Defending *Dobbs*: Ending the Futile Search for a Constitutional Right to Abortion

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I. INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*,[1] the Supreme Court halted its quixotic quest to find a right to abortion somewhere in the Constitution. Justices had previously perceived this right lurking in the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.[2] Scholars, who are overwhelmingly pro-choice, have tried to shore up these justifications and have added two more—the Thirteenth Amendment's prohibition of "involuntary servitude" and the Nineteenth Amendment's guarantee of women's suffrage.[3] Omitted from this search has been the most relevant constitutional provision: The Tenth Amendment, which generally reserves contested social and moral issues like abortion to the states.[4]

Although *Dobbs* has unleashed a political firestorm,[5] its legal reasoning was sound. The Court treated the Constitution as law, to be enforced by faithfully interpreting its words in light of its structure, its drafting and ratification history, and the understandings of those who carried it into effect for over a century.[6] Viewed in such purely legal terms, the Court reached four correct conclusions about a Mississippi law that banned abortion after fifteen weeks. First, the Constitution's text did not grant a right to abortion.[7] Second, no one who drafted, ratified, or implemented the Fourteenth Amendment (or the Bill of Rights provisions incorporated as Due Process

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
2. *See infra* notes 41–91, 248–52 and accompanying text.
3. *See infra* Section II.B.3. (a)–(d).
4. *See* U.S. CONST. amend. X. The exception is when the Constitution prohibits the states from exercising certain powers—for instance, enacting *ex post facto* laws or bills of attainder.
5. *See infra* Parts V. & VI.
6. *Dobbs*, 142 S. Ct. at 2240–85.
7. *Id.* at 2240, 2242, 2244–45, 2266–67.

Clause "liberties") thought they were conferring such a right.[8] Third, abortion was not among those rights that were implicit because they were deeply rooted in America's history and traditions.[9] On the contrary, no federal or state constitution, statute, or common law recognized such a right until a few states did so in the late 1960s.[10] Fourth, the Constitution's democratic structure left abortion to the political process.[11]

Ultimately, the only possible legal basis for a right to abortion was precedent. In *Roe v. Wade*,[12] the Court held that either the Ninth Amendment or the Due Process Clause conferred a right of privacy that encompassed a woman's ability to choose abortion after consultation with her physician.[13] This novel right was absolute during the first three months of pregnancy, amenable to state regulations to protect the mother's health during the second trimester, and subject to prohibition thereafter (when the fetus became viable and the state's interest in protecting its "potential life" became compelling).[14] In *Planned Parenthood v. Casey*,[15] only two Justices voted to reaffirm *Roe* in full.[16] Three concurring Justices conceded that *Roe* was probably decided wrongly, but expressed fear that overruling it might create a public perception that the Court was bowing to political pressure.[17] As a compromise, they reaffirmed *Roe* but altered its rationale (with "liberty" replacing doctor-patient "privacy") and discarded its trimester framework in favor of a new test: States could not "unduly burden" a woman's abortion choice before viability.[18]

The *Dobbs* Joint Dissent (written by Justices Breyer, Sotomayor, and Kagan) argued that stare decisis counseled adhering to this precedent.[19] By contrast, the majority concluded that *Roe* and *Casey* should be overturned

8. *See id.* at 2240–41, 2244, 2248–49, 2252–54.
9. *Id.* at 2240, 2244, 2246–60.
10. *Id.* at 2240, 2248, 2254, 2259.
11. *Id.* at 2240, 2257–59, 2261, 2265–66, 2276–77, 2279, 2283–84.
12. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.
13. *Id.* at 153–66.
14. *Id.* at 162–65.
15. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.
16. *See id.* at 911–22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922–43 (Blackmun, J., concurring in part and dissenting in part).
17. *Id.* at 853–69 (Joint Opinion of O'Connor, Kennedy & Souter, JJ).
18. *Id.* at 844–901.
19. *Dobbs*, 142 S. Ct. at 2317–20, 2333–50 (Breyer, Sotomayor & Kagan, JJ., dissenting).

because they were "egregiously wrong," poorly reasoned, unworkable, and negatively affecting other legal doctrines.[20]

It is impossible to determine which side correctly applied stare decisis, because the Court's treatment of this doctrine has been incoherent.[21] Every Justice would say that precedent should be respected unless it is plainly incorrect and causing serious legal and practical problems, but such judgments are extremely subjective.[22] Consequently, Justices of all political stripes tend to invoke stare decisis when they want to reach a result that cannot be justified through traditional constitutional analysis, but ignore this doctrine (or "distinguish" prior cases in hairsplitting ways) when they seek a different outcome that conflicts with precedent.[23] Finally, Justices have often noted that stare decisis is at its weakest in cases arising under the Constitution because the Court is bound by the document itself and has a special duty to rectify its previously mistaken interpretations, since it is "practically impossible" to reverse those decisions by amendment.[24]

The critical problem is that stare decisis has been awkwardly transplanted from the common law to constitutional adjudication. In the former system, legislatures sometimes delegate their power to make law in certain areas (such as torts) to courts, which follow precedent yet incrementally develop the law in light of changing social and economic circumstances—always subject to legislative revision or rejection.[25] By contrast, constitutional law has often featured not gradual evolution but dramatic reversals, as occurred in 1937–38[26]

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20. *Id.* at 2244, 2261–79.

21. *See infra* Section V.B.

22. *See infra* notes 317–18 and accompanying text.

23. *See* Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 520, 521, 523–25, 578 (2008).

24. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

25. *See* Pushaw, *supra* note 23, at 521, 524–25, 577.

26. In 1937, the Court abandoned two lines of precedent. First, it rewrote Article I as granting Congress essentially unrestrained power. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34–40 (1937) (upholding the National Labor Relations Act as "necessary and proper" to effectuate Congress's power to regulate interstate commerce, despite longstanding case law reserving labor matters to the states); Helvering v. Davis, 301 U.S. 619, 639–46 (1937) (reversing course by sustaining the Social Security Act under Congress's power to tax and spend for the general welfare). Second, the Court rejected its entrenched precedent holding that "liberty" under the Fourteenth Amendment Due Process Clause guaranteed "freedom of contract" and thereby prevented states from enacting legislation designed to protect employees through minimum wages, maximum hours, health and safety regulations, and the right to unionize. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–400 (1937). Stare decisis had no force in these cases, yet they have become landmarks. *See* Robert J. Pushaw, Jr., *Enforcing Principled Constitutional Limits on Federal Power: A Neo-Federalist Refinement of Justice Cardozo's Jurisprudence*, 60 WM.

and during the Warren Court era (1953–1968)[27]—and in a few bombshell cases since then, such as *Roe* and *Obergefell*.[28]

Ironically, then, stare decisis relies upon Justices to respect a case that itself flouted precedent. Moderate Republicans like Justices Stewart, Powell, O'Connor, and Kennedy often did so (sometimes with significant modifications),[29] but their sole heir today is Chief Justice Roberts. To illustrate, in *Dobbs* he concurred on the ground that the constitutional right to abortion recognized in *Roe* and *Casey* could be preserved as long as women had a "reasonable opportunity" to make this choice (as the state's fifteen-week period allowed), but that this time frame need not be extended to the point of fetal viability (about twenty-three weeks).[30] Tellingly, no one joined Chief Justice Roberts's opinion.[31] The dissenters likely realized that he had butchered *Roe* and *Casey* (as their holdings hinged on viability), whereas the majority saw his opinion as a nakedly political compromise with no constitutional foundation. The Chief Justice thus continued his self-defeating gambit of attempting to convince the public that the Court impartially applies the law by writing an opinion that can only be explained in political, rather than legal, terms.[32]

A final difficulty with transplanting stare decisis is that Congress cannot override the Court's constitutional rulings, even when they are really based on common law.[33] The absence of this traditional legislative check on

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& MARY L. REV. 937, 946–84 (2019) (describing how the Court in 1937 effectively eliminated judicially enforceable restrictions on legislatures, and recommending a revival of Justice Cardozo's vision of broad yet genuinely bounded government power).

27. The Warren Court dismantled huge swaths of precedent, most importantly in *Brown v. Bd. of Educ*., 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson* in holding that the Equal Protection Clause prohibited racial discrimination in public schools), and *Baker v. Carr*, 369 U.S. 186 (1962) (applying the Equal Protection Clause, originally understood as applying only to civil rights, to assert that state legislative apportionment had to be based on population—a question the Court had always treated as political before). Again, those cases are now unassailable.

28. Obergefell v. Hodges, 576 U.S. 644 (2015) (announcing a Fourteenth Amendment right to same-sex marriage).

29. *See* Pushaw, *supra* note 23, at 523–25, 578–84.

30. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2310–17 (2022) (Roberts, C.J., concurring in the judgment).

31. *Id.* at 2310.

32. *See infra* notes 332–35 and accompanying text.

33. Repudiating the historical understanding that the Court's rulings on the Constitution bound only the parties to a case and that political officials could thereafter act on their own reasonable interpretations, the Warren Court asserted that it was the final and ultimate arbiter of constitutional meaning. *See* Cooper v. Aaron, 358 U.S. 1, 18–19 (1958).

judicial overreaching means that the only limit on the Justices is their own sense of prudential self-restraint, which has often been found wanting.

Admittedly, stare decisis has utility when the Court has previously construed a vague constitutional provision in a particular way that reasonably reflects its meaning to those who wrote, ratified, and implemented it. But the doctrine makes far less sense as applied to a case like *Roe*, where a majority of Justices legislated their desired policy result, then scrambled to identify some constitutional support for it.[34] *Casey* deserves even less stare decisis respect because the result depended on a concurrence by three Justices who brokered a political compromise.[35] They acknowledged *Roe*'s lack of grounding in the Constitution and significantly changed its legal analysis and rationale, yet reaffirmed the right to abortion simply to avoid a public backlash.[36]

In short, the Court is on the right track in cases like *Dobbs* by retreating from eccentric, unreviewable, common law policymaking and instead focusing on the Constitution itself.[37]

Alas, average Americans, politicians, pundits, and even lawyers rarely read Court opinions but instead care only about whether they personally agree with the outcome, as the reaction to *Dobbs* illustrates.[38] One can hardly blame them, as the Court's constitutional opinions have often featured legal window dressing for results already reached on political or ideological grounds. Therefore, the current majority of Justices must illuminate the public about the Court's proper role in interpreting the Constitution as law. The Court tried to do so in *Dobbs*, without the Chief Justice's support

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Thereafter, the Court has rejected all legislative attempts to correct its errors. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act, which defied the Court's decision to limit Free Exercise Clause rights).

34. *See infra* Section II.B.1. & 2.

35. *See infra* Part III.

36. *See infra* notes 139–82 and accompanying text.

37. I recognize that the modern Court has deviated significantly (sometimes totally) from the Constitution's language and original meaning—and that therefore, realistically, constitutional "law" consists largely of principles developed through common law. *See, e.g.*, Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). Many other distinguished scholars, both conservative and liberal, have endorsed this "Burkean" vision of making constitutional law through precedent as promoting judicial restraint. *See* Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 312 (2005) (citing Thomas Merrill, Barry Friedman, Ernest Young, Richard Fallon, and Charles Fried). I disagree that this approach is appropriate or that precedent meaningfully limits the Justices.

38. *See infra* Section V.C.

and without widespread popular approval.[39] Hence, its educational task will be formidable, and perhaps impossible.

The foregoing themes will be detailed in four Parts.[40] Part II examines the Court's discovery in 1965 of a constitutional right to marital privacy, its awkward common law extension of that right to include abortion in *Roe*, and attempts by Justices and scholars to bolster *Roe*'s shaky constitutional footing. Part III describes how the three concurring Justices in *Casey* concocted an unprecedented version of stare decisis that allowed them to purport to follow *Roe* while substantially changing its legal framework. Part IV demonstrates that the Justices applied *Casey*'s malleable "undue burden" approach to reach any results they desired, as illustrated in cases concerning laws that either banned late-term abortions or that mandated certain safety standards for abortion providers. Part V analyzes *Dobbs* and defends the decision as restoring the idea of the Constitution as law.

II. ABORTION AND THE CONSTITUTIONAL RIGHT TO PRIVACY

As the Constitution says nothing explicit about privacy or abortion, the Court has created and modified such rights in pure common law fashion. The Justices have denied doing so and have insisted that they were merely interpreting the Constitution. Some commentators forthrightly declared that the Court was an emperor with no clothes, while others set forth new constitutional justifications. Examining the relevant precedent and scholarship from 1965 until 1991 illustrates this confusion.

A. Griswold *and the Right of Privacy*

In *Griswold v. Connecticut*,[41] the Court announced a new right of privacy that included married couples' use of contraceptives, and accordingly

39. *See generally infra* Section V.B. and Part VI.

40. In this Article, I do not purport to provide a comprehensive summary and analysis of all the writing on abortion, which would take several volumes. Rather, I highlight certain key legal, political, and scholarly points that help explain and justify *Dobbs* as a matter of constitutional law, contrary to the overwhelmingly negative response to that decision by academics and commentators.

41. Griswold v. Connecticut, 381 U.S. 479 (1965).

invalidated a state statute banning their use.[42] The Justices disagreed, however, about how this right could be derived from the Constitution.

In his majority opinion, Justice Douglas found privacy to be implicit in the First, Third, Fourth, and Fifth Amendments: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[43] Justices Harlan and White, however, asserted that the Connecticut law ran afoul of the Fourteenth Amendment Due Process Clause by "violat[ing] basic values 'implicit in the concept of ordered liberty.'"[44] Finally, Justice Goldberg (joined by Chief Justice Warren and Justice Brennan) maintained that marital privacy was one of the Ninth Amendment rights "retained by the People."[45] In dissent, Justices Black and Stewart contended that the state law did not violate the Constitution (which does not contain a right of "privacy") and that the majority had invalidated the statute merely because they thought it reflected a foolish policy.[46] Justice Black accurately accused his colleagues of assuming the role of "a court of common law" instead of expounding the Constitution.[47]

Griswold typifies the Warren Court's tendency to reach a result deemed just, then trying to locate a constitutional hook for it. Yet none of the clauses proffered by the Justices concerned marital privacy or contraception. Justice Douglas tossed out a buffet of possibilities, none of them appetizing. For example, the First Amendment actually contradicts his theory, as it looks not to privacy but to *public* acts like speech, press, assembly, petitioning the government, and religious conduct.[48] Likewise inapposite is the Third Amendment, as Connecticut was not quartering soldiers in homes.[49] The Fourth Amendment, which protects people against unreasonable searches and seizures of their "persons" and "houses," perhaps hints at in-home privacy, but is plainly directed at the admissibility of evidence in criminal proceedings.[50] Similarly, the Fifth Amendment guarantees the rights of the accused: grand juries for capital and other major crimes; no double

42. *Id.* at 483–86.
43. *Id.* at 484–85.
44. *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)); *id.* at 502 (White, J., concurring).
45. *Id.* at 486–99 (Goldberg, J., concurring, joined by Warren, C.J. & Brennan, J.).
46. *See id.* at 507–27 (Black, J., dissenting); *id.* at 527–31 (Stewart, J., dissenting).
47. *See id.* at 510 n.1 (Black, J., dissenting).
48. *See* U.S. CONST. amend. I.
49. *See id.* amend. III.
50. *See id.* amend. IV.

jeopardy; the privilege against self-incrimination; and due process rights such as a trial before an impartial decision maker.[51]

Recognizing that none of these provisions supplied a right of privacy, Justice Douglas claimed that they combined to emit a penumbra of privacy rights that had somehow escaped the attention of every Justice for 175 years.[52] He resorted to this farfetched rationale to avoid endorsing the Harlan/White position that the Court could interpret "liberty" in the Due Process Clause as conferring novel substantive rights that could be invoked to invalidate duly enacted laws.[53]

That reluctance reflected the often awful history of Substantive Due Process. This doctrine originated in *Dred Scott v. Sanford*.[54] There the Taney Court adopted the most extreme pro-slavery position in holding that the Fifth Amendment Due Process Clause prohibited Congress from restricting slavery in United States territories because doing so would deprive slaveowners who wished to move west of their absolute "liberty" and "property" rights in their slaves.[55] The Court revived this idea in the late nineteenth century by imaginatively construing Due Process "liberty" as including freedom of contract, which states could not infringe by enacting regulations to protect workers (e.g., providing for maximum hours of employment)—as epitomized in *Lochner v. New York*.[56] Less controversially, the Court in the 1920s recognized parents' "liberty" to educate their children.[57]

51. *See id.* amend. V.
52. *See supra* notes 43, 48–51 and accompanying text.
53. Griswold v. Connecticut, 381 U.S. 479, 481–86 (1965).
54. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.
55. *Id.* at 450–52.
56. Lochner v. New York, 198 U.S. 45 (1905). The Fourteenth Amendment, designed in part to overturn the Court's activist Substantive Due Process decision in *Dred Scott*, cannot sensibly be interpreted as supplying authority for the Court to continue to use that same discredited methodology. *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Randy Barnett*, 103 MICH. L. REV. 1081, 1093 (2005).
57. *See Griswold*, 381 U.S. at 481–83 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (striking down an Oregon statute requiring children to attend public school on the ground that the First and Fourteenth Amendments implicitly gave parents the right to educate their children at a Catholic school)); *id.* (citing Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a state could not prohibit German language study in a private school)).

An ardent supporter of progressive economic legislation, Justice Douglas had applauded the Court for repudiating *Lochner* in 1937.[58] Thus, he strenuously denied Justice Black's charge that the Court was resurrecting the reasoning of such cases by acting as "a super-legislature" to evaluate "the wisdom, need, and propriety of [state] laws."[59] But Justice Douglas protested too much. Or, more likely, he did not care, as he was one of the founders of Legal Realism and notorious for dashing off snappy opinions with little regard for careful craftsmanship.[60]

Griswold's only remaining justification was the Ninth Amendment. That clause, however, sought to preclude federal officials (including judges) from going beyond their enumerated constitutional powers and transgressing certain well-understood natural rights and reserved state powers.[61] Three Justices inverted the Ninth Amendment's meaning by relying upon it to arrogate federal power (in the judiciary) to strike down a state law they disliked.[62]

Given the lack of any genuine constitutional foundation for a right of privacy, one might have expected that the doctrine would have been abandoned. Instead, the Court extended the right of privacy to use contraceptives—which *Griswold* had confined to married couples[63]—to anyone who was making "the decision whether to bear or beget a child."[64] This new conception of privacy as involving the choice of having children paved the way to recognizing a right to abortion.

58. *See* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423–25 (1952).

59. *See Griswold*, 381 U.S. at 481–82 (responding to Justice Black's accusation in his dissenting opinion).

60. *See* G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 26, 41, 45, 60–86 (1988).

61. *See Griswold*, 381 U.S. at 520 (Black, J., dissenting); *id.* at 529–30 (Stewart, J., dissenting).

62. *See supra* note 61 and accompanying text; *see also* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) (arguing that the Ninth Amendment was not designed to provide a fountain of individual rights, but rather to limit interpretations of federal power that would interfere with states' ability to enact laws as they saw fit).

63. The Court conjured up the image of state officials invading the bedrooms of married couples. *See Griswold*, 381 U.S. at 482, 485–86. That scenario had never actually occurred.

64. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

B. The Roe *Revolution*

1. The Justices' Opinions

In *Roe v. Wade*,[65] the Court invalidated a Texas statute that banned abortion except to save the mother's life.[66] Justice Blackmun began his majority opinion by maintaining that English and American law historically had penalized abortions only if performed after the first fetal movement ("quickening"), which happened at approximately sixteen weeks.[67] He then leaped to the conclusion that the Constitution contemplated a similar framework and that states had to permit abortion until a fetus became viable (at about twenty-four weeks).[68] The Court jettisoned *Griswold*'s reliance on Bill of Rights "penumbras" and instead adopted the two alternative bases set forth in the concurrences:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[69]

Justice Blackmun characterized the right of abortion as part of the confidential relationship between a woman and her doctor.[70]

Remarkably, the Court deemed this freshly minted right "fundamental," so that state limitations on it would be subject to strict scrutiny (i.e., they had to be the least restrictive means of achieving a compelling government interest).[71] Justice Blackmun dismissed Texas's contention that it had a compelling interest in protecting all unborn children as constitutional "persons,"[72] but he refused to answer "the difficult question of when life begins."[73] He acknowledged, however, that the fetus had an independent

65. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
66. *Id.* at 117–18, 166.
67. *Id.* at 132–47.
68. *Id.* at 158–62.
69. *Id.* at 153; *see also id.* at 153, 163 (declaring that forcing a woman to give birth would cause her both physical and mental harm).
70. *Id.* at 153, 163, 165–66.
71. *Id.* at 152–56, 162–66.
72. *Id.* at 156–58.
73. *Id.* at 159.

existence that distinguished abortion from prior privacy cases, which implicated only the rights of the individual claimants.[74]

To accommodate the competing interests at stake, the Court divided pregnancy into "trimesters."[75] During the first three months, a woman's choice regarding abortion was virtually immune from state interference.[76] In the second trimester, a state could regulate abortion to safeguard the mother's health (e.g., by assuring that doctors had proper training).[77] In the last trimester, when the fetus had grown to viability, the state's interest became compelling and it could ban abortion "except when it is necessary, in appropriate medical judgment," to preserve the mother's life or health.[78] The companion case of *Doe v. Bolton*[79] broadly defined "health" to encompass "emotional, psychological, [and] familial" considerations,[80] which were not susceptible to objective medical determinations and thus amounted to licensing abortion on demand.[81]

The dissenting Justices minced no words. Justice White condemned the majority for asserting "raw judicial power" to impose their personal views instead of following the Constitution, which committed such controversial issues to the political process: "[N]othing in the language or history of the Constitution" supported the Court's announcement of a right to abortion that overrode all states' legislation, which had "weigh[ed] the relative importance of the continued existence and development of the fetus . . . against a spectrum of possible impacts on the mother."[82] Justice Rehnquist argued that the Constitution did not confer a right of "privacy" and that, even if it did, such a right should not be extended to a procedure in a public medical

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74. *See id.*
75. *Id.* at 163–66.
76. *Id.* at 163–64.
77. *Id.*
78. *Id.* at 164–65. *Cf. id.* at 167–71 (Stewart, J., concurring) (rejecting the notion that the Constitution contains a right of privacy, but finding that Substantive Due Process precedent had recognized a liberty interest in family issues that extended to freedom to make the abortion decision).
79. Doe v. Bolton, 410 U.S. 179 (1973) (invalidating a Georgia statute that banned abortions except in cases of rape or when the mother's life or physical health were at risk, and that required such abortions to be performed only in accredited hospitals with approval by at least three doctors).
80. *See id.* at 192; *see also id.* at 209–21 (Douglas, J., concurring) (maintaining that the right to abortion necessitated total deference to a woman's preferences and her physician's judgment, which could take into account not just medical issues but also psychological, social, economic, and educational factors).
81. *See* Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 HARV. L. REV. F. 415, 415 (2021).
82. *Doe*, 410 U.S. at 221–22 (White, J., dissenting).

center.[83] Moreover, he contended that Due Process "liberty" could not reasonably be read to encompass abortion, since thirty-six of thirty-seven states banned or strictly limited abortion in 1868 and for a long time thereafter (with most such laws remaining in effect as of 1973).[84] Relatedly, this tradition meant that any such liberty interest could hardly be deemed implicit or "fundamental."[85] Justice Rehnquist presciently warned of the dangers of the Court's freewheeling approach:

> As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.[86]

Finally, the Court's alternative constitutional source for a right to abortion—"the Ninth Amendment's reservation of rights to the people"[87]—repeated the error in *Griswold*. The Ninth Amendment does not appoint the Court as a rolling constitutional convention to fabricate new rights to invalidate state laws that a majority of Justices find distasteful.[88] Rather, the Amendment reflected its drafters' acknowledgment that they could not enumerate all recognized natural law rights, but abortion was surely not one of them, as lawyers and philosophers deemed abortion contrary to natural law.[89] Ironically, then, the Ninth Amendment actually supported Texas's claim that the Constitution *required* the state to protect the unborn child—as eminent natural law scholars still argue today.[90]

From a legal standpoint, the dissent's constitutional arguments were unanswerable. Justice Blackmun simply brushed them aside and imposed

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83. *Roe*, 410 U.S. at 172–73 (Rehnquist, J., dissenting).
84. *Id.* at 174–77.
85. *Id.* at 174.
86. *Id.*
87. *Id.* at 153 (majority opinion).
88. *See supra* note 62 and accompanying text.
89. *See* Duane L. Ostler, *Rights Under the Ninth Amendment: Not Hard to Identify After All*, 7 FED. CTS. L. REV. 35, 75–77 (2013).
90. *See infra* notes 350–52 and accompanying text.

his pro-choice view (shared by six fellow Justices), as his later-released papers confirmed.[91]

2. *The Response to* Roe

Given law professors' overwhelming support for *Roe* today,[92] it is surprising that so few of them defended the decision at the time.[93] Most telling is that even pro-choice constitutional law scholars decried the Court's weak legal analysis. Most famously, John Hart Ely maintained that, even though *Roe* reflected his idea of progress, it "is bad constitutional law, or rather . . . is *not* constitutional law and gives almost no sense of an obligation to try to be."[94] He explained that a right to abortion could not reasonably be derived from the Constitution's text, its drafting or ratification history, its structure, or America's historical treatment of abortion.[95] On the contrary, those constitutional materials actually supported the states' compelling interest in protecting fetal life throughout pregnancy, despite the Court's bald assertion that the fetus had no moral value that the law could recognize until after viability.[96] Turning to recent constitutional precedent, Professor Ely echoed Justice Rehnquist's point that a right to home privacy had no relevance to a medical procedure in a public facility.[97] Ely concluded that *Roe* had revived the *Lochner* era, when the Court "simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures."[98]

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91. *See* Gregory C. Sisk, *The Willful Judging of Harry Blackmun*, 70 MO. L. REV. 1049, 1053–60 (2005).

92. *See, e.g.*, Andrew Coan, *What Is the Matter with* Dobbs*?* 35 (Ariz. Legal Stud. Discussion Paper No. 22–24, 2022), https://ssrn.com/abstract=4294242 [https://perma.cc/2EP4-6ZDF]) (noting that the pro-choice constitutional position is the "prevailing orthodoxy within the legal academy").

93. An exception was Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees*: Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765, 772–75 (1973) (contending that the Constitution should be creatively read to protect rights related to privacy and families).

94. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

95. *See id.* at 935–36.

96. *Id.* at 924–26.

97. *See id.* at 927–33.

98. *See id.* at 937–39 (citing Lochner v. New York, 198 U.S. 45 (1905)). A leading libertarian scholar independently reached similar conclusions. *See* Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 173–75 (pointing out that Anglo-American law historically recognized the fetus as a person, even before "quickening"); *id.* at 176–77 (questioning the majority's treatment of abortion as the removal of an unwanted body part); *id.* at 167 (noting that *Roe*'s historical analysis, even if correct, provided no support for the trimester framework); *id.* at 180–84

3. *From* Roe *to* Casey*: Common Law Line-Drawing and Scholarly Attempts to Provide Better Constitutional Justifications*

Roe entangled the Court in case-by-case determinations as to whether specific state regulations of abortion served compelling government interests. Examples included laws requiring informed consent; waiting periods; the father's approval; parental consent for minor children; record-keeping for public health purposes; and various medical precautions (for example, that abortions be performed in hospitals; that a second doctor be present; and that abortions not be done after twenty weeks unless a test established that the fetus was not viable).[99]

Obviously, a Constitution that is silent on abortion itself provides no guidance about such details, so the Court had to make policy judgments. Not surprisingly, Presidents and Senators considered each potential Justice's personal, religious, moral, political, and ideological beliefs about abortion.[100] Between 1981 and 1991, Republican Presidents Reagan and Bush, who had pledged to overturn *Roe*, appointed five Justices (O'Connor, Scalia, Kennedy, Souter, and Thomas), who joined the original *Roe* dissenters (Justices Rehnquist and White).[101] Thus, the end of *Roe* seemed imminent.

These political developments, and the Court's failure in *Roe* to identify a plausible basis in the written Constitution for the right to abortion, led liberal intellectuals to seek alternative foundations in the Equal Protection Clause, the Nineteenth Amendment, the Thirteenth Amendment, and the First Amendment Religion Clauses. None of these provisions, however, supplied firm textual support.

(arguing that the Due Process Clause requires states to protect the unborn child, subject to a woman's right to protect her life or health). *Roe* "just declared by fiat" that the liberal view of abortion on demand would become the national rule, thereby setting off an ongoing cultural war. *See* Calabresi, *supra* note 56, at 1096.

99. *See* Pushaw, *supra* note 23, at 539–42 (summarizing and analyzing these cases).

100. *See id.* at 584–85.

101. *See, e.g.*, Jamin B. Raskin, Roe v. Wade *and The* Dred Scott *Decision: Justice Scalia's Peculiar Analogy in* Planned Parenthood v. Casey, 1 AM. U. J. GENDER & L. 61, 61–62 (1993) ("The Supreme Court built by Presidents Ronald Reagan and George Bush was partially designed to overturn *Roe v. Wade* . . . .").

a. Equal Protection

Ruth Bader Ginsburg built upon prior scholarship in criticizing Justice Blackmun for rooting the abortion right in a Due Process notion that abortion was a private decision between a female patient and her physician.[102] Rather, she contended that laws banning or limiting abortion violated the Equal Protection Clause because they constituted sex discrimination, as only women bore the burdens of pregnancy and childbirth.[103] Other scholars have argued that anti-abortion laws reflect not merely the professed concern for protecting the fetus's life, but also invidious discrimination—particularly the stereotype that a woman's proper role is motherhood.[104] Although this equality principle seemed more plausible than the privacy rationale, it has always presented three problems under Equal Protection doctrine.

First, a claimant must establish that the government classified based on sex.[105] However, in 1974 the Court ruled that *any* government discrimination against pregnant women was not a sex-based classification subject to heightened scrutiny.[106] Even if one questioned that holding as to matters like employment, states have plausibly argued that abortion laws (1) did not draw such a classification but rather regulated a medical procedure, and (2) often imposed penalties on doctors, including men.[107]

Second, the plaintiff has the burden of proving intentional discrimination, not merely that a law has a disparate impact on women.[108] State officials have defended abortion restrictions and bans as intended to protect the

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102. *See generally* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

103. *See id.* at 382–83; *see also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 987 (1984). This idea traces to Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 58 (1977) (criticizing the Court for focusing on patient-physician privacy and liberty rather than women's equality).

104. *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 815–17 (2007); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISC. 160, 162–63 (2013). The equality defense of abortion has been developed in great detail over many years, and I do not purport to consider this voluminous literature here. Rather, I will merely highlight a few key legal points.

105. *See, e.g.*, Pers. Adm'r v. Feeney, 442 U.S. 256, 271–75 (1979).

106. Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, 95 Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. 2000e(k)).

107. *See* Michael Stokes Paulsen, *The Worst Constitutional Law Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1008–11 nn.34–35 and accompanying text (2003); Sherif Girgis, *Why the Equal Protection Case for Abortion Rights Rises or Falls with* Roe*'s Rationale*, HARV. J.L. & PUB. POL'Y PER CURIAM, no. 13, Summer 2022, at 1.

108. *See Feeney*, 442 U.S. at 271–81.

unborn child's life, and it is nearly impossible to prove that this proffered justification hides a purpose of subordinating women.[109] Indeed, once one realizes that men and women have long held similar views on abortion and that millions of the latter are pro-life, it becomes tenuous to claim that anti-abortion laws must reflect bias against "women" generally.[110]

Third, even assuming that abortion statutes are sex-based classifications that purposefully discriminate against women, they are reviewed under "intermediate" scrutiny,[111] a more lenient standard than the strict scrutiny that applies to infringements of fundamental rights under the Due Process Clause (the *Roe* approach).[112] Therefore, state laws on abortion would merely need to serve an important (not compelling) government interest and be substantially related (not narrowly tailored) to meet that interest.[113] Laws safeguarding fetal life meet that test, however much liberal judges and scholars ignore or minimize that government interest.[114] Ironically, then, under Equal Protection, women would receive less constitutional protection.

b. Nineteenth Amendment

Ratified in 1920, the Nineteenth Amendment prohibited sex discrimination in voting. This Amendment has supported two distinct arguments concerning abortion.

First, state statutes enacted before 1920 that prohibited or restricted abortion were constitutionally suspect because they adversely affected women who could not vote on them.[115] Such laws may have remained on the books simply due to legislative inertia and thus should be treated as presumptively invalid, at least until current voters (half of whom are women)

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109. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268–74 (1993).
110. *See* Girgis, *supra* note 107.
111. *See* Craig v. Boren, 429 U.S. 190, 199–204 (1976).
112. *See* Roe v. Wade, 410 U.S. 113, 152–56, 162–66 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
113. *See Craig*, 429 U.S. at 197.
114. *See* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 482–83 (1990).
115. *See* Barbara J. Cox, *Refocusing Abortion Jurisprudence to Include the Woman: A Response to Bopp and Coleson and* Webster v. Reproductive Health Services, 1990 UTAH L. REV. 543, 561–62.

expressly approve them.[116] *Roe* could have been decided on such grounds, but instead invalidated all state laws limiting access to pre-viability abortions, so it became irrelevant whether such legislation was passed before or after women received the suffrage. The Court created a constitutional right to abortion and presumed to speak for all women instead of deferring to what citizens—including women—wanted.

The second theory is that the Nineteenth Amendment, although specifically addressed to voting, manifested a more general principle of women's equality in civil society.[117] The Court swiftly endorsed this idea in *Adkins v. Children's Hospital*[118] in the course of striking down a minimum-wage law for women as violating the Due Process "liberty" to contract.[119] The Court stressed that women had the same freedom to bargain over wages as men, since the Nineteenth Amendment had capped off a sea change in recognizing women as equals not just politically but also economically and socially.[120]

This expansive reading of the Nineteenth Amendment could support a right to abortion. Indeed, many Justices have incorporated into their Due Process "liberty" analysis the idea that women's social and economic equality can be advanced by ensuring access to abortion.[121] But the Court has never identified the Nineteenth Amendment as a source of this right. The Nineteenth Amendment's text, focused on voting, does not provide a natural home for a right to abortion. Moreover, a broader construction of that Amendment based on women's socioeconomic equality, like the similar Equal Protection claim, dismisses what many women and men

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116. *See* Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 111 (2000).

117. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (arguing that the Court's equality jurisprudence has been stunted by a focus on the Fourteenth Amendment while ignoring the subsequent half-century of debates that culminated in adoption of the Nineteenth, which enshrined Americans' decision to reject traditional concepts of family that had shaped women's legal status and instead embrace the concept of "equal citizenship" for women in all areas—not merely voting).

118. Adkins v. Child.'s Hosp., 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

119. *See id.* at 544–47, 554.

120. *See id.* at 552–53; *see also* Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and* Adkins v. Children's Hospital*, 1905–1923*, 78 J. AM. HIST. 188 (1991) (tracing the origins of this theory to civil rights lawyer Alice Paul); Gladys Wells, *A Critique of Methods for Alteration of Women's Legal Status*, 21 MICH. L. REV. 721 (1923) (contending that political equality for women extended to their civil rights).

121. *See infra* notes 143–44, 147 and accompanying text.

(and their elected representatives) recognize: that the fetus has an independent physical and moral status.[122]

c. Thirteenth Amendment

Recognizing the foregoing problems, Andy Koppelman proposed a different constitutional theory: that laws banning abortion violated the Thirteenth Amendment's prohibition on "involuntary servitude" by coercing a woman to carry and bear a child.[123] Professor Koppelman conceded that no one who wrote, ratified, or effectuated the Thirteenth Amendment imagined that it conferred a right of abortion.[124] Accordingly, he relied on later cases interpreting that Amendment as forbidding the involuntary control of someone's body or services for another's benefit, as when the Court prohibited employers from enforcing peonage labor contracts by compelling poor men to work off (rather than pay off) their debts.[125] By analogy, states could not command a woman—and only a woman—against her will to use her body to serve a fetus.[126] Koppelman maintained that, because anti-abortion laws violated the constitutional right of women to be free of involuntary servitude, the state had the burden of justifying this transgression by proving it had an overriding interest in saving the fetus—a burden it could not carry because it was impossible to determine when a fetus became a "person."[127]

122. Indeed, some commentators have submitted that abortion-rights activists have actually hurt the feminist cause by using the male body as the baseline, which engenders social hostility toward pregnancy and motherhood. *See* Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 890 (2011).

123. *See generally* Koppelman, *supra* note 114, at 480–535.

124. *See id.* at 488–89; *see also* Kurt Lash, Roe *and the Original Meaning of the Thirteenth Amendment*, 21 GEO. J.L. & PUB. POL'Y (forthcoming 2023) (showing that this Amendment narrowly abolished only "slavery" (owning another human being as property) and "involuntary servitude" (coerced lifetime service to a master), and did not affect laws restricting or banning abortion).

125. *See* Koppelman, *supra* note 114, at 484–503.

126. *See id.* at 484–85, 487–91, 503–11, 519, 528–33.

127. *See id.* at 485, 511–18, 534; *see also* Julie K. Suk, *A World Without* Roe: *The Constitutional Future of Unwanted Pregnancy*, 64 WM. & MARY L. REV. 443, 447–50, 503–14 (2022) (claiming that abortion bans violate the Fifth and Fourteenth Amendments by "taking" property because they give the government an uncompensated economic benefit from the mother's work of carrying, bearing, and caring for children, which supplies the government with needed citizens and a labor force).

Unlike many pro-choice Justices and scholars, Professor Koppelman does not simplistically characterize abortion as a matter of a woman's autonomy, as if a fetus has no biological or moral significance. Nonetheless, I am not persuaded that applying a technical "burden of proof" standard decisively shifts the balance in favor of a right to abortion. It is unclear why a government that seeks to restrict or ban this procedure must prove that a fetus is a "person," as contrasted with a "human life" worth preserving. Scientific advances since *Roe* have unmistakably confirmed that a fetus, long before viability, has a human existence independent of the mother (a distinct DNA, heartbeat, and the like).[128] Hence, applying Koppelman's logic, the Thirteenth Amendment would actually prohibit a mother from controlling—indeed, sacrificing—the body of her unborn human child for her benefit (physical, economic, or social).[129]

No Justice has ever mentioned the Thirteenth Amendment as a basis for a right to abortion, probably because Koppelman's argument instinctively sounds so odd, even though it is actually more textually grounded and coherent than *Roe*'s privacy rationale. The search for a constitutional justification for abortion reached a new level of desperation with the First Amendment Religion Clause theory.

d. The Religion Clauses

Justice Stevens claimed that anti-abortion legislation violated both Religion Clauses. First, it ran afoul of the Establishment Clause because it was based not on legitimate secular policies but rather on theological beliefs, such as the Catholic teaching that a fetus acquires a soul two months after conception.[130] But citizens have every right to support laws that reflect their religious and moral views, as long as the government

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128. *See* Paulsen, *supra* note 107, at 1016–18; *see also* Charles J. Cooper et al., Roe *and* Casey *Were Grievously Wrong and Should be Overruled*, HARV. J.L. & PUB. POL'Y PER CURIAM, no. 17, Fall 2021 (demonstrating the scientific consensus that an embryo is a distinct member of the human species at the earliest stage of development).

129. *See* Koppelman, *supra* note 114, at 534 (alluding to this possible argument, but not refuting it).

130. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 778–79 (1986) (Stevens, J., concurring), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Webster v. Reprod. Health Servs., 492 U.S. 490, 560–72 (1989) (Stevens, J., concurring in part and dissenting in part). He repeated such arguments in *Planned Parenthood v. Casey*, 505 U.S. 833, 911–22 (1992) (Stevens, J., concurring in part and dissenting in part). No other Justice joined Stevens's opinions, although a few expressed some sympathy with his idea. *See Webster*, 492 U.S. at 552–54 (Blackmun, J., concurring in part and dissenting in part) (joined by Brennan & Marshall, JJ.).

does not compel others to support or endorse their beliefs.[131] For example, under Justice Stevens's reasoning, the Court erred in sustaining the Civil Rights Act because it imposed the conviction of Christians like Reverend Martin Luther King Jr. that God created all people equal.[132]

Second, Justice Stevens asserted that abortion restrictions violated the Free Exercise Clause by denying a woman's freedom of conscience to choose to end her pregnancy.[133] However, having an abortion is not an exercise of a religious belief (compared to, say, attending church), and in any event a person's conscience does not exempt her from obeying the law. For instance, everyone must pay taxes, even those who have sincere religious objections to doing so.[134]

The attempt to locate the right to abortion in the Religion Clauses went nowhere.[135] Ultimately, the Court rejected possible First, Ninth, Thirteenth, and Nineteenth Amendment sources for this right and instead settled on *Roe*'s Substantive Due Process "liberty" rationale.[136] Significantly, however, the Court included within that analysis the rhetoric of equality, as illustrated by *Planned Parenthood v. Casey*.[137]

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131. *See* John M. Breen, *Abortion, Religion, and the Accusation of Establishment: A Critique of Justice Stevens's Opinions in* Thornburgh*,* Webster*, and* Casey, 39 OHIO N.U. L. REV. 823, 828, 830–31, 837–42, 845, 848–78 (2013). Furthermore, even if religious faith has partly motivated the decisions of anti-abortion Justices, there are also valid secular and legal grounds for concluding that the Constitution does not create a right to abortion. *See* Coan, *supra* note 92, at 30–32.

132. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 249–62 (1964) (upholding the Civil Rights Act of 1964 as a valid regulation of interstate commerce, even though Congress was also addressing a moral evil); *see also* Jonathan C. Augustine & John K. Pierre, *The Substance of Things Hoped for: Faith, Social Action, and the Passage of the Voting Rights Act of 1965*, 46 CUMB. L. REV. 425, 431–52 (2016) (emphasizing that King and his fellow Christians characterized the Civil and Voting Rights Acts as expressions of their religious belief in equality).

133. *See Thornburgh*, 476 U.S. at 777–78; *Webster*, 492 U.S. at 571–72.

134. *See* United States v. Lee, 455 U.S. 252, 256–61 (1982).

135. Scholars have continued to develop this argument. *See, e.g.*, Richard Schragger & Micah Schwartzman, *Religious Freedom and Abortion*, 108 IOWA L. REV. (forthcoming 2023). I recognize that some people's religious beliefs allow them to obtain an abortion or assist others to do so. Nonetheless, a state need not accommodate every possible religious view in enacting laws that serve a valid government interest, such as protecting fetal life.

136. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846–53, 857, 869 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

137. *Id.* at 852–64, 869.

III. *CASEY*: SAVING *ROE* THROUGH A NAKEDLY POLITICAL COMPROMISE

A. The Casey *Opinions*

In *Casey*, only Justices Blackmun and Stevens reaffirmed *Roe* in all respects.[138] By contrast, Justices O'Connor, Kennedy, and Souter wrote a "Joint Opinion" that (1) retained *Roe*'s "essential holding" that women had a right to abortion pre-viability, but that afterwards states could limit or ban this procedure (except when a woman's life or health were at risk), but (2) gave more weight to the states' interests in protecting maternal health and the fetus's "potential life" throughout pregnancy.[139]

Expanding on *Roe*'s Due Process theme, these Justices declared: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[140] This vacuous statement suggests that constitutional liberty would include the right of a sincere follower of Aztec religions to sacrifice virgins. Similarly unpersuasive was the Joint Opinion's assertion that, even though many Americans believed that abortion was profoundly wrong, the Court had the duty "to define the liberty of all, not to mandate our own moral code."[141] Of course, by denying that the fetus had any moral status and merited legal protection, contrary to the views of millions of Americans, the Justices were imposing their own "moral code."[142]

Justices O'Connor, Kennedy, and Souter then smuggled the equality principle into their Due Process discussion by emphasizing that abortion uniquely implicated women's liberty interests because only they had to endure pregnancy and childbirth.[143] Thus, a woman had to be free to decide whether or not to bear these burdens based on her personal views

138. *Id.* at 911–22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922–43 (Blackmun, J., concurring in part and dissenting in part).

139. *Id.* at 844–901.

140. *Id.* at 851.

141. *Id.* at 850.

142. Accordingly, the Court's arbitrary assertion that the fetus's human life became worthy of constitutional protection only at the point of viability had no biological, moral, or legal basis. More generally, the Constitution provides no guidance as to when, if ever, a woman's rights to autonomy and equality should prevail over the human rights of the fetus. *See* Paulsen, *supra* note 107, at 1018–21.

143. *See Casey*, 505 U.S. at 852.

and circumstances—"to retain the ultimate control over her destiny and her body."[144]

The Joint Opinion repeatedly acknowledged that *Roe* was likely decided incorrectly in 1973,[145] but concluded that it should not be overruled, for two reasons.[146] First, stare decisis counseled adhering to *Roe* because no intervening legal or factual developments had weakened it, and women had come to rely on abortion to ensure their social, economic, and educational equality.[147] Second, if *Roe* were overturned, Americans might believe the Court had capitulated to political pressure instead of neutrally applying the law, thereby undermining the Court's legitimacy and authority.[148] Indeed, *Roe* was a rare case in which "the Court's interpretation of the Constitution call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[149]

Ironically, this professed fealty to precedent did not prevent Justices O'Connor, Kennedy, and Souter from overruling two previous cases[150] and making three major changes to *Roe*. First, the right to abortion would no longer rest on patient-physician "privacy" derived from either the Ninth Amendment or the Due Process Clause, but would be based exclusively on a woman's fundamental "liberty" interest.[151] Second, the Joint Opinion repudiated *Roe*'s trimester framework and replaced it with a bilateral line: States could ban abortion only after the fetus had attained viability, subject to the "life or health" exception (but with a capacious definition of "health").[152] Third, for pre-viability abortions, these three Justices abandoned the Court's longstanding "strict scrutiny" standard of review and instead

144. *See id.* at 869.
145. *See id.* at 853, 857–59, 861, 869.
146. *See id.* at 854–71.
147. *See id.* at 854–64; *id.* at 912–14 (Stevens, J., concurring in part and dissenting in part) (agreeing that stare decisis required reaffirming *Roe*).
148. *Id.* at 864–69.
149. *Id.* at 867.
150. The Court overturned two earlier decisions by upholding a state's requirements that women (1) wait twenty-four hours before obtaining an abortion, and (2) give "informed consent" after reading material about the fetus's development and the health risks of abortion. *See id.* at 881–87.
151. *See id.* at 844, 846–53, 857–61, 869, 871, 876.
152. *See id.* at 869–79.

adopted an "undue burden" test not found in any prior case.[153] Under that new standard, the state could promote its "profound interest in potential life"—an interest the Court had repeatedly minimized in the past[154]—by making sure that this choice was informed and by attempting to "persuade the woman to choose childbirth over abortion."[155]

Chief Justice Rehnquist and Justice Scalia published separate opinions, each joined by Justices White and Thomas, contending that *Roe* should be overruled.[156] Except for a minor technical matter,[157] they reached four similar conclusions.

First, before 1973, the Constitution had been understood as reserving abortion to the states, which had prohibited or limited abortion rather than protecting it as a fundamental right.[158] *Roe*'s invention of such a right had not ended the "national division" over abortion but instead had exacerbated it by preventing political debate and compromise in each state, thereby transferring the issue to the national level (including protests at the Court).[159]

Second, *Roe* had erroneously extended the Court's precedents on family privacy and autonomy. Those cases did not involve the momentous decision to terminate a human life.[160]

Third, the three swing Justices applied a bizarre notion of stare decisis, which allowed them to preserve what they dubbed *Roe*'s "central holding" while rejecting several key elements of that holding, such as privacy, strict scrutiny, and trimesters.[161] Furthermore, the Court had a special duty to correct gravely mistaken constitutional decisions like *Roe*, particularly

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153. *See id.* at 874–78. An "undue burden" meant placing "a substantial obstacle in the path of a woman seeking an abortion." *Id.* at 877.

154. *See id.* at 871–78.

155. *See id.* at 878.

156. *See id.* at 944–79 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *see also id.* at 979–1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

157. Justice Scalia maintained that the Due Process Clause did not include a "liberty" interest in abortion. *See id.* at 979–83 (Scalia, J., concurring in the judgment in part and dissenting in part). By contrast, the Chief Justice acknowledged such an interest but characterized it as non-fundamental, so that state regulations of abortion would be upheld as long as they had a "rational basis"—a lenient test almost all laws meet. *See id.* at 951, 966–79 (Rehnquist, C.J., concurring in part and dissenting in part).

158. *See id.* at 951–53 (Rehnquist, C.J., concurring in part and dissenting in part); *see also id.* at 979–81 (Scalia, J., concurring in the judgment in part and dissenting in part).

159. *See id.* at 995–96, 1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

160. *See id.* at 951–53 (Rehnquist, C.J., concurring in part and dissenting in part); *see also id.* at 982–84 (Scalia, J., concurring in the judgment in part and dissenting in part).

161. *See id.* at 955–56 (Rehnquist, C.J., concurring in part and dissenting in part); *see also id.* at 993–94 (Scalia, J., concurring in the judgment in part and dissenting in part).

because Congress could not do so, and an amendment was virtually impossible as a practical matter.[162] Nor should the Court adhere to a bad constitutional decision simply because many citizens might otherwise believe that the Court was buckling to political pressure (from the right).[163] Logically, reaffirming *Roe* might also be perceived as caving in to political pressure (from Democrats), and in any event the Court's role was to faithfully interpret the Constitution—which often required unpopular judgments—without worrying about possible public disapproval.[164]

Fourth, the Joint Opinion's new "undue burden" standard lacked any constitutional basis.[165] Even if it did, attempting to determine which state burdens were "undue" would require judges to make wholly subjective judgments.[166]

B. A Critical Analysis of Casey

The controlling opinion of Justices O'Connor, Kennedy, and Souter rested entirely on an unprecedented three-pronged version of stare decisis.[167] First, they affirmed *Roe* merely because it was precedent.[168] Article III "judicial power," however, requires courts to render a judgment after expounding the law, which necessitates determining whether earlier decisions were legally sound.[169] This obligation is especially important in interpreting

162. *See id.* at 954–66 (Rehnquist, C.J., concurring in part and dissenting in part).

163. *See id.* at 958–64; *see also id.* at 996–99 (Scalia, J., concurring in the judgment in part and dissenting in part).

164. *See id.* at 963–64 (Rehnquist, C.J., concurring in part and dissenting in part); *see also id.* at 996–1001 (Scalia, J., concurring in the judgment in part and dissenting in part).

165. *See id.* at 964 (Rehnquist, C.J., concurring in part and dissenting in part); *see also id.* at 985, 987 (Scalia, J., concurring in the judgment in part and dissenting in part).

166. *See id.* at 945, 964–66 (Rehnquist, C.J., concurring in part and dissenting in part); *see also id.* at 985–93 (Scalia, J., concurring in the judgment in part and dissenting in part).

167. *See supra* notes 147–55, 161–66 and accompanying text.

168. *See supra* notes 147–49 and accompanying text.

169. For detailed analyses of the long-established meaning of "judicial power," see, for example, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 741–42, 746–47, 808–09, 823, 826–31, 844–49, 866–67 (2001); Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 9–11, 66–75 (2010).

the Constitution, for reasons the dissenters set forth.[170]

Second, the concurring Justices asserted that the Court must steadfastly follow a precedent in a controversial area (like *Roe*) that the President and many Americans had challenged—even if that criticism rested on a correct interpretation of the Constitution's text, structure, and history up until the time of the contested decision—to avoid a political and popular backlash that might harm the Court's reputation.[171] On the contrary, the Justices have sworn to uphold the Constitution and are granted independence to ensure that they do so regardless of political considerations.[172] They betray that oath by reaffirming a case that they conclude had misread the Constitution simply to convince ordinary folks that the Court is committed to the rule of law.[173]

Third, stare decisis, by definition, demands fidelity to precedent. Justices O'Connor, Kennedy, and Souter purported to retain *Roe*'s "central holding" and merely modify minor details (a traditional common law approach), but in reality rewrote that holding and its underlying rationale.[174] Most importantly, *Roe* held that either the Fourteenth Amendment Due Process Clause or the Ninth Amendment conferred a right of privacy between a female patient and her doctor in deciding whether to have an abortion.[175] The Joint Opinion, however, declared that the fundamental right to abortion was exclusively based on Due Process "liberty."[176] Furthermore, under established doctrine, state laws infringing that right had to survive strict scrutiny, but the Court jettisoned that standard of review and instead made up a special "undue burden" test.[177] Finally, Justice Blackmun implemented *Roe*'s holding through the trimester framework, which the three swing Justices tossed out.[178]

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170. *See, e.g.*, *Casey*, 505 U.S. at 954–66 (Rehnquist, C.J., concurring in part and dissenting in part).

171. *See supra* notes 148–49 and accompanying text.

172. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 413, 415, 418–25, 432–33 (1996).

173. *See* Calabresi, *supra* note 37, at 313–14, 335–48 (arguing that the Constitution contemplates that each branch has a duty to interpret it, and that therefore when the President or a majority of Congress ask the Court (as they did in *Casey*) to overrule a case that they reasonably determined has misread the Constitution (like *Roe*), the Court need not follow that precedent but rather should apply the original meaning).

174. *See supra* notes 139, 150–55 and accompanying text.

175. Roe v. Wade, 410 U.S. 113, 152–66 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

176. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844–53, 857–61, 869, 871, 876 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

177. *See id.* at 874–78.

178. *See id.* at 869–79.

In sum, Justices O'Connor, Kennedy, and Souter recognized that the Court in *Roe* had misinterpreted the Constitution, yet reaffirmed a right to abortion without providing any additional constitutional justification and based their decision on a novel stare decisis doctrine that actually eviscerated precedent.[179] This implausible analysis suggests that the Joint Opinion simply brokered a palatable political compromise.[180]

Nonetheless, the *Casey* majority solidified when Bill Clinton became President in 1993 and appointed abortion supporters Ruth Bader Ginsburg and Stephen Breyer to replace Justice White (a *Roe* dissenter) and Justice Blackmun.[181] *Casey*'s legally unprincipled nature became apparent, however, when the Justices attempted to apply it to new laws regulating abortion.[182]

IV. HAPHAZARDLY IMPLEMENTING *CASEY*: PARTIAL-BIRTH ABORTION AND HEALTH REGULATIONS

Casey discarded *Roe*'s unworkable trimester scheme for a new one that proved to be equally untenable, as determining whether a law imposed an "undue burden" on a woman's choice of abortion was inherently subjective.

179. Professor Paulsen has contended that *Casey* was a uniquely awful decision, for three reasons. First, a majority of Justices reaffirmed and extended *Roe* even though they knew it had wrongly interpreted the Constitution and was morally repugnant. *See* Paulsen, *supra* note 107, at 997–1002, 1025–32, 1040–42. Second, the Court perverted stare decisis by asserting that it had a special duty to stick with a clearly erroneous constitutional precedent in a controversial area (*Roe*) simply to avoid a public perception of vacillation that might damage the Court's power, legitimacy, and prestige. *See id.* at 998–1000, 1029–36, 1040, 1043. Third, *Casey* deliberately sought to entrench *Roe* and, in authoritarian terms, demanded obedience to its decrees and de-legitimized any criticism of its decision as an attack on the rule of law. *See id.* at 998, 1032–38.

180. Politically, the Joint Opinion might well have articulated Americans' ambivalence about abortion by permitting states to encourage childbirth over abortion and to make sure women deliberate about this decision with complete information, but to finally leave the choice before fetal viability up to the individual. However, the Court is duty-bound to enforce the Constitution, not write political op-eds.

181. *See* Notes, 509 U.S. IV (1993) (detailing the Ginsburg nomination and confirmation); Notes, 512 U.S. IV (1994) (announcing the Breyer appointment).

182. For a thorough treatment of the political dynamics surrounding this issue, see generally MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 88–150 (2020) (demonstrating that the terms of the abortion debate shifted from an emphasis on constitutional rights (protecting either women's autonomy or the fetus's human life) to policy arguments about (1) abortion's costs and benefits for women, families, the poor, and minorities; and (2) whether the medical profession's pro-choice position reflected science or politics).

Not surprisingly, the Justices applied this test to reach different results in cases addressing laws that either banned late-term abortions or required abortion providers to follow specific health and safety standards.

A. Contradictory Results in Partial-Birth Abortion Cases

In the early 1990s, doctors developed "partial-birth abortion" (PBA) procedures, in which they either (1) induced delivery, opened the fetus's skull and sucked out its brains, then extracted the entire fetus, or (2) cut up the fetus and removed the pieces through the vagina.[183] These procedures were typically performed late in the second trimester (when the fetus might be viable) or later[184] as a matter of convenience rather than medical necessity.[185] Beginning in the mid-1990s, thirty states prohibited PBA as tantamount to infanticide.[186]

Abortion-rights organizations claimed that such statutes were unconstitutional.[187] In 2000, five Justices agreed that these laws "unduly burdened" a woman's right to abortion.[188] After Congress in 2003 enacted a materially identical statute, however, five Justices reached the opposite conclusion.[189] These two cases will be considered in turn.

1. Stenberg

Stenberg v. Carhart[190] concerned a Nebraska law that banned PBA, except in the rare instance when it was needed to save a mother's life threatened by a physical illness or injury.[191] In a 5-4 decision, Justice Breyer initially declared:

> Millions of Americans believe . . . abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the

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183. Stenberg v. Carhart, 530 U.S. 914, 924–28 (2000) (describing these procedures).
184. *See* Gonzales v. Carhart, 550 U.S. 124, 135–40 (2007).
185. *See* 142 CONG. REC. 136, 1744–48 (1996).
186. *Stenberg*, 530 U.S. at 989, 995–96 n.13 (Thomas, J., dissenting) (setting forth these state laws).
187. *Id.* at 922 (majority opinion).
188. *See id.* at 921–22, 929–46.
189. *See Gonzales*, 550 U.S. at 145–68.
190. *Stenberg*, 530 U.S. 914.
191. *Id.* at 921–22 (statutory citation omitted).

> Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case.[192]

The Court struck down Nebraska's law, mainly because the statute did not contain the requisite exception to safeguard the mother's health.[193] Justice Breyer acknowledged that various late-term abortion procedures were so new that there were not yet reliable studies about their comparative effects on women's health, but concluded that the choice of procedure should be left to each doctor's "appropriate medical judgment."[194] The Court also ruled that the law "unduly burdened" a woman's right to choose abortion because some PBAs might be performed before fetal viability.[195] In a concurring opinion, Justice Ginsburg (joined by Justice Stevens) derided PBA supporters as "irrational" and speculated that PBA bans were designed to erode *Roe*.[196]

Four Justices dissented.[197] Justice Kennedy, one of the authors of the *Casey* Joint Opinion, argued that the majority had misapplied it, for three reasons. First, Nebraska did not unduly burden the right to pre-viability abortion because its officials confirmed that the ban applied only to PBAs performed after viability.[198] Second, the state had a strong interest in disallowing a new procedure that resembled infanticide and thereby to regulate professional medical ethics:[199]

> [T]he Court substitutes its own judgment for the judgment of Nebraska and some 30 other States . . . . The decision nullifies a law expressing the will of the people . . . . The State chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human

192. *See id.* at 920–21 (footnote omitted) (first citing Roe v. Wade, 410 U.S. (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); and then citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228).
193. *Id.* at 929–38.
194. *See id.* at 936–38.
195. *Id.* at 930, 938–46.
196. *See id.* at 951–52 (Ginsburg, J., concurring).
197. *See id.* at 952–1020 (dissenting opinions).
198. *Id.* at 957, 965–79 (Kennedy, J., dissenting).
199. *Id.* at 956–64, 970–72, 979.

> life, while the State still protected the woman's autonomous right of choice . . . . The Court closes its eyes to these profound concerns.[200]

Third, *Casey* nowhere required deference to every doctor's discretionary judgment that their preferred abortion method would be marginally safer—a novel "health" exception that would negate all state efforts to regulate or prohibit any abortion procedure, contrary to *Casey*'s recognition of the government's interest in affirming the value of fetal life.[201]

Justice Thomas, joined by Justice Scalia and the Chief Justice, agreed that the Court had not correctly applied *Casey*, but clarified why he had dissented in that case:[202]

> [T]he *Casey* plurality opinion was constructed . . . out of whole cloth. The ["undue burden"] standard [it] set forth . . . has no historical or doctrinal pedigree. The standard is the product of its authors' own philosophical views about abortion, and it . . . has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the [*Roe*] standard it purported to replace.[203]

Similarly, Justice Scalia assailed the majority for rendering a judgment

> not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is "undue"—*i.e.*, goes too far.
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> . . . .
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> . . . [I]t is really quite impossible for us dissenters to contend that the majority is *wrong* on the law . . . . The most that we can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law. And those who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the *application* of *Casey*, but with its *existence*. *Casey* must be overruled.
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> . . . .
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> . . . [T]his Court, armed with neither constitutional text nor accepted tradition, can[not] resolve th[e] contention and controversy [over abortion] rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people–where the Constitution, by its silence on the subject, left it–and let *them* decide, State by State, whether this practice should be allowed.[204]

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200. *Id.* at 979.
201. *Id.* at 964–70.
202. *Id.* at 980–1020 (Thomas, J., dissenting).
203. *Id.* at 982.
204. *Id.* at 955–56 (Scalia, J., dissenting).

Predictably, most legal academics applauded the Court's decision.[205] The most prominent objector was Akhil Amar, a pro-choice liberal who nonetheless condemned the Court's cold, partisan polemic.[206] He especially lamented Justice Breyer's plea that pro-life Americans obey the Court merely because it has asserted a constitutional right to abortion:

> There are several problems here. First, exactly where and how and why does "the Constitution" offer this basic protection? In other words, where is the first link in the chain of proper constitutional argument, connecting *Roe*'s rules to something actually in the document? . . . [I]t is hardly a state secret that *Roe*'s exposition was not particularly persuasive, even to many who applauded its result. *Casey* built on *Roe* without ever explaining why *Roe* was right. Now *Stenberg* builds on *Casey* and *Roe*, and critics may justly feel that this is a shell game with no pea. If all sides are being invited to come together in good faith, it is hard to ask them to cohere around *Roe* simply because "this Court" keeps incanting it without justifying it constitutionally. "We shall not revisit those legal principles." Shut up, he explained. . . .
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> Second, . . . *Roe* . . . contained very little about women's equality, more about the rights of doctors, and rather a lot about privacy. But to talk about privacy is to beg the question of the moral status of the fetus. How can all be asked to come together around a discourse that fails to acknowledge the basic moral insight of one side—that the fetus is a moral entity? Even if the moral nothingness of the fetus were obvious to most right-thinking folk when the fetus is a near-microscopic clump of cells, the issue in *Stenberg* is very different—late second-trimester abortions of recognizable humans, with hands, organs, dimensions, senses, and brains.[207]

Furthermore, Professor Amar rejected any possible Equal Protection claim because, unlike the old Texas statute in *Roe*, the laws in states banning partial-birth abortion (like Nebraska) had been enacted recently through a political process in which women participated equally, and they endorsed the ban by huge margins.[208] He maintained that the Court had no constitutional justification for voiding Nebraska's policy, which protected women's abortion choice at an early stage of pregnancy but prohibited late-term abortions.[209] Finally, Amar excoriated Justices Ginsburg and

205. *See, e.g.*, *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 179, 219–29 (2000) (citing scholars who praised *Stenberg*).
206. *See* Amar, *supra* note 116, at 109.
207. *Id.* at 110 (footnotes omitted).
208. *Id.* at 111. This point is crucial, because Justice Ginsburg and her acolytes presume to speak for "women" generally, even when (as with PBA) they clearly are expressing the views of a small fraction of women.
209. *See id.* at 111–12.

Stevens for labeling as "irrational" citizens who believed that PBA uniquely denigrated human life because it mimicked infanticide.[210]

I agree with the *Stenberg* dissenters and Professor Amar, but would add two insights. First, assuming the Court in *Roe* and *Casey* legitimately replaced constitutional law with politics and ideology, the Justices should be politically savvy and design an abortion policy that has broad appeal. Public opinion polls suggest that Justice Kennedy came closest to articulating such a position: allow red states to reflect their voters' preference for childbirth, but give women freedom to choose abortion in the early months of pregnancy, and then permit governments to ban abortion at later stages.[211] This popular centrist approach explains why PBA prohibitions had such massive support, even among pro-choice advocates.[212] Throwing caution to the wind, five Justices embraced the most extreme pro-choice viewpoint: abortion on demand throughout pregnancy, by whatever procedure a physician selects, however barbaric.[213] The Court then demanded that everyone defer to its superior wisdom. It was similar to *Dred Scott*, in which the Court unsuccessfully attempted to twist the Constitution to ram the most radical pro-slavery approach down the throats of the American people.[214]

Second, the result in abortion cases often depends on a single Justice. Most pertinently, Justice Kennedy, who had previously questioned *Roe*'s constitutional analysis,[215] switched his vote at the eleventh hour in *Casey* to salvage the basic right to abortion.[216] In light of this game-changing gift to his liberal colleagues, they should at least have honored Kennedy's wishes as to PBA, a rare and ethically troubling procedure. Their refusal to do so made little practical sense and was short-sighted. Justice Breyer now had four other votes and apparently did not consider that one of those Justices might retire or die and be replaced by a hard-core conservative Republican—exactly what occurred when President George W. Bush appointed Samuel Alito to replace Justice O'Connor in 2006.[217] His 2005

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210. *Id.* at 112–13.

211. *See* Stenberg v. Carhart, 530 U.S. 958, 956–79 (2000) (Kennedy, J., dissenting); *see also* Pushaw, *supra* note 23, at 551, 553–54, 559–61.

212. *See supra* notes 186, 199–201, 208 and accompanying text.

213. *See supra* notes 192–204, 207–10 and accompanying text.

214. *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 400–54 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

215. *See supra* note 145 and accompanying text.

216. Rowland Evans & Robert Novak, *Justice Kennedy's Flip*, WASH. POST (Sept. 4, 1992), https://www.washingtonpost.com/archive/opinions/1992/09/04/justice-kennedys-flip/17eb4e0b-72f6-4678-b5bb-7a3e8f79b395/ [https://perma.cc/A22S-2SY3].

217. *Supreme Court Nominations Research Guide*, GEO. L. (Mar. 8, 2023, 10:20 AM), https://guides.ll.georgetown.edu/c.php?g=365722&p=2471098 [https://perma.cc/ERA3-ZE8A].

selection of John Roberts to succeed William Rehnquist as Chief Justice made no difference as to PBA cases, but would eventually affect the vote as to pre-viability abortion.[218]

In 2003, pro-lifers finally succeeded in persuading Congress to enact the Partial-Birth Abortion Ban Act (PBABA).[219] When a constitutional challenge to that law reached the Court in *Gonzales v. Carhart*,[220] Justice Kennedy cast the pivotal vote, and he did not bow to precedent.

2. Gonzales

Congress prohibited *all* PBAs (which might sweep in some performed on pre-viability fetuses), except where necessary to save a mother whose life was physically endangered.[221] Congress found that a health exception was not needed because "a moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[222]

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, protested in vain that the PBABA was materially identical to Nebraska's law (especially by denying a "health" exception) and that therefore *Stenberg* required striking the PBABA down to preserve women's autonomy, dignity, and equality.[223] Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, weakly distinguished the federal from the state statute[224] and ruled that the PBABA did not unduly burden a woman's right to abortion.[225] Reiterating his *Stenberg* dissent,[226] Justice Kennedy maintained that *Casey*

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218. *See infra* notes 240, 305–06, 332 and accompanying text.
219. 18 U.S.C. § 1531(a), (b) (2003).
220. Gonzales v. Carhart, 550 U.S. 169 (2007).
221. 18 U.S.C. § 1531(a).
222. *Id.* § 1531 note (Congressional findings).
223. *See Gonzales*, 550 U.S. at 169–91 (Ginsburg, J., dissenting).
224. The Court brought up two differences. First, the PBABA required delivering the whole fetus, whereas the Nebraska law also included a "substantial portion" of the fetus. *Id.* at 151–53. Second, unlike that state's law, the PBABA contained an explicit requirement that a doctor intend at the beginning of the procedure to do an overt act that kills the fetus. *Id.* at 151, 153, 155–56. However, neither of these distinctions are persuasive, particularly since the Court in *Stenberg* held that the Constitution always mandates a broad "health" (not merely a "life") exception. *See supra* Section IV.A.1.
225. *Gonzales*, 550 U.S. at 145–68.
226. *See* Stenberg v. Carhart, 530 U.S. 914, 956–79 (2000) (Kennedy, J., dissenting).

balanced the constitutional right to abortion against the government's valid interests—such as banning a procedure that looks like infanticide and thus raises profound medical and ethical concerns—which would be rendered nugatory if doctors could choose any abortion option.[227] Justices Thomas and Scalia concurred, but instead of applying precedent repeated their argument that the Court's abortion jurisprudence had no constitutional foundation.[228]

Once again, it is difficult to say which opinion was legally correct, because the "law" of abortion is a matter of case-by-case development. An originalist would agree with the concurrence. By contrast, the dissent appealed to "living constitutionalists" who would have rigorously applied *Stenberg*, including most elite legal academics and commentators.[229] However, a clear majority of Americans (including most women)[230] would be unlikely to subscribe to Justice Ginsburg's notion that prohibiting a single, and rare, late-term abortion procedure posed a dire threat to women's liberty and equality—or that such an abortion has no more moral salience than clipping one's toenails. By contrast, Justice Kennedy's majority opinion captured mainstream American public opinion. His modest decision did not even technically overrule *Stenberg*, much less question *Roe* or *Casey*. He simply stated that elected representatives could express their constituents' revulsion at an offensive late-term abortion procedure.[231]

Gonzales revealed that a change in Court personnel could alter results in abortion cases, as the only pertinent difference from *Stenberg* was that Justice Alito had replaced Justice O'Connor. Again, however, those cases involved only a tiny fraction of abortions.[232] The basic constitutional right to abortion seemingly became entrenched when President Barack Obama appointed two pro-choice Justices, Sonia Sotomayor (in 2009) and Elena Kagan (in 2010), to replace the similarly minded Justices Souter and

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227. *Gonzales*, 550 U.S. at 145–46, 159–67.

228. *Id.* at 168–69 (Thomas, J., concurring).

229. *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 816, 837–38 (2007); Jack M. Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843, 854 (2007).

230. *See supra* notes 183–86, 199–201, 204, 207–12 (describing the overwhelming public consensus that partial-birth abortion should be prohibited, even among those who supported a woman's right to choose earlier in pregnancy).

231. *Gonzales*, 550 U.S. at 141, 145, 156–60, 163.

232. *See Stenberg*, 530 U.S. at 923–24, 929 (documenting that only about ten percent of abortions were performed after the first trimester, and that only a small fraction of them involved partial-birth abortion).

Stevens.[233] Indeed, during the next decade, the Court twice reaffirmed *Roe* and *Casey*.

B. Invalidating State Restrictions on Abortion Providers

In *Whole Women's Health v. Hellerstedt*,[234] Justices Sotomayor, Kagan, Kennedy, and Ginsburg joined Justice Breyer's opinion striking down a Texas law that required (1) abortion clinics to have hospital-grade facilities, and (2) doctors who performed abortions to have admitting privileges in a hospital no more than thirty miles away.[235] The Court held that this law imposed an "undue burden" on a woman's right to abortion by sharply reducing the availability of this service, which outweighed the dubious benefits to women's health asserted by Texas.[236] Chief Justice Roberts and Justices Thomas and Alito dissented.[237]

After President Donald Trump appointed conservative Republican Justices Neil Gorsuch in 2017 and Brett Kavanaugh in 2018,[238] it appeared likely that they would join the three *Hellerstedt* dissenters in upholding a Louisiana statute that was virtually identical to Texas's. However, in the 2020 case of *June Medical Services v. Russo*,[239] Chief Justice Roberts broke with his conservative colleagues. He wrote a dispositive solo opinion explaining that stare decisis compelled him to follow *Hellerstedt* and join the judgment—albeit not the strident pro-abortion rhetoric and the "benefits vs. burdens" balancing test of the four liberals.[240] Although a four-year-

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233. Barry J. McMillion, Cong. Rsch. Serv., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 18 (2022).

234. Whole Women's Health v. Hellerstedt, 579 U.S. 582 (2016).

235. *Id.* at 607–27.

236. *Id.* at 609–27.

237. *Id.* at 628–43 (Thomas, J. dissenting); *id.* at 644–84 (Alito, J,, dissenting, joined by Roberts, C.J. & Thomas, J.).

238. Adam Liptak, *Kavanaugh and Gorsuch, Justices with Much in Common, Take Different Paths*, N.Y. TIMES (May 12, 2019), https://www.nytimes.com/2019/05/12/us/politics/brett-kavanaugh-neil-gorsuch.html [https://perma.cc/686X-MQTS].

239. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

240. *See id.* at 2112–33 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ.); *id.* at 2133–42 (Roberts, C.J., concurring); *see also* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 SUP. CT. REV. 277 (arguing that, starting in the 1990s, pro-lifers began to publicly justify state laws limiting abortion as intended to protect women's health rather than to save the unborn—a subterfuge designed to push women into the traditional role of motherhood and thereby roll back the Court's recognition of women as full citizens with constitutional rights to equality and liberty).

old opinion by a bare majority applying a vague standard that had no constitutional basis should not have had much precedential force, what likely alarmed the Chief Justice was that state legislatures and federal judges had defied *Hellerstedt* and thereby questioned the Court's authority. Nonetheless, *June Medical* hardly halted such legal challenges, which ultimately succeeded.

V. *DOBBS* AND THE DEATH OF *ROE*

The demise of *Roe* brings to mind the following dialogue in Ernest Hemingway's *The Sun Also Rises*. "'How did you go bankrupt?'" Bill asked . . . . Mike said: "'Gradually, then suddenly.'"[241]

From one perspective, *Roe* eroded gradually. Since the Reagan Administration (1981–1989), Republican Presidents have promised to appoint anti-*Roe* judges. They did so successfully with Antonin Scalia, Clarence Thomas, and Samuel Alito, but miscalculated with Sandra Day O'Connor, Anthony Kennedy, David Souter, and John Roberts. Thus, *Roe* endured, albeit in *Casey*'s diluted form. In September 2020, however, the ground suddenly shifted when Justice Ginsburg died and was replaced by the staunchly conservative Amy Coney Barrett.[242]

A. A Legal Analysis of Dobbs

One of the laws that directly conflicted with *Roe* and *Casey* was a Mississippi statute banning abortions after fifteen weeks.[243] In *Dobbs v. Jackson Women's Health Organization*,[244] Justice Alito wrote for the majority to uphold this law and overrule *Roe* and *Casey*.[245] Chief Justice Roberts and Justices Thomas and Kavanaugh each issued concurring opinions,[246] while Justices Breyer, Sotomayor, and Kagan authored a Joint Dissent.[247] Instead of summarizing these five opinions separately, I will

241. ERNEST HEMINGWAY, THE SUN ALSO RISES 141 (1926).

242. *See* Shiam Kannan, *Amy Coney Barrett's Appointment is a Victory for Judicial Restraint*, CORNELL REV. (Oct. 10, 2020), https://www.thecornellreview.org/amy-coney-barretts-appointment-is-a-victory-for-judicial-restraint/ [https://perma.cc/5R65-PM4Z]; *see also* Earl Michael Maltz, *The Long Road to* Dobbs, 50 HASTINGS CONST. L.Q. 3 (2023) (discussing the complex political considerations and historical contingencies that influenced the President's nominees and the Senate's treatment of each candidate).

243. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

244. *Id.* at 2228.

245. *Id.* at 2240–85.

246. *Id.* at 2300–04 (Thomas, J., concurring); *id.* at 2304–10 (Kavanaugh, J., concurring); *id.* at 2310–17 (Roberts, C.J., concurring in the judgment).

247. *Id.* at 2317–50 (Breyer, Sotomayor & Kagan, JJ., dissenting).

weave in their main points in the course of evaluating each major legal source that the Justices considered: the Constitution's language; historical understandings; structural principles like federalism; and precedent.

1. The Constitution's Text

Justice Alito began by emphasizing that the Constitution does not mention abortion.[248] He declared that "*Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed:"[249] the Fourteenth Amendment's reference to "liberty;" its incorporation of various First, Third, Fourth, and Fifth Amendment freedoms against the states; or the Ninth Amendment's reservation of rights to the People.[250] Nor did the Court's more recent oblique nod to the Equal Protection Clause fill this textual lacuna.[251] As Justice Thomas observed: "That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search for a constitutional justification."[252]

The dissenters could not, and did not, claim that the Constitution *as written* conferred a right to abortion. Rather, as discussed below, they based that right on evolving constitutional concepts of liberty and equality, as interpreted by the modern Court.[253]

2. Historical Understandings

The Joint Dissent conceded Justice Alito's point that the framers and ratifiers of the Fourteenth Amendment did not think they were granting a right to abortion.[254] He acknowledged, however, that the Due Process Clause included certain fundamental rights and liberties not expressly listed in the Constitution, but only if they were "'deeply rooted in our history and

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248. *Id.* at 2240, 2242, 2244–45, 2266–67 (majority opinion).
249. *Id.* at 2265; *see also id.* at 2245 ("[*Roe*'s] message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance.").
250. *Id.* at 2245, 2265.
251. *Id.* at 2245–46.
252. *Id.* at 2303 (Thomas, J., concurring).
253. *See id.* at 2317–50 (Breyer, Sotomayor & Kagan, JJ., dissenting).
254. *Id.* at 2323–25.

tradition' and . . . essential to our Nation's 'scheme of ordered liberty.'"[255] Justice Alito concluded that abortion did not meet this test because from 1789 until the late 1960s, no federal or state constitution, statute, or case recognized a right to abortion.[256] On the contrary, all states followed English common law in making abortion unlawful, and from 1868 (the Fourteenth Amendment's ratification date) until 1973, three-quarters of the states criminalized abortion at all stages of pregnancy.[257]

Countering that the men behind this Amendment had no concern for women's rights, Justices Breyer, Sotomayor, and Kagan extended the historical inquiry past 1868.[258] For example, the Nineteenth Amendment granted women the right to vote in 1920; the feminist movement flowered in the 1960s; and the Court in the early 1970s reinterpreted the Equal Protection Clause as prohibiting discrimination based on sex.[259] The dissenters argued that in light of these changed political, legal, social, and economic circumstances, the Court in *Roe* and *Casey* had correctly read the Constitution as promoting women's liberty and equality by guaranteeing their right to choose abortion.[260]

Justice Alito conceded that contemporaneous historical understandings might not necessarily define the outer limits of Fourteenth Amendment "liberty."[261] Nonetheless, he noted with approval the Court's extreme reluctance to recognize any new "liberty" interest because that word had over 200 possible meanings, so that without historical context judges would tend to confuse their personal notions of "liberty" with what the Due Process Clause protects.[262] Justice Alito maintained that the majority of Justices in *Roe* and *Casey* (and the Joint Dissent) had made exactly this mistake in finding that a right to abortion was part of the Constitution's framework of "ordered liberty," which included making certain choices central to privacy, autonomy, and dignity.[263] The Court held that, since abortion was not a fundamental "liberty" interest, state abortion regulations needed only a "rational basis," which included a desire to protect unborn lives.[264] Finally, Justice Alito rejected an amici's Equal Protection argument on the ground that the Court had held that a state's regulation of a subject that

255. *Id.* at 2246 (majority opinion) (quoting Timbs v. Indiana, 139 S. Ct. 682, 689 (2019)).
256. *Id.* at 2240, 2244, 2246–60, 2266.
257. *Id.* at 2241, 2248–56, 2259–60, 2267.
258. *Id.* at 2323–33 (Breyer, Sotomayor & Kagan, JJ., dissenting).
259. *Id.* at 2324–25, 2328–33.
260. *Id.* at 2317–44.
261. *Id.* at 2257–58 (majority opinion).
262. *Id.* at 2247–48.
263. *Id.* at 2240–43, 2246–62, 2265–75.
264. *Id.* at 2283–84.

affected only one gender (like pregnancy) was not a sex-based classification subject to heightened scrutiny unless it reflected invidious discrimination —which the goal of preventing abortion did not.[265]

Justice Alito's historical analysis was generally correct, but requires further elaboration. In *Casey*, the Court identified Due Process Clause "liberty" as the source of the right to abortion.[266] Instead of applying its longstanding doctrine under that provision, however, the majority in *Casey* came up with two novel approaches, which the *Dobbs* Joint Dissent valiantly but unsuccessfully tried to rationalize.

First, the dissenters' repetition of the assertion that a right to abortion was an element of "ordered liberty" did not make it so—and hardly substituted for the additional required showing that this right was deeply rooted in American history and tradition. Admittedly, Justices Breyer, Sotomayor, and Kagan cited historians who have disputed Justice Alito's conclusion that English and early American common law prohibited abortion before quickening.[267] Even if these scholars were correct, however, that would merely indicate that some states would not criminally punish such early abortions—not that there was a constitutional right to them, and certainly not that there was a right that extended much later to the point of viability. Furthermore, if abortion over the first five or six months of pregnancy had a firm historical basis, it is inconceivable that the vast majority of states would have made this procedure a crime for a century afterward.

Second, the Joint Dissent echoed the *Casey* concurrence in declaring that Due Process "liberty" also included "equality," which blended together to encompass notions of dignity and autonomy.[268] The Fourteenth Amendment, however, distinguishes "liberty" (in the Due Process Clause) from "equality" (in the Equal Protection Clause). The latter clause should have been more attractive to the dissenters because it does not require evidence that the equality right has deep historical roots. On the contrary, the Equal Protection Clause originally did not prohibit states from discriminating against females at all.[269] It was only in the early 1970s that the Court abandoned that historical

265. *Id.* at 2244–46.
266. *See supra* notes 140–41, 143–44, 151, 176 and accompanying text.
267. *Dobbs*, 142 S. Ct. at 2323–24 (Breyer, Sotomayor & Kagan, JJ., dissenting).
268. *See id.* at 2317–20, 2323, 2329–30, 2333.
269. *See* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161–64.

meaning and extended heightened "intermediate" scrutiny to such laws, which had to be "substantially related" to an "important" government interest.[270]

Accordingly, whether abortion is an aspect of women's constitutional equality depends entirely on modern jurisprudence. On this point, Justice Alito relied on one prior case to conclude that a state's regulation of a medical procedure that affected only one sex (like abortion) did not amount to harmful discrimination.[271] That decision is logical. For example, a state's regulation of testicular cancer surgery does not violate equality principles merely because it applies only to men.

However, Justice Alito's invocation of precedent was selective, as the rest of his opinion explained why he would not follow *Roe* and *Casey*. Moreover, he did not adequately address the dissenters' contention that abortion laws (particularly bans) did not merely regulate a medical operation, but at least partly reflected hostility to women's equal rights.[272] Unfortunately, the dissenters were stuck in *Casey*'s Procrustean Due Process bed, which forced them to focus on "liberty" instead of making a formal Equal Protection claim.[273] That buried argument would have been that Mississippi's ban on abortion—like earlier discrimination against women in government benefits, employment, and education—did not substantially relate to an important state interest (protecting women's health and general well-being). The response would have been that the statute significantly advanced the state's important interest in protecting the fetus (a human life distinct from the mother), which differentiates this regulation from previous laws that negatively affected women (and no one else) who sought equal job opportunities, schooling, or benefits.

As usual, the Justices' different analyses depended heavily on a nonlegal question: Does a fetus have an independent moral status as a human being? The majority answered yes, the Joint Dissent no. But the overarching fact is that no one who framed, ratified, or implemented the Fourteenth Amendment for over a century thought it conferred a right to abortion. Consequently, rather than trying to massage that history, the dissenters would have been better off concentrating solely on a "living Constitution" argument: Whatever a bunch of long-dead guys might have intended or understood, in modern America constitutional "liberty" and "equal protection of laws" should be construed as granting women a right to abortion.[274]

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270. *Id.* at 164–72.
271. *See Dobbs*, 142 S. Ct. at 2245–46.
272. *See id.* at 2324–25, 2329–30, 2333 (Breyer, Sotomayor & Kagan, JJ., dissenting).
273. *See id.* at 2317, 2319–23, 2326–33.
274. One commentator has faulted the Court for failing to examine the Fourteenth Amendment's drafting and ratification records to establish that its original public meaning

3. Constitutional Structure

Justice Alito ruled that, because the Constitution neither explicitly nor impliedly conferred a right to abortion, its democratic and federalist structure left this issue to the state-by-state political process.[275] Therefore, a majority of Justices had previously erred by imposing their personal, moral, social, and economic philosophies to strike their preferred balance between a woman's interest in abortion and the fetus's life, instead of allowing elected state representatives to make such policy judgments according to their citizens' wishes.[276] Indeed, far from resolving the national debate over abortion, *Roe* and *Casey* had inflamed and prolonged it, as even Justice Ginsburg recognized.[277] Justice Kavanaugh echoed these points and characterized the Constitution as "neutral" on abortion and hence as leaving this issue to the democratic process,[278] but he added that not only the states but Congress could address this issue.[279] Justices Breyer, Sotomayor, and Kagan denied that the Court acted "neutrally" by leaving abortion to politicians, many of whom would take sides against women who wished to have an abortion.[280]

The divergent *Dobbs* opinions about constitutional structure flowed from the Justices' different perspectives about the validity of creating rights not mentioned in the Constitution or implicit in light of historical norms. The majority of Justices took a dim view and concluded (correctly, in my view) that the Court had illegitimately made up a right to abortion, and accordingly returned this subject to the political process—where the Constitution had appropriately left it in the 185 years before *Roe*.[281] By contrast, the dissenters believed that the Court had properly given fresh meaning to hallowed constitutional concepts like liberty and equality, and

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did not include a right to abortion. *See* Michael L. Smith, *Abandoning Original Meaning*, 86 ALB. L. REV. 43 (2023). However, no Justice or reputable legal historian has ever cited any such contemporaneous evidence (and I have found none), and it is farfetched to claim that Americans in 1868 implicitly granted a right to abortion, then made its exercise a crime. *See supra* notes 8–9, 82–84, 95–96, 158, 254–65 and accompanying text.

275. *Dobbs*, 142 S. Ct. at 2240, 2257–59, 2261, 2265–66, 2276–77, 2279, 2283–84.

276. *See id.*

277. *Id.* at 2279–81 (citing Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992)).

278. *Id.* at 2304–10 (Kavanaugh, J., concurring).

279. *Id.* at 2305.

280. *Id.* at 2328–29 (Breyer, Sotomayor & Kagan, JJ., dissenting).

281. *See supra* notes 249–52, 263, 275–79 and accompanying text.

that therefore the right to abortion—like any other individual constitutional right—was not subject to the whims of voters.[282]

Dobbs potentially raised another important issue of constitutional structure. Justice Alito reiterated the traditional conservative position that federalism principles dictated that abortion, like all controversial social and moral issues, be left to the states.[283] Justice Kavanaugh asserted, without explanation, that Congress could also regulate abortion.[284] The constitutional source of Congress's power to do so is not clear, and the Court has never addressed this issue.[285] In 2022, the Democratic-controlled House proposed codifying a national right to abortion,[286] and a later Republican-majority Congress may do the opposite. Under established Commerce Clause doctrine, Congress probably has power to regulate abortion because it is economic activity that, considered in the aggregate nationwide, "substantially affects" interstate commerce.[287] Nonetheless, Congress would be unwise to exercise such power because enshrining either the pro-choice or pro-life position by statute would generate the same ill will that the Court created when it nationalized abortion by judicial decree: shutting out half of all Americans from participating in the debate.

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282. *See supra* notes 253, 258–60, 268, 272–73, 280 and accompanying text.

283. *See supra* notes 275–76, 281 and accompanying text.

284. *See Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring).

285. In *Gonzales v. Carhart*, 550 U.S. 169 (2007), the Court simply assumed Congress had the power to prohibit partial-birth abortion, and neither party litigated this issue. From a practical standpoint, the majority of five conservative Republicans had no incentive to question Congress's power because they sought to uphold this ban and thus eviscerate *Stenberg*. *See supra* Section IV.A.2.

However, the current Court might well raise that question if a liberal Congress nationalizes abortion rights. If the Court faithfully applied existing law, the likeliest result would be that Congress can regulate all types of abortion under the Commerce Clause as "economic activity" that exerts a "substantial effect" on interstate commerce. *See* United States v. Lopez, 514 U.S. 549, 551–68 (1995). I reach a similar conclusion, albeit through originalist methodology. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 8–67 (1999) (demonstrating that this Clause, as originally understood, authorized Congress to regulate the sale of property and services and all related activities geared towards the market that have out-of-state impacts); *id.* at 149–50 (applying this framework to argue that Congress can enact legislation on abortion, such as protecting abortion clinics as commercial enterprises); *see also* Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. LEGIS. 319, 322–23, 345–53 (2005) (concluding that the Commerce Clause allows federal regulation of abortion procedures).

286. *See* Amy B. Wang & Eugene Scott, *House Passes Bills to Codify Abortion Rights and Ensure Access*, WASH. POST (July 15, 2022, 1:42 PM), https://www.washingtonpost.com/politics/2022/07/15/house-abortion-roe-v-wade/ [https://perma.cc/FSQ5-834U].

287. *See supra* note 285 and accompanying text.

4. *Precedent*

The relevance of precedent had two facets. First, should the Court have adhered to the *Roe* line of cases? Second, if not, should other Substantive Due Process decisions be reconsidered?

a. *Prior Abortion Cases*

The Joint Dissent's strongest legal argument was that stare decisis counseled following the precedent set in *Roe* and reaffirmed in decisions like *Casey* and *Hellerstedt*.[288] Justice Alito countered that the Court had often overruled precedent and should do so in this instance for four reasons—all disputed by the dissenters.[289]

First, the majority deemed *Roe* "egregiously wrong" and badly reasoned, as the Court circumvented the democratic process to make up a right to abortion that had no basis in the Constitution.[290] Indeed, even prominent pro-choice scholars like John Hart Ely, Laurence Tribe, Mark Tushnet, and Phillip Bobbitt had lamented *Roe*'s weak constitutional analysis.[291] *Casey* then compounded the error by drawing an arbitrary line at viability, inventing an "undue burden" test for pre-viability abortions, and demanding that all Americans accept its ruling.[292] Justices Breyer, Sotomayor, and Kagan responded that the Court in *Roe* had appropriately recognized women's basic "liberty" interest in choosing abortion and had subsequently buttressed this holding by emphasizing the centrality of abortion to women's constitutional equality.[293] These three Justices argued that no legal or factual changes had occurred since 1973 that would provide the special justification necessary to overturn such longstanding precedent, as contrasted with the massive social, economic, and legal shifts that warranted the Court's reversing course to uphold progressive legislation in 1937 and to end states' racial

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288. *Dobbs*, 142 S. Ct. at 2317–20, 2333–50 (Breyer, Sotomayor & Kagan, JJ., dissenting).
289. *Id.* at 2244, 2261–80 (majority opinion).
290. *Id.* at 2240–41, 2265–72.
291. *Id.* at 2270 (citations omitted).
292. *Id.* at 2241–42, 2265–66, 2271–72; *see also id.* at 2279–81 (reiterating this argument and noting that the Court's prediction that *Casey* would finally resolve the abortion debate had not come true, and that continuing to reaffirm that case would simply prolong bitter political disputes).
293. *Id.* at 2317–47 (Breyer, Sotomayor & Kagan, JJ., dissenting).

segregation in 1954.[294] The dissenters, however, never defended Justice Blackmun's opinion in *Roe*, which had been based on physician-patient privacy. Rather, they reiterated the *Casey*/*Stenberg* position that *Roe* should be affirmed simply because it was precedent.

Second, Justice Alito maintained that the "undue burden" standard was unworkable because it was fatally vague and depended entirely on a judge's subjective feeling that a particular state regulation of abortion did or did not go too far.[295] The Joint Dissent replied that the Court often set forth flexible standards rather than rules, and that judges had been applying *Casey* for three decades without any major difficulties.[296] But the dissenters failed to identify a constitutional source for the "undue burden" test.

Third, Justice Alito noted that *Roe* and its progeny had negative effects on other areas of law.[297] For example, the Court had distorted its ordinary First Amendment freedom of expression doctrine in the context of abortion protests.[298] Justices Breyer, Sotomayor, and Kagan did not address this problem.[299]

Fourth, *Roe* and *Casey* had not created substantial reliance interests, unlike precedent protecting concrete property or contract rights.[300] The Joint Dissent replied that women had come to rely heavily on their constitutional right to abortion, which was critical not only to their personal autonomy but also to their economic and social well-being.[301] In contrast to precedent protecting decisions already made which required significant investment of resources with a long time horizon (such as purchasing property or getting

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294. *Id.* at 2334–43.

295. *See id.* at 2242, 2272–75 (majority opinion). *See generally* Clark D. Forsythe & Rachel N. Morrison, *Stare Decisis, Unworkability, and* Roe v. Wade*: An Introduction*, 18 AVE MARIA L. REV. 48 (2020) (arguing that *Roe* and *Casey* had proved unworkable because (1) their standards were vague; (2) the Court appointed itself national manager of abortion procedures, but lacked the expertise and resources to do so (especially because there is no objectively reliable national system of abortion data); and (3) the Court adopted an extreme rule (abortion on demand up to twenty-four weeks, and easily obtainable thereafter because of the broad "health" exception) that conflicted with scientific evidence about fetal development, public opinion, and international norms).

296. *Dobbs*, 142 S. Ct. at 2334–37 (Breyer, Sotomayor & Kagan, JJ., dissenting).

297. *Id.* at 2275–76 (majority opinion).

298. *Id.* at 2276; *see also id.* at 2303–04 (Thomas, J., concurring) (reiterating this point and adding that *Roe* had had the devastating impact of enabling sixty-three million abortions).

299. Thus, they likely concluded that this issue was trivial and designed to distract attention from the central fact that the Court was overruling *Roe* and *Casey*.

300. *Dobbs*, 142 S. Ct. at 2276–78.

301. *See id.* at 2334–35, 2343–47 (Breyer, Sotomayor & Kagan, JJ., dissenting); *see also* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023) (contending that women had both tangible and intangible reliance interests in expecting the Court to adhere to *Roe* and *Casey*).

married), cases recognizing an abortion right produced no significant reliance, except for the small number of women who became pregnant before *Dobbs* and wanted to obtain an abortion in a state that then banned the procedure.[302] Even in *Casey*, the Court admitted that women could "take virtually immediate account of any sudden restoration of state authority to ban abortions."[303]

The Court acknowledged the dissenters' concern that overturning *Roe* would elicit a public outcry, but emphasized its duty to make principled constitutional decisions without worrying about political fallout.[304] Conversely, Chief Justice Roberts proposed a transparently political compromise: modifying rather than overruling *Roe* and *Casey* by reaffirming a constitutional right to abortion, but only to the point where a woman had a "reasonable opportunity" to make this choice (as Mississippi's fifteen-week period did) rather than extending this time to fetal viability (around twenty-three weeks).[305] He did not persuade any of his colleagues, likely because his novel "reasonable opportunity" standard had no basis in either the Constitution itself (the majority's lodestar) or precedent (the Joint Dissent's preferred law, which treated viability as critical).[306]

302. *See Dobbs*, 142 S. Ct. at 2276.

303. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

304. *Dobbs*, 142 S. Ct. at 2278–79. The dissenters argued that the controversy swirling around *Roe* and *Casey* was a reason to reaffirm those cases. *See id.* at 2347–48 (Breyer, Sotomayor & Kagan, JJ., dissenting).

305. *Id.* at 2310–17 (Roberts, C.J., concurring in the judgment).

306. *See Casey*, 505 U.S. at 846; *see also* Eric R. Claeys, Dobbs *and the Holdings of* Roe *and* Casey, 20 GEO. J.L. & PUB. POL'Y 283, 287–92, 296–98, 327–28 (2022) (demonstrating that Roberts's "fair opportunity" theory would rewrite *Roe*, *Casey*, and many other cases, which unequivocally held that the Constitution allows women to obtain abortions until viability and hence would dictate striking down the Louisiana statute); Sherif Girgis, *Two Obstacles to (Merely) Chipping Away at* Roe *in* Dobbs (Aug. 19, 2021) (unpublished manuscript) (available at https://ssrn.com/abstract=3907787 [https://perma.cc/E2B7-PUEQ]) (accurately predicting that Roberts would try to kick the can down the road by narrowing, but not eliminating, the right to elective abortion through a malleable "fair opportunity" test, but explaining why sound judicial reasoning required the Court to either invalidate the state law or wholly overturn that precedent). *See generally* Sherif Girgis, *Misreading and Transforming* Casey *for* Dobbs, 20 GEO. J.L. & PUB. POL'Y 331 (2022) (explaining why Roberts's approach would completely alter *Casey*'s usage of the phrase "undue burden," which applied not to bans but rather to regulations that made it too hard to get an abortion).

b. Other Substantive Due Process Cases

Justice Thomas contended that the Due Process Clause does not confer any substantive legal rights, and that the Court's past creation of them—starting in *Dred Scott*—amounted to illegitimate policymaking.[307] Accordingly, he not only denounced *Roe* but also urged the Court to reconsider *Griswold* and more recent cases recognizing the constitutional freedom of consenting adults to engage in sodomy and enter same-sex marriages.[308] The dissenters agreed with Justice Thomas that *Dobbs* logically imperiled all Substantive Due Process cases, which had held that the Constitution granted people autonomy to make certain intimate decisions that were beyond government control.[309]

Justice Alito responded that those precedents were categorically different because only abortion raised the profound moral question of destroying a human life.[310] Justice Kavanaugh concurred that *Dobbs* left these other cases untouched, and he added that no state could prohibit its residents from traveling to another state to get an abortion.[311]

Justice Alito's distinction based on the unique nature of abortion, while sensible, is a matter of fact rather than law.[312] There is no legally principled reason to overrule *Roe* on the ground that the Court made up a constitutional right to abortion to enact its policy preferences, yet leave intact the case upon which *Roe* rested: *Griswold*, in which a majority of Justices likewise invented a right of privacy not contained in the Constitution but that aligned with their vision of wise policy.

Nonetheless, *Griswold* will almost surely survive simply because these days so few Americans believe that states should ban contraception.[313] Similarly, *Lawrence* is likely safe not because of the quality of its legal analysis, but rather because the public overwhelmingly objects to the

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307. *Dobbs*, 142 S. Ct. at 2300–04 (Thomas, J., concurring).
308. *Id.* at 2301.
309. *Id.* at 2319–32 (Breyer, Sotomayor & Kagan, JJ., dissenting).
310. *Id.* at 2257–61, 2265, 2268, 2277–78, 2280, 2284 (majority opinion).
311. *Id.* at 2309 (Kavanaugh, J., concurring).
312. To be sure, cases involving an act taken by one person or two consenting adults that affect only them are genuinely different from abortion, where the woman's choice fatally harms a non-consenting third party, the fetus. But the Constitution does not address any of these situations.
313. *See* Frank Newport, *Americans, Including Catholics, Say Birth Control Is Morally OK*, GALLUP (May 22, 2012), https://news.gallup.com/poll/154799/Americans-Including-Catholics-Say-Birth-Control-Morally.aspx [https://perma.cc/3CQW-HT46].

government invading the bedrooms of adults.[314] Finally, *Obergefell* will probably stand because, since 2015, hundreds of thousands of same-sex marriages have been legally entered, and as a practical matter it would be impossible for the Court to nullify such marriages in states that (without *Obergefell*) would ban them.[315] These examples suggest that, although the majority in *Dobbs* insisted that popular opinion has no place in analysis of the Constitution, they understood that at some point Americans will rebel if certain precedents are overturned.[316]

B. Dobbs *and the Dubious Value of Stare Decisis (And Law Generally) in Constitutional Cases*

Dobbs illustrates that stare decisis in constitutional law is so malleable as to be almost useless as a constraint on decision-making. The Justices on both sides marched through four factors—whether the prior decision was plainly wrong, unworkable, negatively affecting other legal doctrines,

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314. *See LGBT Rights*, GALLUP, https://news.gallup.com/poll/1651/.-.-rights.aspx#!mn-topics [https://perma.cc/EG9B-3N5E] (stating that 79% of Americans believe gay or lesbian relations between consenting adults should be legal).

315. *See* Scottie Andrew, *Same-Sex Weddings Have Boosted Economies by $3.8 Billion Since Gay Marriage Was Legalized Five Years Ago this Month, a New Study Says*, CNN: BUS. (June 2, 2020, 4:05 PM), https://www.cnn.com/2020/06/02/economy/same-sex-weddings-3-billion-trnd/index.html [https://perma.cc/CHH4-TWQK] ("[T]here are 513,000 married same-sex couples in the United States, and 293,000 of them got married after June 2015.").

316. Two professors have argued that *Dobbs* was not radical but rather modest: The Court applied conventional legal analysis, left the abortion issue to the democratic process, and did not question other Substantive Due Process cases. *See* Steven F. Hayward & John Yoo, *What the* Dobbs *Draft Opinion Doesn't Do*, NAT. REV. (June 1, 2022, 6:30 AM), https://www.nationalreview.com/2022/06/what-the-dobbs-draft-opinion-doesn't-do/ [https://perma.cc/S83E-KFTX]. However, these scholars faulted Justice Alito for failing to advance an alternative constitutional theory to explain why those other unenumerated rights should remain intact, such as by grounding a right to engage in intimate activities that do not harm others in the Fourteenth Amendment Privileges or Immunities Clause. *Id.*

But if the Court has a duty to expound the Constitution based on its text, structure, and history, it makes little sense to shift rights made up under the Due Process Clause to another constitutional provision that is also silent about such rights. For instance, the phrase "privileges or immunities" had a specific legal meaning to those who drafted and ratified it: certain well-established civil rights, which did not include use of contraceptives, engaging in sodomy, or same-sex marriage. *See generally* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014). Hence, those cases are distinguishable only because of the fact that such actions, unlike abortion, do not directly harm third parties.

or inducing reliance—and came to opposite conclusions.[317] As all of these criteria require subjective judgments, one cannot say with any confidence which side was right.

This vagueness has resulted from the Court's clumsy attempt to graft stare decisis—a rule designed by English common law judges to foster self-restraint as they gradually developed legal doctrine case-by-case, always subject to legislative override—onto constitutional decision-making.[318] This transplantation might have worked if the Court had functioned as originally intended. Most famously, Alexander Hamilton argued that federal judges—appointed based on their great legal knowledge and integrity, and granted independence to ensure their "impartial administration of the laws"—would not exercise an "arbitrary discretion" but rather would steadfastly discharge their duty by, among other things, only disregarding government acts that were at "irreconcilable variance" with the Constitution (such as *ex post facto* laws).[319] Cases decided based on such faithful legal exposition would become binding precedent.[320] Hamilton assured skeptics that impeachment was a "complete security" to punish any judge who abused his power by engaging in "deliberate usurpations" of legitimate legislative authority.[321]

Alas, impeachment quickly faded as a check on Justices' dubious constitutional rulings, and after the Washington Administration only a few Justices (like Holmes, Brandeis, and Cardozo) were chosen for their peerless legal skill and integrity rather than largely for political reasons.[322] Not surprisingly, these political appointees often formed a majority and exercised an "arbitrary discretion" to strike down laws that did not conflict with the Constitution, but rather with their own views. Stare decisis does not require adherence to such decisions, but only to those that reflected a

317. *See supra* Section V.A.4.

318. *See* Pushaw, *supra* note 23, at 521–29, 577–91.

319. *See* THE FEDERALIST NO. 78, at 522–30 (Jacob E. Cooke ed., 1961). For a comprehensive analysis of the Founders' expectations concerning Article III courts, see Pushaw, *supra* note 172, at 398, 417–27.

320. *See* THE FEDERALIST NO. 78, at 529–30 (Alexander Hamilton); *see also* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 472–79, 489–504, 523–25, 527–28 (1994) (explaining that the proper exercise of "judicial power" would generate applicable precedent).

When Hamilton discussed the binding effect of "precedent," it is unclear whether he was referring to the duty of inferior federal courts to follow Supreme Court case law or to stare decisis (i.e., the practice of a high court following its own past decisions), or both.

321. THE FEDERALIST NO. 81, at 545–46.

322. Admittedly, some of these political appointees went on to become great Justices, like John Marshall (who had almost no formal legal education and was a legislator and Secretary of State) and Joseph Story, who was legally astute but appointed at the tender age of thirty-two.

reasonable exposition of the written Constitution.[323] That is why many Justices have emphasized that stare decisis has the least force in constitutional cases.[324]

This doctrine can fairly be characterized as a last resort, invoked by judges (like the *Dobbs* dissenters) who cannot credibly defend a previous Court decision as a correct interpretation of the Constitution's language, structure, and history. Although both Republican and Democratic appointees invoke stare decisis selectively, it is especially ironic for liberal Justices (and their scholarly acolytes) to now demand fealty to stare decisis, since they have championed Warren Court decisions that discarded precedent wholesale in almost every major area of constitutional law.[325]

Indeed, stare decisis often presents that very contradiction: asking Justices to adhere to a prior case that itself defied precedent. In the past, several Justices sincerely did so. The most pertinent example is Justice Stewart, who dissented from the *Griswold* Court's creation of a right to use contraception,[326] yet eight years later joined the majority in extending that right in *Roe* simply because he felt bound by *Griswold*.[327] Justice Kennedy, who at the eleventh hour switched his vote in *Casey* to avoid overturning *Roe*,[328] might be cited as a more recent example. However, he and the other concurring Justices (O'Connor and Souter) did not faithfully comply with *Roe*, but rather rewrote major portions of that opinion.[329] Nor did Justice Kennedy have a more general commitment to stare decisis, as evidenced

323. *See* Paulsen, *supra* note 81, at 436–37 (arguing that our Constitution requires judges to faithfully interpret and apply—not revise—that document, and that therefore the judicial practice of stare decisis cannot preclude rejection of past decisions that the Court concludes conflict with what the actual Constitution provides).

324. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022).

325. *See* Pushaw, *supra* note 23, at 522–28, 577–91. Looking forward, I doubt that the *Dobbs* dissenters' passionate defense of stare decisis will lead Justices Sotomayor and Kagan to faithfully follow *Dobbs* in later cases.

326. Griswold v. Connecticut, 381 U.S. 479, 527–31 (1965) (Stewart, J., dissenting).

327. *See* Roe v. Wade, 410 U.S. 113, 167–68 (1973) (Stewart, J., concurring), *overruled by Dobbs*, 142 S. Ct. 2228.

328. *See* Evans & Novak, *supra* note 216.

329. *See supra* notes 150–55, 161, 174–80 and accompanying text.

by his majority opinion in *Lawrence v. Texas* (overruling *Bowers v. Hardwick*)[330] and his unprecedented decision in *Obergefell*.[331]

Just as Justice Kennedy in *Casey* claimed to uphold *Roe* but replaced its analysis with a new "undue burden" standard, so too Chief Justice Roberts in *Dobbs* purported to reaffirm *Casey* but dreamed up a novel "reasonable opportunity to choose abortion" test.[332] The difference is that the Chief Justice could not persuade any of his colleagues to join his opinion. The same thing happened in the other landmark case during his tenure, when he switched his vote under political pressure and patched together a transparently political opinion to sustain the Affordable Care Act.[333] He also likes to "distinguish" prior cases in dubious ways (often by confining them to their facts) to avoid overruling them—a practice that Justice Scalia accurately deemed "faux judicial restraint."[334] In short, Chief Justice Roberts is on a self-defeating mission of attempting to convince the American public that the Court impartially applies the law by writing opinions that can only be explained in political, rather than legal, terms.[335]

The foregoing state of affairs seems to confirm the insights of the many legal scholars who over the past century have rejected the traditional image of judges neutrally interpreting and applying the law. Examples include Legal Realism, Critical Legal Studies, political science literature concluding that judges seek to rationally maximize their policy preferences, and psychological studies showing that judges suffer from familiar problems that negatively affect rational decision-making generally.[336] Although modern Justices never mention such scholarship, they may subconsciously

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330. *See* Lawrence v. Texas, 539 U.S. 588, 562–79 (2003); *id.* at 586–606 (Scalia, J., dissenting) (contending that the majority should not have overruled the Court's correct decision seventeen years before in *Bowers* that the Constitution did not confer a right to engage in consensual sodomy, and noting that Justice Kennedy had abandoned his paean to stare decisis in *Casey*).

331. *See generally* Obergefell v. Hodges, 574 U.S. 1118 (2015).

332. *See Dobbs*, 142 S. Ct. at 2310–17 (Roberts, C.J., concurring).

333. *See* Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government Have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 1994–99, 2019–33, 2045–53 (2013) (describing Roberts's implausible conclusion that the Act's imposition of a "penalty" against Americans who failed to purchase health insurance, which Congress had expressly (and unlawfully) enacted under its Commerce Clause power, could also be re-characterized as a "tax" and thus sustained as an exercise of Congress's plenary Taxing Clause power).

334. *See* FEC v. Wis. Right to Life, 551 U.S. 449, 499 n.7 (2007) (Scalia, J., concurring) (criticizing Roberts for his "obfuscation" in purporting to distinguish, rather than honestly overrule, the leading case dealing with First Amendment limits on campaign-finance reform laws).

335. *See* Pushaw, *supra* note 333, at 1996–99, 2026–30, 2042–53.

336. *See* Pushaw, *supra* note 23, at 524–27, 584–85.

have internalized it insofar as they have eschewed black-letter rules in favor of developing flexible standards that can be applied on a case-by-case basis to reach results deemed just and practical.[337] This common law approach can be defended as enabling the Court to account for both case facts and for larger legal, political, social, and economic trends.[338]

The downside of such freewheeling jurisprudence is that most Americans (and their elected representatives) feel that politics and ideology drive constitutional law, and that therefore only results matter. Consequently, Supreme Court nominations focus not on a candidate's legal skill and qualifications, but rather on his or her political, ideological, and religious views.[339] Since the Reagan Administration, the crucial question has been: "Will you overrule *Roe*?" The one nominee who answered honestly, Robert Bork, got destroyed.[340] Learning that lesson, Clarence Thomas, John Roberts, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett replied vaguely that they had no political agenda, would fairly apply the law, and respected precedent.[341] The beauty is that all of these statements could be true and yet not preclude voting to overturn *Roe*. Again, stare decisis does not always require following any particular case, and a Justice committed to apolitically following the law of the actual Constitution would join the *Dobbs* opinion.[342]

In fact, only such Justices can restore the basic concept that "We the People" ratified a supreme and fundamental law that establishes the structure

337. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 36–81 (1992).

338. *See* Pushaw, *supra* note 23, at 524–27, 584–85.

339. *See* Jack M. Balkin, *Abortion, Partisan Retrenchment, and the Republican Party*, Yale L. Sch. Pub. L. Rsch. Paper (forthcoming 2023) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4215863# [https://perma.cc/LVM4-EBB5]) (maintaining that *Roe* could be overturned only when Republican Presidents appointed a majority of Justices who were "movement conservatives" such as Antonin Scalia and Clarence Thomas, rather than moderate Republicans like Sandra Day O'Connor and Anthony Kennedy).

340. *See* Edward Walsh, *In the End, Bork Himself Was His Own Worst Enemy*, WASH. POST (Oct. 24, 1987), https://www.washingtonpost.com/archive/politics/1987/10/24/in-the-end-bork-himself-was-his-own-worst-enemy/761dcecb-4c18-4eb9-a374-4ca8ceb796a7/ [https://perma.cc/42K9-6ELT].

341. *See* Harold Maass, *Did SCOTUS Judges Lie about* Roe v. Wade*—or Just Use 'Careful Lawyerly Phrasing*,' WEEK (June 30, 2022), https://theweek.com/roe-v-wade/1014722/did-conservatives-lie-about-roe-v-wade-in-their-confirmation-hearings [https://perma.cc/VW22-GTU7].

342. *See supra* Section V.A.4.

of our government and the individual rights that We wish to protect—and the related idea that We (not five Justices) can amend the Constitution through Article V. Yet the reception of *Dobbs* suggests that this rehabilitation project will be exceedingly difficult, and probably impossible.

C. The Reaction to Dobbs

Americans' response to *Dobbs* (which started with the leak of Justice Alito's opinion on May 2, 2022) mirrored political and ideological fault lines.[343] Pro-choice liberals—Democratic politicians and their shock troops in the academy, media, entertainment, and corporations—almost uniformly condemned the decision,[344] with Akhil Amar again the most notable exception.[345] Their main argument (repeated *ad nauseam* on social media) was that conservative Republican pro-life Justices had abandoned the Constitution as interpreted since *Roe* and instead imposed their political, ideological, religious, and moral views.[346]

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343. *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/ [https://perma.cc/88RJ-8VD2] (finding that 70% of Republicans agreed with *Dobbs*, whereas 82% of Democrats disapproved).

344. For the analysis of the leading scholar in this field, see Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023) (arguing that *Dobbs* illustrates that originalism is not an objective, value-neutral method of interpretation, but rather is a form of "living constitutionalism" that makes contested claims about history and tradition to advance the conservative Republican political agenda, which has always identified overruling *Roe* as its central goal).

345. *See* Akhil Reed Amar, *The End of* Roe v. Wade, WALL ST. J. (May 14, 2022), https://www.wsj.com/articles/the-end-of-roe-v-wade-11652453609 [https://perma.cc/WGN3-GTZW] (maintaining that, contrary to the accusations of his fellow pro-choice Democrats, *Dobbs* was not "illegitimate or improperly political" because (1) *Roe* had no grounding in the Constitution itself or in longstanding American traditions (such as the unique legal protection afforded marriage); and (2) the Court has often reversed prior egregious misinterpretations of the Constitution).

346. *See* Coan, *supra* note 92, at 2–6, 10–38 (summarizing and criticizing this reigning orthodoxy). Professor Coan points out that liberals have long maintained that constitutional law depends on morality—including the moral judgment in *Roe* and *Casey* that abortion is critical to women's liberty and equality. *Id.* at 3–5, 13, 18, 22, 33–42, 52–53. Consequently, liberals cannot coherently claim that *Dobbs* is lawless or illegitimate simply because it reflected the different moral view of the current majority of Justices that abortion is akin to murder. *See id.* at 2–3, 10–43, 50–53. In *Dobbs*, both the majority and dissent made plausible legal arguments, which ultimately implicated each side's different moral convictions. *See id.* at 3–6, 12–43, 52–53; *see also* Cass R. Sunstein, Dobbs *and the Travails of Due Process Traditionalism* (Harv. Pub. L. Working Paper No. 22-14, 2022), https://ssrn.com/abstract=4145922 [https://perma.cc/9BYG-77NL] (contending that (1) the *Dobbs* Court's "history and tradition" approach to identifying unenumerated Due Process Clause rights

Admittedly, the *Dobbs* majority did decline to follow the Constitution as construed in the *Roe* line of cases, but stare decisis does not compel adherence to erroneous precedent.[347] Indeed, it is telling that no reputable legal analyst who has criticized *Dobbs* has done so based on a full-throated defense of Justice Blackmun's opinion in *Roe*.[348] Similarly absent is a persuasive explanation of how *Casey*'s analysis, particularly the "undue burden" test, flows from the written Constitution. Rather, the consensus seems to be that the result in *Roe* and *Casey* corresponds with elite political opinion on abortion, so there must be a right to it somewhere in the Constitution.[349]

Moreover, the conservative ideological analogue to *Roe* would not be overruling it and returning abortion to the political arena, but rather replacing *Roe* with a new constitutional doctrine recognizing that the Due Process and Equal Protection Clauses protect unborn children as "persons" and thus prohibit all abortions.[350] Two renowned legal philosophers, John Finnis and Robert George, have long made this argument (with far more historical support than Justice Blackmun mustered in *Roe*) and summarized it in a *Dobbs* amicus brief.[351] Yet the Court's conservatives (even Justice

cannot be reconciled with a lot of precedent, and (2) this Clause protects certain interests that are fundamental to self-determination, which may or may not include abortion).

347. *See supra* notes 289–92, 300, 323–24, 342 and accompanying text.

348. *See* Richard W. Garnett, *Anti-Catholic Attacks After Dobbs*, FIRST THINGS (June 29, 2022), https://www.firstthings.com/web-exclusives/2022/06/anti-catholic-attacks-after-dobbs#print [https://perma.cc/S5D9-3SA3] (observing that *Dobbs*'s angry critics have not defended *Roe*'s reasoning, but rather have asserted that (1) the mere fact that the Court imposed its sweeping pro-abortion fiat fifty years ago should be enough to sustain the decision, and (2) the Catholic Justices in *Dobbs* acted solely upon their religious beliefs, even though they based their decision on constitutional law and returned the issue to the democratic process, where a variety of religious and secular perspectives would be considered).

349. *See supra* notes 2–3, 34–36, 68–98, 156–66, 171–82, 203–14, 229, 343–46 and accompanying text.

350. The Court rejected this argument, made by Texas, in *Roe v. Wade*, 410 U.S. 113, 156–57 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

351. *See* Brief of *Amicus Curiae* Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners, *Dobbs,* (No. 19-1392) (July 29, 2021); *see also* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 14–15, 35 (2013) (concluding that this position has a sound, albeit not irrefutable, constitutional basis). Although the Finnis/George idea might seem extreme, *Roe* and *Casey* recognized a right to abortion for *any* reason, which logically includes eugenics (e.g., solely because of the fetus's sex, race, or disability). If that result seems heinous, it must be because the fetus is not an "it," but rather a recognizably human being—a common-sense realization

Scalia) have never gone that far, and the *Dobbs* majority merely held that the Constitution leaves abortion to the democratic process.[352] The few constitutional law scholars who are conservatives have consistently followed a similar line of reasoning (often for decades)[353] and hence endorsed *Dobbs*.[354]

Accordingly, after *Dobbs* states can still have liberal laws—including those that are anathema to social conservatives, such as late-term abortions and taxpayer funding of the procedure.[355] That result respects constitutional democracy, unlike the Court's demand in *Roe*, *Casey*, and *Stenberg* that

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that eviscerates the legal and moral assumptions underlying the Court's pre-*Dobbs* abortion jurisprudence. *See* Paulsen, *supra* note 81, at 415–21, 425–36 (showing that many advocates, as late as the early 1970s, supported legalizing abortion for eugenic reasons, including to reduce the Black population). *But see* Khiara Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 25–27, 31–65 (2022) (asserting that *Dobbs* injures Black women because they are (1) far more likely to seek abortion because of poverty that itself reflects structural racism; (2) less likely to travel out-of-state to obtain an abortion; (3) more likely to die in states that prohibit abortion; and (4) more likely to face criminal penalties for violating state anti-abortion laws).

352. *Dobbs*, 142 S. Ct. at 2242–43, 2283–84. This limited holding reflects the view that some states allowed abortion after the Fourteenth Amendment's ratification, and no one thought to argue that such laws violated the right of fetuses as "persons" within the meaning of that Amendment. *See* Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091 (2023) (making this point, and also claiming that the Court significantly over-counted the number of states that had totally banned abortion as of 1868); *but see* John Finnis and Robert B. George, *Equal Protection and the Unborn Child*, 45 HARV. J.L. & PUB. POL'Y 927, 969–75 (2022) (questioning Tang's historical analysis).

353. The most prolific such author has been Mike Paulsen, who over the past three decades has written numerous scholarly articles and popular essays on the constitutionality of abortion, many of which I have cited.

354. *See, e.g.*, Garnett, *supra* note 348; John O. McGinnis, *A Return to Fundamentals*, CITY J. (May 3, 2022), https://www.city-journal.org/a-return-to-fundamentals [https://perma.cc/N8XS-DWWZ] (praising Justice Alito for promoting the rule of law by rooting his analysis in the original meaning of the Constitution's text, not precedents that reflected the Justices' notions of good policy); O. Carter Snead, *The Leak Shows Why Abortion Policy Should Be Returned to the States*, WASH. POST (May 5, 2022), https://www.washingtonpost.com/opinions/2022/o5/05/overturn-roe-politics-state-legislatures/ [https://perma.cc/CND4-CH9V]; Jonathan H. Adler, *Sherif Girgis on the Draft* Dobbs *Opinion and Its Critics*, REASON: VOLOKH CONSPIRACY (May 26, 2022), https://reason.com/volokh/2022/05/26/sherif-girgis-on-the-draft-dobbs-opinion-and-its-critics/ [https://perma.cc/LMN4-V4EA] (providing a wide-ranging defense of *Dobbs*). Professor Calabresi has argued that a genuinely originalist decision in *Dobbs* would have rested its correct conclusion that there is no right to abortion on the Privileges or Immunities Clause, not on Substantive Due Process. *See* Steven Calabresi, *The True Originalist Answer to* Roe v. Wade, WALL ST. J. (May 9, 2022), https://www.wsj.com/articles/the-true-originalist-answer-to-roe-v-wade-11652027903 [https://perma.cc/H882-63Z7].

355. Space constraints preclude me from examining the many state laws that have been enacted in the wake of *Dobbs*.

all Americans must submit to the pro-choice view because a majority of Justices said so, with no plausible constitutional explanation.

VI. CONCLUSION

Dobbs mercifully ended the Court's fifty-year quest to locate a right to abortion in a Constitution that does not contain one. Relying on the *Griswold* Court's perception of a right of privacy lurking in the shadows of various constitutional provisions, a majority of Justices in *Roe* discovered a right to abortion in either the Due Process Clause or the Ninth Amendment. The Court in *Casey* fabricated a unique form of stare decisis that conceded *Roe*'s lack of a genuine constitutional justification, purported to reaffirm it while significantly altering its analysis, and admitted its decision was motivated by fear of political and public blowback. The Court applied *Casey*'s "undue burden" test in *Stenberg* to strike down a ban on partial-birth abortion, then reached the opposite conclusion in *Gonzales*, but somehow without overruling *Stenberg*. The *Casey* standards proved similarly elastic in reviewing other abortion regulations.

In *Dobbs*, four Justices sought to continue this impressionistic, case-by-case approach. By contrast, the majority treated the Constitution (not the United States Reports) as the supreme law. The *Dobbs* Court carefully interpreted the written Constitution—its words, history, structure, and implementing practice and precedent for over a century—and held that it does not confer a right to abortion, but rather leaves this issue to the political process. The Court explained why its methodology and conclusions comported with the judiciary's proper constitutional role.

Unfortunately, most Americans lack even a basic understanding of our constitutional system, much less of the Court's appropriate function. Relatedly, very few citizens, political and legal officials, or commentators actually read the Justices' opinions.

But it is not merely widespread ignorance that has created this sad state of affairs—and led people to judge the Court's decisions not based on their legal reasoning but on their results. For many decades, too many Justices have arrogantly imposed their policy views onto the Constitution instead of faithfully interpreting it. A Court that has politicized constitutional law should not be surprised that citizens and their elected representatives believe that it will—and indeed should—continue this practice. And no issue has inflamed the public more than abortion. The average American only knows about the Justices because of their confirmation hearings, which have become a political and media circus focused on abortion.

The foregoing factors explain why so many pro-choice Americans have responded so vehemently, and sometimes violently, to *Dobbs*. The current majority of Justices have the unenviable job of withstanding relentless political and media pressure if they wish to restore traditional constitutional interpretation.