**Notes for November 3, 2022**

**Abortion and Public Policy After Dobbs**

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Introduction

1. In the Dobbs decision, the Supreme Court overturned Roe (1973) and Casey (1992) holding that the Constitution does not contain a right to abortion, giving full power to the individual states to decide policy on abortion.
2. Some states like Texas have passed very strict laws, others like New York more permissive.
3. The challenge is to overcome partisan policies and open up the opportunity for genuine dialogue and citizen input.
4. History and Content
5. Roe v. Wade
6. In 1969 a Texas woman (Jane Roe), pregnant with her third child filed a lawsuit against a local district attorney, Henry Wade, seeking an abortion which was against Texas law.
7. In 1973, the Supreme Court decided 7 to 2 in her favor based on the Due Process Clause of the 14th Amendment that provides a fundamental right to privacy, including a pregnant woman’s right to an abortion. This struck down many anti-abortion laws in the states. The Court also held that the right to an abortion is not absolute and should be balanced against the government’s interests in protecting women’s health and prenatal life. During the first trimester (3 months) the decision to terminate is solely up to the woman. During the second trimester the state could regulate (but not outlaw) abortion. During the third trimester when the fetus is viable Roe said the state could outlaw abortion.
8. The United States Conference of Catholic Bishops (USCCB) strongly condemned Roe in 1973 as violating the dignity of unborn human beings.
9. Theological Reaction cf *How Brave a New World* by Richard McCormick, S.J.
10. Reviewing the reaction of moral theologians, McCormick criticized Roe as “poorly researched” and “shabbily reasoned.” For the present (1974) the matter should be decided by state legislatures which gives “all of us an opportunity to share in the democratic process.” Citizens have a moral obligation to participate in this process, especially because the values at stake are fundamental to the “continuance of civilized society.”
11. McCormick suggested 10 rules for discussing abortion:
12. Attempt to identify areas of agreement: for example, most people think abortion is undesirable.
13. Avoid the use of slogans: for example, calling abortion “murder” which means unjustified killing.
14. Report the opposing position fairly and accurately.
15. Distinguish right-wrong (an objective analysis of the act of abortion) from good-bad which brings in the intention of the one seeking an abortion.
16. Try to identify the core issue which is the evaluation of nascent life (not the question of the beginning of personhood).
17. Admit weakness of one’s own position: for example, those opposed to abortion should recognize that fetal life before implantation often ends in spontaneous abortion and sometimes in twinning.
18. Distinguish the formulation and the substance of a moral conviction: for example, Pope Pius XIII stated that direct abortion was never permissible even to save the life of the mother but the thrust of the Catholic moral tradition allows this.
19. Distinguish morality and public policy. It is possible to judge abortion morally wrong but it cannot be totally outlawed in a pluralistic society.
20. Distinguish morality and pastoral care. A moral statement states a general principle which does not consider the ability of a person to understand or live it.
21. Incorporate the woman’s perspective.
22. On November 12, 2002 on the 30th anniversary of Roe, the American Bishops issued a statement:
23. The bishops commended the growing number of persons, especially youth, who commit to work to overturn Roe.
24. During the 30 years, over 40 million lives were destroyed by abortion; one in four pregnancies ended in abortion; yearly 1.3 million abortions.
25. Progress has been made: each year fewer abortions are done. The number of Americans identifying as pro-life has grown while pro-choice advocates have declined “significantly.” Individual parishes and Catholic social service agencies have assisted women facing difficult pregnancies, most state legislatures have restricted or regulated abortion.
26. They note the pastoral importance of their “Project Rachel” designed to bring forgiveness, hope and healing to men and women grieving the loss of a child by abortion.
27. They commend the annual March for Life in Washington.
28. This statement does not call abortion the “preeminent moral issue of our time,” a term found in their later voting guide, *Faithful Citizenship*.
29. *Faithful Citizenship* 2015 offers guidance that can be applied to the on-going debate on public policy and abortion
30. Abortion is a “preeminent moral issue,” an intrinsically evil act which claims over a million innocent lives each year.
31. They quote Pope Francis: “Politics, though often denigrated remains a lofty vocation and one of the highest forms of charity, in as much as it seeks the common good”

(n 19).

1. Catholic lay men and women can be actively involved: running for office; working within political parties; joining advocacy networks, community organizations to apply moral teaching to public policy and issues.
2. We should form our conscience according to Church teaching on the dictates of human reason. Prayerful reflection is essential to discern the will of God on this issue.
3. We need the virtue of prudence to determine what is most fitting in a specific context and to act decisively to build a society of justice and peace.
4. The document mentions a number of intrinsically evil acts, including abortion, euthanasia and racist behavior.
5. There may be times when a Catholic who rejects a candidate’s unacceptable position on an intrinsically evil act “may reasonably decide to vote for that candidate for other morally grave reasons” and not “to advance partisan preferences as to ignore a fundamental moral evil” (n 35). Such a decision are to be made by each Catholic guided by a “conscience formed by catholic moral teaching” (n37).
6. Planned Parenthood v Casey 1992 Court upheld (5 to 4) the right to have an abortion prior to fetal viability
7. PP challenged Pennsylvania law requiring a waiting period, spousal notification, parental consent for minors.
8. The Court upheld the “essential holding” of Roe that Due Process clause of the fourteenth upholds the right of a woman to have an abortion before viability.
9. The Court overturned the Roe trimester framework in favor of a viability norm.
10. Four Justices joined in saying Roe should have been struck down, setting the stage for Dobbs.
11. The Court upheld 4 provisions of the state law but struck down spousal notification.
12. The result - women retained the right to abortion before viability (about 24 weeks or 6 months).
13. The state could restrict abortion if it does not place an “undue burden” on pregnant women or “substantial obstacles.”
14. The USCCB condemned Casey as it did Roe.
15. Catholics for Choice (CFC)
16. Founded in 1973 after Roe.
17. Claimed Catholics could in good conscience support access to abortion.
18. In October 1984 they placed an ad in the NYT signed by over 100 Catholics, including some priests, claiming abortion can sometimes be a “moral issue.”
19. The Vatican censored the priests and the USCCB insisted that CFC was not a Catholic organization, does not speak for the Catholic Church, is opposed to its teachings on abortion and is an “arm of the abortion lobby.”
20. Sister Margaret McBride, RSM
21. In 2009, as a member of the ethics board of St. Joseph Hospital in Phoenix, she approved of an abortion to save the life of a 27 year-old mother of 4 children who had a close to 100 percent chance of dying.
22. A year later Bishop Thomas Olmstead told her she was automatically excommunicated for participating in an abortion. Olmstead severed relationships with the hospital which said it would save the life of the mother in a similar situation since that is traditional Catholic teaching.
23. The Mercy Order later announced that McBride was no longer excommunicated and was a Sister of Mercy in good standing.
24. Catholic teaching approves indirect abortion (removing a cancerous uterus saving the life of the mother but indirectly causing the death of the fetus. It does not allow direct abortion. McBride said she considered the case an indirect abortion.
25. Dobbs v Jackson Women’s Health Organization
26. General background
27. With the three Trump appointees to the Court, Neil Gorsuch, Brent Kavanaugh, Amy Coney Barrett, commentators expected Roe would be overturned.
28. In anticipation, some states set up trigger laws prohibiting abortion. For example, 30 days after the Dobbs decision Tennessee made abortion illegal after fertilization with no exemptions for rape, incest or maternal health.
29. The Case
30. Specific background: March 2018, the Mississippi state legislature passed a law prohibiting almost all abortion after 15 weeks of pregnancy. Jackson Women’s Health Organization filed suit in federal district court challenging the constitutionality of the law. The court permanently invalidated the law, a decision affirmed in December 2019 by a three judge panel of the U. S Court of Appeals for the Fifth Circuit. The state appealed to the Supreme Court which agreed in May 2021 to hear the case limited to the single question of whether all born or pre-viability abortions are unconstitutional. Oral arguments were heard in December 2021. In May of 2022 a draft of the majority opinion written by Samuel Alito was leaked to the press (Politico) a rare breach of Court confidentiality which sparked national discussion.
31. The decision: In general the Court (6-3) upheld the Mississippi law banning abortions and 5-4 overturned both Roe and Casey. (Roberts dissenting).
32. Majority arguments: The Constitution does not grant a right to abortion and it is not “deeply rooted in the nation’s history and tradition” and not implicit in the concept of “ordered liberty.”
33. Alito explicitly said ruling was only on abortion and not on other rights like same sex marriage and contraception but Thomas opened up the probability that it did.
34. Alito said Roe and Casey were so “egregiously wrong” that the “*stare decisis*” norm not to overturn established law should not be followed although Roe had been in place for almost five decades. He cited the Court overturning Plessey v Ferguson decision establishing separate but equal public schools for black citizens.
35. Kavanaugh said he would not support laws forbidding a citizen to travel to another state to obtain an abortion.
36. Dissenting Opinion
37. In a jointly written statement Stephen Breyer, Sonia Sotomayor and Elena Kagan argued the majority “decimated women’s reproductive freedom” and undermined women’s personal autonomy. The majority opened up various possibilities: state restrictive laws outlawing abortion from fertilization and for rape, incest and maternal health which was already happening with trigger laws, and allowing prosecution of pregnant women seeking an abortion; and even a nationwide ban on abortion from the moment of conception.
38. The dissenters also feared the loss of other established rights such as same sex marriage and contraception, citing the opinions of Clarence Thomas.
39. They accused the majority of undermining the traditional image of the Court as a stable institution, since a simple change of majority overturned a traditional right.
40. They omitted the traditional word “respectfully” from their dissent.
41. Responses of Those Supporting Dobbs
42. Archbishop of Baltimore Willian Lori, Chair of Bishops Committee on Life Issues
43. Dobbs is an “historic ruling” that restores to voters and their leaders in the Catholic Church to influence public policy on abortion.
44. It provides an opportunity to build a new culture of life and to reengage the issue with our fellow citizens.
45. It is also a challenge to us to redouble our efforts to serve women in difficult pregnancies and to protect both the mother and the child.
46. The Church has a tremendous network of healthcare, education and charitable work to help expectant mothers and those who face difficulties after giving birth to caring for their babies.
47. The Church must advocate in the public arena for good health care, housing, employment, a living wage and adoption services.
48. USCCB offered a statement signed by Archbishop Jose Gomez, president of USCCB and by Lori
49. Roe was an unjust law that resulted in the deaths of tens of millions preborn children. It was a grievous denial of the truth that all persons have a God given rights to life, liberty and the pursuit of happiness.
50. The second part reflects Lori’s more positive approach.
51. Vatican Pontifical Academy for Life
52. The issue of abortion is “a matter of broad social significance.”
53. States should enact policies that favor life without falling into apriori ideological positions.
54. We need adequate sexual education, health care for all and laws to “protect the family and motherhood overcoming existing inequalities.”
55. George Weigel in an article in *First Things*, entitled “Dobbs and the Vindication of American Democracy”
56. Dobbs has struck a blow for civil rights as important as Brown v Board of Education (1954) which declared segregated public schools unconstitutional.
57. He praises the pro-life citizens Catholics, Protestant, Jewish and others who attended the annual March for Life and who staff thousands of pro-life pregnancy and maternity centers to care for pregnant women before and after birth, exposing the mendacity of the charge that pro-lifers only care about babies before they are born.
58. He mentions heroes of the movement, author Richard Newhaus and Mary Ann Glendon and politicians of both parties, Henry Hyde (r) and Robert Casey (d), former Gov. of PA.
59. He recognizes that there are tremendous political, cultural and social ramifications of Dobbs that must be dealt with in the years ahead.
60. *Protecting the Unborn: A Scholars’ Statement of Pro-Life Principles and Political* *Prudence* published by Ethics and Public Policy Center signed by 20 scholars including George Weigel Robert Garage
61. Intro: As pro-life scholars we believe a just society would meet the “myriad needs of pregnant women while legally protecting their unborn children at every stage of development. Access to medical treatment for pregnant women is part of the pro-life ideal, not an exception to it. In crafting laws to protect fetal life political realities may make full protection impossible, In this case it is morally justified to support the best law possible. The perfect should not be the enemy of the good.
62. Human beings born or unborn, having profound inherent dignity, are entitled to legal protection from lethal attack even to avoid very difficult parenting. Accepting the death of an unborn child, not as a mean to save the life of the mother, but as a byproduct is morally permissible (cancerous uterus case). Decisions to protect mothers can be morally left to the “reasonable medical judgment” of doctors and can be based on the risk of permanent impairment of major bodily function and not only a risk of imminent death.
63. It can be morally appropriate to support laws that ban some or most elective abortions while permitting them in case of “rape or incest or fetal abnormality, or at some early stages of pregnancy.” This is so even it may indirectly contribute to more abortions if there is no realistic alternative to afford more protection. “Law making is the art of the possible.”
64. It would be morally permissible to support a state law prohibiting abortion after 8 weeks if the alternative is to do nothing.
65. “To disregard political realities is no virtue.” It is prudent to take into account a law’s durability.
66. General conclusions: faced with imperfect options, choose the one that promises the most protection of unborn children over time. Lawmakers and citizens should remain committed to advancing a culture of life.

1. Those opposed to Dobbs
2. League of Women Voters
3. Dobbs deprives women of their “bodily autonomy” which means they are “no longer equal individuals in our democracy.”
4. It will “exacerbate societal inequalities,” disproportionately affecting the people of color and low income communities.
5. It will foreshadow the eroding of other rights including marriage equality, access to contraception and private consensual intimate conduct.
6. “We will use our anger to fight in the legislatures, the courts and the streets.”
7. Kathleen Kaveny in *Commonweal*  Sept 2022
8. In 1973, Roe provoked a raging political conversation about abortion where there was none; functioning like a political virus, where “mutant DNA reconfigured and divided the country.”
9. In 1975, 51% of Republicans identified as pro-life, in 2022 it was 70%. During the same period Democrats went from 33% pro-life to 10% in 2022.
10. Dobbs was radical in the sense that it took away almost all abortion as a legal possibility for women. The Guttmacher Institute estimated 25% of American women will have an abortion in her lifetime (some studies say 31% of Catholic women). It will exacerbate the culture wars and conservative states will attempt to restrict it, while progressive states will see themselves as sanctuaries for pregnant women. The dissent did not recognize the failure of Roe to settle the debate once and for all.
11. Kaveny lauds Roberts for trying to hold the country together by upholding the Mississippi law which is not “unduly burdensome,” but not overturning Roe. Kaveny sees this as a “possible blueprint” for a workable compromise, 15 week restriction roughly similar to Western European countries that have restrictions for the health of the mother.
12. The current debate is not about good or evil. It is about 2 goods, a women’s bodily integrity and moral autonomy; and protecting fetal life. Roberts could not convince Kavanaugh to join him, very unfortunately according to Kaveny.
13. The Current Situation in the States
14. The Guttmacher Institute October 1, 2022
15. Twenty-two states have laws that could be used to restrict the legal status, 13 states have trigger laws now in place that ban all abortions, 4 states have passed constitutional amendments declaring their constitution does not protect the right to an abortion or allow the use of public funds for abortions.
16. Sixteen states have laws that protect the right to abortion. Twelve states explicitly permit abortions prior to viability or to protect the mothers health. Five states protect abortion providers.
17. Ohio restrictions as of June 28, 2022: get state sponsored counseling and wait 24 hours before the procedure, parental consent for a minor; public funding only in case of rape, incest and life of mother; banned at six weeks except for those three reasons; no abortion for fetal disabilities. The story of a 10 year-old girl from Ohio victim of rape (rapist has been arrested) who had to travel to Indiana for an abortion.
18. Brenan Center August 24, 2022
19. Restricting
20. Mississippi, Arkansas, Oklahoma, Missouri and South Dakota are now enforcing trigger laws. Legal challenges are underway.
21. Over 100 bills restricting abortion after 12 weeks have been introduced in states across the country, including Florida, Iowa and New Jersey. Other bills seek to restrict abortion by establishing the fetus as a legal person.
22. Expanding
23. Two dozen states introduced bills to expand abortion coverage in Medicaid, including California, Oregon and Maryland have enacted these.
24. Eighty-five bills have been introduced to protect abortion access, forty to rapid abortion access.
25. Kansas voters rejected a proposed constitutional amendment that would make abortion illegal by a substantial margin (59-41).
26. Abortion pills now account for over half the abortions. Some states are challenging laws that criminalized the selling and use of abortion pills.
27. Brenan report summary: The right to an abortion is now dictated by geography, and in some cases travelling is criminalized. We now have a “medley of state level abortion laws” that are sure to have dire health, legal and political consequences.
28. Pew Research Polling July 6, 2022
29. Before and after Dobbs about 60% of Americans think abortion should be legal in all or most cases, about 57% disapprove of Dobbs (43% strongly disapprove) 41% approve, 25% strongly.
30. Partisan divide: about 80% of those leaning Democrat disapprove of Dobbs and 70% Republican leaners approve Dobbs. Some 84% of Democrats in all or most cases it should be legal. Republican 60% believe it should be illegal.
31. Gender divide: over 60% of women disapprove of Dobbs (47% strongly); 52% of men disapprove (37% strongly).
32. In seventeen states with new restrictions/laws 46% approve and 52% disapprove.
33. Twenty states where abortions are legal allow up to 24 weeks 65% disapprove of Dobbs (half strongly) 34% approve (19% strongly)
34. Religious groups approval of Dobbs White evangelicals 71% approve, 27% disapprove, Catholics 48% approve, 51% oppose Dobbs; Nones 73% disapprove of Dobbs and 22% approve.
35. Age: under age 30, 69% disapprove, over 51% disapprove.
36. Education: Post grads 66% disapprove; high school 50% disapprove.
37. Toward Solutions
38. It is important to distinguish the morality of the act of abortion, (as right or wrong) from public policy which accounts for diverse views.
39. Almost everyone sees abortion as negative: tragic, dangerous, a hard choice, morally repugnant or intrinsically evil. Does anyone really think society would be better if we could increase the number of abortions from 1 million a year to 2 million a year??
40. Very few favor abortion after viability (only 1% occur after 24 weeks).
41. European democracies as a model
42. Most members of the EU have compromise legislation in place without great political turmoil that allows abortion upon request up to viability.
43. Some have restrictions. Italy, since 1994 for example, allows abortion through the first ninety days after counseling in a public medical facility. It is allowed after that if the pregnancy causes a serious danger to the woman’s life. Abortion is not a constitutional right but it is not a crime. Italy found a workable compromise through legislation and a national referendum. Massimo Faggioli thinks it unlikely the U.S. will some find such a consensus since the U.S. culture wars keep abortion alive as a divisive issue.
44. With Richard McCormick some Catholic theologians (David Cloutier, CU) have continued to hope that states would encourage genuine dialogue leading to just and wise public policies.
45. The development of policies is better left to state legislatures than federal courts.
46. States can serve as social laboratories for experiments with public policies.
47. States could learn from one another what compromises work best.
48. Voting for state legislators who are open to working on bipartisan legislation to develop just abortion laws that serve the common good. Ballotpedia.org has a great deal of information on the Ohio General Assembly both the 33 member Senate with names and party affiliation, limited to 2 four year terms and 99 member House limited to 4 two year terms. It does not provide information on a candidate’s position on abortion policy.
49. Partisan polarization as obstacle to workable solutions
50. Both parties agree that our democracy is at risk for various reasons: the 2020 election was stolen, peaceful transfer of presidential power was challenged (Jan 6th),

Election deniers are on the ballot in swing states (over 60% in Michigan). Jon Meacham and other historians say this is the biggest challenge to democracy since the Civil War.

1. There is a clear political advantage in keeping abortion as a divisive issue and not much is favoring compromise. This tends to extreme positions to outlaw all abortion or permit it totally at the discretion of the pregnant woman with no protection for fetal life.