



Written by [Bob Adelman](#) on July 27, 2021

Conservative Republican Senators Urge SCOTUS to Overturn *Roe v. Wade*

Republican Senators Josh Hawley of Missouri, Mike Lee of Utah, and Ted Cruz of Texas filed an [amicus brief](#) with the Supreme Court on Monday urging the high court to overturn *Roe v. Wade* and its follow-up decision in *Planned Parenthood v. Casey* (which affirmed *Roe*). The trio made the case that the original decision was flawed and the follow-up decision just made things worse. The whole issue, said the senators, is best resolved by following the Constitution and returning the power to make legislation regarding abortion back to the states.



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The senators wrote that the high court's initial decision in *Roe* was "controversial and conceptually flawed from the outset." The court used the term "viability" in determining when abortion may be allowed, a waffle term that may occur sometime during the 24th week of pregnancy.

In *Casey*, wrote the senators, the high court just made things worse by using the term "undue burden" on the mother. They called it "ambiguous," "too subjective," "unworkable and unpredictable."

Instead of wading into political waters not specifically prescribed by the Constitution — "this status quo is untenable" they said — the court "engenders unpredictable consequences" as well as "usurping the constitutional prerogatives of the [states]."

This opportunity arose when the Supreme Court agreed back in April to take on *Dobbs v. Jackson Women's Health Organization*. In 2018, Mississippi passed a law banning abortions after 15 weeks of gestation. The Jackson Women's Health Organization (JWHO) immediately sued, found an Obama-appointed judge to agree, and the law was blocked.

The brief filed by the Republican senators said that just because *Roe* is nearly 50 years old, and *Casey* 20 years old, doesn't mean the issue was decided correctly:

Stare Decisis [to stand by things decided in the past] considerations may be important to the judicial process, but they are not absolute. Where prior precedents are demonstrably unworkable, it is appropriate for the Court to reconsider them.

The high court's previous decisions are, wrote the senators, demonstrably unworkable:

A precedent can prove unworkable in several ways. A history of confusion in the lower courts, an unstable pattern of Supreme Court decisions, and a persistent lack of judicially



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manageable standards all suggest that a precedent is or has become unworkable.

For example, wrote the senators, consider the “undue burden” standard the court used in *Casey* to replace the “viability” standard in *Roe*:

Casey has forced the Court to distort other generally applicable standards that are themselves unworkable.

Casey does not represent long-settled doctrine, rests on a foundation of flawed judicial reasoning, and boasts no traditional reliance interests.

They concluded:

Stare Decisis is not an absolute shield that protects failed precedents from subsequent review....

As the Court has repeatedly explained over the course of many decades, decisions that have proven unworkable ... are prime candidates for reversal.

This is particularly true where, as here, the underlying decision [*Roe*] is egregiously wrong.

The three conservative Republican senators are not alone in filing such briefs. One written by Jacob Weaver, a graduate of the University of Michigan School of Law, has gained the support of 22 pro-life groups and signatures from more than 300 lawmakers in 35 states.

Wrote Weaver: “The power to regulate abortion falls squarely into States’ police powers” just as it did for 150 years prior to the flawed decision in *Roe*.

He added: “We argue that [overturning *Roe* and *Casey* would] depoliticize the court and ... return states to their rightful place in the constitutional scheme.”

Constitutional scholar and law professor Rob Natelson was more pointed:

Judicially, *Roe v. Wade* was ... a “rogue decision,” because it violated accepted judicial standards. Courts normally respect precedent, but *Roe* reversed hundreds of years of Anglo-American law.... *Roe* effectively voided statutes in all 50 states. *Roe* converted democratic resolution into Supreme Court diktats....

Roe v. Wade pretends to be constitutional law, but it’s not. It’s an absurd ruling stemming from arrogant decision-making and misuse of history.

A core issue regarding *Roe* and *Casey* is the high court’s overreach in those decisions. As Walter Weber, senior legal counsel for the American Center for Law and Justice (ACLJ), wrote:

One of the problems we face is that the Supreme Court has acted as if it is the Constitution [itself] — that whatever it says becomes part of the text [of the Constitution].

That is not what the Constitution says.... When the Supreme Court says we have a decision that we know is wrong but we are going to follow it anyway ... what they are saying is that our rulings take a higher priority than the Constitution itself.



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At bottom the issue is about the right to life. As former Chaplain Colonel Wes Smith noted:

If you end a life — that is killing. Whatever the justification is, it is killing.

We need to call it for what it is.

What the people who are pro-abortion [are calling for] is state sanctioned killing.

The high court will hear arguments in the case *Dobbs v. Jackson Women's Health Organization* in early October, with a ruling due next spring. If it overturns *Roe* and *Casey* in its ruling, it will change everything. It would signal the end of the abortion holocaust and take a huge step toward repairing the culture that has been so badly damaged by those decisions. While the millions of lives that have been lost since 1973 cannot be restored, the lives of millions more can be saved from state-sanctioned killing in the future.



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