before turning to the case, let me give you some background data on abortion. I am going to draw mostly from the Guttmacher Institute, a very reliable source of data on pregnancy and women's health. To start with, there were 862,300 abortions in the US in 2017. That was down from 1,212,350 in 2008. You may note that those were the Obama years. They saw a dramatic decline in abortions. By contrast, there were 3,747,340 live births in 2019. That's about a four to one ratio.

Let's define some terms. Roe v Wade mentions three trimesters. These are three stages of pregnancy, each three months long. The first trimester would be zero to thirteen weeks; the second would be fourteen to twenty-six weeks; the third would be twenty-seven to forty weeks. A baby born at forty weeks is considered full term. One born before thirty-seven weeks is premature. The date of delivery is usually calculated from the last menstrual period or LMP. During the first trimester, the embryo is early in organ development. Before thirteen weeks the lungs and brain are immature. If born at that point, it would be unlikely to survive. At ten weeks it is considered a fetus. Around ninth or tenth week, an ultrasound can usually reveal gender. Viability means the ability to survive outside the mother's body. At twenty-four weeks a delivered fetus is at considerable risk but may be survive if given intensive care after birth. At twenty-seven to thirty weeks it is more likely to survive, again with intensive care. Often state laws will use weeks as a measure rather than trimesters.

Almost all abortions are in the first trimester. Only 11% are after that time and only 1% are 21 weeks or later. At the current time 15 states ban abortions after 20 weeks. The term partial—birth abortion is medically imprecise but implies that the fetus is partially out of the mother's body and is then terminated. The courts have upheld the Partial-Birth Abortion Ban Act of 2003.

Cortical function (the brain kicks in and the fetus is able to feel pain) develops at 29-30 weeks. Before that a fetus can recoil from stimulus, but that is not pain.

The courts have permitted various forms of regulation, some of which make it harder to get abortions. It is legally permitted to require that the abortion be performed by a licensed physician; that it be in a hospital, not a clinic; that a hospital be allowed to refuse to perform abortions; that a woman have compulsory counseling;, that there be a waiting time, typically 24 hours, after counseling; that there be parental consent for a minor. It is also permissible to tell the woman that the fetus can feel pain.

Regarding public opinion, there are three general categories of thinking. Questions have slightly different wordings but in general 10-15% want a total ban, 25-30% want unlimited access, and 55-65% want full access but favor a mix of restrictions or regulations. 60% are ok with unlimited access in the first trimester. Asked an independent question on this topic, 75% think a woman at that point should be allowed to make an abortion decision with NO outside interference.

Now, back to the case. Roe versus Wade was handed down in 1973, 49 years ago. At this point it is considered "*settled law*." That term –settled law – means that a ruling is so definitive that it is not questioned by the courts. Dozens of cases challenging Roe have been struck down. The principle of *stare decisis* is a relevant concept, at least if you are a judicial conservative. That means that if an issue comes before the court, the justices would say, "we have already decided that. It may be a good decision or a bad decision but it was decided long ago by an earlier court and we are not going to mess with it." All three Trump appointees – Gorsuch, Kavanaugh, Barrett – said during their confirmation hearings they would adhere to *stare decisis* and to the principle of *settled law.*

Roe v Wade involved a woman from Texas who was pregnant and could not get an abortion. She ultimately had the baby and gave it up for adoption. But the case continued. Ordinarily when a case is "moot," i.e., the issue is resolved so a court decision would not make a difference, the court will not make a ruling. But if the *issue* is one that will continue, even after this specific case is past, they will take the case. That was true with Roe.

The court ruled that pregnancy logically had three trimesters of three months each. In the first trimester, the decision of the woman and her doctor had exclusive authority. This was based upon the right of privacy inherent in the constitution. We are a "liberal" republic which means the government is limited by what it can do. Liberal, by the way, is a 19th century term, not the same as today's political liberalism. Under the constitution, the government cannot get involved unless it has a compelling state interest. For those who look out today and see "big government" this may seem a strange concept, but to constitutional scholars (and justices) it is a big deal. If there is an epidemic, the government can require people to stay home or to get a vaccination, both limitations on personal freedom. Why can they do this? Because it is the obligation of the state, i.e., the government, to protect the public. If there is no state interest, they cannot take action. For example, the government cannot ban wearing stripes with plaid on the grounds that it is ugly. The state does not have an interest in, or the power to, protect us from bad taste. So plunge ahead with your stripes and plaids with no fear of being stopped.

The state also has to do the least possible to achieve its goals. If the health authorities decided there were too many colds and they were going to shut down the country for a week to try to limit contagion, they could not do that. Why? It's too much. It goes beyond the needs of the society to be protected from colds. Maybe a public service announcement would be better in this case.

Using these principles of law, the Supreme Court decided by 7-2 that a woman had the right to an abortion under certain circumstances. They said that the Fourteenth Amendment and the Ninth Amendment guaranteed Americans a right to privacy, and that included medical treatment. (At this point, we also have the right to privacy in our marriage, procreation, contraception, family relationships, child rearing, and education).

There is also the concept of Substantive due process. The term due process usually refers to what happens when you get involved with the law. You have the right to be advised of your rights, the right to remain silent, the right to an attorney. This is called Procedural due process. Those who watch crime shows know those rights. Substantive due process says we also have First Amendment rights (speech, religion, protest, etc.), and the right to privacy. If you want to do weird things in the bedroom, enjoy yourself. The government won't stop you.

But, by the way, that was not always true. Not many decades ago, the government could ban anything except conventional sex. But the Supreme Court began to tell states to stay out of the bedroom, so people now have options, without the fear of being arrested. We have a living constitution that can adapt over time.

Regarding those trimesters, during the first trimester, Roe said there was complete privacy. The government could not get involved. During the second trimester, the government could regulate health conditions and the circumstances of the procedure but could not ban the procedure. In the third trimester, it could ban abortion if it wished. At this point, a third of the states have bans of some sort .

A major criticism of this decision was that the word "privacy" is found nowhere in the constitution. "They just made up a new right," as Justice Scalia said later. Indeed, the word was not there but we have the right to privacy from searches, privacy from having soldiers housed in our homes, etc. Privacy was a big deal to the people who wrote the Bill of Rights. They may not have used that word but they did not want the government messing around with their private affairs. The two dissenters in Roe also said that there was no such thinking in the minds of the Founders. In retrospect this was a memorable point given that it is a major argument of the constitutional Originalists – that we have to consider what the Founders were thinking. To be honest, that argument makes me nervous considering some of the thing that our Founders were thinking, about women and African-Americans for instance. But that will have to be a different podcast.

Two other points are important. First, regarding the argument that a fetus is a person and has the right to life, the court said in Roe that any reference to a "person" in the constitution did not cover a fetus. As they put it, the word person "does not include the unborn." Moreover, "the

unborn have never been recognized in the law as persons in the whole sense." This became a big deal later as opponents of Roe promoted the idea of Personhood, that even an early embryo was a person with rights equal to those of a living person. That may seem like grasping at straws but that argument actually appeared in court this week.

The further point had to do with the distinction between conception and fertilization. Today most people use the terms interchangeably but in the past they were quite different. Fertilization occurs when an egg and a sperm unite to create a single cell. That is the first step in pregnancy. Some people go so far as to say that douching violates the rights of a future person. The Catholic Church, in the papal encyclical *Humanae Vitae*, also seems to suggest that even birth control pills are blocking pregnancy and are therefore depriving future people of life. The second term is conception. This is not the same as fertilization. At one time, conception was when the woman could feel movement. In the Bible it was called "quickening," as in the phrase "the quick and the dead." In traditional Catholic teaching, an embryo did not have a soul until the quickening.

This whole issue of quickening, or when life begins, got to be a mess, according to the Court. Traditional teaching was that it was 40 days for a male and 80 for a female. Maybe someone out there understands the logic of that distinction, but I don't. But the logic was that before quickening, the fetus was a part of the mother, not an independent entity. In the end, the Court gave up. As they put it, "Those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus" so they decided to leave the topic.

Let me pause for a moment and share a personal thought. To me, so many of these arguments are theological in nature, not constitutional. They have to do with the concept of a soul and when a soul enters the body, and ultimately that has to do with a belief in God. Such a belief is important to many Americans but Americans do not agree on these points. As Justice Holmes said in an earlier case, "The constitution is made for people with fundamentally differing views." And these arguments do not belong in a Supreme Court setting. Thanks to Thomas Jefferson and the influence of his Declaration of Religious Freedom, we have been able to keep our law separate from religious authorities and influences and have kept this complex country together for 242 years. These kinds of theological arguments make me very nervous.

There have been several cases relevant to Roe but the most significant was in 1993, *Casey versus Planned Parenthood*, commonly called Casey. This had to do with a Pennsylvania law that imposed limitations on Roe. The Court affirmed Roe, but said that regulations were allowed so long as they did not impose an "undue burden" on a woman, defined as something that has the "purpose or effect," of creating a "substantial obstacle" to abortion. The Pennsylvania law said that before an abortion, there should be a 24-hour waiting time, informed consent, including making sure the woman knows of alternatives to abortion and potential health damage, spousal notice, and parental consent for minors. The spousal notification was struck down by the court, but the other items were upheld. The court also replaced trimesters with the concept of "viability." To repeat, viability means the an age when a premature fetus can survive outside the mother's body. As we noted earlier, this is around 20 weeks.

Casey was a 5-4 decision, and it affirmed Roe. Obviously, the shift of even one justice could produce a different outcome. That shift occurred when Barack Obama was denied the right to make an appointment, and Trump then appointed Neil Gorsuch, Brett Kavanaugh**,** and Amy Coney Barrett.

And now we have *Dobbs versus Jackson*, the Mississippi case. The main issue in this case is the early date at which a ban would kick in. The law defines it as 15 weeks. To pro-choice advocates, this is an effective ban for many women. Anti-abortion activists would prefer a complete reversal of Roe.

Let me summarize my impression of some of the arguments presented to the Court on December 1.

I had mixed feelings about the arguments. I have listened to previous arguments, and read previous arguments and thought these were weak. Both sides seemed to be arguing public discourse as much as points of law. The Mississippi Attorney General was particularly weak, making inflammatory statements about killing babies and comparing Roe to Plessey v Ferguson, the 1896 case that affirmed the legality of separate but equal. Plessey is considered perhaps the worst decision in Supreme Court history. Comparing it to Roe seemed to be throwing red meat to the anti-Roe justices. He definitely did not seem to be arguing constitutional law

The plaintiffs in the case, who were challenging the Mississippi law, had two attorneys. One represented the organization that was bringing the case. The other was the U. S. Deputy Attorney General. They also appeared to be using the arguments of public discourse more than issues of law. Their strongest case was in *stare decisis* and *settled law*. After 49 years of being constitutional law, and with no meaningful changes in the nature of law or society or medicine, it would be a radical break with the past to overturn this case. Of course they *did* make those points, although I thought Justice Sotomayor made them even better. But they also engaged in what I would call feminist arguments. Overturning Roe would cause serious harm to women, would be particularly hurtful to poor women and women of color. In American law, women and persons of color have special standing because of past patterns of discrimination so those may have been points of law, but too often these arguments, even when they were valid (which I think most of them were), sounded like what I would hear on a cable TV discussion. Of course, I was listening rather than watching so the speaker was not identified by name, and I did not always figure out which speaker was which from their voices. I hope the Deputy Attorney General was making the points of law, because some of the arguments were not points of law.

Let me list some points that occurred to me.

First, Mississippi argued that there are two sets of interests involved, the interests of the woman and the interests of the embryo or fetus. It is the obligation of the court to accommodate both of these rights. The interest of the fetus is obviously to live. The interests of the woman can be accommodated by adoption services or other assistance.

And there were two arguments that struck me. Neither was a point of law but both were revealing.

Bret Kavanaugh noted that the country was very divided. People were passionate and angry. If we support one side or the other, we will offend much of the population. Perhaps we should just remain "neutral" and return the issue to the people, that is, to the states.

This is not the argument of a Supreme Court Justice. This is the logic of a politician trying to get re-elected. But Kavanaugh has a life-time appointment. God save us.

The other argument was made by Sonya Sotomayor. She asked rhetorically, "Will this court survive the stench this creates in the public perception, that the constitution and its reading are just political acts? If people believer this is all politics, how will we survive? How will the court survive?" This may have been a subtle appeal to Chief Justice Roberts to stop this runaway train.

Breyer and Kagan both noted that Mississippi political figures said that we now have new justices so it is time to bring this issue forward. They clearly think they have rigged the court and can now do what they have wanted to do for so long.

Obviously, the court will survive. But it was once the most respected institution in the country. Now it is seen as something down in the gutter, along with other hack political figures. For shame.

For me, the most surprising thing in the whole hearing was the fact that Justice Clarence Thomas spoke over and over and over. This is a man who often goes *years*, literally years, without asking a single question or making a single comment. It is obvious that he thinks his moment has come. He has waited his whole career for this, for the time when he is in a majority that may actually (he hopes) reverse Roe.

I was shocked to hear that a quarter of all American women have an abortion. I had never heard that statistic. And I was surprised to hear that there is a 10% failure rate where established birth control methods are concerned. This means, we were told, that 10% of all women using established birth control methods will get pregnant within a year. I have been trying to figure out what this means? Does it mean that people using condoms will forget to put one on? Or that women using a pill will forget to take them? Or that those methods just don't work? I am still thinking of this statistic.

I was surprised that Justice Amy Coney Barrett said at least twice, maybe more, the phrase "you know." She spoke, "like, you know," as if she were in high school. I expect better from a Supreme Court justice.

It seems that these so-called conservative justices are calling for state's rights. They are really back there in a previous age when the goal was to reduce the role of the federal government in supporting individual rights. They appear to be going back to the Douglass argument in the Lincoln-Douglass debates of 1858 in which Douglass argued for Popular Sovereignty regarding whether Kansas would have slavery. And given that the argument for the Civil War was state's rights, and the argument for resisting integration in the 1960s was rooted in state's rights, this argument falls into a dark history.

The Mississippi Attorney General, who presented their case, said that there had been major changes in medicine, which completely altered the nature of the issue. Justice Sotomayor asked him which particular changes did he mean? He said, now we can determine that a fetus feels pain. Sotomayor cut him down. She said that modern medicine does not say that. When a person is brain dead, their body can still respond to stimuli, but that is just a reaction. A twitch is not a feeling. There is no consciousness or awareness. Only a small, marginal element of the medical profession argues this, and they are not credible. Ouch!

It was obvious that she was better informed on this point than the Mississippi Attorney General.

However, I did see, just before the arguments, a United States Senator demonstrating what he said was modern medicine. He had on the floor of the Senate a blown-up image of a 1973 ultra-sound of a fetus. It was very blurry. It was hard to tell what you were seeing. Then he showed a modern ultra sound. It was beautiful color with striking detail. I have seen ultrasounds of fetuses but have never seen anything like this. He said, 'look at that beautiful baby. She is sticking her tongue out at us.' And, he added, out of the blue, this is ready for a late-term abortion. This was bait and switch, big time.

There were several references to *watershed cases***.** These are cases so significant that they authoritatively define a point of law. Brown v the Board of Education is one. Baker v Carr, requiring equal districts within states, was another. But in each situation when some previous case was overthrown to establish a watershed decision, the new decision expanded individual rights. Overturning Roe would be the only case in which reversing an earlier ruling would *reduce* individual rights.

Walking away from *stare decisis* and settled law and *watershed* cases would be the opposite of conservativism. It would be radical judicial activism.

I was surprised to learn that most states in the early 1800s allowed abortion under common law. 1821 was the first state law, in Connecticut, that addressed the issue. Then in the 1820s there was a general reversal of individual rights. I had known of that retrenchment in terms of voting rights for women and African-Americans and in terms of the concept of citizenship but not in terms of abortion. My colleague Professor Moran had explained to me once that there had been a general pattern of reversing individual rights during that time. He was not quite sure why that had happened, but women's rights were caught up in that tidal wave. By 1840 eight states limited abortion and by 1868 36 states did.

There was a discussion of the 15 weeks rule of the Mississippi law. Chief Justice Roberts asked rhetorically, why 15 weeks? Why not ten, or six? The reference to six weeks referred to the Texas "heartbeat" law. Of course, Roberts raised a significant point. As soon as the Mississippi law is approved other states will pass laws with even more restrictive thresholds for getting an abortion**.**

If we think back to the Senate confirmation hearings for the Trump appointees -- Gorsuch, Kavanaugh, Barrett – all made commitments to *stare decisis*. All made reference to the principle of *settled law*. Of course, that was then. This is now.

Twice the Mississippi Attorney General compared the anticipated reversal of Roe to *Brown verses the Board of Education.* As if the single greatest decision in Supreme Court history, abolishing segregation, could be compared, and should be compared, to reversing a decision guaranteeing abortion rights. But that was how he saw it. Roe was a monstrous evil that had brought great harm to our country.

I have to say that this comparison, of Roe v Wade with Plessey v Ferguson, sounds racist. It is as if he is saying, "you have protected Black kids. Why won't you protect fetuses." The Court, in Roe, had expressed concern about what they called the "racial overtones" of some of the arguments. I think they were right.

I have two final points before we finish.

The first has to do with public opinion. Despite what Justice Kavanaugh said, this decision should be a matter of law, not a matter of how angry the public will be with whatever is decided. But just in case he is curious, the public supports abortion rights and is opposed to overturning Roe. I discussed this earlier but some additional information might be helpful.

A major poll by the respected PEW organization in late 2019 found that 61% of the public wants to see abortion l*egal* in all or most cases. Only 38% would like to see it *illegal* in all or most cases. On the specific issue of Roe, 70% do NOT want to see it overturned.

Of course, there are partisan difference. 82% of Democrats want abortion available in all or most cases, while 62% of Republicans are on the opposite side -- They want it *illega*l in all or most cases. But the Republicans are divided on this issue. 77% of conservative Republicans want it illegal in all or most cases while only 41% of moderate or other Republicans do.

Some other patterns are interesting. By age, 70% of those between 18 and 29 want abortion to be legal but only 55% of those above 65. By education 64% of those with high school or less want it legal but 72% of those with college educations do. By religion, there are also interesting patterns. 60% of white mainline Protestants (Presbyterians, Methodists, Lutherans, Disciples of Christ) want it legal, but only 20% of white Evangelicals. Among Black protestants 64% want it legal and among Catholics 56% do. This is the exact opposite of the position of the Catholic Church. Obviously most Catholics are not paying attention to their bishops. And among those who are religiously unaffiliated 83% want it available. I suspect that unaffiliated category includes people brought up in a church but driven out by views they do not like.

One final point on public opinion. 57% of all Americans know someone who had an abortion. There is no difference between Democrats and Republicans on this point. Of those who do NOT know someone, 57% want to maintain Roe. Of those who *do* know someone, 64% want to retain Roe. 7% is not an enormous difference but is statistically significant. Humanizing the case makes a difference.

Finally, what do I think will happen if the Mississippi law is upheld? My suspicion is that the court will try to be clever and split the difference. Chief Justice Roberts will try very hard to prevent a total reversal of Roe. But this will not solve the problem. I know that the naïve Justice

Kavanaugh believes the states will then have the issues and the federal courts will be spared. I think the exact opposite will be true. Many, many states have laws sitting there waiting to hit the Send button. They will flood the system with new restrictions. Each and every one of those new laws will provoke legal challenges. Those challenges will work their way up and up until Justice Kavanaugh will be left saying, "But I thought we dealt with this." Brett, do you also believe in the Easter Bunny? You probably should take my class on American politics before you make your final decision. But maybe it's too late.

I also anticipate that even if Roe were overturned, quite a few people would be disappointed. Many people believe that overturning Roe would make abortion illegal. But it would not do so. It would merely say that there is not a national guarantee of women's rights and each state can do its thing. I think we should anticipate furious battles in several states, *and* at the national level.

Moreover, the advocates of women's rights will not give up. The Democrats will promise that if they get control of the House and Senate they will pass the bill enshrining women's reproductive rights into law. And if it passes, it will once again wind up before the Supreme Court.

And this will come just as we are gearing up for the 2022 election.

Brett, you are not closing the door on political turmoil and litigation. You are opening it. And pouring oil onto the fire.

Thank you for listening.

Supplementary Discussion: I asked two former students for their thoughts and insights. I think you will find these valuable.

Response One

I really enjoyed the talk on Roe. Whatever one's political holdings, I think you have to admit that the talk was accurate, informative, based in historical fact and concrete statistics, and a genuine attempt to give treatment to the arguments of both sides.

Beyond that, I have a lot of thoughts on the talk and on the topic generally. I think the lecture was a fantastic snapshot of the constitutional issues presented by Dobbs. Brilliant people spend their entire lives studying the intricacies of constitutional law and the history of American jurisprudence, so naturally that can't all be condensed into one lecture, but I think this podcast did a great job of pulling out key facts and points of law to serve as a framework for the discussion.

I would suggest, for those people with a keen interest in understanding the rubric by which the Court is compelled (by its own hand) to consider and decide cases, to read up on the different levels of scrutiny. They are rational basis, intermediate scrutiny, and strict scrutiny.

Traditionally, laws reviewed under strict scrutiny almost certainly fail. There are only four classes that automatically enjoy the benefit of strict scrutiny. They are race, national origin, religion, and alienage. Note that gender is not among these classes.

Intermediate scrutiny was established in Craig v. Boren (1976). The case was borne of an Oklahoma law restricting the sale of beer to men under 21 and to women under the age of 18.

The court decided that the statute was unconstitutional, because men and women are entitled to equal protection of the law. I think it's important to note that while laws discriminating based on gender are subject to heightened scrutiny by the Court, they are not subject to strict scrutiny. This has a tremendous impact on outcomes.

One part of the talk I found especially interesting was the statement that (paraphrasing) the Court's prior major reversals of precedent only served to expand rights, not retract them. Think of Brown v. Board, Obergefell, etc. This was a very interesting framing. I don't disagree with it. That being said, I'm sure anti-abortion advocates would argue that Dobbs has the potential to also expand rights - the rights of a fetus.

That, in my opinion, leads us to the biggest issue with this entire topic. I think everyone agrees that we should outlaw murder in every form. That's not a controversial statement, as far as I know. The question is whether (or when) an abortion constitutes murder. Professor Stockton's talk had a quote that I found very useful in thinking about this - where he mentioned that an earlier court stated that scientists, theologians, and religious leaders cannot agree on when life begins, so the courts certainly can't make that determination, either. Because there's no real answer to that question, I think this issue will always be in play in some sense. If Roe is overturned, as the talk mentioned, many states will instantly implement copycat laws of Mississippi, or perhaps they will seek to push the bar back even earlier than 15 weeks. Democrats and Republicans will (and always have) make claims that voting for them will either expand or contract abortion rights, especially in light of Dobbs.

The Supreme Court has for a long, long time been a political football. Prof. Stockton mentioned it used to be a respected apolitical institution, but things have changed. I have heard this many times. The Supreme Court has a complicated history - not everyone knows this necessarily, but the Court, which exists by virtue of the Constitution, was not originally or explicitly given the power to decide whether laws were constitutional. This process, called Judicial Review, is a power the Court gave to itself in deciding the 1803 case of Marbury v. Madison. The Court decided that its obvious role was to say what the law is, and therefore it has the power to overturn laws as unconstitutional. Roe exists as a bulwark against laws like the one in Mississippi, by providing that such laws are unconstitutional.

That brings us to the real problem with this case. Prof. Stockton mentioned in his lecture that one of the issues argued to the court is that the Constitution doesn't mention the word abortion. The right to an abortion is one that the Roe Court read into the Constitution based on its explicit mention of different rights concerning privacy. Abortion is not the only right enjoyed by Americans that the Court has read into the Constitution despite its silence. For example, the right to travel is not written down in our founding document, but the Court has decided that the collective leanings of the Constitution imply such a right. This is where the trouble arises, and why abortion is always an issue in play. Abortion laws exist by virtue of state legislatures, and the courts. The U.S. Congress has punted the issue to the courts. Arguably, the states have, too. What we need is a constitutional amendment. I think it's wrong for the Court to have to decide precisely when and how abortions should be legally/medically/morally permissible. The job of the court is to interpret the laws that already exist, or to flag (and overturn) laws that do not conform to the Constitution. I've always felt that abortion fitting under a broad heading of "privacy" was a huge stretch. Even though a constitutional amendment would also not necessarily be "final" (see Prohibition) - it is the proper vehicle for dealing with this type of question. Because we keep this issue in play in the courts, we wind up with tons of single-issue voters who support a certain party just in the hopes of stacking the Supreme Court in their favor.

That's a broken system. The podcast mentions that the majority of Americans favor abortion rights, and oppose overturning Roe. Will overturning Roe lead to court packing to change it back? I don't know. It's a slippery slope. By the way, the "right to privacy" is not a constitutional amendment, either. It's a concept taken from an aggregate look at several amendments together. Besides that, the talk makes mention many times of a principle known as stare decisis. I want to emphasize that this is the glue which holds our entire legal system together. Courts operate on a tiered system. Most people, in their lives, will only interact with lower courts. Lower courts are bound by the decisions of higher courts. Remember that our judicial system is bifurcated into state and federal. So, if you are dealing with a case in your local state district court, say, the 36th District Court for the City of Detroit, those judges are supposed to follow the rulings of the Wayne County Circuit Court, which follows the Michigan Court of Appeals, which follows the Michigan Supreme Court. Likewise, if you're dealing with a case in the Federal District Court for the Eastern District of Michigan, those judges are required to follow the decisions of the 6th Circuit Court of Appeals, which follows the rulings of the US Supreme Court. Precedent is binding, all the way down. The only court where precedent isn't binding per se is the Supreme Court. It has the power to overturn its own prior rulings. Historically, the Court has been highly averse to doing this, for a number of reasons. One reason is that flipflopping takes away its legitimacy. There's a wonderful, insightful book on this issue (and other related ones) called The Case Against The Supreme Court. Everyone should read it. The question today is, if the current SCOTUS is willing to cast aside Roe, what happens to other landmark cases? What happens to gay marriage, which in my experience is opposed by the same folks who oppose abortion? Personally I have mixed feelings about stare decisis. Mostly negative. After all, if it were a concrete principle, we would be stuck with a lot of bad Supreme Court decisions that upheld racism, eugenics... basically you name it, the Court has at some point in history rubber stamped it. What about Citizens United? Until we fix that, our democracy is on borrowed time. I don't understand the idea that the Court shouldn't review its prior decisions with an open mind, simply by virtue of the fact that the issue was already decided. What's the idea there - that our government hit peak moral authority in the mid-to-late 20th century, so we don't need to check back on anything? I think it just boils down to political expedience.

I made a list of things I wanted to touch on and instead I rambled everywhere, so I'll check off my last few items here. One - the talk mentions the concept of redressability. Typically, for a case to be heard in court, a party must have standing. Standing means a concrete injury, traceable to the defendant, and fixable by the court. It's true that SCOTUS chose to follow through with Roe instead of dismissing it as moot once the baby was born. This is not always how it plays out. Usually courts drop a case if it qualifies as moot. Just something to think about in the context of abortion cases. Two - the talk mentioned this - and I thought it was crucial. Many women do not even know they're pregnant until the 6 week mark - and there's nothing magical about 15 weeks. If the Court is willing to roll back the current standard of viability to an arbitrary number of 15 weeks, it will certainly be willing to roll back further. Lastly, on the subject of viability - I used to worry that it was a shifting goalpost. As medical science improves, might doctors be able to incubate a 20, or 15, or 10 week fetus outside the womb? I used to think medical advancements were the greatest threat to our current understanding of when abortion is legal. Obviously I was wrong.

Response Two, John Knappman

One thing to understand is that the Supreme Court decision process is not just based on oral argument by a couple attorneys. In something like the Mississippi case, it is probably the least important part of the process. I will guarantee you that Justice Thomas or Sotomayor do not sit there thinking, "Gee, I wonder how I will decide this? Let's hear what this lawyer has to say."

The string of cases involving Roe v. Wade, including Casey, has been an ongoing saga. Interest groups and advocates have all filed briefs, along with the actual parties. Those written briefs, probably hundreds of them, are pretty comprehensive in their arguments. In fact, the written briefs are usually much more important than the oral arguments.

After the oral arguments, the justices will debate among themselves, both in writing and in person. Although observers seem to agree there are six votes to vacate Roe, that does not mean there are six votes that agree how to do it. They could in theory keep some aspect of Roe, but carve out such an exception that it is gutted. I think this is a distinct possibility, as it helps them out with their public opinion and stare decisis problems. It also allows some of the more recent Court additions to claim that they did not lie in their confirmation hearings.

Overturning Roe outright would be a bold step, but in line with the trend that has been going on for 30 years. It is already much more difficult for women to get an abortion in some states, and the Court has not stopped those restrictions. Without Roe, it goes to the states.

In many states, nothing would change and abortion would still be legal. Michigan would be vastly different, as it is currently Manslaughter under state law. Then the onus would be on state lawmakers if they want to keep that or not. Women who want abortions would obviously go to another state for them, if they could.

I hope this was helpful

Response to Knappman

I think this is really valuable to consider. If anything oral arguments are more of a chance for us to hear the justices then for them to really gain new insight. I am curious how the court could carve up Roe without overturning it… to me it's fairly cut and dry, either the standard is viability or it's 15 weeks… not sure if there's much wiggle room. But I don't really know.


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