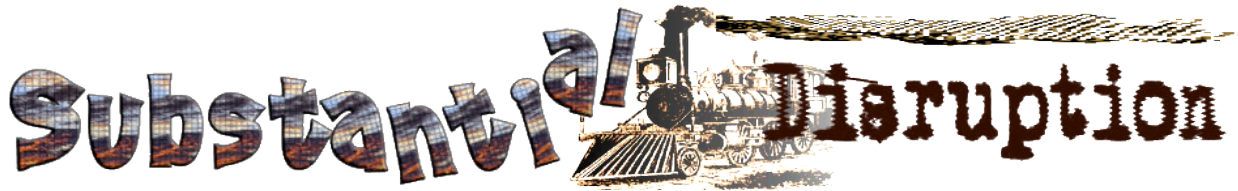


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## Oral Argument Impressions: the SCOTUS Abortion Case

By Mike Tully

I just listened to oral arguments in *Dobbs v. Jackson Women's Health*, the Mississippi case that could overturn *Roe v. Wade* and eliminate the constitutional right to abortion. For the record, I have not listened to any commentary nor read any coverage of the arguments, so this is my unfiltered reaction. I won't predict the outcome; that's a fool's errand. But I could detect themes likely to be addressed in a case opinion, however it turns out.

### *The Issues*

The Justices agreed the fulcrum issues are *stare decisis* and viability. *Stare decisis* means “stand by things decided.” Judicial precedent should be followed unless there are compelling reasons not to. The viability standard was the basis for both *Roe* and the later case of *Planned Parenthood v. Casey*. A woman currently has the right to terminate a pregnancy before the fetus is viable, but not afterward.

### *Stare Decisis*

The justices agree that overturning *Roe* and *Casey* would be historic. Justice Amy Coney Barrett deemed it the central issue in the case. While that doesn't necessarily mean she would uphold *Roe*, it does indicate she's concerned about the implications of overruling what several of the Justices termed a “super precedent.”

Barrett's personal view on abortion is absolute. She co-wrote a law review article with John H. Garvey, currently the President of the Catholic University of America, that referred to abortion as “always immoral.” If she ruled based on her personal beliefs, Barrett would ban abortion completely. She seems willing to temper her personal beliefs with a respect for precedent.

Justice Stephen Breyer warned the integrity of the Court may depend on the outcome. He noted Mississippi and other states passed abortion restrictions in the hope that six conservative justices would overturn *Roe*. That, said Breyer, would suggest the Court ruled on the basis of political partisanship, not on constitutional law. If the Court is regarded as a political institution guided by partisanship instead of the Constitution, he argued, the Court would lose its power and legitimacy and the rule of law would suffer.

### *Viability*

Several justices questioned the viability standard. Under *Roe* and *Casey*, a woman has the right to an abortion before the fetus can survive outside the womb. Several justices suggested the line was arbitrary. Critics say Mississippi's new law, which bans abortions after 15 weeks, is arbitrary. The logic is that, if

the viability standard is arbitrary, what is wrong with upholding the Mississippi law, which is also arbitrary?

The opponents of the law noted that viability was a logical balance between the rights of the woman and the state and fetus. It's a well understood, unambiguous national standard. They argued that abandoning the viability test would unleash chaos, with various states choosing various limits, followed by various courts issuing various rulings. If fifteen weeks is an acceptable standard, then why not twelve weeks? Or six? Or twenty-seven?

### *The Impact on Women*

The challengers cited the burden a woman faces if forced to carry an unwanted pregnancy to term. Pregnancy impacts a woman's body and sometimes threatens her health. Poor women and women of color suffer more adverse health consequences from pregnancies. I'm not sure that argument resonated with any of the male justices except for Justice Breyer.

Opponents could have pointed out the obvious: overruling *Roe* and *Casey* and permitting states to veto a woman's child-bearing decision would relegate American women to the status of second-class citizenship. It would set the rights of women back more than a century.

### *The Unspoken Interest*

There are three interested parties in the case: the woman, the fetus, and the state. The interests of the woman were well articulated, as noted above. The interest of the fetus – being born – was mentioned without much elaboration. The interest of the state was not given the attention it deserved. What exactly is the interest of the state?

Proponents cast the state's interest as essentially humane and spiritual, preserving a human life for the sake of the life itself. But that's a religious view, not a secular one. Nobody described the interest of the state as pecuniary, but that's what it is. The state needs taxpayers. Every fetus is a potential taxpayer. Anybody suggesting a state's interest is anything but financial is delusional.

### *The Legal Standard*

*Roe* and *Casey* are based on the right to liberty and the concurrent right to privacy. There's no distinction between the two; you can't have one without the other. Imagine that you have absolute liberty to do anything you want, any time you want, anywhere you want. However, you are constantly under surveillance. That's not liberty; it's captivity.

Some justices suggested the liberty/privacy standard should be replaced. They questioned whether a "substantial burden" test is better. In other words, does the law create a substantial burden on women? That's a test commonly used to determine the legitimacy of regulations, but rarely invoked when a fundamental constitutional right is involved. It would lead to chaos.

Would courts in California and Alabama define the standard the same way? That's highly unlikely. The test would have to be imposed on a case-by-case basis. That could lead to judicial chaos and jam court

calendars. If there's anything both liberal and conservative judges agree on, it's the need to control the docket.

### *The Outcome*

It's impossible to predict the outcome. However, the oral argument suggests that neither of two extreme results – preserving *Roe* and *Casey* as is or reversing them totally – is likely. If so, the Court may adopt an arbitrary standard, such as Mississippi's fifteen weeks, or use the substantial burden test. Either way, they will leave a judicial mess in their backwash.

Many observers hope the Supreme Court will pave a new judicial highway that settles the abortion debate once and for all. They are more likely to find themselves in a judicial round-about and travel in circles for decades