

The Supreme Court has an opportunity to correct the mistake of 'Roe v. Wade'

On Monday, the Supreme Court agreed to hear one of the most important abortion-related cases in three decades, presenting a welcome opportunity for the justices to correct one of the court's most glaring and harmful errors, and to affirm that the Constitution of the United States does not prevent governments from protecting through law the most vulnerable among us.

Court-watchers, advocates and activists had been wondering for months whether the court would take up the case of *Dobbs v. Jackson Women's Health Organization*, which involves the constitutionality of a 2018 Mississippi law, the Gestational Age Act, which prohibits abortions after the unborn child is 15-weeks-old except in medical emergencies or in instances of what the law calls "severe fetal abnormalities." It is not clear why the justices waited so long to rule on the state's request for review, but it is widely believed that a majority of the current justices believe that the court erred nearly 50 years ago in *Roe v. Wade* when it discovered [an expansive right to abortion](#) in the Constitution's privacy-protecting provisions.

The *Dobbs* case, which will be heard by the court in its term that begins in October, is a clear and clean vehicle for abandoning the court's misguided assumption of the role of abortion-regulation supervisor – a mistake that distorted our politics and judicial-nominations process and undermined our professed commitments to human dignity and equality. Both *Roe* and the 1992 *Planned Parenthood v. Casey* decision, which reaffirmed *Roe's* core, should be rejected, and We the People should be permitted once again – as we did for centuries – to

protect human persons in the womb.

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During the three decades since *Casey*, the court's abortion-related cases have avoided the central question. Instead, they have involved limits on pro-life protests and counseling, health-and-safety regulations of abortion providers' facilities and the partial-birth-abortion procedure. In *Dobbs*, it will be difficult for the justices to evade the issue: Were *Roe* and *Casey* wrongfully decided?

They were. The majority of the court knows that they were and should say so. *Roe* relied heavily on inaccurate history; *Casey* invoked bad philosophy and a grandiose notion of the judicial role. The fact that Americans disagree about the morality of abortion – although, it should be emphasized, most of us support limits such as the ones adopted in Mississippi – does not authorize our Supreme Court to disable us from debating, discouraging and limiting it. To be sure, our Constitution and our Bill of Rights do remove some matters from ordinary politics, but Americans never adopted – and do not embrace – the extremist abortion-rights regime that the Supreme Court conjured in *Roe* and *Casey*.

It is often asserted by abortion-rights advocates that regulations of abortion involve the inappropriate imposition of a sectarian (which usually means "Catholic") morality. In fact, until *Roe*, Anglo-American law had always permitted governments to proscribe abortions, and there is nothing specifically "Catholic" about recognizing the fact that unborn children are human persons, entitled to the same legal protections enjoyed by other (bigger, perhaps) persons.

Relatedly, there have been and will be insinuations that the

current Supreme Court is “too Catholic” and that the Catholic justices on the court (there are now at least six) would be putting their “personal views” above the law if they were to uphold the Mississippi regulation. The charge that the Catholic justices are unable to comply with their oaths of office echoes the anti-Catholicism that was a feature of most of American history – but one we might have hoped was disappearing. Again, the questions whether *Roe* was correct and whether the Constitution confers a sweeping, near-absolute right to abortion are not theological ones. Judges are not robots, and they all have histories, commitments, views and biases. Still, Catholic justices are no less able than their non-Catholic colleagues [to decide impartially](#) the legal questions presented.

Third, it will be claimed by headline writers that a decision to abandon the *Roe* error will outlaw abortion entirely. It will not. The court interprets laws; it does not make them. *Roe* and *Casey* have tied the hands of state and federal legislators and prevented them from enacting rules that citizens support. Repenting and retreating from this overreach would not, by itself, end abortion or create a culture of life. It would, though, permit the people’s representatives to design laws and regulations that take account of the fact – and it is a fact – that unborn persons are persons, and intentionally killing them is wrong.

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