



SYMPOSIUM: *Dobbs v. Jackson Women's Health Organization*

PERSPECTIVES ON THE IMPENDING FATE OF *ROE*

[The Supreme Court's ruling in Dobbs v. Jackson Women's Health Organization, expected to be issued in June 2022, could mean the end of Roe v. Wade. Or maybe just the beginning of the end. It could even mean the end of the fight to overturn it. Following are keen takes on the significance of the case from prominent pro-life leaders and thinkers, including three of the Human Life Foundation's Great Defenders of Life—Clarke Forsythe, Kristan Hawkins, and Helen Alvaré.—the Editors]

Clarke Forsythe

The Supreme Court announced Monday that it will hear Mississippi's defense of its limit on abortion after 15 weeks of pregnancy. However the high court rules, it's unlikely to satisfy activists on either side. But a large majority of Americans would likely support a decision upholding the law.

Mississippi's law prohibits abortion when "the probable gestational age of the unborn human being" is "greater than" 15 weeks, "except in a medical emergency or in the case of a severe fetal abnormality," defined as a condition that is "incompatible with life outside the womb." As in previous abortion cases, the law was challenged as unconstitutional in toto by an abortion clinic, Jackson Women's Health Organization.

The state's limit has broad support nationally. As one researcher found, "Polls stretching back for decades show that two-thirds or more of the public believe abortion should generally be illegal in the second trimester." The most recent Gallup poll on the matter in 2018 found that 65% thought abortion should be illegal in the second trimester (after 12 weeks). A January 2020 Marist Poll found 7 in 10 Americans support limiting abortion after the first trimester.

There is a notion—repeated throughout the media and implied sometimes even by Supreme Court justices—that Americans are too "polarized" to decide the abortion issue through the democratic process and need the court to do it for them. The Mississippi case and polling on gestational limits obviously demonstrates that there is copious middle ground. The position of activists at both ends of the spectrum shouldn't obscure the broad public agreement on moderate limits, and the potential for legislators to write reasonable laws.

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Mississippi hasn't asked the Supreme Court to overturn *Planned Parenthood v. Casey* or *Roe v. Wade*. Instead, the justices will consider "whether all pre-viability prohibitions on elective abortions are unconstitutional," a modest question. This is one the high court has never addressed directly, though it has bypassed it more than once. The Supreme Court created its "viability rule" in *Roe*—though it was dictum, a point not necessary to its decision. And it merely repeated the rule in *Casey*, also dictum, based on the casual assertion that states have two interests in limiting abortions—in prenatal lives and maternal health—which are "not strong enough" before fetal viability to justify a broad limitation.

Mississippi is challenging those factual assumptions by pointing to evolving understanding of fetal development through ultrasonography, enhanced state legal protection in tort and criminal law for prenatal injury and contemporary data on the medical risks to women from late-term abortions. A well-regarded 2004 study—which Mississippi cites in its legislative findings—found that the risk of maternal mortality increases considerably for late-term abortions. Specifically, "compared with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes."

Many Americans might be surprised to know that since *Roe* in 1973, the Supreme Court hasn't addressed an actual abortion prohibition that applied before fetal viability. (The Congressional ban on partial-birth abortion, which the Court upheld in 2007, prohibited one very narrowly defined abortion procedure.) Many scholars on both sides of the abortion issue agree that the high court has never given an adequate rationale for its viability rule.

Mississippi's law also spotlights the embarrassing disparity between U.S. and international law on abortion. A 2011 United Nations survey and other studies show that America—because of *Roe*—is one of only seven nations, of some 198 across the globe, that allow abortion for any reason after 20 weeks of pregnancy.

Mississippi's law reflects the diversity of approaches that the states have taken on abortion in recent years. Delaware, Hawaii, Illinois, Maine, Massachusetts, New Mexico, New York, Rhode Island and Vermont have passed laws to codify *Roe*. These would keep abortion legal for nearly any reason, at any time of pregnancy, as the Supreme Court through *Roe* has dictated for 48 years. Six other states had previously passed similar laws.

On the other hand, some 13 states in recent years, including Mississippi, have passed strong limits on abortion. Missouri, North Dakota, South Dakota, Tennessee and Utah have also passed prohibitions of abortion conditioned on the overruling of *Roe*. None is enforceable now due to injunctions by federal or state courts. Virtually all exclude the women seeking abortions from any legal penalties—Mississippi's are limited to the "physician"—as state abortion policy generally did for nearly a century before *Roe*.

Like it or not, this diversity is democracy at work. These varied laws embody public opinion much better than the sweeping edict in *Roe* that put the court at the center of abortion politics. Legislators are accountable to the people for their votes, unlike judges. There is democratic legitimacy in laws passed by elected representatives, reflecting the consent of the governed.

If the court loosens its grip on abortion politics, the states have shown that they are ready and able to address the issue in ways that reflect Americans' varying viewpoints, grounded in the science of fetal development and maternal health.

—Clarke Forsythe is senior counsel at Americans United for Life and author of *Abuse of Discretion: The Inside Story of Roe v. Wade*. This piece was originally published in the *Wall Street Journal* and is reprinted with Mr. Forsythe's permission.

Kristan Hawkins

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court will consider—for the first time since *Roe v. Wade*—allowing state abortion bans based on gestational limits. As a tragic consequence of *Roe*, abortion on-demand has come to operate silently in the background of American life, largely accepted as the status quo by the generations born since 1973. Many say that *Roe* is settled law, but what the law is and whether it's actually settled (spoiler: It's not) are questions the abortion industry and its political allies would prefer to leave untouched.

With the Supreme Court potentially on the brink of reversing *Roe v. Wade*, *Roe*'s defenders are in a situation much like that of *The Wizard of Oz*'s “man behind the curtain.” They have been operating a powerful-looking propaganda machine churning out innocuous-sounding ideas like “a woman's right to choose” for decades, hoping no one pulls back the curtain to reveal the truth and drain the puppet master of his influence over public opinion. The abortion movement knows that the ground on which it stands is weak, and its worst nightmare is that ordinary Americans will come to *know* the extent of abortion violence permitted under law in the United States. To pave the way toward the public embrace of a victory in *Dobbs*, Americans need to talk about *Roe*.

Polling on American sentiment toward abortion consistently finds a bizarre contradiction: Many more Americans support the vague concept of *Roe* (the “right to choose”) than they do the actual tenets of *Roe* (abortion on demand through all nine months of pregnancy, for any reason, and often funded by taxpayers). The most recent Gallup polling finds that 58 percent of Americans oppose overturning *Roe v. Wade* (while 32 percent support overturning it), but only 32 percent of the same group believe that abortion should be “legal in all circumstances” (as it is under *Roe*). That means there's a huge discrepancy between Americans saying they support *Roe* and understanding that *Roe* is synonymous with abortion being “legal in all circumstances.”

But even the 32 percent statistic appears to be an overestimation of support for *Roe* when contrasted with the same pollster's findings in 2018, when Gallup revealed *that only 13 percent of Americans support abortion in the third trimester*. It is simply not possible for 58 percent of Americans to support *Roe* if only 13 percent of Americans support third-trimester abortions. Skewed polling like this, which fails to ensure that Americans know what they are expressing support for when they endorse *Roe v. Wade*, along with a media complicit in the misdirection, have culminated in the propagandistic claim that *Roe* is settled. It is anything but settled.

Those working to win Americans over to the pro-life position are not up against massive support for *Roe v. Wade*. Rather, they are up against Americans *not knowing what Roe v. Wade permits*—and they need to return the conversation to exposing *Roe* in order to neutralize the *Dobbs* fearmongers.

For proof of how tenuous the abortion industry's grasp on American abortion opinion is, just look to Nancy Pelosi, one of the most ardent acolytes for *Roe v. Wade*. Pelosi is so afraid to discuss the realities of the ruling that she refuses to even engage with reporters on the subject. When asked at a press conference whether a 15-week-old preborn child is a human being, Pelosi didn't own up to the Supreme Court decision she claims to embrace by stating that, “Yes, a 15-week-old baby is a human being who can be legally killed for any reason in any state.” Instead, Pelosi did what *Roe*'s defenders always do: ignored the damning question and pledged fealty to *Roe*. “Let me just say that I am a big supporter of *Roe v. Wade*,” Pelosi said, before citing her own five children as her bizarre credential for taking such a draconian position on the killing of innocent children. She then ignored follow-up questions and called on the next reporter.

By pledging fealty to *Roe* instead of engaging in conversation about it, defenders of the ruling

reveal that their kryptonite is exposure of the facts about *Roe*. They don't want Americans to know that the U.S. is among only seven nations permitting the killing of unborn children past 20 weeks of pregnancy—something that even the *Washington Post* admits is true. Among these fellow governments are the notorious human rights abusers North Korea and Communist China. And in the U.S., *Roe* permits abortion not just past 20 weeks, but up until the very moment of birth.

Leading up to *Dobbs v. Jackson Women's Health Organization*, the abortion industry and its mainstream media and pop culture allies will not be objectively analyzing the legal merits of *Roe* (spoiler: There are none). Instead, the pro-life movement should be prepared for frenetic, panic-inducing coverage characterizing *Roe*'s impending demise as the biggest setback for women in modern history—a dystopian nightmare for U.S. women and girls. According to our opponents, rape survivors will be left destitute, women carrying children diagnosed with fetal “anomalies” will be forced to subject them to unnecessary suffering, and the opportunities women have gained over the last century will vanish without the right to kill their children. They'll claim that women will have to forgo career and education goals, and will frame this as a loss of “autonomy” over their bodies and an exertion of “control” by the “religious right.” In other words, abortion allies will unleash every trick in their abortion marketing playbook with greater ferocity than Americans have probably ever seen. It will be an onslaught.

Of course, the pro-life movement has debunked these claims *ad nauseam*. Pro-life Americans needn't be overwhelmed by the noise, but they must be prepared to demand accountability on the questions the abortion industry and its allies have spent 48 years deflecting. Remember: The abortion lobby can only argue that reversing *Roe* is bad if Americans first accept the premise that *Roe* itself is good. Rather than trying to play defense against the apocalyptic projections Big Abortion will make about the reversal of *Roe*, pro-life Americans need only bring the conversation back to *Roe* itself, forcing *Roe*'s defenders to actually *defend Roe*.

The Pro-Life Generation has the upper hand in the court of public opinion leading up to the *Dobbs* ruling and the potential end of *Roe*. Now is not the time to squander it by letting the abortion industry dictate the terms of the public conversation around abortion.

—Kristan Hawkins is president of *Students for Life of America*.

Teresa Stanton Collett

Last month the Supreme Court agreed to review the constitutionality of a Mississippi statute prohibiting most abortions performed after 15 weeks gestation.¹ The Mississippi prohibition is unremarkable, even liberal, when compared with the laws governing abortion in most European nations, where gestational limits on abortion have been employed for decades,² yet it is being discussed in some quarters as the equivalent of imposing a national ban on all abortions. In fact, it is not, and even if the Court goes so far as to declare that the Constitution poses no impediment to any pre-viability prohibition, an important question remains: Does the Constitution require all prohibitions to contain a “health” exception, and if so, how is health to be defined?

To explain the gravity of this question, a brief review of the legal history of abortion is in order.

Jane Roe's case was brought to the courts by abortion rights activists, who had enjoyed some early success in efforts to repeal existing protections for unborn children,³ but soon suffered nu-

merous defeats in other state legislatures. The pro-life public largely supported the states' abortion restrictions, notwithstanding the shifting views of elite legal⁴ and medical professionals.⁵ As well documented by Clarke Forsythe, the opinion of *Roe v. Wade*⁶ was the result of some odd and unforeseeable events combined with judicial maneuvering to achieve a particular legal result.⁷ The opinion itself largely reflects the legal imagination of its author, Justice Blackmun, rather than a legal mandate from the people embodied in the text of the Constitution.

Justice Blackmun crafted *Roe* to be seen largely as a “moderate” opinion,⁸ an opinion that seemingly limited abortion on demand to the first 12-14 weeks of pregnancy, which the Court identified as the “first trimester.” After that period, states had the power to regulate abortion to protect women’s health and safety. Laws to protect the child were only permissible after the baby developed to the point of viability, when he or she could live outside the womb. Even then, states would be required to allow the child to be killed through abortion if a doctor deemed it “necessary to protect the woman’s life or health.”

The deceptiveness of *Roe*’s purportedly constitutional compromise becomes apparent when reading *Roe*’s companion case, *Doe v. Bolton*.⁹ As proliferators know, but most voters do not, *Doe* defined “health” to include “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.” Under this definition, any woman who is distressed by her pregnancy qualifies for an abortion under the “health” exception. The provider need only characterize the abortion as “necessary” for the woman’s “psychological health.”¹⁰

This brief legal history illustrates an important point about the possible outcome of *Dobbs*—if a majority of the Court uphold the Mississippi pre-viability prohibition at 15 weeks, it is equally crucial that the Court also uphold the narrow life and health exceptions contained in the statute:

[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.¹¹

Both “severe fetal abnormality” and “medical emergency” are defined in the statute.¹² Unlike the Court’s construction of Georgia’s “health” exception in *Doe*, recognizing both psychological and social concerns, the Mississippi exceptions are limited to physical conditions.¹³

Pro-life advocates should guard against a pyrrhic victory that directly overrules *Roe v. Wade* and *Planned Parenthood of S.E. Penn. v. Casey*, while expanding the availability of abortion on demand by imposing the broad health exception of *Doe v. Bolton* on every prohibition.

NOTES

1. *Dobbs v. Jackson Women’s Health Organization*, No. 18-60868 (5th Cir. 2019), cert. granted, Sup. Ct. Dkt. 19-1392 (May 17, 2021).

2. Mary Ann Glendon, *Abortion and Divorce in Western Law* (1989).

3. Alaska, Hawaii, New York, and Washington repealed their prohibitions on abortion, and generally allowed licensed physicians to perform abortions on request before fetal viability. Judith P. Borne et al., *Surveillance of Legal Abortions in the United States, 1970*, J. Ob. Gyn. Neonatal Nursing 17, 18 (Apr. 1971) at [https://www.jognn.org/article/S0090-0311\(15\)30413-0/fulltext](https://www.jognn.org/article/S0090-0311(15)30413-0/fulltext).

4. Samuel Walker, *May 21, 1959, A First Step: American Law Institute Proposes Abortion Law Reform*, Today in Civil Rights History at <http://todayinclh.com/?event=american-law-institute-proposes-abortion-law-reform>.

5. Amicus Brief of the American Association of Pro-Life Obstetricians and Gynecologists in *June Medical LLC v. Russo*, 591 US ___, (2016) at https://www.supremecourt.gov/DocketPDF/18/18-1323/126927/20191227154424488_AAPLOG%20Amicus%20Brief.pdf

6. 410 U.S. 113 (1973).

7. Clarke Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (2013).

8. “[A]ppellant and some amici argue that the woman’s right is absolute and that she is entitled to terminate her pregnancy at

whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.” *Roe* at 153.

9. 410 U.S. 179 (1973).

10. California provides a useful example of the abuse of the “psychological” health standard. After liberalizing the state’s abortion laws in the 1960s, California defined “necessary” for the psychological health as the same used for civil commitment, i.e., one had to be a danger to oneself or another, or the property of another. Despite this very, very narrow definition for what would constitute a mental health justification for abortion, in 1970 more than 60,000 women in California obtained an abortion on mental health grounds (representing more than 98 percent of all abortions sought and authorized under the 1967 California Therapeutic Abortion Act). In *People v. Barksdale*, 8 Cal. 3d 320, 105 Cal. Rptr. 1, 503 P.2d 257 (1972), the California Supreme Court, noting these statistics, struck down the law, saying that either pregnancy created mental health issues no one normally would anticipate or that doctors who had to approve abortions for mental health reasons did not understand the law.

11. *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019).

12. “Severe fetal abnormality” is defined as “a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb.” “Medical emergency” is defined as a condition in which “an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.” Also, the medical licenses of doctors who violate the Act “shall be suspended or revoked[.]”

13. *Dobbs*, 945 F.3d at 269, n. 3.

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George McKenna

Decades ago I worked on a project to develop a telecourse on controversial political issues. The project was headed by a former associate of Edward R. Murrow, the famed CBS broadcaster of the 1950s. Like Murrow, he enjoyed debates on hot-button issues and was well-informed on the facts that set the stage for the debates. But on one issue I found a surprising ellipsis in his knowledge base. As he worked over his introduction to the topic of abortion, he tried this out on me: “Now, the Supreme Court’s *Roe v. Wade* decision struck down all legal bans on abortion for the first trimester of pregnancy, right?” No, I said, its decision in *Roe* and its companion case, *Doe v. Bolton*, in effect outlawed bans on abortion for all three trimesters.

He was thunderstruck. He was a thoroughly secular liberal, fine with early abortions but simply could not process the idea of an abortion in the eighth or ninth month.

Here is what *Roe v. Wade* has wrought. We have a sitting governor in the State of Virginia, Ralph Northam, a former pediatric neurologist, who has carefully explained what you do after you’ve aborted a late-term baby who is struggling to stay alive: “The infant would be kept comfortable. The infant would be resuscitated *if that’s what the mother and the family desired. . . .*” (My italics) Otherwise “a discussion would ensue between the physician and the mother.” Dr. Northam said this on the air, in a radio interview, and was surprised that so many listeners were appalled.

Now we have a challenge to *Roe v. Wade* that is expected to be taken up in the fall: an appeal by the state of Mississippi to uphold its ban on abortion after the 15th week of pregnancy. Mississippi’s legal team sought answers to three different questions bearing on the case, but the Court narrowed them down to one: *whether all pre-viability bans on elective abortions violate the Constitution.* How will the Court answer that question?

We know that three judges, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, will answer with an emphatic “Yes.” I will hazard a probable “no” from Justices Clarence Thomas and Samuel Alito, and all the rest are question marks. From a pro-life perspective the shakiest question-mark may be

John Roberts, because of his reluctance to overturn longstanding precedents. The second-shakiest, in my opinion, is Brett Kavanaugh, because of apparent assurances he had given to Maine Senator Susan Collins, a “right to choose” supporter, during three hours of private conversation with her before she voted “yes” for his confirmation. (See my article in the Winter 2019 edition of *HLLR*.) If, despite my fears, both Roberts and Kavanaugh vote strictly on the constitutionality of Mississippi’s ban on abortion, pro-life wins by 6-3. If one of them defects, pro-life wins by 5-4. If both defect, *Roe v. Wade* will have barely beaten back its most serious challenge. All of this figuring, by the way, is based on the assumption that Justices Neil Gorsuch and Amy Coney Barrett will vote for life. If that doesn’t happen, it could be a blowout 7-2 vote for abortion, and pro-lifers would probably need a constitutional amendment to get rid of *Roe v. Wade*. Which, by the way, is what many of them were asking for right after the case was decided in 1973, until the Catholic Bishops prevailed, backing the modified version of letting the states decide what to do about abortion within their own borders.

How *should* this case be decided? Holding strictly to the issue allowed by the Court, I would vote “no” on the question of whether all pre-viability prohibitions on elective abortion are unconstitutional. I would even hazard an *obiter dictum* that, except to save the life of the mother, *no* such prohibitions should be unconstitutional. I follow the science, which says that human life begins at or around the time sperm fertilizes the egg, and my moral code, which says you’re not supposed to kill people.

So I’m a little disappointed with the Mississippi law. It left quite a bit on the table (so to speak) by not banning abortion in the first trimester, when, nationally, more than 90 percent of abortions are performed. Even so, there are reasons for hope. As Hadley Arkes has noted, this case may finally force the Court—and the public—to recognize how morally crazy the “viability” standard is. A child in the womb is only legally human when he or she is able to live outside the womb? By that standard, helpless people are not entitled to our protection.

To which I would add my own hope that sustaining Mississippi’s abortion law would go far toward desacralizing *Roe v. Wade*. The abortion industry has come to treat *Roe* as a holy writ whose basic structure must never, never be tampered with. If the Court sustained this law, it would reset the time clock for “abortion rights.” If Mississippi were allowed to ban the killing of non-viable babies after the first 15 weeks of a woman’s pregnancy, then the fact of non-viability would no longer be a shield against a ban. Non-viability would be irrelevant. But if non-viability becomes irrelevant *after* 15 weeks, why not *before* 15 weeks? Why not 14 weeks, or 13? And so on, down the line. The old slippery slope, this time working in our favor.

—George McKenna is professor emeritus of political science at City College of New York.

Kristen Day

Democrats for Life of America (DLFA) enthusiastically welcomes the Supreme Court’s decision to hear *Dobbs v. Jackson Women’s Health Organization*. We join the rest of the pro-life movement in urging the Court to overturn *Roe v. Wade* or at least curtail the limits *Roe* has imposed on our ability to protect unborn life. DFLA hopes that *Dobbs* will serve as a historic turning point in the way our nation frames the debate around abortion.

The Roberts Court is slow, incrementalist, and concerned about the institutional legitimacy of the Supreme Court. If the decision in *Dobbs* fits that trend—giving the pro-life movement a partial victory but not everything it wants—there will be understandable disappointment within the movement. Yet it is also worth considering the upshot of such a decision. In that scenario, we should take heart and counsel from an unlikely source: the late Justice Ruth Bader Ginsburg. Herself a hero of the pro-choice movement, she unabashedly critiqued *Roe* for being too broad and overreaching; she would have preferred a more incremental approach to legalizing abortion, one that would not have spurred so much backlash.¹ In an incrementalist *Dobbs* decision, the pro-life movement can avoid that pitfall (among the many others) of *Roe*. Such a *Dobbs* decision could be the cornerstone upon which we slowly craft an unshakeable pro-life consensus that lasts generations.

It is helpful to take stock of our country's current abortion debate. During his tenure in the Senate, Joe Biden voted in favor of a federal ban on late-term abortion, regularly supported budgets including the Hyde Amendment, and said that abortion is “always a tragedy.”² In the course of the presidential primary, Mr. Biden reversed himself and began campaigning to end the Hyde Amendment and codify *Roe* into federal law. Mr. Biden justified his significant shift in substance and tone by indirectly invoking the pro-life movement's success: more state regulation on abortion, a decline in the number of abortion clinics, and of course, more Supreme Court justices likely to overturn *Roe*.³ Both this platform and this reasoning illustrate a journey toward greater polarization on abortion for our nation, for the Democratic Party, and for President Biden.

This (oversimplified) history of Mr. Biden's about-face on abortion highlights the symbolic value of the *Roe* case. It can only be assumed that when politicians promise to “codify *Roe*,” they are speaking symbolically; would the pro-choice coalition not prefer to legislate along the lines of *Planned Parenthood v. Casey*, or *Whole Woman's Health v. Hellerstedt*, or the laws passed in New York and Illinois in 2019? Although subsequent cases have overshadowed *Roe* legally, *Roe* remains firmly rooted in the American imagination as the case that legalized abortion across the entire nation. *Dobbs* has the potential to become similarly lodged in our national conscience. It is imperative—both during litigation and after the Court rules—for the pro-life movement to recognize the symbolic salience of this case and respond accordingly. There is a chance for *Roe* to be superseded not just legally, but symbolically, and thus to chart a course which is more hospitable for the unborn.

Biden's newfound abortion extremism also mirrors the ways in which the “pro-life” and “pro-choice” sides have radicalized each other: each ratcheting up the stakes in response to the other's moves. This dynamic of polarization will likely continue in response to any variety of rulings in *Dobbs*. If the Supreme Court gives the pro-life movement an inch more room for legal restrictions, abortion activists will declare that *Roe* was overturned and attempt to mobilize resistance and win over public opinion.

No matter the legal ramifications of *Dobbs*, there will be plentiful political, intellectual, cultural, and, perhaps above all, social work for the pro-life movement. A groundbreaking 2019 sociological study found that most Americans speak little about abortion, often out of fear of conflict. The same study found that this left people without vocabulary to discuss abortion with scientific, moral, and legal nuance.⁴ *Dobbs* will give us ample opportunities to advocate for the lives of the unborn with subtlety, information, and passion. We must use the openings *Dobbs* will create with family members, friends, and colleagues. If they are already pro-life, now is an ideal moment for their increased involvement. If they disagree with us, when better to courageously and respectfully engage in rigorous dialogue?

What better time to dispel the myths about abortion and the pro-life movement? *Dobbs* will offer

fresh chances to prove that our movement is not about propping up patriarchy, that we care for human life at all stages (not just in the womb), and that women will thrive more in a society that restricts abortion than in one that celebrates it. When better to lovingly share the alternatives to abortion? When better to replace the faux hospitality of networks assisting women to get abortions⁵ with the extension of our clinics that support and empower women to carry their pregnancies to term?

No matter how the Court ends up ruling in *Dobbs*, any success the pro-life movement achieves against abortion will need to be extended into a whole-life movement. We need an extensive range of options on the table to support mothers, fathers, and children born and unborn. This is one reason DFLA cheers President Biden's child tax credit. The pro-life movement will also need patient, canny alliances as we work with others who may not share our entire outlook or agenda in states that currently enshrine abortion in their laws, budgets, and culture. As we build a culture of life, every victory against one threat to human life helps us dismantle the others. Every victory against the death penalty, racism, and euthanasia is a victory against abortion, and vice versa.

With the clashing symbols of *Roe* and *Dobbs*, our nation could experience a reframing of the abortion debate unlike anything we have experienced in the last half century. *Dobbs* already has generated and will doubtless continue to generate big, front-page headlines and endless conversation across a variety of media. Abortion advocates will have quite an opening. So too will the pro-life movement! Let your friends know that they do not have to choose between being Democrats and being pro-life. DFLA's elected officials have a long, proud history of voting "pro-life for the whole life." The members of our rising generation of incredible activists, candidates, and legislative and executive leaders promise to honor and extend that legacy. Our goal is for both political parties to agree on defense for the unborn and support for their mothers.

DFLA will be on the front steps of the Supreme Court with our megaphones, but we will also be in the trenches: giving witness, persuading others, and making sacrifices to support the most vulnerable in our society. Democrats for Life of America will seize the opportunity provided by *Dobbs* to defend unborn children, empower women, and build a lasting pro-life consensus.

NOTES

1. <https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>
2. <https://www.politico.com/story/2019/06/21/joe-biden-abortion-hyde-amendment-1543804>
3. Ibid.
4. https://churchlife-info.nd.edu/en-us/how-americans-understand-abortion-a-comprehensive-interview-study-of-abortion-attitudes-in-the-u.s?utm_campaign=AAS%20Research%20Report%202020&utm_source=MICL%20Resources%20Page&utm_medium=MICL%20Resources%20Page&utm_content=MICL%20Resources%20Page
5. <https://abortionfunds.org/>

—*Kristen Day is executive director of Democrats for Life.*

Helen Alvaré

In *Dobbs*, the Supreme Court will not restore greater protection to unborn life without a credible argument that by so doing, they are not impairing 21st-century women's equal and robust opportunities in every sector of society. This is true even though *Roe v. Wade* and *Planned Parenthood v. Casey* appeared to rest a constitutional right of abortion in women's "liberty" (freedom from the

burdens of pregnancy and mothering) and not their “equality” interests. But no one can forget the *Casey* plurality’s ringing claim that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by the availability of abortion in the event that contraception should fail.” In fact, abortion advocates continue to lean heavily on this claim. It features relentlessly in the legislative histories of several states (RI, IL, NY, VT) recently enshrining abortion on demand throughout pregnancy into law.

Not surprisingly, the *Casey* Court cited no empirical data in support of its conclusion, only footnoting the musings of two committed pro-legal-abortion academics. No such evidence was introduced, either, in the state contests noted above. Instead, legislators and interest groups with a shocking lack of curiosity or intelligence regarding abortion’s true impacts upon women rely upon the “intuition” that, without children, women will finish high school or attain higher education. Without children, women will obtain or excel in particular employment.

And they couldn’t make the empirical case even if they were genuinely interested in doing so. Dozens of laws since the 1970s have enshrined into law women’s equal opportunities in politics, the economy, housing, education, the military, and myriad other domains. Women—with and without children—have grasped these opportunities afforded to them and achieved impressive results in every domain. Today there are more women in college than men. There are more women in many graduate programs too. As of December 2019, women constituted more than half of the U.S. workforce.

Even those knowing the least amount about the sciences of economics and sociology would know how impossible it is—credibly, statistically—to sustain the claim that women’s current successes in these and other domains could be *causally* tied to abortion. There are simply too many factors, unfolding through too many decades, and intersecting with too many other phenomena (e.g., the economy generally, developments in technology affecting the labor force) to allow for a reliable conclusion. Furthermore, there is important evidence to the contrary.

First, a meta-analysis of the credible literature about abortion’s effects upon women—some by abortion advocates—indicates that, on average, it has negative physical and psychological effects. Even were there some economic advantages to obtaining an abortion, the negative effects of these harms would have to be netted out.

Furthermore, it is easy enough to point to a raft of empirical data showing that abortion rates and ratios declined at the same time that women’s academic, employment, and income data *soared*. In short, there isn’t even a *correlation* between women’s having abortions and their achievements in these domains. The correlation is the *opposite*. So how could abortion have *caused* improvements?

Third, the women most likely to succeed in feminist-materialist-equality terms are the very women experiencing the *fewest* abortions. These are white women with higher education. Poorer women, women of color, and women with fewer educational opportunities, on the other hand, have highly disproportionate rates of abortion. This suggests that deprivation and tragedy lead to abortion; abortion does not cause accomplishment.

In fact, legal abortion has likely held women back from even greater gains by disincentivizing lawmakers and corporations from accommodating women with their children more generously. If the whole world—including pro-abortion feminists—proclaims that the “ideal worker” is like a man without parenting responsibilities, then why should public and private policies extend accommodation to women? Or why else is it that only now, in the early 21st century, are corporations and lawmakers seriously considering significant financial assistance for parents, and laws and policies mandating greater flexibility for parents, and paid leave from work with a job guaranteed upon return?

Even though the *Dobbs* case is proceeding within the “liberty” framework established by *Roe* and

Casey, more than a few amici will likely be making the case to the Supreme Court that abortion does not cause equality between the sexes. In fact it almost certainly impairs it. Whatever the Court actually does in its final opinion, it will need this reassurance.

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Kelsey Hazzard

Dobbs v. Jackson Women's Health Organization presents the Supreme Court with an opportunity to save countless lives from the violence of abortion. That is, of course, the primary reason the Court should reverse *Roe v. Wade* and *Planned Parenthood v. Casey*.

There is a secondary reason, however, which I wish to explore here: Reversing *Roe* and *Casey* will correct an egregious violation of the separation of church and state.

For decades, the abortion industry and its lobbyists have advanced a false narrative that the pro-life position is inherently religious. Speaking as a pro-life atheist, that is hogwash. In fact, nearly 13 million religiously unaffiliated Americans oppose abortion.¹ We accept the overwhelming scientific consensus that human life begins at fertilization.

Scientific consensus, not religion, should inform government policy. But the justices who decided *Roe v. Wade* paid no heed to that laudable principle. They relied heavily upon religion and pseudo-science to muddy the waters and strip unborn children of legal recognition:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.

. . . The Aristotelian theory of mediate animation, that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this ensoulment theory from those in the Church who would recognize the existence of life from the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief amicus discloses, this is a view strongly held by many non-Catholics as well, and by many physicians.²

The Court treated the Stoics, Jewish scholars, Aristotle, and modern-day physicians as equally valid, competing sources of wisdom on the question of when a human life begins. They are not. No offense to Aristotle, but he never saw a sonogram. The Stoics lacked the benefit of the scientific method. If the Court had a robust respect for the separation of church and state, the disciplines of philosophy and theology would not have warranted consideration. The Supreme Court would have followed modern medicine—and *Roe* would have been a very different opinion.

It's worth noting that *Roe* primarily cites beliefs from Western traditions. If the Court had expanded its horizons a bit, the fallacy might have been easier to spot. For instance, Malaysian

folklore holds that a child lives for forty days in its father's womb, located in his brain, before making the journey to the mother's womb. Among the Arapesh of Papua New Guinea, it was believed that baby-making required repeated acts of intercourse during the first few weeks of pregnancy. Neither of those beliefs is any more wrong than the "preformationist" hypothesis of 17th-century Europe, which held that each sperm contained a tiny child, called a homunculus. (You may have noticed echoes of that belief from pro-choice internet trolls who say that if abortion is murder, masturbation is a holocaust.) Perhaps we should count ourselves lucky that the Supreme Court didn't cite Spartan philosophy, which encouraged infanticide.

All of those beliefs were potentially defensible in the times and places they arose. But we know better now. My life, your life, and the life of every powerful person in a black robe began when an egg cell fused with a sperm cell.

Alas, the Court's privileging of supernatural nonsense to justify abortion only worsened in *Planned Parenthood v. Casey*, when Justice Kennedy infamously declared that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."³

We have freedom of thought in this country. You're at liberty to believe whatever you want to believe. You can believe the earth is flat; we'll all judge you for it, but it's not illegal to believe it. But if your belief that the earth is flat leads you to ignore the curvature of the earth while you're navigating an airplane, we have a problem. And if a person's subjective beliefs about the "mystery of human life" are allowed to trump laws against killing other people, that's not liberty. That's oppression.

The evidence for life before birth is overwhelming. Knowing what we now know, the denial of life's existence in the womb amounts to a religious doctrine—and a particularly destructive one. It has no place in a civilized legal system.

The law at issue in *Dobbs* prohibits abortion after 15 weeks. There is no avoiding the fact that a 15-week-old in the womb is alive: not merely a "mystery" or "potential life," but a living person with recognizably human features. Indeed, a 15-week law is rather modest by international standards. It's high time for the Court to accept the science and restore church-state separation. It's high time for the Court to reverse *Roe* and *Casey*.

NOTES

1. Hazzard, Kelsey. "Non-religious pro-life population grows to 12.8 million." *Secular Pro-Life Perspectives*, 18 Aug. 2018, <https://blog.secularprolife.org/2018/08/non-religious-pro-life-population-grows.html>
2. *Roe v. Wade*, 410 U.S. 113, 160-161 (1973).
3. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

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