

Roe v Dobbs

Discussion Guide Materials for
Deliberative Forums on
the Issue of Abortion in America

Outline

Public Deliberation

Approaching the Topic

Historical Context

Legal Context

Roe v Wade

Dobbs v Jackson Woman's Health Organization

What Now? Laws, Laws, Laws

State Legislatures

State Constitutions

Legislative Amendments

Referenda Amendments

Executive Orders

National Legislation and Federal Laws

Federal Constitutional Amendments

Where Do You Stand?

What Do We Do?

Seeking a Democratic Resolution

Guiding Questions

Appendix 1 Our Metaphysical Problem

Appendix 2 Some Scientific Aspects of Fetal Development: Fetal Heartbeat and Fetal Pain

Public Deliberation

Through deliberation, people develop a fuller understanding of issues and come to appreciate how these issues are experienced differently by different people. Public deliberation also helps citizens to develop a shared resource of expanded knowledge, which emerges as people express their own perspectives and learn from the perspective of others. Drawing on this enriched understanding and the shared resource of knowledge enabled by deliberation, people can develop informed opinions. These informed opinions can, in turn, provide guidance to those who have the responsibility of devising policy or implementing programs.

Deliberative Forums seek to capitalize on the value of public deliberation and to do so in a structured way. By providing a mixed group of participants with balanced background information, the opportunity for small-group deliberation, and, where possible, access to a resource panel of experts, we seek to provide you with a unique opportunity to work together as you develop the kinds of opinions that will provide advice and counsel to public officials across the political divide.

Approaching the Topic

The issue of abortion in America is far more complex than the rhetoric of picket lines and social media posts. National concerns that have resulted in polemics about the issue and affected the legal status of abortion include religious beliefs, health and safety concerns for women and children, and the political and socio-economic influences of the day. These national disputes often mirror individual concerns — concerns ranging from personal belief systems to a focus on one’s family and self. To better understand this issue, we need access to medical facts and legal decisions, a grasp of the debate’s historical context, and a willingness to pursue the alternatives that exist for discussing the issue apart from its political discord. Equally important, we need to understand how it plays itself out in the private struggles behind individual decisions.

What’s Your Frame of Mind?

The terms we use to discuss any issue call to mind many associations, some of which we may not explicitly acknowledge. Together these terms and their associations make up a Frame, and these Frames play an important role in public deliberations. Specifically, the terms used to name or describe an issue encourage each of us to attach particular values or concerns to the issue.

This is particularly the case with the phrases such as “Pro-Life” and “Pro-Choice.” Yet those who are ‘pro-life ’ certainly respect the role of individual choice in their own lives (so they are not strictly speaking ‘anti-choice’) and those that are ‘pro-choice ’ certainly respect human life in their overall worldview (so they are not strictly speaking ‘anti-life’.)

In responsible democratic deliberation, participants should be explicit about the reasons why they hold their views, and they should be willing to offer the rationale that supports their positions. They should also be willing to listen to and consider the rationale and positions of others. When you join the conversation about the Issue of Abortion in America, we hope you will be mindful of and explicit about the terms and associations—the Frames—with which you and others discuss the issue.

Historical Context

Abortion has been a contentious issue in the United States from the country's founding to the present day. Yet a look at the history of abortion in America reveals a surprising ebb and flow of public tolerance and resistance over time. These changes in the country's attitude toward abortion are reflected by changes in its legal status. At the beginning of the 19th century, abortion during the early stages of pregnancy was a practice understood by many women. By the end of the 19th century, however, the practice had been made illegal in many states, and these bans on abortion continued until the *Roe vs. Wade* decision in 1973. With the *Dobbs Decision*, however, the issue has been returned to the states in a manner similar to the situation prior to *Roe* i.e., in some states it is illegal and punishable by law and in other states it is legal and permissible.

19th Century Background

Abortion, when carried out early in pregnancy, was practiced without legislative sanction in the United States from colonial times through the first decades of the 19th century. Abortion was only a criminal act if carried out after the time of "quickening," or when the woman first felt fetal movement, usually between 16 and 20 weeks of pregnancy. Common medicinal practice of the time affected abortion through the use of herbs (abortifacients) to induce miscarriage. Home medicine pamphlets included information on "nostrums for block menses," and mothers passed knowledge of family remedies for unwanted pregnancies onto their daughters. While practiced in private and mostly 'under the radar,' abortion was criticized by those who thought it morally wrong, including ministers, doctors, and local leaders. Famously, there were leading Common Law Jurists like Blackstone who argued that abortion of a 'quick' child should be considered at least "a heinous misdemeanor." There was, however, no organized effort at the State level to restrict or prohibit the practice.

Between 1825 and 1850 abortion became commercialized and lucrative, and consequently, more available. In addition to "regular physicians," a growing number of "irregular physicians" practiced abortion, claiming the efficacy of pills, powders, and potions for bringing on a missed or suppressed menstrual period. Some also advertised the practice of surgical abortion. Abortion was increasingly used by white, married, Protestant women of the middle and upper classes. This, along with the growing influx of immigrants, the flourishing of "irregular physicians," and what seemed to be a greater frequency of deaths among women receiving abortions, caused alarm among middle-class physicians, clergy, and legislators. The time was ripe for restricting abortion.

In 1847, the American Medical Association was founded to improve and control the practice of medicine and to form "regular physicians" into a respected, powerful, cohesive and proactive group. The AMA also sought to professionalize medical practice and training, which involved putting the "irregulars" practicing abortion out of business.

Around 1858, the AMA organized physicians that had begun to speak out against abortion and aligned itself with the growing social movement to make the practice illegal.

Comstock Law (1873)

Be it enacted... That whoever, within the District of Columbia or any of the Territories of the United States...shall sell...or shall offer to sell, or to lend, or to give away, or in any manner to exhibit, or shall otherwise publish or offer to publish in any manner, ... an obscene book, or any cast instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion,, shall be deemed guilty of a misdemeanor, and on conviction thereof in any court of the United States...he shall be imprisoned at hard labor in the penitentiary for not less than six months nor more than five years for each offense, or fined not less than one hundred dollars nor more than two thousand dollars, with costs of court.

Though no one religion took a united stand against abortion, by the late 1860's, at the urging of physicians, many Protestant sects and the Catholic Church began to take official stances against it. In 1869, Bishop Spaulding of Baltimore set forth the official Catholic position: abortion was not to be allowed under any circumstances. The AMA was able to use these religious edicts to bolster its crusade against abortion and successfully change public policy: between 1860 and 1880 at least 40 anti-abortion statutes entered state law books. By the end of the 19th century, all states had banned abortion or severely restricted its use to cases where it was necessary to save the life of the woman as determined by a medical physician. North Carolina's 1881 State law outlawing abortion is typical of the anti-abortion laws passed during this period:

Sec. 1. "That every person who shall wilfully administer to any woman either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, shall be guilty of a felony, and shall be imprisoned in the state penitentiary for not less than one year nor more than ten years, and be fined at the discretion of the court."

Sec. 2. "That every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or any thing whatsoever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, shall be guilty of a misdemeanor, and, on conviction, shall be imprisoned in the jail or state penitentiary for not less than one year or more than five years, and fined at the discretion of the court."

Yet during the 19th century when state laws increasingly criminalized abortion after quickening there were few prosecutions and those prosecutions seldom resulted in convictions. However, one effect of this change in social climate and statutory law was to drive abortion underground. Those individuals who performed abortions still had the knowledge, and women still found themselves with unintended or unwanted pregnancies. The first era of illegal abortion had begun.

Legal Context

For the first 60 years of the 20th Century, there were no efforts to change state abortion laws. Then in the early 1960's, groups, including the American Medical Association, advocated for the passage of so-called reform laws that would permit physicians to perform abortions under certain circumstances — typically if the pregnancy resulted from rape or incest, if there was a substantial likelihood of fetal deformity, or if the continuation of the pregnancy would threaten the life or health of the woman.

A group called “repealers” went further than reformers but both believed that they could not be successful fighting for changes in state legislatures on a state-by-state basis. They turned to the courts, with repealers arguing that women had a constitutionally protected right of privacy which included deciding whether and when to continue a pregnancy.

The link between privacy and reproductive choice was forged in **the Supreme Court's 1965 Griswold decision**. In a 7 to 2 majority the court struck down the 1879 Connecticut statute which made it illegal “to use any drug or article to prevent conception.” The decision held that there exists a zone of privacy which encompasses the marital relationship and that this zone of privacy outweighs any legitimate interest the state may have in preventing sexual immorality in the manner of the Comstock Laws.

In 1972, the United States Supreme Court asserted that the right to privacy attaches to the individual and not just to a couple. Writing for the majority, Justice William Brennan said, “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Those words were to set the stage for *Roe v. Wade*, decided the next year.

The Roe v Wade Decision (1973)

Norma McCorvey was a high school dropout who lived in Texas at a time when abortion was illegal in the State. While still in her teens, she gave birth to a daughter in 1965 and, by the end of 1966, was pregnant again. In both cases she gave up custody of her children. During the summer of 1969 she became pregnant again by a third man. This time she did not want to give birth.

Attorneys representing the plaintiff, now called “Jane Doe,” challenged the Texas anti-abortion statute in a class action suit. It alleged in part that the Texas law infringed upon the plaintiff's “right to safe and adequate medical advice pertaining to the decision of whether to carry a given pregnancy to term” and upon “the fundamental right of all women to choose whether to bear children.”

The following is a summary of the case as it was argued, from the decision itself and from the dissenting argument. This will help set the stage for the successful overturning of *Roe* in the *Dobbs* decision.

Justice Blackmun's Opinion

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.....

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of person "liberty" embodied in the Fourteenth Amendment's due process clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras. . .

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. ...These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," ... are included in this guarantee of personal privacy. They also make it clear that the right has some extension activities relating to marriage, ... procreation, ... contraception, ... family relationships, ... and child rearing and education ...

On the basis of elements such as these, some 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. The arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.

We, therefore, conclude that this right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

Some argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus 'right to life would then be guaranteed specifically by the Amendment... [But] the Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." ... [But] the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application. ... In short, the unborn have never been recognized in the law as persons in the whole sense.

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Justice Rehnquist's Dissent

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

... I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the court has referred to as embodying a right to privacy.

The adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental..." Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.

Response to Roe

Justice Rehnquist's belief that the issue of abortion needs to be resolved through the legislative process gave opponents of the Roe v Wade opinion a path toward overturning the decision. For the past decades and even more so recently, state legislators have sought ways to restrict abortion, noting that some regulations are allowable in Roe.

Casey

A key moment in this push back against Roe at the state level reached the Supreme Court again in 1992 in a case called Planned Parenthood of Southeastern Pennsylvania v. Casey.

Casey upheld the essentials of Roe v. Wade but noted the State's interests "from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." In addition to the "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State," the Court also recognized the role of the State in overseeing the facilities and services provided in clinics such as those maintained by Planned Parenthood. The concept of the "*undue burden standard*" emerged as "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."

Following this ruling, many states began to enact and enforce increasingly strident clinic regulations (width of corridors and requirements for doctors to have attending privileges with local hospitals) and patient/doctor requirements like waiting periods and the use of ultra sounds for educational purposes. The immediate result was that more and more clinics were forced to close. In Texas, for example, the number of facilities providing abortions eventually dropped from 40 to 20.

Whole Woman's Health et al. v. Hellersted

In 2016 a Texas case came before the Supreme Court known as as "Whole Woman's Health et al. v. Hellerstedt." The court's majority opinion determined that a number of the state regulations constituted a medically unnecessary undue burden for women seeking a pre-viability abortion and that the arguments put forward in their favor lacked the kind factual evidence that the court requires. Furthermore, the effect of these regulations "would be harmful to, not supportive of, women's health."

By emphasizing the need for medical evidence and good argument, the Court reminded state legislatures that the "Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake" (referring to Gonzales).

Moving Away from Roe

In spite of these rulings, states continued to push the boundaries of what constituted an undue burden. In fact, many states began to enact legislation that bypassed Roe explicitly. In 2021 a Texas House Bill took the issue of abortion outside the state courts and placed it in the realm of civil society. And many states sought legislation that limited abortions to 15 weeks and even 6 weeks.

In the meantime, a multi-pronged effort by opponents of Roe promoted legal arguments such as “Originalism” and legislative templates for states to develop “trigger laws” to be enacted should Roe be overturned.

The appointment of three conservative justices during the Trump Administration tilted the Supreme Court in the direction of reconsidering Roe.

The moment came in a case called *Dobbs v. Jackson Women’s Health Organization* (December, 2021). The Court wasted no time ‘cutting to the chase. It asserted that “Roe was egregiously wrong from the start” (June 24th, 2022).

Dobbs: Edited Summary from The Majority Opinion

Mississippi’s Gestational Age Act provides that “[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly 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.” Before this Court, petitioners defend the Act on the grounds that *Roe* and *Casey* were wrongly decided and that the Act is constitutional because it satisfies rational-basis review.

Held: The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives.

...

The critical question is whether the Constitution, properly understood, confers a right to obtain an abortion.

First, the Constitution makes no express reference to a right to obtain an abortion, but several constitutional provisions have been offered as potential homes for an implicit constitutional right. The *Casey* Court grounded its decision solely on the theory that the right to obtain an abortion is part of the “liberty” protected by the Fourteenth Amendment’s Due Process Clause...

The term “liberty” alone provides little guidance. Thus, historical inquiries are essential whenever the Court is asked to recognize a new component of the “liberty” interest protected by the Due Process Clause. ... Guided by the history and tradition that map the essential components of the Nation’s concept of ordered liberty, the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion.

The Court also examines whether the right to obtain an abortion is rooted in the Nation’s history and tradition and whether it is an essential component of “ordered liberty.” The Court finds that the right to abortion is not deeply rooted in the Nation’s history and tradition....

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, and *Casey* described it as the freedom to make “intimate and personal choices” that are “central to personal dignity and autonomy.”

Roe and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed “potential life.”... But the people of the various States may evaluate those interests differently. The Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.

Finally, the Court considers whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents. The Court concludes the right to obtain an abortion cannot be justified as a component of such a right. Attempts to justify abortion through appeals to a broader right to autonomy and to define one’s “concept of existence” prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion is different because it destroys what *Roe* termed “potential life” and what the law challenged in this case calls an “unborn human being.”

The doctrine of *stare decisis* [adherence to previously decided cases] does not counsel continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role and protects the interests of those who have taken action in reliance on a past decision. It “reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.” It “contributes to the actual and perceived integrity of the judicial process.” And it restrains judicial hubris by respecting the judgment of those who grappled with important questions in the past. But *stare decisis* is not an inexorable command and “is at its weakest when [the Court] interpret[s] the Constitution.”

The Court’s cases have identified factors that should be considered in deciding when a precedent would be overruled.

The nature of the Court’s error. ... *Roe* was egregiously wrong and on a collision course with the Constitution from the day it was decided. *Casey* perpetuated its errors, calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State’s interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who disagreed with *Roe*.

The quality of the reasoning. Without any grounding in the constitutional text, history, or precedent, *Roe* imposed on the entire country a detailed set of rules for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation.... the opinion spent many paragraphs conducting the sort of fact finding that might be undertaken by a legislative committee, and did not explain why the sources on which it relied shed light on the meaning of the Constitution.

As to precedent, citing a broad array of cases, the Court found support for a constitutional “right of personal privacy.” But none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed “potential life.” When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were “consistent with,” among other things, “the relative weights of the respective interests involved” and “the demands of the profound problems of the present day.” These are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body. ...

Reliance interests. Overruling *Roe* and *Casey* will not upend concrete reliance interests like those that develop in “cases involving property and contract rights.” In *Casey*, the controlling opinion conceded that traditional reliance interests were not implicated because getting an abortion is generally “unplanned activity,” and “reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.” Instead, the opinion perceived a more intangible form of reliance, namely, that “people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail” and that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women as well as the status of the fetus. The *Casey* plurality’s speculative attempt to weigh the relative importance of the interests of the fetus and the mother represent a departure from the “original constitutional proposition” that “courts do not substitute their social and economic beliefs for the judgment of legislative bodies.”

Some have argued that overruling *Roe* and *Casey* would threaten the protection of other rights under the Due Process Clause. The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

Given that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot “substitute their social and economic beliefs for the judgment of legislative bodies.” That applies even when the laws at issue concern matters of great social significance and moral substance. A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity.” It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.

Mississippi’s Gestational Age Act is supported by the Mississippi Legislature’s specific findings, which include the State’s asserted interest in “protecting the life of the unborn.” These legitimate interests provide a rational basis for the Gestational Age Act.

Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. The Court overrules those decisions and returns that authority to the people and their elected representatives.

In essence, The Dobbs decision finds that Roe’s decision failed to account for the traditions and values of our nation’s history and the fact that abortion, much less the right to abortion, cannot be found in and thereby justified by the text of the Constitution, specifically the 14th Amendment’s liberty clause.

Because of these failures, the *Roe* decision was egregiously wrong and can be overruled as precedent.

The language of *Roe* and subsequently *Casey* can read as legislation and so the issue of abortion must appropriately be returned to the States and Congress. That is, “it must be returned to the legislative bodies that are duly elected by the people.”

The dissent will address these concerns. It will review the history of abortion in the United States and raise questions as to whether the laws fairly and adequately took into account the experiences of women who would be affected by those laws and who were not allowed to participate in the formulation of and support for those laws.

So too, by limiting the reading of the Constitution and state statutes to “black letter” textualism, the analysis overlooks the social context for those texts and even the “original intent” of the Founders to view the Constitution as dynamic and capable of evolving as society changes. Properly understood, *Roe* and *Casey* responded to the changing realities of the times and the lived experiences of women confronting their pregnancies. Contrary to the the majority decision, the dissent does not believe that everything is determined by current majorities and that some liberties and protections offered by the Constitution are not up for popular vote.

Dobbs: Summary from The Dissent (Breyer, Sotomajor, Kagan)

For half a century, *Roe v. Wade*, (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman’s right to decide for herself whether to bear a child. ...Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

...

The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman’s interest and recognizes only the State’s (or the Federal Government’s).

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in “1868, the year when the Fourteenth Amendment was ratified”? ...The majority’s core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. ...

If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

We referred there to the “people” who ratified the Fourteenth Amendment: What rights did those “people” have in their heads at the time? But, of course, “people” did not ratify the Fourteenth Amendment. Men did. So it is perhaps

not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788— did not understand women as full members of the community embraced by the phrase “We the People.” ...

“There was a time,” Casey explained, when the Constitution did not protect “men and women alike.” But times had changed. A woman's place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was “no longer consistent with our understanding” of the Constitution. Now, “[t]he Constitution protects all individuals, male or female,” from “the abuse of governmental power” or “unjustified state interference.”

“The Founders,” we recently wrote, “knew they were writing a document designed to apply to ever-changing circumstances over centuries.” ...Or in the words of the great Chief Justice John Marshall, our Constitution is “intended to endure for ages to come,” and must adapt itself to a future “seen dimly,” if at all.

That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. ...Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty.

“*Stare decisis*” means “to stand by things decided.” ...*Stare decisis*“ promotes the evenhanded, predictable, and consistent development of legal principles.” It maintains a stability that allows people to order their lives under the law.*Stare decisis* also “contributes to the integrity of our constitutional system of government” by ensuring that decisions “are founded in the law rather than in the proclivities of individuals.”

...the majority's repeated refrain about “usurp[ing]” state legislatures“ power to address” a publicly contested question does not help it on the key issue here. ...The point of a right is to shield individual actions and decisions “from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” However divisive, a right is not at the people's mercy.

In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* “egregiously wrong.” That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees....It makes radical change too easy and too fast, based on nothing more than the new views of new judges.

“The most striking feature of the [majority] is the absence of any serious discussion” of how its ruling will affect

What Now? Laws, Laws, Laws

Behind both the majority opinion and the dissent lie differing judicial philosophies. There are those who say that the Constitution is a living document and that the courts have a role in using its basic principles to address, judiciously, new circumstances. Others say that it is a bounded document whose texts are literally restricted and cannot be adjusted according to the times.

Regardless of one's view of the constitution, as a consequence of the Dobbs Decision, many states are enacting laws prohibiting abortion at the state level. These include both specific state laws as well as state constitutional amendments. Other states offer laws that protect access to abortion and prevent interference with the practice from states outside their jurisdiction.

Some states are seeking to expand or restrict access to abortion through referenda. There are also competing attempts to either restrict or protect abortion through Federal Law and, ultimately, Amendments to the US Constitution. Finally, some states have sought to protect abortion access through an Executive Order from the State's Governor and on the Federal level a Presidential Executive order went into effect shortly after the Dobbs decision.

It is telling to note that within each abortion framework, there are differences of how and how far to proceed.

States Legislatures

Implementing abortion bans

By making abortions illegal, a number of restrictions and consequences will follow. One 'model template' for legislators to use notes that "To ensure that all parties participating in an illegal abortion are subject to enforcement, we recommend that the above criminal penalties for performing an illegal abortion should be extended to anyone, except for the pregnant woman, who (a) conspires to cause an illegal abortion or (b) aids or abets an illegal abortion. Aiding or abetting an illegal abortion should include, but not be limited to: (1) giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortions or means to obtain an illegal abortion; (2) hosting or maintaining a website, or providing internet service, that encourages or facilitates efforts to obtain an illegal abortion; (3) offering or providing illegal "abortion doula" services; and (4) providing referrals to an illegal abortion provider."

States like **Oklahoma** have passed house bills that ban abortion in all cases except to save the life of the mother. A excerpt from the Bill on Abortion begins, in standard capital letters: BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

The terms “abortion” and “unborn child” shall have the same meaning; and

“Medical emergency” means a condition which cannot be remedied by delivery of the child 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 caused by or arising from the pregnancy itself.

Notwithstanding any other provision of law, a person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.

A person convicted of performing or attempting to perform an abortion shall be guilty of a felony punishable by a fine not to exceed One Hundred Thousand Dollars (\$100,000.00), or by confinement in the custody of the Department of Corrections for a term not to exceed ten (10) years, or by such fine and imprisonment.

States like **Indiana** would ban

“abortions altogether, with exceptions allowed in cases of fetal abnormalities considered lethal, or to prevent serious physical health risks to the mother. Exceptions also are permitted for underage victims of rape or incest, but only up to 10 weeks of pregnancy.

Physicians found to have violated the measure could be charged with a felony and face the revocation of their medical license.”

Protecting Abortion Access

Four states, including Connecticut, have legislative declarations affirmatively protecting a woman's right to choose abortion. The others are Maine, Maryland, and Washington.

Connecticut law provides that “the decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician.”

Maine's law states, “it is the public policy of the State that the State not restrict a woman's exercise of her private decision to terminate a pregnancy before viability.” Maryland law provides that the state may not interfere with the decision of a woman to terminate a pregnancy: (1) before the fetus is viable or (2) at any time, if an abortion is necessary to protect the life or health of the woman, or the fetus is affected by genetic defect or serious deformity or abnormality.”

Washington law declares, “every woman has the fundamental right to choose or refuse to have an abortion...The state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health.”

State Constitutions

Normally proposed amendments to state constitutions must be approved by the state houses over two terms before being placed on the ballot.

Proposed Personhood Amendments

Key to the personhood argument is the notion of potentiality. In the Dobbs decision the Justices quoted from Roe that the fetus was a “potential person” and placed that side by side with the claim in the Mississippi case that it was an “unborn person.” The former can be interpreted to say that during the first trimester (12 weeks) the fetus is NOT YET a person in the same way that an egg is not yet a chicken; in the latter case one must argue that it IS ALREADY WHAT IT WILL BE i.e., a person in the moral and legal sense. Philosophers will call this the Metaphysical Problem behind the abortion debate. See Appendix

From the *Florida Assembly*: “Person Defined: (a) The rights of every person shall be recognized, among which in the first place is the inviolable right of every innocent human being to life. The right to life is the paramount and most fundamental right of a person. (b) With respect to the fundamental and inalienable rights of all persons guaranteed in this Constitution, the word 'person' applies to all human beings, irrespective of age, race, sex, health, function, or condition of dependency, including unborn children at every stage of their biological development regardless of the method of creation. (c) This amendment shall take effect on the first day of the next regular legislative session occurring after voter approval of this amendment.”

The State of Georgia discovered challenges when the “unborn child,” now entitled to 14th Amendment protection, tasked the Georgia Department of Revenue to set a tax exemption of \$3,000 per pregnancy for fetuses after about six weeks of gestation. It is not clear how such pregnancies will be identified and tracked and what would happen with a miscarriage. Further, the authors of the Bill would count unborn fetuses in the census thus altering the population of congressional districts. But at this time, there is no way for the Federal Census to account for this.

Proposed Reproductive Rights Amendments

From the *State of California*: “The state shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy..., and the constitutional right to not be denied equal protection.... Nothing herein narrows or limits the right to privacy or equal protection.”

The *State of New York* bundled the right to seek an abortion in a more inclusive “Equal Rights Amendment” that brought criticisms of including too many categories and not enough categories (i.e., religion):

“....The proposed Amendment expands equal protection under the law to several new identity classes, including on the basis of: Ethnicity, national origin, age, disability and sex. Sex includes sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, reproductive healthcare and autonomy. Additionally, this amendment preserves laws designed to prevent or dismantle discrimination on the basis of these characteristics such as affirmative action.”

Referenda

In the U.S., the terms initiative and referendum refer to processes that allow citizens of states to vote on particular pieces of legislation: The initiative process allows citizens to propose a new statute or constitutional amendment; The referendum process allows citizens to refer a law that passed the legislature to the ballot for voters to decide whether to uphold or repeal the law. (Ballotpedia)

Abortion, as a ballot measure topic, refers to policies that seek to:

- ban abortion at various fetal development stages;
- legalize or expand abortion services or access;
- define a *person* to include fetuses;
- allow or prohibit the use of public funds for abortions;
- require parental notification before a minor can obtain an abortion;
- declare a state constitutional right to abortion; or
- declare that there is no state constitutional right to abortion

Prior to the overturning of Roe, the *State of Kansas* had a state constitutional right to abortion. Shortly after the Dobbs decision, a *Kansas Referendum* sought to return the laws regarding abortion to the state legislature. The citizens were asked to "Vote No to keep the state's constitutional right to abortion" or "Yes to overturn that constitutional right and return the issue to the State legislature." In this first test of the post-Roe era, Kansas citizens voted 59% - 41% in favor of securing state constitutional abortion rights.

The Iowa No Right to Abortion in Constitution Amendment

This referendum measure would add a section to the state constitution that says, "To defend and protect unborn children, we the people of the State of Iowa declare that this Constitution does not recognize, grant, or secure a right to abortion or require the public funding of abortion."

The Michigan Right to Reproductive Freedom Initiative

The ballot initiative would provide for a state constitutional right to reproductive freedom. The term *reproductive freedom* would be defined as "the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care."

The ballot initiative would provide that the state can regulate abortion after *fetal viability*, except that the state could not ban the use of abortion to "protect the life or physical or mental health of the pregnant individual," as determined by an attending health care professional.

Executive Orders

Note: These can be overturned upon change of office and have been used so far to protect abortion rights

State Level

Pennsylvania Executive Order (protecting abortion rights)

In July, 2022 Gov. Tom Wolf (D) signed an executive order protecting reproductive rights in the state. The order prohibits disciplinary action against health care providers for providing or assisting in reproductive health services that are legal in Pennsylvania and prevents certain state employees from assisting in investigations regarding these services. In addition, the order requires the state to initiate a public education campaign on reproductive health services and protecting medical data on personal electronic devices. The order also states that the state's governor will decline extradition requests made for people receiving, providing or assisting in reproductive health services. It went into effect upon signing. (Guttmacher)

Federal Level

Presidential Executive, Biden Administration ((protecting abortion rights)

The Executive Order directs the Secretary of Health and Human Services (HHS) to consider action to advance access to reproductive healthcare services, including through Medicaid for patients who travel out of state for reproductive healthcare services....to consider all appropriate actions to ensure health care providers comply with Federal non-discrimination laws so that women receive medically necessary care without delay....and to accurately measure the impact that diminishing access to reproductive health care services has on women's health...

The Lincoln Proposal (protecting the rights of the unborn)

Though strictly an argument for a President's Executive Order, the Lincoln Proposal is also an argument for a national prohibition of abortion based upon fetal personhood.

"[The] President should fulfill his duty to faithfully execute the guarantees of the Fourteenth Amendment to the Constitution by issuing an Executive Order recognizing pre-born persons as constitutional "persons" entitled to the fundamental human rights of due process and equal protection of the laws safeguarded in that Amendment.

The Lincoln Proposal focuses presidential energy not merely on abortion's regulation, but rather on the ultimate goal of abortion's abolition.

The Lincoln Proposal represents the next step toward an American culture capable of overcoming the Supreme Court's jurisprudence of violence and doubt, and moving boldly into an American future uplifting, empowering, and protecting every member of our common family." (Americans United for Life)

National Legislation and Federal Laws

A key Post-Roe strategy for both proponents and opponents of abortion will be to introduce into Federal Law restrictions on abortion or guarantees for abortion rights across the land. This would essentially replace the Supreme Court's role in determining the outcome of the abortion debate.

Proposed Federal Laws Restricting Abortion

"Protecting Pain-Capable Unborn Children from Late-Term Abortions Act "

This legislation was submitted by Senator Lindsay Graham and proposed a 15 week Federal Ban on Abortion:

"The term 'unborn child 'means an individual organism of the species homo sapiens, beginning at fertilization, until the point of being born alive."

The Bill outlines fetal development and seeks a consensus document restricting abortion at 15 weeks. It allows for exceptions due to documented instances of rape and incest and in matters of the woman's life or in cases of severe fetal abnormalities resulting in the death of the unborn child. It includes penalties for physicians who violate the law but not for the women who might undergo an illegal abortion.

Graham seeks to normalize the discussion of 'unborn children 'with a view toward an eventual federal ban while also allowing states and localities to enforce stricter anti-abortion laws.

Some criteria such as 'fetal heartbeat and fetal pain 'are subject to serious scientific analysis and are sometimes misused in debates over abortion. Nonetheless, Graham's bill seeks to meet the Gonzales requirement for scientific evidence. [see Appendix on Fetal Development]

Missing from discussions of fetal pain in this context is the physical, emotional, psychological and socio-economic pain that a woman being force to deliver an unwanted pregnancy will under go. This is the challenging balance that was recognized by Roe and Casey (using the phrase "potential life").

This bill also fails to take into account the chilling effect that the penalties in this law will have on physicians and the loss of access that women will have to abortion services.

Proposed Federal Laws Protecting Access to Abortion

Reproductive Freedom For All Act

Sponsored by Susan Collins, Lisa Murkowski, Kyrsten Sinema and Tim Kaine, the "bill would restore the right to obtain an abortion by enacting in federal law Roe v. Wade and other seminal Supreme Court decisions pertaining to reproductive freedom. In addition, our bill would protect access to contraception.... By reinstating—neither expanding nor restricting—the longstanding legal framework for reproductive rights in this country, our bill would preserve abortion access along with basic conscience protections that are relied upon by health care providers who have religious objections." (Senator Collins)

Excerpts from the Act:

For decades, the Supreme Court of the United States has held that the liberty protected by the Fourteenth Amendment encompasses a right to make certain reproductive decisions without undue government interference.

While these precedents have advanced slightly different constitutional rationales, and have acknowledged that some government regulation is acceptable, they have created a society whereby Americans expect to make certain reproductive decisions without undue government interference. Generations of American women have relied on the fact that they have the freedom to make such choices as a matter of fundamental personal right.

Women's Health Protection Act

This bill prohibits governmental restrictions on the provision of, and access to, abortion services. Specifically, governments may not limit a provider's ability to prescribe certain drugs, offer abortion services via telemedicine, or immediately provide abortion services when the provider determines a delay risks the patient's health.

Furthermore, governments may not require a provider to perform unnecessary medical procedures, provide medically inaccurate information, comply with credentialing or other conditions that do not apply to providers whose services are medically comparable to abortions, or carry out all services connected to an abortion.

In addition, governments may not (1) require patients to make medically unnecessary in-person visits before receiving abortion services or disclose their reasons for obtaining such services, or (2) prohibit abortion services before fetal viability or after fetal viability when a provider determines the pregnancy risks the patient's life or health.

Critics of 'codifying Roe' fear that states will revert to restrictions aimed at making abortions an undue burden and therefore they seek to reinforce ease of access to abortion services. ...

Regardless, with any Federal law there will be winners and losers - both Roe and Dobbs realize this, but Dobbs punts it back to the states where there will be winners and losers whereas Roe accepted the fact of basic disagreement on the national level.

Federal Constitutional Amendments

A constitutional amendment proposal supporting or limiting abortion rights would, like any amendment, require a two-thirds vote of both the US House and US Senate — If such a constitution amendment proposal somehow passed, three-fourths of state legislatures must then ratify it for the amendment to become law.

Alternately, two-thirds of US states could request the nation conduct a constitutional convention — sometimes known as an Article V convention — for the purpose of amending the Constitution. Three-fourths of states would again have to ratify any amendments the convention proposed.

While this Amendment process may represent the long term goal of both positions, it is outside the range of possibility at this time. (It is worth noting that Justice Scalia at one point suggested that the Amendment process be

Where do you Stand?

In the midst of all these laws and amendments stand individual citizens. Public opinion polls and focus groups seek to tease out where we collectively stand by asking individuals where they stand. And often, public opinion on the issue of abortion is measured by surveys.

In deliberative forums these surveys can measure opinions after the survey takers have become familiar with the topic and have discussed the issue with others. The more detailed the questions along with an opportunity to offer reasons for one's opinion can create results that may be more useful to state legislators than many 'off the cuff' replies to questions posed by typical polling or focus group organizers. They can also help you flesh out your thoughts about the types of situations where a woman might consider terminating a pregnancy.

Consider the wide range of reasons that women give for seeking an abortion according to the Guttmacher Institute: They feel that they are not ready for a child or another child; they feel they are too young or not mature enough; they feel they can't afford another child or they simply do not want children. They feel that they are finished with child bearing. They feel that their current relationship is unstable or abusive. Can you think of other situations or know of someone who faced these or similar situations?

Since almost 90 percent of abortions occur during the first trimester (the first 12 weeks), what are your personal feelings here and what do you think our public policy should be? Note a distinction between your position as an individual citizen and the hypothetical position of a legislator who needs to consider other citizens as well as any specific consequences regarding a public policy.

1. During the first trimester (12 weeks), do you believe that women should be allowed to terminate a pregnancy as a matter of law or public policy when:

	Yes	No	Not sure
a. they are not ready for a(nother) child	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. the timing is wrong	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. they can't afford a baby	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. they have completed childbearing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. their children are grown	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. they have other people depending on them	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. they don't want to be a single mother	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h. they are having relationship problems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
i. they don't feel mature enough to raise a child	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
j. they feel too young	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
k. they feel that it would interfere with education or career plans	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
l. they don't want others to know that they had sex or got pregnant	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
m. they don't want children	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Where do you stand on situations of rape, incest and the life of the mother or the viability of the fetus (congenital abnormalities)? These kind of rare cases can involve abortions in the second (3.8% in the range of weeks 16-20) and very rarely in the third trimester (1.3%) when the life of the woman is in mortal danger or the fetus can no longer survive. The claim that Roe or any other abortion laws would allow “abortions on demand up to the moment of birth” is factually inaccurate.

2. In cases where the health of the woman or fetus are affected or in cases of rape or incest, do you believe that women should be allowed to end or terminate a pregnancy as a matter of law or public policy when they:

	Yes	No	Not sure
a. have physical problems with health	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(i) Allowable during first trimester (1-12 weeks)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(ii) Allowable during the second trimester (13-20 weeks)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. have possible problems that would affect the health of the fetus	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(i) Allowable during first trimester (1-12 weeks)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(ii) Allowable during the second trimester (13-20 weeks)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. are a victim of rape or incest	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(i) Allowable during first trimester (1-12 weeks)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(ii) Allowable during the second trimester (13-20 weeks)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

What Do We Do?

Despite the wide variety of voices one now hears across the land, there are some essential elements in many of the positions. We can see these in disagreements both between the abortion rights and the abortion ban positions and also within each of the positions themselves.

Some opposing abortion take an 'absolutist view 'while others come from a more 'incrementalist 'view. The former want to define fetal personhood from the moment of fertilization with no exceptions for rape or incest (you don't follow a rape with a murder) though a medically established threat to the life of the mother would be allowed. The latter seek something like a 'heart-beat 'criteria around 6 weeks with room for exceptions for rape, incest and the life of the mother.

There are those supporting abortion rights that want to codify Roe (with its trimester framework) and those who fear that that would take us back to the status quo where there are large swaths of the country where abortion was basically unavailable (given the Casey caveat and that some restrictions can be interpreted more harshly than others).

Seeking A Democratic Resolution

In addressing the issue of abortion in a democratic way, we may need to find more nuanced and creative ways to come to a resolution if not a consensus on the topic. These are the trade-offs and compromises that are part of the democratic process. Perhaps the pro-life side will need to be incrementalist. From a public policy perspective, they may need to look at a 15 week model and emphasize more government support for families. Perhaps abortion rights groups can look at the Irish model determined by a citizen juried referendum that settled on 15 weeks with exceptions that make it similar to Roe. Within both frameworks we would have to increase support for families including maternal leave, low cost access to pregnancy related healthcare, and low cost access to contraception. In Europe where these conditions are present, abortion rates are lower because more support is given. This kind of compromise maintains some Roe-like flexibility with guard rails after the 15th week. It is also similar to the Mississippi 'ban 'after 15 weeks. But it could be argued that these compromises won't work unless state laws are bundled with state budgets for supporting women and families.

Nevertheless, these suggested compromises will not be satisfying to many and may only receive lip service till another day. Perhaps the ultimate resolution will be at the ballot box as the Dobbs decision surmised. Yet for this to be fully realized, we need an educated citizenry.

Guiding Questions

Please use the following questions as prompts for your deliberations.

1. On a *state legislative level*, consider and discuss the various State attempts to either ban or allow abortion during the first trimester. What kind of arguments or reasons can you give for or against state bans on abortion in accord with the Dobbs decision or states's attempts to codify a version of Roe?
2. On a *state constitutional level*, consider and discuss the various attempts to amend State Constitutions to either codify abortion rights or to establish Personhood Amendments. What kind of arguments or reasons can you give for or against these positions? What should state legislators consider when discussing public policy matters in regard to these issues?
3. On the *Federal and National level* many attempts mirror the proposals for and against on the state level. Do you think that Federal Laws are the way to proceed since they would ban or allow abortion across the nation and in a way be consistent with the Dobbs Decision (i.e., the issue must be returned to the democratic process).
4. At bottom, do you agree or disagree with the Supreme Court Dobbs decision? What do you think about the dissent in Dobbs? In very general terms and without worrying about all the details, which decision might you support - Roe or Dobbs?
5. Do you think that a 15 week limit with exceptions coupled with increased state budgets for families is a fair compromise? How realistic would it be to expect State Houses to support this?

Appendix 1: Our Metaphysical Problem

One of the great divides in the abortion debate is over the status of the fetus. This is particularly true during the first trimester when over 90% of all abortions are performed. Speaking abstractly, some argue that during this first trimester the fetus is a potential human being in the moral and legal sense, but not yet (in the sense that an egg is not yet a chicken). Others argue that the fetus is already what it will be (a human being in the full moral and legal sense) and that destroying the fetus, even from the moment of conception, is no different, morally, than killing a 2-year old child in the privacy of your back yard. But there is no microscope in the world, no scientific method, that can see which meaning of potential is correct: is it potential in the sense of “is not yet” or potential in the sense of “is already what it will be.” Like many metaphysical problems, this can become a matter of belief and conviction for many of us; and it is but one of many ways that people of principle and good will can disagree about the issue of abortion.

On a more personal level, there are those who see the pregnancy as the presence of a beautiful child and a living human being; and there are those who see the pregnancy as a personal crisis, a tragic situation that must be dealt with as best one can. And then there are those who share a thousand nuanced feelings in-between.

Yet once politicized, one side sees murder; the other choice. Here’s the source of the labels on the picket lines – and why we must try to go beyond the picket lines in this conversation.

Appendix 2: Some Scientific Aspects of Fetal Development - Fetal Heartbeat and Fetal Pain

Over the past 20 years our understanding fetal development has grown as has the ability to visualize this development through enhanced 3-D color sonograms. This science has been used as part of the factual background in arguments supporting abortion restrictions and bans. Though some of these arguments have been misleading (early stages of cardiac activity will 'sound 'like heartbeats on some sonogram devices), an awareness of the science behind both "fetal pain" and "fetal heartbeat" is important for understanding some of the issues used in legislative bills, etc.

To start with, the term 'fetal 'is often used for a series of developmental stages starting from gestation and moving on to the development of the embryo.

Here are some key dimensions of fetal development during the first 15 weeks (94% of all abortions): Evolving from the size of a grain of rice (wks 1-4) the embryo develops into the fetus around wk 8 where it will be measured around 1/2" (.6 inches). By the 12th week it will be around 2.1 inches and by the 15th week it will reach 4 inches in length. By this time, many of the basic elements of a human body will have been formed.

A number of abortion-restrictive bills use the development of fetal pain and fetal heartbeat as criteria to limit abortions. The science behind these two criteria is briefly described below:

Fetal Heartbeat: Echocardiographic and anatomical correlations in first trimester fetuses show that by 11 weeks ' gestation, the position of the fetal heart within the chest is similar to that in later gestation, and the spatial relation of the great arteries and their relative sizes are similar to those on second-trimester scans by 12 weeks 'gestation. [NIH <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3279166/>]. Prior to this stage, it is medically accurate to say that there is the beginning of 'cardiac activity 'in the form of a group of cells initiating electrical activity.

Fetal Pain: Many of those in State Legislatures who favor drawing the line at 20-22 weeks claim that the fetus can experience pain at that point. But a survey of peer reviewed scientific literature presents a different picture: "Pain perception requires conscious recognition or awareness of a noxious stimulus. Neither withdrawal reflexes nor hormonal stress responses to invasive procedures prove the existence of fetal pain, because they can be elicited by nonpainful stimuli and occur without conscious cortical processing. Fetal awareness of noxious stimuli requires functional thalamocortical connections. Thalamocortical fibers begin appearing between 23 to 30 weeks 'gestational age, while electroencephalography suggests the capacity for functional pain perception in preterm neonates probably does not exist before 29 or 30 weeks." Fetal Pain: A Systematic Multidisciplinary Review of the Evidence (Journal of the American Medical Association, 2005).

It should be noted that the science described in Senator Grahams 'bill differs here:

“Substantial evidence indicates that neural elements, such as the thalamus and subcortical plate, which develop at specific times during the early development of an unborn child, serve as pain-processing structures, and are different from the neural elements used for pain processing by adults. Recent evidence, particularly since 2016, demonstrates that structures responsible for pain show signs of sufficient maturation beginning at 15 weeks of gestation.”

It is important to recall that the facts of human development only contribute the setting of the problem, not its resolution. Many will disagree over the status of the fetus at this stage and whether it constitutes a justification to prohibit abortion during the first trimester.

There is a tension in the laws over whether a woman maintains the right to determine her life choices during the first trimester of pregnancy or whether the state has the right to force her to carry the pregnancy to term (which is the logical extension of laws prohibiting abortion in these circumstances).

For those opposing abortion, this tension is to be resolved in favor of the fetus and abortion laws must effectively affirm that life is a human right and should not be sacrificed unless the mother's life is at risk. For those supporting abortion rights, the woman's life and personal autonomy weigh in her favor.