Vindicating Cassandra: A Comment on *Dobbs v. Jackson Women's Health Organization*

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Introduction

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court of the United States overruled *Roe v. Wade* and held that the U.S. Constitution does not guarantee the right to terminate a pregnancy.[1] The decision triggered abortion bans in 11 states.[2] Nine other states have pre-*Roe* abortion bans on the books, and it's unclear what will happen with them.[3] It is certain that no Supreme Court decision has so quickly resulted in the prohibition of so much private conduct that was once afforded the highest constitutional protection.

Dobbs is shocking—not just because of the circumstances in which a draft of Justice Samuel Alito's opinion for the Court was leaked to the public.[4] *Dobbs* will have an impact on the lives of millions; it will create new legal conflicts (which are already happening); and it creates uncertainty for other rights. The most alarmist predictions from reproductive-rights supporters proved accurate.[5] Like Cassandra,

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[1] See 142 S. Ct. 2228 (2022).

[2] See Elizabeth Nash & Isabel Guarnieri, 13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned, Guttmacher Inst. (June 6, 2022), https://tinyurl.com/529zdcj6.

[3] *Id.*

[4] About which this essay will not speculate.

[5] Compare Kathleen Parker, Calm Down. Roe v. Wade Isn't Going Anywhere, Wash. Post (June 3, 2018), https://tinyurl.com/e3ch9z73 with How Activists Can Prepare for a Post-Roe World, Reproaction (Sept. 21, 2018), https://tinyurl.com/2p8ts3jt.

who warned in vain of the impending fall of Troy, they have been vindicated by devastation.[6]

Of course, the fall of Troy ended the Trojan War. *Dobbs* is a victory for one side in an ongoing constitutional conflict. It strives to be more than that, but the moment slips without decisive resolution. This essay explains why and describes and criticizes *Dobbs*'s reasoning.

Part I summarizes the history of abortion in the United States. Part II describes and evaluates *Roe*'s reasoning; explains how *Roe* became a focal point of constitutional conflict; and maps the political and legal landscape prior to *Dobbs*. Part III summarizes the opinions in *Dobbs*. Part IV argues that Alito's opinion for the Court fails to achieve three of its major goals. The opinion lands some justified blows on *Roe* but falls well short of demonstrating that it was "egregiously wrong." Its own constitutional interpretation suffers from crippling flaws, with the result that it fails to show that the Constitution doesn't protect abortion rights. And it not only fails to extricate the federal judiciary from abortion-related conflict but also invites attacks on other rights, from contraception to sexual intimacy to marriage.

I. Abortion in America, From the Founding to *Roe*

A. Abortion at the Founding

No abortion statutes existed in the United States when the Constitution was ratified. State courts followed the common law, distinguishing between abortion before and after "quickening"—the perception of fetal movement, roughly 14–20 weeks after pregnancy. A fertilized egg couldn't be the victim of a homicide, but the common law did criminally punish the termination and expulsion of a "quick" fetus.[7]

Abortion was widely practiced but not publicized. Observers generally believed that abortion was chosen by (as one doctor put it) "unmarried females, who, through imprudence or misfortune, have become pregnant, to avoid disgrace which would attach to them from

[6] See Hyginus, Fabulae 93 ("Cassandra, daughter of the king and queen, in the temple of Apollo, exhausted from practising, is said to have fallen asleep; whom, when Apollo wished to embrace her, she did not afford the opportunity of her body. On account of which thing, when she prophesied true things, she was not believed.").

[7] See James C. Mohr, Abortion in America 3–4 (1978).

having a living child."[8] It wasn't understood as a means of family limitation, with one important exception: enslaved African women. Enslaved African women, through childbearing, fulfilled an economic function for enslavers, particularly after Congress banned the international slave trade in 1808.[9]

In opposition to their "function" as child bearers, enslaved women used abortion as a means of resistance.[10] Prominent southern medical journals published essays about "the unnatural tendency in the African female to destroy her offspring" and described numerous "domestic remedies" that could be used to terminate pregnancy.[11] But white, married women didn't abort—or so it was thought.

By the 1840s the social perception of abortion had transformed. Abortion-inducing drugs were advertised in the popular press.[12] Newspaper exposés revealed that abortion was a daily practice among the upper and middle class in northern cities.[13] Physicians across the country lamented that abortion involved not "the unfortunate only, who have been deceived and ensnared by the seducer" but also "the virtuous and intelligent wife and mother."[14] Sensationalized cases led to new restrictions, as some states challenged the quickening line.[15]

[8] John B. Beck, An Inaugural Dissertation on Infanticide 67 (1817).

[9] See Sara Clarke Kaplan, The Black Reproductive: Unfree Labor and Insurgent Motherhood 13 (2021) ("Following the legal end of its participation in the transatlantic slave trade, the United States became the only slaveholding society in the Americas to successfully rely on . . . the multigenerational growth of an enslaved labor force and expansion of a plantation economy solely through the procreation of existing captives."); Thomas Jefferson, "Extract from Letter to John Wayle Eppes" (June 30, 1820), https://tinyurl.com/887xhr2s ("I know no error more consuming to an estate than that of stocking farms with men almost exclusively. I consider a woman who brings a child every two years as more profitable than the best man of the farm. What she produces is an addition to the capital, while his labors disappear in mere consumption.").

[10] See Stephanie Camp, Closer to Freedom: Enslaved Women and Everyday Resistance in the Plantation South 63 (2005).

[11] E.M. Pendleton, On the Susceptibility of the Caucasian and African Races to the Different Classes of Diseases, S. Med. & Surgical J. 338 (1949).

[12] See Mohr, *supra* note 7, at 49.

[13] See *id.* at 125.

[14] Jesse Boring, Foeticide, 2 Atlanta Med. & Surgical J. 257–58 (1857).

[15] See Mohr, *supra* note 7, at 145.

B. The Physicians' Campaign

Beginning in the 1850s, "regular" physicians who were associated with the country's better medical schools and well-organized local medical societies pursued an anti-abortion campaign. The goal was "educating up" the public to abortion as an "evil" that would "undermine the very foundation of all domestic morals."[16]

Why? While many "regulars" had earnest objections to abortion, they also had an economic interest in stricter abortion restrictions: They faced competition for their services from midwives, herbal healers, and other "irregular" practitioners.[17] But there's no evidence of a grand scheme to dupe the public. Rather, the regulars appear to have sincerely affirmed the (today, scientifically uncontroversial) fact that quickening is an insubstantial stage of gestation.[18] They then sincerely drew the (then and now, fiercely controverted) conclusion that all abortion was morally unjustifiable.[19] Like many today who believe abortion is murder, they found it difficult, if not impossible, to find a sufficiently counterbalancing value to stopping perceived murder.

Sincerity notwithstanding, it's important to situate the regulars' campaign in social context when evaluating the legislation that they inspired. This context included hostility to immigrants, Catholics, and people of color, as well as support for traditional gender norms.[20] Leading physicians proclaimed that "[t]he true wife" did not *seek* "undue power in public life, . . . [u]ndue control in domestic affairs, . . . [or]

[16] *Id.* at 171.

[17] *Id.* at 30–39.

[18] *Id.* at 36. See also Justin Buckley Dyer, Slavery, Abortion, and the Politics of Constitutional Meaning 116 (2013) ("[B]y mid-century the quickening requirement was increasingly thought to be in tension with the best medical science and with the principles underlying the traditional common law categories.").

[19] *Id.*

[20] See Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973, 11 (1997); Melissa Murray, "Roe v. Wade," in Critical Race Judgments: Rewritten U.S. Court Opinions on Race and the Law 531 (Bennett Capers, Devon W. Carbado, R.A. Lenhardt, & Angela Onwuachi-Willig eds. 2022). See also Michelle Goodwin, Policing the Womb: Invisible Women and the Criminalization of Motherhood 4 (2020) ("In southern states many . . . midwives or women trained in pregnancy delivery and termination were African American. It is estimated that 50 percent of births in the United States were attended by Black midwives.").

privileges not her own[.]"[21] White women were vital because "upon their loins depends the future destiny of the nation," and the regulars lamented the loss of "national characteristics" as a result of declining "American" birth rates.[22] They also emphasized the (alleged) prevalence of abortion among Protestant women.[23]

As Reva Siegel has shown, regulars unfolded a political-economic vision that tracked the general view of a woman's role at the time.[24] Women were to perform the work of gestation and nurturance, and men—especially male physicians—supervised reproduction for the sake of national prosperity.[25] As campaign leader Horatio Storer put it, "medical men are the physical guardians of women and their offspring; from their position and peculiar knowledge necessitated in all obstetric matters to regulate public sentiment, and to govern tribunals of justice."[26] Between 1860 and 1880, at least 40 new anti-abortion statutes were enacted, with most states eliminating the quickening distinction.[27] Campaigners worked closely with legislators, petitioning for reform and familiarizing legislative committees with Storer's major publications during their deliberations.

C. The Rise of Reproductive Rights

The birth-control movement of the 1920s stemmed from early feminists' "voluntary motherhood" demand—a demand for more control

[21] Horatio Storer, Why Not? A Book for Every Woman (1868), reprinted as A Proper Bostonian on Sex and Birth Control 85, 184 (1974); James S. Whitmire, Criminal Abortion, Chi. Med. J. 385, 392 (1874).

[22] Whitmire, *supra* note 21, at 392.

[23] See Mohr, *supra* note 7, at 167.

[24] See also Silvia Fedirici, Caliban and the Witch: Women, the Body and Primitive Accumulation 74–75 (2004) (arguing that the transition from a subsistence to a capitalist economy saw the reproductive work of women "being mystified as a natural vocation and labeled 'women's labor'" and women "excluded from many waged occupations." The result was a "sexual division of labor that . . . not only fixed women to reproductive work but increased their dependence on men.").

[25] See Reva B. Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 318 (1992).

[26] Horatio R. Storer, On Criminal Abortion in America 56 (1860).

[27] Mohr, *supra* note 7, at 200. See also James S. Witherspoon, Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's L.J. 29, 34 nn.18–19 (1985) (listing state statutes that increased punishments based on proof of quickening).

over when and how women became pregnant.[28] Birth-control advocates demanded access to resources by which reproductive control could be achieved. In 1921 Margaret Sanger founded what would become the Planned Parenthood Federation of America to provide contraception and information about contraception.[29] But as Melissa Murray notes, Sanger opposed abortion, believing it to be "unsafe and dangerous."[30]

If the birth-control movement descended from the voluntary-motherhood demand, it fell importantly short in ways that did enduring damage to the cause of reproductive freedom. Leading progressive birth control advocates believed in the science of eugenics and defended birth control as a means of population control.[31] Whatever the motivations, Dorothy Roberts has observed that "[b]irth control became a means of controlling a population rather than a means of increasing women's reproductive autonomy."[32] When the sterilization of Black, Puerto Rican, and Native women became official policy in subsequent decades, "family planning" became associated with racial genocide.[33]

Planned Parenthood's first national conference on abortion was held in 1955. It was attended by elite physicians and focused on enabling physicians to provide therapeutic abortions. The final joint conference statement calling for reform of criminal abortion laws didn't discuss women's rights.[34]

In 1959 the American Law Institute proposed a model abortion law that tracked the Planned Parenthood joint statement.[35] By 1970, 12 states had passed abortion-reform measures.[36] But transformative

[28] See Melissa Murray, Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade, 134 Harv. L. Rev. 2025, 2038 (2021).

[29] *Id.*

[30] *Id.*

[31] See *id.* at 2039 ("With eugenics as a frame, Sanger and the birth control movement could emphasize contraception not only as conducive to women's health and autonomy, but also as a means of promoting the national welfare.").

[32] Dorothy Roberts, Killing the Black Body 113 (1993).

[33] See *id.* at 142.

[34] See Reagan, *supra* note 20, at 220.

[35] See Herbert F. Goodrich & Paul Wolkin, The Story of the American Law Institute, 1923–1961, 5–7 (1961).

[36] Judith Hole & Ellen Levine, Rebirth of Feminism 284 (1971).

change remained elusive, leading nonprofessional women to pursue more radical options.[37] An example: the Chicago-based "Jane," which negotiated with illegal abortion providers to lower prices, created a "scholarship" fund to help low-income abortion-seekers and even provided abortions themselves within an environment that was designed for and to empower women.[38]

Simultaneously, "women's liberation" groups emerged from protest movements in which women were marginalized by fellow leftists.[39] A feminist consensus developed around the need for abortion access.[40] And feminists took their arguments public—to politicians, medical professionals, judges, and ordinary people, pushing for abortion access as necessary for all women, everywhere.

By the late 1960s, a majority of Americans believed that abortion shouldn't be a crime.[41] But decriminalization efforts stalled. Influential pro-lifers[42] elaborated constitutional arguments for prenatal rights.[43] Robert Byrn, a Fordham law professor, published in 1966 an article arguing that abortion violated the Fourteenth Amendment's Equal Protection Clause by denying unborn "person[s] . . . the equal protection of the laws."[44] In December 1971 a New York judge appointed Byrn as the official legal "guardian" of all fetuses between 4 and 24 weeks of development that were scheduled for abortions in New York City hospitals.[45] Along with some high-profile legislative defeats, constitutional arguments for prenatal

[37] See Reagan, *supra* note 20, at 222–45.

[38] See Jenny Brown, Without Apology: The Abortion Struggle Now, 132–39 (2019).

[39] See Reagan, *supra* note 20, at 228–30.

[40] See *id.* at 233.

[41] See Changing Morality: The Two Americas, A Time-Louis Harris Poll, Time (June 6, 1969), https://tinyurl.com/3vb9devb.

[42] At this juncture, predominantly Catholics who regularly participated in national, statewide, and local organizations See Jennifer L. Holland, Tiny You: A Western History of the Anti-Abortion Movement 28–31 (2020).

[43] See, e.g., David Louisell, The Practice of Medicine and the Due Process of Law, 16 UCLA L. Rev. 16 (1968); A. James Quinn & James A. Griffin, The Rights of the Unborn, 3 Jurist 578 (1971). See also Mary Ziegler, Abortion and the Law in America: Roe v. Wade to the Present 17 (2020) (discussing how "[p]ro-lifers looked to both [the Due Process Clause and the Equal Protection Clause] in advocating for fetal rights").

[44] See Robert Byrn, Abortion in Perspective, 5 Duquesne L. Rev. 125 (1966).

[45] See David G. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade 522 (1994).

personhood encouraged proponents of abortion rights to develop constitutional arguments of their own and to shift to litigation as a movement strategy.[46]

II. The Law and Politics of *Roe*—and Anti-*Roe*

Roe didn't "start" a national conflict over abortion, but it was a significant battle in a longer war. This part discusses the *Roe* litigation; Justice Harry Blackmun's opinion for the Court; and *Roe*'s emergence as a focal point of constitutional conflict and an inspiration for litigation, legislation, and judicial selection efforts that eventually produced *Dobbs*.

A. The Road to Roe

On March 3, 1970, lawyers Sarah Weddington and Linda Coffee filed a constitutional challenge to an 1857 Texas law banning all abortions not necessary to save a pregnant woman's life. Weddington and Coffee represented three plaintiffs: Marsha and David King, who had medical reasons to avoid pregnancy, and Norma McCorvey, a 21-year-old high-school dropout and survivor of an abusive relationship who was in the midst of her third pregnancy.[47]

For Weddington in particular, abortion rights were at once personal, political, and constitutional. When Sarah became pregnant during her final year of law school, she and her husband, Ron, drove together across the U.S.-Mexico border to procure an abortion.[48] That experience made her responsive to inquiries by Judy Smith and Bea Vogel, two University of Texas-Austin students who were seeking to provide information about safe abortions in Mexico without facing criminal prosecution in Texas.[49] It was at the UT Law snack bar that Judy first suggested a constitutional challenge to Texas's anti-abortion statute.[50]

Meanwhile, lawyers at the ACLU of Georgia were litigating a constitutional challenge to Georgia's abortion restrictions on behalf of Sandra Bensing.[51] The 22-year-old "Mary Doe," like "Jane Roe," was a high-school dropout, was a survivor of abusive relationships, and

[46] See *id.* at 495.

[47] See *id.* at 405–06.

[48] See *id.* at 393–94.

[49] See *id.* at 394.

[50] *Id.* at 395.

[51] *Id.* at 428.

had given birth to multiple children before being denied an abortion.[52] The all-female team litigating *Doe v. Bolton* included Margie Hames, Tobi Schwartz, Elizabeth Rindskopf, and Ruste Kitfield.[53]

The principal briefs in *Roe* deploy constitutional reasoning that had long informed contestation over abortion inside and outside the courts. Roe's brief focused on whether the right to privacy that was held in *Griswold v. Connecticut*[54] and *Eisenstadt v. Baird*[55] to include contraception also included abortion.[56] Texas's brief articulates the then-dominant pro-life constitutional position that the "unborn child" has a constitutionally guaranteed "personal right . . . to life" protected by the Fourteenth Amendment's Due Process and Equal Protection Clauses, both of which guarantee rights to "life" and "protection" to "person[s]."[57] Both sides were asking the Court to resolve the conflict over abortion by declaring one political movement's position unconstitutional.

B. The Roe *Opinion*

Roe and *Doe* were 7-2 decisions, each authored by Nixon-appointed Justice Harry Blackmun and joined by three other Republican appointees. *Roe* begins with abortion history—like, a *lot* of abortion history, ranging back to the Persian Empire.[58] The gist of it: (1) Attitudes about abortion have changed over time; (2) the common law didn't prohibit pre-quickening abortion and may not have even prohibited post-quickening abortion; and (3) American law followed the common law regarding abortion until the late-19th century.

[52] See *id.* at 425–28.

[53] *Id.* at 425.

[54] 381 U.S. 479 (1965).

[55] 405 U.S. 438 (1972).

[56] See Br. for Jane Roe et al., in Linda Greenhouse & Reva B. Siegel, Before Roe v. Wade: Voices That Shaped the Abortion Debate before the Supreme Court's Ruling 233–34 (2012). Notably, the brief doesn't make equal protection arguments. This seems a glaring omission from today's vantage point, but arguments that abortion restrictions discriminated against poor people who were less able to obtain permission for therapeutic abortions had been rejected by a number of lower courts. See, e.g., United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969); Steinberg v. Brown, 321 F. Supp. 741, 748 (N.D. Ohio 1970); Doe v. Bolton, 319 F. Supp. 1048, 1056 (N.D. Ga. 1970). And the Court's sex-discrimination doctrine had only just begun to develop. See Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1974).

[57] See Br. for Appellee Henry Wade, in Greenhouse & Siegel, *supra* note 56, at 243–44.

[58] Roe v. Wade, 410 U.S. 113, 129–50 (1973).

Justice Blackmun identifies three possible justifications for abortion restrictions: (1) discouraging illicit sex; (2) maternal health and safety; (3) the protection of prenatal life. Justice Blackmun quickly dismisses (1) because Texas didn't advance it; says that (2) is relevant only late in pregnancy; and reserves further analysis of (3).[59]

Blackmun then considers whether there exists a constitutional right to terminate a pregnancy. He states that the answer turns on the right to privacy but doesn't identify that right's constitutional source. He cites First,[60] Fourth,[61] Fifth,[62] and Fourteenth Amendment cases,[63] as well as Justice Arthur Goldberg's concurrence in *Griswold*,[64] which relied on the Ninth Amendment's command that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[65]

Then comes a momentous declaration: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[66] Why? Blackmun discusses physical, psychological, financial, and social "detriment[s]" that the state "would impose upon the pregnant woman by denying this choice."[67] He quickly adds that (1) the choice will be made by the "the woman and her responsible physician . . . in consultation"; (2) "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life"; and (3) "at some point in pregnancy, these respective interests become . . . compelling."[68] And he states that during the early stages of a pregnancy, strict scrutiny of abortion restrictions—the highest level of

[59] See *id.* at 148–50.

[60] See Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[61] See Terry v. Ohio, 392 U.S. 1, 8–9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886).

[62] See Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[63] See Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942); Loving v. Virginia, 388 U.S. 1, 12 (1967); Eisenstadt, 405 U.S. at 453–54.

[64] 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

[65] U.S. Const. amend. IX.

[66] Roe, 410 U.S. at 153.

[67] *Id.*

[68] See *id.* at 153–54.

judicial scrutiny, reserved only for a handful of constitutional rights (on which more below)—is constitutionally required.[69]

Blackmun then sketches a framework for balancing abortion rights against states' interests in maternal health and the existence of "potential life."[70] The most important stage is viability—the point at which "the fetus . . . has the capability of meaningful life outside the mother's womb."[71] After viability, states can ban abortion except "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[72]

We have no record of any criticism of *Roe* from prominent reproductive-rights supporters. Pro-life criticism, however, followed immediately. Maryland Rep. Lawrence Hogan and New York Sen. James Buckley called for a constitutional amendment declaring that Fourteenth Amendment personhood began at conception.[73] The National Conference of Catholic Bishops issued a statement sharply criticizing the Court for rejecting prenatal constitutional personhood.[74] Pro-life legal scholars reiterated constitutional arguments for prenatal constitutional personhood.[75] Professor Charles Rice made the first of many comparisons of *Roe* to *Dred Scott v. Sandford*,[76] in which the Court denied that Black people could ever be citizens of the United States.[77]

The most important critique of *Roe* outside of pro-life circles was Harvard Law Professor John Hart Ely's essay, "The Wages of Crying Wolf."[78] Ely emphasizes that the Court had since 1938 singled

[69] See *id.* at 155.

[70] *Id.* at 154.

[71] *Id.* at 163.

[72] *Id.*

[73] Garrow, *supra* note 45, at 606. See Roe, 410 U.S. at 157–58 (determining that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn").

[74] See Pastoral Message, Feb. 13, 1973, https://tinyurl.com/ycxxr3kk.

[75] See, e.g., Robert M. Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807 (1973); Joseph O'Meara, Abortion: The Court Decides a Non-Case, 1974 Sup. Ct. Rev. 337 (1974).

[76] 60 U.S. 493 (1857).

[77] See Charles E. Rice, The Dred Scott Case of the Twentieth Century, 10 Houston L. Rev. 1059 (1973). On the *Roe-Dred Scott* comparison and its use by conservatives, see Dyer, *supra* note 18, at 3–12.

[78] John Hart Ely, The Wages of Crying Wolf, 82 Yale L.J. 920 (1973).

out for heightened judicial review only legislation affecting rights enumerated in the first eight amendments (the "Bill of Rights") or affecting politically vulnerable ("discrete and insular") minorities.[79] All other legislation, however, was subject to a lower "tier" of scrutiny. *Roe* had seemingly departed from this framework, and the Court hadn't adequately explained why. Questions raised but left unanswered included:

(1) Why is viability the critical constitutional line? To say that "the fetus . . . has the capability of meaningful life outside the mother's womb" is just to describe what viability is; it doesn't justify it.[80]
(2) Why does it matter whether zygotes or fetuses are constitutional persons? Can't states prohibit people from killing dogs and other non-human animals?[81]
(3) What does any of this have to do with privacy? *Griswold* emphasized how enforcement of a ban on contraceptives would require police to invade marital bedrooms. Is there a similar concern here?[82]
(4) Are women discrete and insular minorities? If zygotes or fetuses aren't, why not?[83]

Roe's failure to answer such basic questions was the basis for Ely's memorable charge that "[*Roe*] is not constitutional law and gives almost no sense of an obligation to try to be."[84] Ely doesn't say that *Griswold* or any of the other personal-liberty precedents upon which *Roe* had relied were "not constitutional law," but his critique resembled conservative then-Yale Law professor Robert Bork's critiques of *Griswold* and, later, *Roe*.[85] Both regarded the use of the Due Process

[79] See United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). The literature on "Footnote Four" is dense, but one can hardly improve upon Jack M. Balkin, The Footnote, 83 Nw. L. Rev. 275 (1989). It's literally a footnote.

[80] See Ely, *supra* note 78, at 924.

[81] *Id.* at 926.

[82] *Id.* at 928–30.

[83] *Id.* at 935.

[84] *Id.* at 947.

[85] See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 8–12 (1971); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 116 (1990).

Clause of the Fourteenth Amendment to protect fundamental rights with great skepticism;[86] Bork considered "substantive due process" illegitimate.[87]

If substantive due process sounds silly, that's because the phrase was popularized by critics of the doctrine. The doctrine holds that the Constitution's guarantees that no "person" shall be "deprived of life, liberty, or property without due process of law" don't just require access to certain procedures (like notice and an opportunity to be heard) prior to the deprivation. They prohibit the government from depriving people of certain fundamental "liberty" rights—some listed in the Bill of Rights, others unwritten—without a compelling reason. The critique of substantive due process was first advanced by progressives who opposed the Court's enforcement of the (unenumerated) liberty to contract during the early 20th century.[88] But conservative critics of *Griswold* and *Roe* like Bork and eventual Justice Antonin Scalia eagerly took it up.

Any opinion recognizing a constitutional right to abortion would have been fiercely criticized. Still, *Roe*'s evident flaws lent credibility to a case for undermining and ultimately overruling it.

C. The Pro-Life Movement and Lifetime Appointments

As the above history suggests, it didn't take *Roe* to organize national movements around abortion rights. Further, as Linda Greenhouse and Reva Siegel have shown, Republican strategists seeking to appeal to pro-life Catholics whom they thought they could dislodge from the Democratic Party successfully lobbied Richard Nixon to campaign against "abortion on demand" prior to the 1972 presidential election.[89] What began as a strategy for targeting Catholics was

[86] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 18 (1980) (characterizing it as a contradiction in terms akin to "green pastel redness").

[87] See Bork, Tempting, *supra* note 85, at 43 (arguing that "substantive due process, wherever it appears, is never more than a pretense that the judge's views are in the Constitution").

[88] See, e.g., Charles Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926). For a discussion of this critique and its adoption by conservatives, see David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights against Progressive Reform 118 (2011).

[89] See Linda Greenhouse & Reva B. Siegel, Before (and after) Roe v. Wade: New Questions about Backlash, 120 Yale L.J. 2028, 2046–47 (2011).

expanded to garner the support of conservatives more generally.[90] Partisan "sorting" on abortion didn't require Justice Blackmun's assistance.

Still, Mary Ziegler has documented how "the anti-abortion movement helped to make the Supreme Court a central issue for rank-and-file Republican voters" and "inspired the Republican Party to change its approach to judicial nominations."[91] These pro-life efforts included fighting to undo campaign finance restrictions in order to make it easier to raise money for conservative candidates who supported the appointment of conservative judges.[92] It also involved pressure on Republican legislators and presidents to undermine abortion rights until a human life amendment could be passed by a Republican Congress or a conservative Supreme Court could overrule *Roe*.[93] It was President Ronald Reagan who first prioritized anti-*Roe* judicial selection.

In the late 1970s, the Court issued three decisions that encouraged pro-lifers and dispirited reproductive-rights supporters. *Planned Parenthood v. Danforth* upheld a requirement that a woman seeking an abortion during the first 12 weeks of pregnancy certify that "her consent is informed and freely given and is not the result of coercion."[94] *Maher v. Roe*,[95] *Beal v. Doe*,[96] and *Poelker v. Doe*[97] upheld laws prohibiting the use of Medicaid funds or public hospital services for abortion. Finally, in *Harris v. McRae*, the Court held as constitutional a federal ban—the Hyde Amendment—on Medicaid reimbursement.[98] Pro-lifers took these decisions as signals to invest in constitutional litigation.[99]

In *Akron v. Akron Center for Reproductive Health*, a 6-3 majority struck down core provisions of an ordinance requiring parental consent

[90] *Id.*

[91] Mary Ziegler, Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment 279 (2022).

[92] See *id.* at 177–224.

[93] See *id.* at 10.

[94] Planned Parenthood v. Danforth, 428 U.S. 52, 65 (1976).

[95] 432 U.S. 464 (1977).

[96] 432 U.S. 438 (1977).

[97] 432 U.S. 519 (1977).

[98] 448 U.S. 297 (1980).

[99] Ziegler, *supra* note 91, at 68.

and notification for abortions performed on unmarried minors; mandating a 24-hour waiting period; "informing" patients that "the unborn child is a human life from the moment of conception" and describing physical and psychological complication from abortion; and providing for the disposal of fetal remains.[100] But Justice Sandra Day O'Connor's dissent delivered a pleasant political surprise to the Reagan White House.[101] In it, O'Connor suggests jettisoning *Roe*'s framework of strict scrutiny for pre-viability abortion restrictions.[102] She argues that the only relevant constitutional question is whether the state has imposed "absolute obstacles or severe limitations on the abortion decision."[103]

The White House used O'Connor's dissent to pitch pro-lifers on Reagan's 1984 reelection.[104] Reagan's next two nominees—Antonin Scalia and Robert Bork—were put forward in part because it was believed that they would meet with pro-life approval. Bork was specifically identified as someone who wouldn't hesitate to overturn *Roe*.[105]

Scalia was easily confirmed. Recognizing that the loss of two more members of the *Roe* coalition left no stable majority in favor of the precedent, the National Abortion Rights Action League vowed to spend $1 million to defeat Bork's nomination.[106] Hundreds of left-leaning organizations formed the Block Bork Coalition to paint Bork as an ideological extremist.[107] It succeeded; Bork was rejected by the Senate. After Reagan's next choice, Douglas Ginsburg, fell through when Ginsburg admitted to marijuana use, Reagan settled on Anthony Kennedy—despite some concerns about privacy-friendly language in his opinions.[108] When Reagan's successor in office, George H. W. Bush, found himself in a position to replace abortion-rights stalwarts William Brennan and Thurgood Marshall (with

[100] 462 U.S. 416 (1983).

[101] It was a surprise because O'Connor's nomination provoked a great deal of opposition from pro-lifers, who blamed her for obstructing abortion restrictions as an Arizona legislator. See Ziegler, *supra* note 91, at 77–78.

[102] See Akron, 462 U.S. at 461–66 (O'Connor, J., dissenting).

[103] *Id.* at 464.

[104] Ziegler, *supra* note 91, at 84.

[105] *Id.* at 96.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 98.

David Souter and Clarence Thomas, respectively), *Roe*'s overruling seemed certain.

D. Undue Burdens, TRAPs, and Tradition

In 1992, in *Planned Parenthood v. Casey*, five Republican-appointed justices voted to preserve *Roe*, but a three-justice plurality significantly modified judicial review of abortion restrictions.[109] The case arose from challenges to Pennsylvania abortion restrictions that included a 24-hour waiting period; a requirement that the person seeking an abortion be informed of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child"; a requirement that a minor seeking an abortion have the consent of one parent or a court order; and a requirement that a married woman inform her husband about the abortion.[110] The Court upheld all but the last requirement.

The *Casey* plurality—Justices O'Connor, Kennedy, and Souter—replaced *Roe*'s trimester framework with an undue-burden standard applicable throughout the pregnancy. The undue-burden standard sought to determine whether "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[111] Before viability, states could promote informed choice and protect maternal health and safety.[112] But they couldn't ban pre-viability abortions.[113]

After performing the ordinary work of a court deciding whether to overrule a precedent—considering the workability of the rule, reliance interests, other developments in the law, changed facts or social understandings of those facts—the plurality identifies *Roe* as an extraordinary precedent demanding extraordinary analysis.[114] It describes *Roe* as one of only three cases—the others being *West Coast Hotel v. Parrish*[115] (holding constitutional minimum wage laws) and *Brown v.*

[109] 505 U.S. 833 (1992).

[110] *Id.* at 844 (plurality).

[111] *Id.* at 877.

[112] *Id.* at 878.

[113] *Id.* at 879.

[114] *Id.* at 855, 861.

[115] 300 U.S. 379 (1937).

Board of Education[116] (holding unconstitutional segregation in public education)—in which the Court had "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[117] It concludes that none of the considerations above supported overruling *Roe*.[118]

Casey produced several separate opinions, the most significant of which was Justice Scalia's stirring dissent. What the plurality describes as its exercise of "reasoned judgment" concerning the meaning of "liberty," Justice Scalia calls "a collection of adjectives that simply decorate a value judgment and conceal a political choice."[119] The plurality isn't seeking to discern the path of the law in good faith—it's "systematically eliminating checks upon its own power."[120] And it's not courageously defending the Constitution—it's displaying "czarist arrogance" by "stubbornly refus[ing] to abandon an erroneous opinion."[121]

The central constitutional premise of Scalia's dissent is majoritarian democracy. Because the Constitution's text doesn't speak to abortion, Scalia argues that such "value judgment[s]" are left to democratic majorities.[122] And the people, Scalia intones, "love democracy . . . and are not fools."[123] He charges that "*Roe*'s mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level."[124] And his rhetoric expresses his sympathy for those who "protest our saying that the Constitution requires what our society has never thought the Constitution requires."[125]

Scalia also casts *Roe* as a particularly damaging variation on a broader theme. He accuses the Court of "ignor[ing] a long and clear

[116] 347 U.S. 483 (1954).

[117] Casey, 505 U.S. at 867.

[118] *Id.* at 869.

[119] *Id.* at 983 (Scalia, J., dissenting).

[120] *Id.* at 981.

[121] *Id.* at 999.

[122] *Id.* at 982.

[123] *Id.* at 1000.

[124] *Id.* at 995.

[125] *Id.* at 999.

tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ceremonies."[126] In case after case, then, the justices were disregarding *tradition* in constitutional interpretation.

In *Washington v. Glucksberg*,[127] in 1997, Chief Justice William Rehnquist wrote for a majority that rejected a substantive due process right to assisted suicide and enshrined Scalia's preferred tradition-centered approach to identifying fundamental rights.[128] *Glucksberg* held that only rights "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" would qualify as fundamental.[129] For the purposes of determining whether a claimed right was deeply rooted, a claimed right had to be given a "careful description."[130] Rehnquist justified this "two-step"[131] on the ground that it would prevent judges from "plac[ing] matter[s] outside the arena of public debate and legislative action."[132]

In application, "careful" meant "narrow." Thus, the challengers to Washington's criminal ban on assisted suicide weren't—according to the Court—claiming "the right to die" or the right to "control one's last days."[133] Rather, they were claiming "the right to commit suicide which itself includes a right to assistance in doing so."[134] The Court rejected this claim because "for over 700 years, the Anglo-American

[126] *Id.* at 1000. This is a reference to Lee v. Weisman, 505 U.S. 577 (1992).

[127] 520 U.S. 702 (1997).

[128] The approach closely resembles Scalia's plurality opinion in Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) ("In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society."). A footnote indicates that the tradition is to be defined at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127 n.6.

[129] Glucksberg, 520 U.S. at 720–21.

[130] *Id.* at 721.

[131] See Randy E. Barnett, Scrutiny Land, 106 Mich. L. Rev. 1479, 1488 (2008). Barnett traces the *Glucksberg* test back to *Bowers v. Hardwick*, in which the Court upheld a ban on sodomy. *Bowers* was later overruled by *Lawrence v. Texas*.

[132] Glucksberg, 520 U.S. at 720.

[133] *Id.* at 722.

[134] *Id.*

common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[135]

The Court's commitment to *Glucksberg* proved unstable, thanks to Justice Kennedy. A swing vote on a Court roughly evenly divided along ideological lines, Kennedy authored two key substantive due process opinions. In *Lawrence v. Texas*, the Court held unconstitutional a Texas ban on same-sex sodomy.[136] In *Obergefell v. Hodges*, the Court held that the Fourteenth Amendment's Due Process and Equal Protection Clauses guaranteed to same-sex couples the right to marry.[137] *Lawrence* didn't mention *Glucksberg*; *Obergefell* discussed it only to reject it as "inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[138]

But G*lucksberg* didn't disappear. The Court applied *Glucksberg* in incorporating against the states, via the Due Process Clause, the rights to keep and bear arms[139] and to not to be subjected to excessive fines.[140] Meanwhile, the pro-life movement worked to take full advantage of *Casey*'s more deferential undue-burden test.

Several states enacted "informed consent" laws requiring people seeking abortions to undergo ultrasounds.[141] States also passed "fetal pain" laws requiring a person seeking an abortion 22 weeks into the pregnancy to be told about the possibility of fetal pain—even though medical evidence suggests that fetal pain is unlikely to occur until the 29th week.[142] Finally, states imposed facially neutral facility, equipment, and staffing regulations on abortion providers, purportedly to protect health and safety.[143] Critics referred to them as Targeted

[135] *Id.* at 711.

[136] 539 U.S. 558 (2003).

[137] 576 U.S. 644 (2015).

[138] *Id.* at 671.

[139] McDonald v. Chicago, 561 U.S. 742, 764 (2010).

[140] Timbs v. Indiana, 139 S. Ct. 682, 690 (2019).

[141] See Mary Ziegler, Liberty and the Politics of Balance: The Undue-Burden Test after Casey/Hellerstedt, 52 Harv. C.R.-C.L. L. Rev. 422, 451 (2017).

[142] *Id.* at 466.

[143] *Id.* at 451.

Regulation of Abortion Providers, or "TRAPs," because of the costly financial and administrative burdens that they imposed.[144]

At the federal level, pro-lifers in 2003 secured the enactment of the Partial Birth Abortion Ban Act, prohibiting the most common form of second-trimester abortions—dilation and evacuation (D&E)—without any health exception. Writing for the Court in *Gonzales v. Carhart*,[145] Justice Kennedy read *Casey* narrowly and emphasized as "central to its conclusion" the premise that "the government has a legitimate and substantial interest in preserving and promoting fetal life."[146]

E. "Pro-Life Justices"

The Court's next major abortion case, *Whole Women's Health v. Hellerstedt*, was decided shortly after Justice Scalia's death in 2016.[147] Here, Justice Kennedy joined a 5-3 majority to hold unconstitutional a Texas law imposing surgical-center and admitting-privilege requirements. Writing for the Court, Justice Stephen Breyer determined that the law imposed an undue burden because it produced no health benefits to justify its costs.[148] Those costs included closing around half of Texas's clinics and increasing travel distances for thousands of women by hundreds of miles.[149]

If *Gonzales v. Carhart* weakened *Casey*, *Hellerstedt* strengthened it. But *Hellerstedt* was decided by an eight-justice Court, and a Republican-controlled Senate declined to hold hearings on Democratic President Barack Obama's nominee for Justice Scalia's seat, D.C. Circuit Judge Merrick Garland. On the 2016 campaign trail, Republican nominee Donald Trump promised that if elected he would appoint "pro-life justices."[150] He put forward a list compiled with the aid of Leonard Leo, the longtime vice president of the Federalist Society,

[144] See Targeted Regulation of Abortion Providers (TRAP) Laws, Guttmacher Inst. (Jan. 2020), https://tinyurl.com/bdhhpx5p.

[145] 127 S. Ct. 1610 (2007).

[146] *Id.* at 1633.

[147] 136 S. Ct. 2292 (2016).

[148] See *id.* at 2300.

[149] See *id.* at 2301–03.

[150] Laura Bassett, Donald Trump Promises to Appoint Anti-Abortion Justices to Supreme Court, The Huffington Post (May 11, 2016), https://tinyurl.com/ycy2aswd.

an influential conservative-libertarian legal organization,[151] as well as the co-chairman of its board of directors.[152] As former Scalia clerk and president of the conservative Ethics and Public Policy Center Ed Whelan described him, "[n]o one has been more dedicated to the enterprise of building a Supreme Court that will overturn *Roe v. Wade* than the Federalist Society's Leonard Leo."[153] Trump's appointment for Scalia's seat, Neil Gorsuch, was on Leo's list.[154]

When Justice Kennedy retired, Trump in 2018 appointed Brett Kavanaugh. Then–D.C.-Circuit judge Kavanaugh's position on abortion was suggested by his dissent from a decision holding that the government's refusal to release a pregnant minor from custody constituted an undue burden.[155] In that dissent, Kavanaugh used the phrase "abortion on demand" three times.[156] Following the death of Justice Ruth Bader Ginsburg—a vigorous defender of *Roe*'s holding, though not its reasoning[157]—Trump appointed Amy Coney Barrett, a former Scalia clerk and law professor at Notre Dame who was known to be pro-life.[158]

[151] On the Federalist Society, see Stephen Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law (2008); Amanda-Hollis Brusky, Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution (2015).

[152] Ziegler, *supra* note 105, at 181.

[153] See Ed Whelan, Mistaken Attack by Andy Schlafly on Leonard Leo, Nat'l Rev. Online (Dec. 9, 2016), https://tinyurl.com/bdekw48h.

[154] See Shane Goldmacher, Josh Gerstein, & Matthew Nussbaum, Trump Picks Gorsuch for Supreme Court, Politico (Jan. 31, 2017), https://tinyurl.com/2u7273kn.

[155] See Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017).

[156] *Id.* at 752, 755–56 (Kavanaugh, J., dissenting).

[157] See Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185 (1992). Justice Alito's opinion for the Court in *Dobbs* notes her criticism of the reasoning without acknowledging the equal protection argument that she advanced in defense of the holding. Compare *id.* at 1200 (arguing that *Roe* should have "honed in more precisely on the women's equality dimension of the issue and, correspondingly, attempted nothing more bold at that time than the mode of decision-making the Court employed in the 1970s gender classification cases") with Dobbs, 142 S. Ct. at 2279 (citing Ginsburg for the proposition that "*Roe* may have 'halted a political process,' 'prolonged divisiveness,' and 'deferred stable settlement of the issue'). As we'll see, he goes on to give the equal protection argument only cursory treatment.

[158] See Ariana de Vogue & Austin Bundy, Barrett Signed a "Right to Life" Letter in Ad That Also Called to End Roe v. Wade, CNN (Oct. 1, 2020), https://tinyurl.com/2fmbmzvb.

When the Court took up Mississippi's ban on abortion after 15 weeks—well before viability—most expected the Court to uphold the law. This would necessarily undermine *Casey*. But when Mississippi initially petitioned for review in *Dobbs*, it expressly stated that "the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*."[159] Only after the Court granted review did it argue for their overruling in its principal brief.[160] And at oral argument, Chief Justice John Roberts—a potential swing vote—suggested that the viability line was inessential to *Roe* and *Casey*.[161]

On May 3, 2022, *Politico* published a leaked draft opinion indicating that the Court was about to overrule *Roe*.[162]

III. Reading *Dobbs*

Justice Alito's opinion for the Court in *Dobbs* closely resembles Justice Scalia's *Casey* dissent in its strident tone and majoritarian, tradition-bound substance. It drew an unsparingly critical dissent and yielded three concurrences. This part summarizes the opinions.

A. The Opinion of the Court

Alito comes out swinging at *Roe*. Previewing the critique to come, he states that *Roe* "did not claim that American law or the common law had ever recognized" a right to terminate a pregnancy; that "its survey of history ranged from the constitutionally irrelevant . . . to the plainly incorrect"; its trimester framework resembled "a statute enacted by a legislature"; and its bad reasoning justified Ely's charge that it was "not constitutional law."[163]

Constitutional analysis begins with Alito's summary dismissal of an argument that abortion restrictions violate the Equal Protection Clause by discriminating on the basis of sex. Alito pronounces this

[159] Pet. for Cert. at 5, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

[160] See Br. for Petitioners at 12–13, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

[161] See Tr. of Oral Arg. at 17–18, 51, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

[162] Josh Gerstein & Alexander Ward, Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows, Politico (May 3, 2022), https://tinyurl.com/ywperwx7.

[163] Dobbs, 142 S. Ct. at 2240–41.

argument "squarely foreclosed by our precedents."[164] He discusses *Geduldig v. Aiello*[165] and *Bray v. Alexandria Women's Health Clinic*,[166] which he reads to hold that pregnancy-based distinctions don't trigger heightened judicial scrutiny and abortion restrictions don't constitute "invidiously discriminatory animus" against women.[167]

Up next is the main event—the substantive due process argument that "liberty" includes abortion rights. All "liberty" rights, says Alito, must be deeply rooted and implicit in ordered liberty under *Glucksberg* to be considered fundamental and receive heightened protection.[168] Alito then dives into abortion history, sweeping through common-law authorities spanning hundreds of years.[169] All authorities indicate that the abortion of a quick child was a common-law crime; none indicate that abortion was ever "a legal right."[170] Alito's survey of the Founding era yields similar results.[171]

By the time that the Fourteenth Amendment was ratified in 1868, Alito finds that toleration of pre-quickening abortion had ceased.[172] Alito isn't interested in why this happened. He explains his lack of interest in his response to an amicus brief by the American Historical Association (AHA).[173] Alito avers that "[t]his Court has long disfavored arguments based on alleged legislative motives" because different legislators have different motives.[174] He notes that the evidence in the AHA brief consists only of statements from supporters of the law—not legislators.[175] Finally, he expresses a broader, political concern about questioning motives in the context of abortion.

[164] *Id.* at 2245.

[165] *Id.* at 2246.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] See *id.* at 2249–51.

[170] See *id.* at 2250.

[171] See *id.* at 2255.

[172] See *id.* at 2254–55.

[173] See Br. for Am. Historical Ass'n et al. as Amici Curiae at 27–28, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), https://tinyurl.com/ytb5h223.

[174] Dobbs, 142 S. Ct. at 2255.

[175] *Id.* at 2254–55.

"Even *Roe* and *Casey*," he stresses, "did not question the good faith of abortion opponents."[176]

Next, Alito considers whether abortion rights, though not deeply rooted in history, fall within some broader right that *is* deeply rooted in history. For instance, the right to play violent videogames wasn't deeply rooted in 1791, but the Court (with Justice Scalia writing) held that "the freedom of speech" includes it.[177] Alito criticizes *Casey*'s formulation of a broader substantive due process right to "liberty" that would include abortion: "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[178] *That* "liberty" is too broad, says Alito, because it might include "illicit drug use, prostitution, and the like,"[179] and *those* rights have no "claim to being deeply rooted in history."[180]

Alito then distinguishes abortion from other substantive due process rights. He doesn't say that rights to marry a partner of the same sex, use contraceptives, or have sex are deeply rooted.[181] But he says that they don't "involve[e] the critical moral question posed by abortion" because they don't implicate "fetal life."[182]

The Court doesn't overrule cases just because they were wrongly decided. Alito identifies "five factors that weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[183]

The first reason that *Dobbs* overrules *Roe* and *Casey* is that they were "egregiously wrong and deeply damaging."[184] Citing Scalia's *Casey* dissent, Alito contends that the Court "usurped the power to address a question of profound moral and social importance that the

[176] *Id.* at 2256.

[177] See Brown v. Entm't Merch. Ass'n, 64 U.S. 786 (2011).

[178] Casey, 505 U.S. at 851.

[179] Dobbs, 142 S. Ct. at 2258.

[180] *Id.*

[181] As a dissenter in *Obergefell*, he could hardly affirm the first of those rights on *Glucksberg* grounds.

[182] *Id.*

[183] *Id.* at 2264.

[184] *Id.* at 2265.

Constitution unequivocally leaves for the people."[185] To add insult to constitutional injury, *Roe* and *Casey* lacked grounding in "text, history, or precedent."[186]

Regarding workability, Alito argues that Scalia was right about the undue-burden test being "inherently standardless."[187] He describes the Court's own shifting undue-burden doctrine, as well as persistent splits between federal appellate courts over various abortion restrictions.[188] Alito moves briskly through the fourth factor, "effect on other areas of law," after summarizing complaints that various justices have leveled against abortion doctrine.[189] The fifth factor, reliance, gets more extensive treatment.

How much are people's expectations tied up in *Roe*/*Casey* continuing to be the law? The *Casey* plurality acknowledged that "[a]bortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control" and that "reproductive planning could take virtually immediate account" of *Roe*'s overruling.[190] But, it stated that "for two decades of economic and social developments, people have organized intimate relationships and made choices . . . in reliance on the availability of abortion."[191] Alito rejects *Casey*'s high-generality reliance in favor of the very "precise" reliance interests that C*asey* conceded were absent.[192] He argues that high-generality reliance "finds little support in our cases" and that the Court is ill-equipped to evaluate "generalized assertions about the national psyche."[193]

Finally, Alito criticizes *Casey*'s concern about seeming to have "surrender[ed] to political pressure" if the Court decided to overrule *Roe*, as well as *Casey*'s aspiration to bring "contending sides of a national controversy to end their national division."[194] To be "affected

[185] *Id.*

[186] *Id.* at 2266.

[187] *Id.* at 2272.

[188] See *id.* at 2274–75.

[189] See *id.* at 2264–65.

[190] Casey, 505 U.S. at 856.

[191] *Id.*

[192] *Id.*

[193] Dobbs, 142 S. Ct. at 2276.

[194] *Id.* at 2278 (quoting Casey, 505 U.S. at 866–67).

by any extraneous influences such as concern about the public's reaction to our work," Alito writes, is to go "beyond this Court's role in our constitutional system."[195]

So, how are judges to review abortion laws going forward? Scholars have long observed that the Court's "default" rule of judicial scrutiny of government restrictions on non-fundamental liberty rights—rational-basis review—can take two forms.[196] One form—"rationality review"—is deferential but not toothless. The Court has held unconstitutional under rationality review a number of government actions upon demonstration that the government sought to achieve an improper goal.[197] The other—"conceivable basis review"—essentially dictates victory for the government. It tells judges not to consider what government actions are actually designed to achieve and doesn't require the government to support with evidence claims that a rights-restriction is justified.[198]

Dobbs applies conceivable-basis review: "A law regulating abortion . . . must be sustained if there is a rational basis on which the *legislature could have thought* that it would serve legitimate state interests."[199] So, abortion laws can be defended and upheld for reasons that never crossed anyone's mind when they were enacted. Alito then provides a list of reasons that might justify abortion restrictions: "[R]espect for and preservation of prenatal life at all stages of development; . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."[200] The Court easily upholds Mississippi's 15-week ban.[201]

[195] *Id.*

[196] See Gayle Lynn Pettinga, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 Ind. L.J. 779, 780 (1987); Raphael Holoszyc-Pimentel, Reconciling Rational Basis Review: When Does Rational Basis Bite, 90 N.Y.U. L. Rev. 2070 (2015); Clark Neily, Litigation without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional, 14 Geo. J.L. & Pub. Pol'y 537 (2016).

[197] See, e.g., Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Romer v. Evans, 517 U.S. 620 (1996).

[198] See FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993).

[199] Dobbs, 142 S. Ct. at 2284 (emphasis added).

[200] *Id.*

[201] *Id.*

A word on what the Court *didn't* say. It *didn't* say that any consideration of the health or safety of pregnant people was constitutionally required. Their health and safety are offered only as reasons for abortion *restrictions*. The silence is striking, particularly given that Chief Justice Rehnquist, dissenting in *Roe*, made clear that he thought an exceptionless abortion ban wouldn't survive rational-basis review.[202]

B. Concurrences

Justice Thomas and Justice Kavanaugh joined Alito's opinion but wrote separately to make points of interest. A longtime critic of substantive due process,[203] Thomas would "reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[204] Given that Thomas dissented in *Lawrence* and *Obergefell*, his opinion is not surprising. He does allow that the Fourteenth Amendment's Privileges or Immunities Clause might justify those decisions.[205]

Kavanaugh emphasizes that the Constitution is neither pro-life nor pro-choice. He mentions amicus briefs that endorsed prenatal constitutional personhood, only to say that they are—like *Roe* itself—wrong.[206] And he also anticipates future constitutional conflicts on the horizon. He briefly addresses two questions: (1) whether a state can "bar a resident of that State from traveling to another State to obtain an abortion" and (2) whether a state can "retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect[.]"[207] His answers to both are "no."

[202] Roe, 410 U.S. at 173 (Rehnquist, J., dissenting).

[203] See Evan D. Bernick, Substantive Due Process for Justice Thomas, 26 Geo. Mason L. Rev. 1087, 1099–1102 (2018) (summarizing Thomas's criticism, which rests on originalist grounds). Randy Barnett and I have defended on originalist grounds a form of substantive review of government actions that deprive people of life, liberty, or property. See Randy E. Barnett & Evan D. Bernick, No Arbitrary Power: An Originalist Theory of the Due Process of Law, 60 Wm. & Mary L. Rev. 1599 (2018). But we agree with Thomas that the identification and protection of fundamental rights of U.S. citizens ought to take place under the Privileges or Immunities Clause.

[204] Dobbs, 142 S. Ct. at 2301 (Thomas, J., concurring).

[205] Since he dissented in *Lawrence* and *Obergefell*, this possibility seems remote.

[206] Dobbs, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

[207] *Id.*

Chief Justice Roberts concurred only in the judgment; he'd have upheld the Mississippi law but wouldn't have overruled *Roe*/*Casey*. He begins by criticizing Mississippi for disclaiming any intention to seek *Roe*/*Casey*'s overruling when petitioning for review and then doing precisely that once its petition was granted.[208] Anticipating the response that the Court couldn't uphold Mississippi's pre-viability ban without overruling *Roe*/*Casey*, Roberts asserts that "there is nothing inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided."[209]

C. The Dissent

In their joint dissent, Justices Breyer, Kagan, and Sonia Sotomayor reject the majority's approach to substantive due process. They argue that constitutional rights shouldn't be frozen in the amber of tradition and contend that the result of the Court's reasoning will be "the curtailment of women's rights and of their status as free and equal citizens."[210]

The majority describes the harms of *Roe*/*Casey* in abstract terms—they harmed democracy. The dissent describes the concrete harms to individuals of overruling them. States can "force [a woman] to bring a pregnancy to term, even at the steepest personal and familial costs."[211] A woman may be forced "to bear her rapist's child or a young girl her father's"; to "carry to term a fetus with severe physical anomalies . . . sure to die within a few years of birth"; or to endure the "risk of death or physical harm."[212] These burdens will fall hardest on "the poor woman who cannot get the money to fly to a distant State for a procedure."[213] And the Court doesn't expressly "stop[] the Federal government from prohibiting abortions nationwide."[214]

To hear the dissent tell it, the majority fundamentally misunderstands how to interpret the Constitution. It's not the case that "we in

[208] Dobbs, 142 S. Ct. at 2310 (Roberts, C.J., concurring).

[209] *Id.* at 2314.

[210] Dobbs, 142 S. Ct. at 2318 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[211] *Id.* at 2317.

[212] *Id.* at 2318.

[213] *Id.*

[214] *Id.*

the 21st century must read the Fourteenth Amendment just as its ratifiers did."[215] Because the ratifiers "did not understand women as full members of the community[,]" privileging their understanding will necessarily "consign[] women to second-class citizenship."[216] The Constitution was "written as it is" to delegate to future generations the application of principles like liberty and equality "to new societal understandings and conditions."[217] So *Obergefell* was right to reject *Glucksberg*'s narrow, tradition-bound approach to liberty.[218]

The dissent excoriates the majority's efforts to distinguish abortion from other substantive due process rights. If fundamental rights need to have been widely embraced in 1868, the dissenters argue that interracial marriage, same-sex intimacy and marriage, and contraceptive use wouldn't qualify.[219] The dissenters pointedly cite Justice Scalia's insistence in his *Lawrence* dissent that readers "not believe" the majority's assurances that recognizing a right to same-sex intimacy did "not involve" same-sex marriage—thus anticipating *Obergefell*.[220]

Next, the dissent criticizes the majority's approach to precedent. The dissent contends that *Casey*'s undue-burden test is no less workable than any number of standards that the Court applies when reviewing everything from election laws to cantaloupe-crating requirements to seatbelt regulations issued by administrative agencies—*all* of the latter of which are scrutinized to determine whether they are "arbitrary or capricious."[221] By contrast, the majority's conceivable-basis approach and its identification of the protection of prenatal life as a legitimate interest invite a host of questions. Is the Court endorsing exception-less abortion bans? If so, what's the constitutional basis for privileging prenatal life over the life of pregnant people? If not, what exceptions are constitutionally required? What's the line between abortion and contraception?

[215] *Id.* at 2324.

[216] *Id.* at 2325.

[217] *Id.*

[218] See *id.* at 2326.

[219] See *id.*

[220] See Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

[221] See Dobbs, 142 S. Ct. at 2335 (joint dissent).

Casey's reliance analysis, the dissent argues, was sound. It's the majority that has gotten lost in abstractions and made "generalized assertions" that are ungrounded in "the reality American women actually live."[222] Take the majority's assertion that "'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.'"[223] The dissent responds that 45 percent of pregnancies in the United States are unplanned; contraceptives fail, and the most reliable ones aren't universally accessible; and sexual activity can be coerced.[224] There's nothing abstract about forcing people to make "different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop."[225]

The dissent concludes by expressing sorrow and indignation. The Court has deprived millions of a right that is "embedded in our constitutional law"[226] and "embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality."[227] It has overruled decisions in which the Court performed its proper role and thrown who-knows-how-many other rights into jeopardy. That is simultaneously outrageous—a "betray[al]" of the Court's "guiding principles"—and an occasion for "sorrow," "for this Court, but more, for . . . many millions of American women."[228]

IV. A Critique of *Dobbs*

Alito's opinion for the Court is ambitious, and it has a number of goals. I will focus on three. The first goal is to demonstrate that *Roe* and *Casey* were badly reasoned. The second is to show that the Fourteenth Amendment doesn't protect abortion rights. And the third is to withdraw the Court—and the federal judiciary—from

[222] *Id.* at 2344.

[223] *Id.*

[224] *Id.*

[225] *Id.* at 2346.

[226] *Id.* at 2348.

[227] *Id.* at 2349.

[228] *Id.* at 2350.

the constitutional adjudication of abortion rights. This section argues that *Dobbs* fails to achieve any of these goals.

A. Alito v. Roe

On Alito's account, *Roe* and *Casey* were badly reasoned because they neglected history, text, and precedent. *Roe* made mistakes on history, and Alito's historical critique of *Roe* is compelling; the other critiques are not.

Roe prioritized the availability of pre-quickening abortion "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century."[229] It made important errors about the common law—for example, raising unwarranted doubts about whether *post*-quickening abortion was unlawful. (It was.)[230] And it underappreciated the significance of the fact that pre-quickening abortion was widely prohibited when the Fourteenth Amendment was ratified. These are important shortcomings, and Alito rightly points them out.

But it's downhill from there. Alito's textual critique focuses on *Roe*'s trimester framework and the viability line. Obviously, neither is specified in constitutional text, but this criticism proves too much. The Court's constitutional decisions in virtually every major area of constitutional law are governed by what Professor Richard Fallon has called "implementing doctrines" that don't appear in any text.[231] That includes the tiers of scrutiny upon which Alito relies in dividing fundamental from non-fundamental rights, as well as the conceivable-basis test he applies to abortion rights.

Still weaker is Alito's criticism of *Roe*/*Casey* for neglecting precedent. Alito criticizes them for neglecting a prenatal-life distinction between abortion and other fundamental rights. But *why* is that distinction so significant? No text or history is offered in support of it. The only cases Alito cites for this distinction are *Roe* and *Casey*! And those now-overruled cases quite obviously *do not* categorically distinguish abortion rights from rights to contraception, procreation, and marriage.

[229] Roe, 410 U.S. at 140.

[230] Dobbs, 142 S. Ct. at 2236.

[231] See Richard H. Fallon, Jr., Implementing the Constitution (2001).

Alito correctly indicts *Roe* for its historical errors. But his textual and precedential critiques fall short. That doesn't mean that the Constitution protects abortion rights. Alito's own constitutional analysis might demonstrate that it does not.

B. Dobbs *as Conservative Living Constitutionalism*

Like Alito's critique of *Roe*, his positive case against abortion rights has textual, historical, and doctrinal components. Because the first two are practically indistinguishable, I'll treat them together before taking on the third.

1. Text and History

Alito's interpretation of the Fourteenth Amendment begins with a declaration: "Constitutional analysis must begin with 'the language of the instrument.'"[232] This tells us less than it might seem. Consider the following things that Alito might mean by "the language of the instrument":

(1) The literal string of words that appears on the document under glass at the National Archives.
(2) What kinds of things the framers/ratifiers of a constitutional provision originally intended or understood those words to express ("Search" in the Fourth Amendment might express "to look over or through for the purpose of finding something."[233]).
(3) What particular things the framers/ratifiers originally understood to be of the relevant kind ("The freedom of speech" might be understood to include, among other things, "newspapers critical of government policy.").
(4) What kinds of things the general public today associates with those words, given the way in which the Supreme Court has interpreted them ("Assistance of counsel" in the Sixth Amendment might express "at government expense, if you can't afford to hire an attorney.").

The first option isn't plausible. Text without context is meaningless. Different words and phrases come to be used in different ways,

[232] Dobbs, 142 S. Ct. at 2244.

[233] See N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989).

to express different things. For instance, "domestic violence" wasn't taken to mean "intimate partner abuse" when it was incorporated into Article IV.[234] But that's the kind of thing those words bring to mind today.

The second and third options are associated with originalism—long the dominant theory of constitutional interpretation within the conservative legal movement from which the majority emerged.[235] Contemporary originalists favor (2). They distinguish between original meaning—what kind of things words/phrases express—and original expected applications—whether a particular thing was thought to be of that kind.[236] That's how Justice Scalia could conclude that the Fourth Amendment's prohibition against "unreasonable searches" applied to law enforcement using thermal imaging to detect drug use inside a home, even though no one imagined such technology at the Founding.[237]

Alito never specifies what he means by "language of the instrument." But his interpretive method is dictated by precedent—he applies *Glucksberg* because that's how the Court has identified fundamental "liberty" rights. And because the Court has prioritized positive law—the laws "on the books" at a given time, here 1868—in determining whether a right satisfies *Glucksberg*, so does he.

Is this originalism? One might hope that it would be, given that Alito, Barrett, Gorsuch, and Thomas have all identified as originalists. It seems obvious that focusing on legal history would help us understand what a constitutional provision guaranteeing "liberty" originally meant to people present at ratification. But *Glucksberg* doesn't *just* require an inquiry into whether a right is deeply rooted. It requires that rights be defined narrowly, at a low level of generality. So, it's a "right to terminate a pregnancy," not a "right to bodily integrity." This requirement invites questions that no originalist justice has persuasively answered.

[234] See U.S. Const. art. IV, sec. 4 ("The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.").

[235] For a brisk history of originalism, see Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 Geo. L.J. 1, 7–14 (2018).

[236] See Lawrence B. Solum, Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record, 2017 BYU L. Rev. 1621, 1663–67 (2018).

[237] See Kyllo v. United States, 533 U.S. 27 (2001).

Consider Angel Raich, who challenged the constitutionality of the Controlled Substances Act under the Fifth Amendment's Due Process Clause.[238] She argued that the act infringed her fundamental "liberty" right to preserve her own life.[239] She claimed that it did so by prohibiting her from using marijuana to ameliorate a life-threatening wasting syndrome.[240] The U.S. Court of Appeals for the Ninth Circuit, applying *Glucksberg*, didn't look to history and tradition for a right to preserve one's own life.[241] Rather, it looked for a right to preserve one's own life *by using medical marijuana*. Unsurprisingly, it concluded that no such fundamental right existed.[242]

Why is framing rights at a low level of generality more likely to capture the original meaning of "liberty"? Why think that either the framers or ratifiers, or an ordinary member of the public, would be more likely to read "liberty" to encompass narrow rights than broad rights? How could one defend what most originalists take to be the uncontroversial proposition that *Brown v. Board of Education* is correctly decided, if one looked to determine whether there existed a narrow right to attend nonsegregated schools in 1868—as opposed to a more general right of citizens to be free from racist exclusion from public institutions?

Joel Alicea calls *Dobbs* originalist on the ground that the Court prioritizes the same evidence that any originalist would.[243] It focuses on 1868, when the Fourteenth Amendment was ratified, and it finds that most states prohibited pre-viability abortion, suggesting that they saw no constitutional problem with doing so.[244]

Randy Barnett and I argue that the positive law of the states is indeed the right place to look to determine whether a right is protected by the Fourteenth Amendment.[245] Widespread prohibitions on abortion in the positive law of the states in 1868 is compelling evidence

[238] See Raich v. Gonzales, 500 F. 3d 850 (9th Cir. 2007).

[239] *Id.* at 864.

[240] *Id.*

[241] *Id.*

[242] See *id.* at 864–66.

[243] See J. Joel Alicea, An Originalist Victory, City Journal (June 24, 2022), https://tinyurl.com/mw5k9ejx.

[244] See *id.*

[245] See Evan D. Bernick & Randy E. Barnett, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 236–50 (2021).

that abortion isn't a fundamental right. Still, a level-of-generality problem lingers.

Think again of *Brown*. Originalists generally agree that the Fourteenth Amendment imposes some kind of anti-discrimination requirement on the states.[246] They've drawn extensively upon abolitionist and Republican constitutional argumentation in the years leading up to and following the Civil War.[247] There is not a *word* in Justice Alito's opinion about what abolitionists, Republicans, or anyone else said about discrimination in connection with the Fourteenth Amendment.

Which brings us to the anti-discrimination argument against abortion restrictions. It is *the* best-known, most-elaborated argument that *Roe* was correctly decided, despite the oft-criticized weaknesses of Justice Blackmun's reasoning.[248] In one leading form, it holds that abortion restrictions discriminate on the basis of sex because they force some people and not others to perform a particular social role: motherhood. Abortion restrictions create inequality by preventing people who would otherwise choose *not* to perform reproductive labor from avoiding it after conception. They require people to endure pregnancy, birth, and lactation, with attendant physical and psychological burdens that range from the nausea-inducing to the extremely painful to the life-threatening.[249] And (so the argument goes) they do so because of stereotypes concerning the social roles that *women* ought to perform.[250]

[246] See, e.g., John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385 (1992); Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995); Steven G. Calabresi & Julia T. Rickert, Originalism and Sex Discrimination, 90 Tex. L. Rev. 1 (2011); Christopher R. Green, Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause (2015); Kurt T. Lash, Enforcing the Rights of Due Process: The Original Relationship between the Fourteenth Amendment and the 1866 Civil Rights Act, 106 Geo. L.J. 1389 (2017); Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment (2020).

[247] See sources cited *id.*

[248] For further discussion of these arguments, see Neil S. Siegel & Reva B. Siegel, Equality Arguments for Abortion Rights, 60 UCLA L. Rev. Discourse 160 (2012).

[249] See Chavi Eve Karkowsky, What Alito Doesn't Understand about Pregnancy, The Atlantic (May 21, 2022), https://tinyurl.com/3cxdxcam.

[250] For an elaboration of this argument by amici in *Dobbs*, see Br. of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, & Reva Siegel as Amici Curiae in Support of Respondents at 7–16, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), https://tinyurl.com/nhj3r85n.

In *one paragraph*, Justice Alito dismisses this argument as "foreclosed by our precedents."[251] He discusses two cases, *Geduldig* and *Bray*, reading them to hold that "laws regulating or prohibiting abortion are not subject to heightened scrutiny."[252]

This won't do. The reasoning of *Gelduldig* is so inconsistent with subsequent decisions that it's doubtful it forecloses anything at all. In *United States v. Virginia*, the Supreme Court held that physical differences between men and women could not justify classifications that "create or perpetuate the legal, social, and economic inferiority of women."[253] Then, in *Nevada Department of Human Resources v. Hibbs*, the Court upheld the Family and Medical Leave Act as a means of enforcing the Equal Protection Clause, reasoning that state leave policies targeted by the FMLA were based on "the pervasive sex-role stereotype that caring for family members is women's work."[254] Further, neither *Gelduldig* nor *Bray* holds that abortion restrictions *can't* constitute unconstitutional sex discrimination. At most, they say they're not *inherently* sex discriminatory.[255] Both leave room for proof that a particular restriction was animated by discriminatory intent.

Of course, Alito disregards evidence of discriminatory intent.[256] But he doesn't do so for reasons that have anything to do with original

[251] Dobbs, 142 S. Ct. at 2245.

[252] *Id.* at 2246.

[253] 518 U.S. 515, 524 (1996).

[254] 538 U.S. 721, 731 (2003).

[255] See Geduldig, 417 U.S. at 496 n.20 (stating that "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation"); Bray, 506 U.S. at 274 (stating that "the goal of preventing abortion . . . *in itself*" does not constitute "invidiously discriminatory animus") (emphasis added).

[256] Or at least claims to. There's an extraordinary footnote in which Alito highlights amicus briefs that cast aspersions on the motives of proponents of abortion legalization—only to say that *those* motives don't matter either. Dobbs, 142 S. Ct. at 2256 n.41. It's extraordinary because even after saying that motives don't matter, Alito states that "[a] highly disproportionate percentage of aborted fetuses are Black[,]" *Id.* I can think of no reason why the racial identity of fetuses would be worth emphasizing if motives *really* don't matter. Alito also cites a concurrence by Justice Thomas from a prior abortion case in which he argues that support of abortion is closely associated with eugenics, racism, and racial genocide. See Box v. Planned Parenthood of Ind. and Ky., Inc., 139 S. Ct. 1780, 1783–87 (2019) (Thomas, J., concurring). For critiques of Thomas's history, see generally Murray, *supra* note 28; Mary Ziegler, Bad Effects:

meaning, which may not even require discriminatory intent.[257] And even taken on its own terms, the distinction Alito draws between the intentions of supporters of legislation and those of legislators is dubious. We've seen that legislators worked together with leading supporters of the campaign. As Alito observed in a concurrence documenting the anti-Catholic roots of state prohibitions on public aid to "sectarian" schools, "the resulting wave of state laws . . . cannot be understood outside this context."[258] Alito didn't cite a single legislator responsible for the Montana state constitutional prohibition at issue, but he made a convincing case that the prohibition was the product of bigotry.

There's a near-universal originalist consensus that *Roe* can't be plausibly defended on the ground of original meaning.[259] But *Dobbs* isn't originalism and gives almost no sense of an obligation to try to be. It focuses its attention on the right time period, but its inquiry into that period is limited by nonoriginalist doctrine, and Alito limits it still further in ways that aren't defended on originalist grounds.[260]

2. Doctrinal Disarray

Dobbs's arguments from constitutional doctrine are its strongest. The Court makes a compelling case that the right to terminate a pregnancy doesn't satisfy *Glucksberg*. Even here, however, there are flaws.

The Misuses of History in Box v. Planned Parenthood, 105 Cornell L. Rev. Online 165 (2020), https://tinyurl.com/2ywbr98p.

[257] See. e.g., Melissa L. Saunders, Equal Protection, Class, Legislation, and Colorblindness, 96 Mich. L. Rev. 245 (1997); Evan D. Bernick, Antisubjugation and the Equal Protection of the Laws, 110 Geo. L.J. 1 (2021).

[258] See Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2270 (2020) (Alito, J., concurring).

[259] Jack M. Balkin, Abortion and Original Meaning, 24 Const. Comment. 291 (2007) and David H. Gans, Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion, 75 SMU L. Rev. F. 191 (2022) are the only scholarly defenses of *Roe* by avowed originalists of which I'm aware.

[260] It might be objected that the protection of prenatal life is a strong enough interest to justify abortion restrictions under any level of scrutiny, regardless of whether such restrictions discriminate on the basis of sex. But that's not an objection that Alito is in a position to make. The protection of prenatal life is treated only as a *legitimate* interest—sufficient under rational-basis review, but not under heightened levels of scrutiny. Ironically, prenatal life is thus downgraded in constitutional importance by *Dobbs*; *Roe* treated it as a *compelling* interest in the late stages of pregnancy.

First, Alito never acknowledges the Court's refusal to apply *Glucksberg* in *Lawrence* and *Obergefell*. True, *McDonald v. City of Chicago*[261] and *Timbs v. Indiana*[262]—incorporating via the Due Process Clause the rights to keep and bear arms and not be subjected to excessive fines, respectively—didn't discuss *Lawrence* and *Obergefell*. But they also didn't claim that *Glucksberg* was the exclusive means of identifying substantive due process rights or overrule any decisions in reliance upon *Glucksberg*.

Second, Alito frames *Glucksberg*'s "implicit in the concept of ordered liberty" language as a second requirement that all fundamental rights must satisfy.[263] This is a reasonable reading of *Glucksberg*, but the Court hasn't consistently adopted it.

Compare *McDonald* and *Timbs*:

McDonald:

> [W]e must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty . . . or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition."[264]

Timbs:

> A Bill of Rights protection is incorporated, we have explained, if it is "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition."[265]

McDonald suggests that a right is *necessarily* implicit in ordered liberty if it's deeply rooted. By contrast, *Timbs* suggests that a right can be elevated to "fundamental" by being (a) implicit in ordered liberty OR (b) deeply rooted in history and tradition. Neither suggests that a deeply rooted right might not be fundamental. *Dobbs* does, without explanation.

[261] 561 U.S. 742 (2010).

[262] 139 S. Ct. 682 (2019).

[263] Dobbs, 142 S. Ct. at 2246 ("In deciding whether a right falls into either of these categories, the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'").

[264] McDonald, 561 U.S. at 764, 767.

[265] Timbs, 139 S. Ct. at 687.

Most importantly, Alito's prenatal-life distinction between abortion and other substantive rights isn't adequately explained or convincingly defended. It comes from the very cases that the Court is overruling. It's deployed alongside *Glucksberg* without discussion of how the distinction and the framework relate to one another in constitutional theory; how the distinction is to be applied in practice; or how the distinction and framework are to interact in case of conflict. Some questions that arise: Why are rights that don't implicate prenatal life more likely to be deeply rooted and implicit in ordered liberty? Who decides whether a right implicates prenatal life, and how? If a claimed right—to same-sex intimacy, for instance—doesn't implicate prenatal life but also does not satisfy *Glucksberg*'s criteria, what happens? *Dobbs* merely describes the prenatal-life distinction without justifying it, recalling *Roe*'s description-without-justification of viability.

Ultimately, *Dobbs* fails both as a critique of *Roe* and as a freestanding analysis of whether the Constitution protects abortion rights. This bodes ill for the last of *Dobbs*'s major aspirations: the Court's withdrawal from the field of abortion-related constitutional conflict.

C. New Battlegrounds, Old Battles

Dobbs seeks to turn back the clock to before *Roe* took one side of an issue about which the Constitution is silent. That's not going to happen.

We've seen the initial constitutional position of pro-lifers was prenatal constitutional personhood. *Dobbs* doesn't embrace prenatal personhood. But only Justice Kavanaugh explicitly rejects it, and Alito's prenatal-life distinction invites pro-life arguments that the Constitution protects prenatal life.[266]

These arguments are advanced by people whom some justices are likely to take seriously. They've been put forward by John Finnis, a titan of natural-law jurisprudence and Justice Gorsuch's thesis adviser at Oxford;[267] Robert George, a highly respected political philos-

[266] See Michael S. Paulsen, Three Very Enthusiastic Cheers for the Dobbs Draft, Nat'l Rev. Online (May 6, 2022), https://tinyurl.com/2s44rh59 ("The opinion goes as far as necessary to decide the case and no further; it does not deny, but (quite the reverse) seems to affirm, the humanity of the living human embryo or fetus, in the course of its discussion of the precise legal issues it treats; it would provide an excellent grounding for the next stage of the debate, in legislatures and in courts.").

[267] See Br. for Scholars of Jurisprudence John M. Finnis & Robert P. George as Amici Curiae in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

opher at Princeton;[268] and Michael Stokes Paulsen, law professor at the University of St. Thomas and among the country's best-regarded originalists, among others.[269] Pro-life legal scholars have published op-eds and essays arguing that the Equal Protection Clause requires states to prohibit abortion and have called for Congress to enact prohibitory legislation.[270] If Congress does, the Supreme Court will need to decide whether Section Five of the Fourteenth Amendment gives Congress such power.

Nor will reproductive-rights advocates cede constitutional ground anytime soon. The view is ascendant[271] on the left that the Supreme Court offers only what Gerald Rosenberg described as a "hollow hope" of transformative social change.[272] But the prescriptions that follow from this critique often involve congressional and executive action. And congressional and executive action will necessarily find its way before the Court. A partial list of constitutional issues that might arise:

- Is abortion economic activity that has a substantial effect on interstate commerce? If so, can Congress exercise its Commerce Clause powers to forbid certain kinds of state interference with it?[273]

[268] *Id.*

[269] See Michael S. Paulsen, The Plausibility of Personhood, 74 Ohio St. L.J. 14 (2012).

[270] See, e.g., John Finnis, Abortion Is Unconstitutional, First Things (Apr. 2021), https://tinyurl.com/sm6fdfjy; Ramesh Ponnuru, What if a Fetus Has Constitutional Rights?, Bloomberg (Mar. 31, 2021), https://tinyurl.com/ms5nr2e7; Robert P. George & Josh Craddock, Even if Roe Is Overturned, Congress Must Act to Protect the Unborn, Wash. Post (June 2, 2022), https://tinyurl.com/275hu43c. See also Caroline Kitchener, The Next Frontier of the Anti-abortion Movement: A Nationwide Abortion Ban, Wash. Post (May 20, 2022), https://tinyurl.com/37fa9n37.

[271] See, e.g., Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy (2022); Ryan D. Doerfler & Samuel Moyn, Democratizing the Supreme Court, 109 Cal. L. Rev. 1703 (2021); Nikolas Bowie & Daphna Renan, The Supreme Court Is Not Supposed to Have This Much Power, The Atlantic (June 8, 2022), https://tinyurl.com/22kwkbd6; Keeanga-Yamahtta Taylor, The Case for Ending the Supreme Court as We Know It, The New Yorker (Sept. 25, 2020), https://tinyurl.com/2htt3pbj.

[272] Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring about Social Change? (2008).

[273] See United States v. Lopez, 514 U.S. 549 (1995); Gonzales v. Raich, 545 U.S. 1 (2005).

- Could Congress use its Spending Clause powers to condition certain kinds of federal grants to states on the lightening of abortion restrictions? If so, what kind, and to what extent?[274]
- If the Court says that either abortion rights or fetal personhood are not protected by the Fourteenth Amendment, can Congress exercise its Section Five enforcement power to protect it anyway?[275]
- The Court has interpreted the Thirteenth Amendment, abolishing slavery, to reach the "badges and incidents" of slavery. It has recognized broad congressional power to define badges and incidents—including racial discrimination in real estate sales.[276] Could Congress define forced birth—among the evils of chattel slavery—as a badge or incident of slavery?[277]

Moral urgency breeds constitutional creativity, and few if any issues match abortion in moral urgency for those invested in the struggle on both sides. It's telling that both pro-lifers and reproductive-rights supporters claim the legacy of the abolitionists, struggling against the forces of slavery, a struggle that ultimately saw both sides claiming that the Constitution established a national floor of fundamental rights below which states could not fall.[278] Constitutional arguments that were "off the wall" when advanced by abolitionists animated the work of the Reconstruction Congress after the Civil War. We can expect some seemingly radical arguments to get "on the table" in the years to come.

[274] See South Dakota v. Dole, 483 U.S. 203 (1987); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[275] See Lopez, 514 U.S. 549; Gonzales, 545 U.S. 1.

[276] See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[277] For a sampling of the literature on the reach of the Thirteenth Amendment, see James G. Pope, Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery, 65 UCLA L. Rev. 426 (2018); Pamela Bridgewater, Breeding A Nation: Reproductive Slavery, the Thirteenth Amendment, and the Pursuit of Freedom (2014); Rebecca E. Zietlow, James Ashley's Thirteenth Amendment, 112 Colum. L. Rev. 1697 (2012); Jennifer Mason McAward, Defining the Badges and Incidents of Slavery, 14 U. Pa. J. Const. L. 561, 571 (2012); Andrew Koppelman, Originalism, Abortion, and the Thirteenth Amendment, 112 Colum. L. Rev. 1917 (2012).

[278] See Barnett & Bernick, *supra* note 245, at 77–88.

As David Cohen, Greer Donley, and Rachel Rebouché have detailed, conflict over abortion will generate a range of legal questions owing to post-*Roe* political and technological developments.[279] There already exist "abortion deserts" across swaths of the country that are dominated by Republicans.[280] *Dobbs* has triggered abortion bans set to go into effect after *Roe*'s overruling, revived pre-*Roe* bans, and guaranteed that others will be enacted in nearly half of the country.[281] Michele Goodwin has documented how state laws criminalize unintentional harm to prenatal life through "feticide laws, drug policies, statutes criminalizing maternal conduct, and statutes authorizing the confinement of pregnant women to protect the health of fetuses."[282] As Republican states have harshly restricted abortion rights, Democratic states have enacted laws to protect abortion providers and out-of-staters seeking abortion care.[283]

As for technology, medication abortion—a two-drug regimen that ends a pregnancy through 10 weeks—now accounts for more than half of all U.S. abortions. It enables pregnant people to terminate their pregnancies without visiting a clinic.[284] It has also led anti-abortion states to enact new laws prohibiting medication abortion via telehealth and selling pills through the mail, as well as to ban certain drugs entirely.[285] What if an abortion-restricting state seeks to punish a local newspaper for advertising abortion care that's available in an abortion-permitting state? The Court that decided *Roe* held this unconstitutional under the First Amendment, but will that precedent hold up after *Dobbs*?[286] Such questions will be litigated.

[279] David S. Cohen, Greer Donley & Rachel Rebouché, The New Abortion Battleground, 122 Colum. L. Rev. ___ (forthcoming 2022).

[280] See Alice F. Cartwright, Mihiri Karunaratne, Jill Barr-Walker, Nicole E. Johns, & Ushma D. Upadhyay, Identifying National Availability of Abortion Care and Distance from Major US Cities: Systematic Online Search, 20 J. Med. Internet Res. 1 (2018); Caitlin Myers et al., Predicted Changes in Abortion Access and Incidence in a Post-Roe World, 100 Contraception 367, 369 (2019).

[281] See Cohen, Donley, & Rebouché, *supra* note 279, at *6–7.

[282] Michele Goodwin, Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront, 102 Calif. L. Rev. 781, 787 (2014).

[283] See Cohen, Donley, & Rebouché, *supra* note 279, at *31–37.

[284] Rachel K. Jones et al., Abortion Incidence and Service Availability in the United States, Guttmacher Inst. (Sept. 2019), https://bit.ly/2W0ACgi.

[285] See Pam Belluck, Abortion Pills Take the Spotlight as States Impose Abortion Bans, N.Y. Times (June 27, 2022), https://tinyurl.com/mpucjjs7.

[286] See Bigelow v. Virginia, 421 U.S. 809 (1975).

State-federal conflicts will also arise. Federal law trumps ("preempts") conflicting state law. The FDA regulates medication-abortion drugs, but are states permitted to regulate a drug *more* harshly than the FDA?[287] The generic manufacturer of mifepristone—part of the two-drug regimen—has filed a lawsuit in Mississippi, arguing that the FDA's more-permissive regulation of mifepristone preempts certain provisions of Mississippi's abortion laws.[288] The outcome may inspire future litigation.

Finally, there will be conflicts over other substantive due process rights. As became clear in *Burwell v. Hobby Lobby Stores, Inc.*, some pro-lifers consider contraceptives—like Plan B and IUDs—that result in the destruction of fertilized eggs to be abortifacients.[289] Is a state's sincere belief that a drug acts as an abortifacient enough to justify a prohibition, even if that belief runs against the current scientific consensus? It may be hard to imagine the Court overturning *Obergefell* and *Lawrence*, thereby allowing states to ban marriage between same-sex couples and prohibit same-sex sodomy. Same-sex marriage polls well.[290] Then again, so did *Roe*.[291] It's reasonable to fear constitutional retrenchment on politically salient rights about which critics of substantive due process have always been skeptical.[292] And it's difficult to imagine those rights surviving *Glucksberg*, as applied in *Dobbs*.

Conclusion

We end where we began, with constitutional conflict. *Roe* didn't start it, and *Dobbs* won't finish it. No one will be persuaded by any judicial opinion—much less *Dobbs*—to stop arguing about abortion. In a political culture where urgent moral questions inevitably become constitutional ones, that means more constitutional argumentation. There will be more battles, and they won't just take place in

[287] See Cohen, Donley, & Rebouché, *supra* note 279, at *38–55.

[288] See Brendon Pierson, Abortion Drug Maker Says Mississippi Can't Ban Pill Despite Supreme Court Ruling, Reuters (July 1, 2022), https://tinyurl.com/2s7brfwn.

[289] 134 S. Ct. 2751 (2014).

[290] See Justin McCarthy, Same-Sex Marriage Support Inches Up to New High of 71%, Gallup (June 1, 2022), https://tinyurl.com/25m6hr9z.

[291] See Domenico Montanaro, Poll: Two-thirds Say Don't Overturn Roe; the Court Leak Is Firing Up Democratic Voters, NPR (May 19, 2022), https://tinyurl.com/4339d9tk.

[292] See Zachary Jarrell, Overview of over 300 Anti-LGBTQ+ Bills in 2022, Wash. Blade (Apr. 22, 2022), https://tinyurl.com/2zhch5ec.

state legislatures or state courts. They'll take place in Congress and administrative agencies. They'll take place in front of clinics and on the streets. And yes, they'll take place before the Supreme Court, again and again. Both sides will lay claim to the Constitution, and the Court will take sides. Perhaps the Court is aware of and prepared for this. But after *Dobbs*, it would be unwise to bet against Cassandra.