

Can We Really Respect the Opinion of Others?

Dobbs vs. Jackson's Women's Health, a decision filed by the United States Supreme Court June 24, 2022, tests the proposition as to whether Americans of different views can respect one another.

The Opinion of the Court could easily have taken the narrow path recommended by Chief Justice Roberts. The Chief wanted simply to decide the Mississippi case before it that worked its way up from the United States Court of Appeals for the Fifth Circuit. The question presented by the Mississippi law, which the Court agreed to determine, was whether abortions could be prohibited after fifteen weeks of pregnancy. The majority, however, believed that deciding the narrow issue before the Court would only postpone the factious debate in America over abortion. Therefore, the majority embarked on the course of judicial activism and went beyond the question presented before it.

The majority in *Dobbs*, upon multiple reads, justified its Opinion based on a number of factors but chiefly these two:

1. That the 1992 decision in *Casey vs. Planned Parenthood Association of Southeastern Pennsylvania*, 60 U.S. 4795 (1992), undermined *Roe vs. Wade* by abandoning the so-called "viability" test and instead reviewed abortion laws based upon whether they represented an "undue burden" on the "right" to abortion. In the view of the Court, *Roe vs. Wade* was already a dead letter. However, that is not quite the case. In spite of the difficulty with defining "viability," the *Casey* court, based upon three swing votes, still found abortion to be a constitutional right.
2. The *Dobbs* Court rejected the concept of viability as determining when a life comes into being. Here, the Court was on more firm ground. Is a newborn baby "viable?" Mankind is one of the few animals that cannot live on its own until it is many years old. No infant is "viable" in the sense of being able to take care of itself. Therefore, those who support abortion are relegated to the argument as to whether an unborn fetus has rights, and, if so, at what point? The more radical pro-abortionists argue that whenever the baby is in the womb, it is a woman's choice and no rights pertain to the unborn infant. However, most people in this country, at least according to the polling, believe that before an infant can survive outside of the womb, it has less rights than when it may live outside the womb. What is that magic date? The *Roe* Court said that a fetus was "viable" and therefore had rights, at the end of the second trimester but had more limited rights in the second trimester. In the first trimester, the fetus had no rights.

The majority Opinion in *Dobbs* places great emphasis on the argument that ethicists and many others have had difficulty choosing the point on the continuum of time as to when a fetus has rights and when it does not. Viability has served as a convenient, albeit imperfect, test. In many states, an unborn fetus, through its representative, can bring a wrongful death and survival action if it is killed in an

automobile accident once it is “viable.” Justice Alito asked the question as to why “viability” should be the test for the rights of a fetus and how does one define that slippery concept?

In trying to understand *Dobbs* and its predecessors, I decided to look on Facebook. It was interesting to see the dramatic differences of opinion. There are those who believe that a woman has the right to choose whether her unborn baby lives or dies, during the entirety of that baby’s stay in the womb. Others, the majority of Americans in fact, believe that at some magic moment there is viability, meaning that a baby may survive outside the womb, and at that moment the unborn has a right to live. Others take the position that there cannot be a narrow definition of life and that early on in the pregnancy, perhaps even at the time of conception, there is the development of humankind taking place in the woman’s womb. Those people argue that the woman is an important, maybe the most important, caretaker of that unborn child, but she cannot deprive that helpless being of any rights whatsoever. The choice as to whether the unborn lives or dies should not be, argued opponents of abortion, in the hands of a single individual who carries that baby.

Of particular interest in this passionate debate is the unwillingness of either side to even listen to the other. This, of course, is not uncommon. Unwillingness to respect others has led to wars, civil strife, anxiety and disruption since the first invasive species of plants replaced their predecessors on the savanna. It is the way nature works. However, supposedly advanced homo sapiens, us, seem to do a particularly poor job of listening to one another.

The question as to what rights the unborn have and when those rights attach is an important discussion whether one approaches it from a religious, philosophical or practical point of view. The ferociously angry debate which is ongoing in this country may generate lots of political donations, but is less important to most people than whether they can make a decent living, support their families and feel safe in the streets.

While the United States Supreme Court in *Dobbs* went further than it had to, taking the time to read **all** the Opinions can only have a salutary effect on those who believe that the only point of view worth listening to is their own.

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