Has Roe v. Wade Met Its Match?
The Brief by Mississippi's Attorney General Makes a Surprising Argument Aimed at Chief Justice Roberts.
By David J. Garrow *Wall Street Journal*, July 30, 2021, p. A15.

No finer or more important brief has been submitted to the U.S. Supreme Court in many decades than the one Mississippi Solicitor General Scott G. Stewart filed last Thursday in *Dobbs v. Jackson Women's Health Organization,* the abortion case the justices will hear in the fall. *Dobbs* is the most important challenge to *Roe v. Wade* (1973) since *Planned Parenthood v. Casey* (1992), in which the court upheld *Roe*'s "essential holding" 5-4. Thanks to Mr. Stewart's handiwork, *Roe*'s status is more fragile than ever.

A Stanford Law School graduate who clerked for Justice Clarence Thomas, Mr. Stewart is most immediately targeting the court's 48-year reliance on fetal viability (approximately 24 weeks of pregnancy) as the decisive point prior to which state efforts to prohibit abortions are voided. Mr. Stewart argues that "a viability rule has no constitutional basis" and that "even if the 'liberty' secured by" the 14th Amendment's Due Process Clause does "protect some right to abortion, nothing in constitutional history or tradition supports tying such a right to viability."

Mr. Stewart also targets *Casey*'s "undue burden" standard, contending that "there is no objective way to decide whether a burden is 'undue.' " He cites the court's own recent abortion rulings as proof that the standard "cannot produce a workable, administrable, predictable jurisprudence." In last year's *June Medical* decision, the five justices who supported the judgment "could not agree on what *Casey* means." At a minimum, Mr. Stewart argues that Mississippi's effort to ban elective abortions after 15 weeks "does not pose an undue burden because it does not," quoting court precedent, " 'prohibit any woman from making the ultimate decision to terminate her pregnancy' " so long as she acts quickly enough.

But viability and the undue-burden standard are only Mr. Stewart's intermediate targets. The true crux of his brief, aimed squarely at Chief Justice John Roberts, is that it is in the court's institutional self-interest to

jettison *Casey* and *Roe*. Some observers, including this writer, have long believed that the justices' pre-eminent attachment to the court's own institutional legitimacy and reputation makes reversal of *Roe,* or *Casey,* virtually unimaginable. But Mr. Stewart fundamentally upends that calculus, and in so doing he presents Chief Justice Roberts and his colleagues with a legacy-defining choice.

"Casey retained *Roe*'s central holding largely on the view that overruling it would hurt this Court's legitimacy," Mr. Stewart observes. Yet since abortion remains "a wholly unsettled policy issue" in dozens of states, under *Roe* and *Casey* the federal judiciary "mows down state law after state law, year after year" with no end in sight. He quotes Justice Lewis Powell, who joined the majority in *Roe,* as warning in another context that "repeated and essentially head-on confrontations between the life-tenured and the representative branches of government will not, in the long run, be beneficial to either."

Terming *Roe* and *Casey* "irredeemably unworkable," Mr. Stewart argues that those precedents "force people to look to the Judiciary to solve the abortion issue—which, 50 years shows, it cannot do." *Roe* and *Casey* have "placed this Court at the center of a controversy that it can never resolve" and litigation "endlessly injects this Court into 'a hotly contested moral and political issue' " (quoting Justice Byron White, a *Roe* dissenter, in a 1986 abortion case) that shows no sign of ever abating.

Thus *Roe* and *Casey* have "harmed the perception of this Court," Mr. Stewart asserts, and "retaining those precedents harms this Court's legitimacy." Worse, "continued judicial involvement here contributes to public perception of this Court as a political branch"—a particular bête noire for the chief justice. "The national fever on abortion can break only when this Court returns abortion policy to the States," Mr. Stewart argues. "Overruling *Roe* and *Casey* . . . would leave the States with exactly as much authority to protect"—yes, protect—"abortion as they have now."

Good luck, Mr. Chief Justice.

Mr. Garrow's books include "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade" and "Bearing the Cross."