Opinion

NCR Voices



Supporters of legal abortion and pro-life demonstrators hold signs outside the U.S. Supreme Court during the annual March for Life Jan. 20, 2023, in Washington, for the first time since the U.S. Supreme Court overturned the *Roe* v. *Wade* abortion decision. (OSV News/Reuters/Jonathan Ernst)



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Last week, two federal judges issued conflicting rulings regarding the Food and Drug Administration's approval of mifepristone, a drug used to induce an abortion. The conflict among judges establishes a path that is likely headed to the U.S. Supreme Court.

In Texas on April 7, conservative Judge Matthew Kacsmaryk, an opponent of abortion, held that the FDA did not follow proper protocols in approving the abortion pill, and then stonewalled efforts to challenge its use. He ordered the withdrawal of the approval, which was granted by the FDA 23 years ago, and applied his ruling nationwide. An appeals court on Thursday (April 13) allowed the drug to continue to be used while the legal challenge goes forward, but let stand part of Kacsmaryk's ruling that restored restrictions on access to the drug that were in place until 2016.

Within an hour of that ruling, in Washington state, Judge Thomas Rice barred the FDA from taking "any action to remove mifepristone from the market or otherwise cause the drug to become less available." The suit in Washington state had been brought by 18 Democratic attorneys general, urging the judge to remove the restrictions on the drug's use that are already in place.

It is interesting to note that one of the key legal issues in both rulings was whether or not the FDA complied with the Administrative Procedure Act, which sets forth how agencies of the government can, and cannot, enact or alter regulations. The APA is what provides grounds for judicial oversight. Judges are not medical experts and can only intervene if there is a showing that the agency violated the APA in some manner or violated a constitutional right. Abortion access no longer enjoys the latter status.

Welcome to the post-*Dobbs* world of abortion politics and jurisprudence. When the U.S. Supreme Court overturned *Roe* v. *Wade* and *Planned Parenthood* v. *Casey* last year in *Dobbs* v. *Jackson Women's Health Organization*, the immediate impact was to kick the issue of abortion back to state legislatures. There, it was hoped, the legislative process might yield some of the kinds of compromises that have long been known in other Western democracies and that more or less reflect public opinion: relatively liberal access to abortion in the early weeks of a pregnancy with increasing limits as a pregnancy develops with strict limitations on late-term abortions.

Alas, as became clear quite early on, there were profound disagreements within the pro-life community about how to proceed. Issues of enforcement were immediately obvious, and nowhere more so than on this thorny issue of medical or chemical abortions, which are induced by taking drugs, not in a surgical procedure. According to both the Centers for Disease Control and the Guttmacher Institute, medical abortions have grown as a percentage of all abortions since 2000 when mifepristone was first approved by the FDA. In 2020, for the first time, they accounted for a majority, 53%, of all legal abortions.

A box containing a mifepristone tablet is pictured in a Feb. 28 photo. (OSV News/Reuters/Calla

A box containing a mifepristone tablet is pictured in a Feb. 28 photo. (OSV News/Reuters/Callaghan O'Hare)

It is one thing for a state to ban surgical abortions within its boundaries. But interstate commerce is implicated in any attempt to ban the sale of FDA-approved drugs across state lines. Pharmaceutical corporations, never known for their alertness to any argument except those emanating from the bottom line, have a stake in keeping these drugs available and have denounced the Texas ruling. Witnessing Big Pharma arm-in-arm with pro-choice groups, one would think, would give liberals pause, but no.

Similarly, the same week the rulings came down, Tennessee was reeling from the murder of six people at a church school in Nashville, but the GOP-controlled

legislature let its concern for the right to bear arms trump its concern for the right to life, expelling two legislators who protested their inaction on gun control. Libertarianism on the right extends to guns but not to persons, and on the left, it extends to persons but not to guns. The lack of intellectual and moral consistency is shocking.

Of course, the bias of the mainstream media is obvious. The New York Times predictably provided an annotated version of the Texas ruling. They huff:

> The ruling calls medication abortion "chemical abortion," refers to abortion providers as "abortionists" and describes a fetus or embryo as an "unborn human" or "unborn child." By contrast, a conflicting ruling by a judge in Washington State that barred the F.D.A. from limiting the availability of mifepristone used terminology like "the termination of an early pregnancy," "fetal loss" and "patients and providers."

I can make the case that the "pro-choice" language the Times prefers is Orwellian, just as my pro-choice friends can argue the judge's language is offensive. As a matter of linguistics, it is worth noting that pro-choice activists and columnists still can't bring themselves to describe the unborn child in a way that sounds accurate and non-Orwellian. Simply repeating "this is a woman's body" is not an argument. A fetus is not like a leg or an arm. The unborn child has different DNA from that of the mother. That said, judges, like journalists, should, as a matter of respect and courtesy, usually refer to people as they refer to themselves, so Judge Kacsmaryk's reference to "abortionists" is wrong, too.

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Meanwhile, in Wisconsin, voters elected a Democratic candidate to the state's Supreme Court by a wide margin, and abortion was a leading issue in the race. Elaine Kamarck of the Brookings Institution concluded that the Wisconsin results were so striking that the right to abortion "will keep winning for the rest of the

decade until the right to abortion is secured state by state in all but the deepest red states and the U.S. Supreme Court’s decision is rendered moot." But last year, Lt. Gov. Mandela Barnes lost his race for the U.S. Senate seat in Wisconsin despite leaning heavily into the abortion issue.

The electoral significance of the abortion issue will vary from state to state and from election to election, depending on other factors. That said, Kamarck is right that in most states, when the issue is faced straight on, Americans will default to the libertarian, pro-choice position. Such libertarianism should be enough to get liberal Catholics worried, but I am not holding my breath. The Catholic left is as morally compromised on this issue as the Catholic right. To the precise degree both move away from the consistent ethic of life, they move away from any distinctly Catholic, morally consistent witness.

In the meantime, in the courts, in the legislatures and at the ballot box, the politics of abortion will remain fraught. Anyone who thought overturning *Roe* would make the politics of abortion less so was not paying attention. Sidelined by those fraught debates is any chance at finding common ground around a strategy for reducing the abortion rate. Now, that goal is as elusive as ever.