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## The Dobbs Effect: Abortion Rights in the Rear-View Mirror and the Civil Rights Crisis that Lies Ahead

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## THE *DOBBS* EFFECT: ABORTION RIGHTS IN THE REAR-VIEW MIRROR AND THE CIVIL RIGHTS CRISIS THAT LIES AHEAD

TERRI DAY\* & DANIELLE WEATHERBY\*\*

### ABSTRACT

*On June 24, 2022, seven weeks after the first-ever leak of a draft opinion, the United States Supreme Court circulated its decision in Dobbs v. Jackson Women’s Health Organization, defying stare decisis, overruling fifty years of precedent, and shattering the hopes of millions of Americans, who wished the leaked opinion was a fiction that would never come to be.*

*As the leaked draft forewarned, Roe v. Wade is no longer the law of the land. No longer is a woman’s right to terminate a pregnancy—to exercise bodily autonomy and be free to control the*

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*trajectory of her life—protected as a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. This sea change in the Court’s Fourteenth Amendment substantive due process jurisprudence raises serious questions about the viability of stare decisis and the future of those fundamental civil rights that are not explicitly named in the Constitution.*

*With abortion rights now in the country’s rear-view mirror, this Essay examines the Court’s historic opinion, which calls into question the legitimacy of other substantive due process implied rights, and exposes the majority’s “history and tradition” justification for abolishing a constitutional right as mere pretext. It also offers insight into the legal, practical, and societal complications that lie ahead. Of course, no one has a crystal ball; however, as Justices Breyer, Sotomayor, and Kagan said in their dissent, “no one should be confident that this majority is done with its work.”*

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## INTRODUCTION

In early May 2022, the nation was rocked to its core when a draft of a majority opinion in *Dobbs v. Jackson Women's Health Organization* was published on Politico<sup>1</sup> in the first-ever leak from the United States Supreme Court. The ninety-eight-page draft revealed the Supreme Court's intent to overturn *Roe v. Wade*, extinguishing the constitutional right to an abortion.<sup>2</sup> Even after Chief Justice Roberts confirmed the authenticity of the leaked draft,<sup>3</sup> legal scholars, women's rights advocates, and the public at large were in disbelief, shocked that the Court would even contemplate reversing a fifty-year-old precedent that secured women the right to bodily autonomy in reproductive decisions.<sup>4</sup> The public held out hope, choosing to believe that the leaked draft was a mistake, that one of the five justices joining the majority would reconsider, or that it was nothing more than a thought experiment. Yet on June 24, 2022, seven weeks after the leak of the draft opinion, the Supreme Court circulated its decision in *Dobbs v. Jackson Women's Health Organization*, defying stare decisis; overruling *Roe v. Wade* and its progeny, *Planned Parenthood v. Casey*;<sup>5</sup> and shattering the hopes of millions of Americans, who wished the leaked opinion was a fiction that would never come to be.

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1. Politico Staff, *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 5, 2022, 9:20 PM), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> [<https://perma.cc/PAD4-QN4D>].

2. *Id.*

3. Kevin Breuninger, *Supreme Court Says Leaked Abortion Draft is Authentic; Roberts Orders Investigation Into Leak*, CNBC (May 3, 2022, 2:40 PM), <https://www.cnn.com/2022/05/03/supreme-court-says-leaked-abortion-draft-is-authentic-roberts-orders-investigation-into-leak.html> [<https://perma.cc/S8US-JU5G>].

4. See, e.g., Shannon Augustus, *League of Women Voters Responds to Leaked Supreme Court Opinion in Dobbs v Jackson Women's Health Organization*, LEAGUE OF WOMEN VOTERS (May 3, 2022), <https://www.lwv.org/newsroom/press-releases/league-women-voters-responds-leaked-supreme-court-opinion-dobbs-v-jackson> [<https://perma.cc/G4AC-66HX>]; Russ Feingold, *The Leaked Dobbs Opinion is a Call to Action*, AM. CONST. SOC'Y (May 3, 2022), <https://www.acslaw.org/inbrief/the-leaked-dobbs-opinion-is-a-call-to-action/> [<https://perma.cc/RPA6-5Z5R>]; HRC Staff, *HRC Statement on Leaked Draft of Supreme Court Opinion in Dobbs v. Jackson*, HUM. RTS. CAMPAIGN (May 3, 2022), <https://www.hrc.org/press-releases/hrc-statement-on-leaked-draft-of-supreme-court-opinion-in-dobbs-v-jackson> [<https://perma.cc/28S8-NUWA>].

5. 142 S. Ct. 2228 (2022).

As the leaked draft forewarned, *Roe* would no longer be the law of the land.<sup>6</sup> No longer would a woman's right to terminate a pregnancy—to exercise bodily autonomy and be free to control the trajectory of her life—be protected as a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution.<sup>7</sup> No longer would states be prohibited from encroaching on this constitutional right. This sea change in the Court's Fourteenth Amendment substantive due process jurisprudence raises serious questions about the viability of *stare decisis* and the future of those fundamental civil rights that are not explicitly named in the Constitution.

This Essay will proceed in two parts. First, it will examine the *Dobbs* Court's reasoning, including the three concurrences and the dissenting opinion of Justices Breyer, Sotomayor, and Kagan. Forty years ago, a new political coalition coalesced around the goal of transforming the Court to roll back the expansion of substantive due process and the implied rights that stemmed therefrom.<sup>8</sup> The movement knew that to mobilize the religious right, its focus should be on the abortion issue and overturning *Roe*.<sup>9</sup> A majority of justices now sitting on the Court have adopted an originalist reading of the Constitution. This majority can “impose a certain

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6. *Id.* at 2284-85.

7. *Id.* at 2318 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (“[Y]esterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected ‘[t]he ability of women to participate equally in [this Nation's] economic and social life.’ But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare.” (internal citation omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

8. See Ilyse Hogue, *A “Woodstock” for Right-Wing Legal Activists Kicked off the 40-year Plot to Undo Roe v. Wade*, *THE INTERCEPT* (May 10, 2022, 1:45 PM), <https://theintercept.com/2022/05/10/roe-v-wade-federalist-society-religious-right/> [<https://perma.cc/EL3H-NV9T>].

9. See, e.g., Katherine Stewart, *How the Christian Right Took Over the Judiciary and Changed America*, *THE GUARDIAN* (June 25, 2022, 3:00 AM), <https://www.theguardian.com/world/2022/jun/25/roe-v-wade-abortion-christian-right-america> [<https://perma.cc/W3S6-8WZS>]; Randall Balmer, *The Real Origins of the Religious Right*, *POLITICO MAG.* (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133/> [<https://perma.cc/BSB5-LD2T>].

moral and religious vision”<sup>10</sup> on substantive due process jurisprudence. Indeed, this is precisely what the *Dobbs* Court achieved. Second, this Essay will explain some of the possible, far-reaching consequences of this tectonic decision. This Essay does not intend its discussion of these consequences as a rant or an alarmist “parade of horrors”; instead, it presents a realistic foreshadowing of what is to come. Of course, no one has a crystal ball; however, as the dissenting Justices said, “no one should be confident that this majority is done with its work.”<sup>11</sup>

### I. THE GUTTING OF SUBSTANTIVE DUE PROCESS IMPLIED RIGHTS

As with other constitutionally protected rights, women’s reproductive rights have never been absolute.<sup>12</sup> In its petition for certiorari, Mississippi first asked the U.S. Supreme Court to “clarify whether abortion prohibitions before viability are always unconstitutional.”<sup>13</sup> According to Chief Justice Roberts, after the Court granted certiorari, “Mississippi changed course.”<sup>14</sup> It appears that Mississippi perpetrated a “bait and switch” on the

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10. Stewart, *supra* note 9.

11. *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

12. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (upholding reasonable limitations on the abortion decision after the first trimester and allowing the states to regulate abortion “in ways that are reasonably related to maternal health”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming *Roe* and confirming “the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health”); *see also Katz v. United States*, 389 U.S. 347, 374 (1967) (Black, J., dissenting) (noting the Fourth Amendment’s limited scope and that “[n]o general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy”); *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (reiterating that the right to keep and bear arms under the Second Amendment “was not unlimited, just as the First Amendment’s right of free speech was not” (citing *United States v. Williams*, 553 U.S. 285 (2008))); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) (reaffirming that the “[l]iberty of speech, and of the press, is also not an absolute right” (quoting *Near v. Minnesota ex. rel. Olson*, 283 U.S. 697, 708 (1931))); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.”).

13. *Dobbs*, 142 S. Ct. at 2313 (Roberts, C.J., concurring).

14. *Id.*

Court, which the majority of the Court gladly welcomed. Instead of reconsidering the viability rule first articulated in *Roe* and reaffirmed in *Casey*, the Court overruled *Roe* and *Casey* in their entirety, completely abandoning the central holding of those cases and stripping women of their constitutional right to terminate a pregnancy.<sup>15</sup>

Chief Justice Roberts, always the champion of the principle of judicial restraint,<sup>16</sup> called the Court's decision to overrule *Roe* and *Casey* "a serious jolt to the legal system."<sup>17</sup> Despite his cautious approach to deciding constitutional questions, it remains unclear whether Chief Justice Roberts would have overruled *Roe* and *Casey* at some point in the future. Criticizing the Court for "overruling *Roe* all the way down to the studs," Chief Justice Roberts opined that the Court should have disentangled the viability standard from the right itself, which is what Chief Justice Roberts did in his concurrence.<sup>18</sup> Consistent with his incremental approach, he said that the Court could "leave for another day whether to reject any right to abortion at all."<sup>19</sup>

Justice Alito's majority opinion varied little from the early draft leaked to the public weeks before.<sup>20</sup> The three major takeaways of

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15. *Id.* at 2283-85.

16. *See, e.g., id.* at 2310-13 (Roberts, C.J., concurring) (explaining that he "would take a more measured course" on the issue of abortion and follow a "simple yet fundamental principle of judicial restraint, ... [by] begin[ning] with the narrowest basis for disposition, [and] proceeding to consider a broader one only if necessary to resolve the case at hand."); *see also* Adam Liptak, *Angering Conservatives and Liberals, Chief Justice John Roberts Defends Steady Restraint*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/chief-justice-john-roberts-defends-steady-restraint.html> [<https://perma.cc/DDH4GEKX>]; Sabrina Willmer, *The Chief Stands Alone: Roberts, Roe and a Divided Supreme Court*, BL (June 25, 2022, 7:33 AM), <https://news.bloomberglaw.com/us-law-week/the-chief-stands-alone-roberts-roe-and-a-divided-supreme-court> [<https://perma.cc/VV88-3CZ2>].

17. *Dobbs*, 142 S. Ct. at 2316 (Roberts, C.J., concurring).

18. *Id.* at 2314-15 ("My point is that *Roe* adopted two distinct rules of constitutional law: one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the State's legitimate interests when the fetus is viable outside the womb. The latter is obviously distinct from the former. I would abandon that timing rule, but see no need in this case to consider the basic right.")

19. *Id.* at 2314.

20. *See* Erin Spencer Sairam, *How The Supreme Court's Ruling on Dobbs Compares to The Leaked Draft*, FORBES (June 24, 2022, 6:15 PM), <https://www.forbes.com/sites/erinspe>



the majority opinion are that: (1) history and tradition do not support an implied right to terminate a pregnancy as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment; (2) stare decisis is not an inexorable command, and the factors to consider when ignoring stare decisis weighed in favor of overruling *Roe*; and (3) the controversial nature of the right to terminate a pregnancy, laden with moral considerations and the states' interest in protecting prenatal life, counsel in favor of returning the issue to the states and the people.<sup>21</sup>

A significant portion of the majority opinion attacks the substantive due process standard for recognizing a right not expressly mentioned in the Constitution as a fundamentally protected right. It is undisputed that the right to terminate a pregnancy is an implied right, meaning it is not explicitly mentioned in the Constitution.<sup>22</sup> In 1965, the Court considered two Connecticut statutes that criminalized the use of contraceptives and the counseling of contraceptive use related to family planning.<sup>23</sup> The landmark decision *Griswold v. Connecticut* recognized an implied right for married couples to use contraceptives, characterized as a right of marital privacy constitutionally protected against state restrictions.<sup>24</sup> The seven justices who recognized this right could not agree on the constitutional basis for their decision. They discussed several theories: (1) the penumbra theory emanating from the First, Third, Fourth, and Fifth Amendments, protecting certain rights not mentioned in the Constitution, described as an “implied right of privacy” that gives life and substance to these rights;<sup>25</sup> (2) the Ninth Amendment’s language and history support the theory that the Framers of the Constitution believed that there were additional fundamental rights beyond the first eight rights

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ncer1/2022/06/24/how-the-supreme-courts-ruling-on-dobbs-compares-to-the-leaked-draft/  
[<https://perma.cc/5XLK-S4TP>].

21. *Dobbs*, 142 S. Ct. at 2246-48, 2280, 2337.

22. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 152 (1973) (“The Constitution does not explicitly mention any right of privacy”).

23. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

24. *Id.* at 484-86.

25. *Id.* at 484.

expressly stated in the Bill of Rights that were protected from governmental intrusion;<sup>26</sup> (3) the theory that there are certain basic values “implicit in the concept of ordered liberty” and protected under the Due Process Clause of the Fourteenth Amendment from government infringement;<sup>27</sup> and (4) the theory that there is a liberty interest protected under the Due Process Clause of the Fourteenth Amendment related to matters within the realm of family life, upon which the State cannot infringe absent substantial justification.<sup>28</sup> Eight years later, in *Roe*, the Court reiterated some of these same constitutional bases in recognizing a constitutionally protected implied right to terminate a pregnancy.<sup>29</sup> In subsequent cases involving implied rights protected under the Due Process Clause of the Fourteenth Amendment, various justices criticized the Court’s substantive due process jurisprudence as being untethered and subject to the whims of the subjective predilections of unelected, individual justices.<sup>30</sup> Chief Justice Rehnquist tried to rein in the substantive due process analysis in *Washington v. Glucksberg*, determining that there was no constitutional protection for the right to assisted suicide.<sup>31</sup> Chief Justice Rehnquist echoed Justice Harlan’s notion of fundamental rights and liberties<sup>32</sup> as those that are “implicit in

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26. *Id.* at 488-90 (Goldberg, J., concurring).

27. *Id.* at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

28. *Id.* at 502-06 (White, J., concurring).

29. 410 U.S. 113, 165 (1973).

30. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 595 (2003) (Scalia, J., dissenting) (criticizing the *Roe* Court making “no attempt to establish that this right was ‘deeply rooted in this Nation’s history and tradition’”); *Obergefell v. Hodges*, 576 U.S. 644, 720 (2015) (Scalia, J., dissenting) (lamenting that the majority’s opinion was grounded in hubris and was “unabashedly based not on law, but on the ‘reasoned judgment’ of a bare majority of th[e] Court”).

31. 521 U.S. 702, 720 (1997) (cautioning that the Court must “exercise the utmost care whenever [it is] asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” (quoting *Moore v. East Cleveland*, 431 U.S. 494 (1977) (plurality opinion))).

32. *See Poe v. Ullman*, 367 U.S. 497, 539-40 (1961) (Harlan, J., dissenting) (challenging the constitutionality of the same legislation struck down in *Griswold* because the right to privacy is a fundamental component of liberty); Andrew B. Schroeder, *Keeping Police out of the Bedroom: Justice John Marshall Harlan, Poe v. Ullman, and the Limits of Conservative*

the concept of ordered liberty.”<sup>33</sup> With the intent to further limit the substantive due process analysis, Chief Justice Rehnquist added that the fundamental right at issue must be carefully defined and “deeply rooted in this Nation’s history and tradition.”<sup>34</sup> Concluding that the “outlines [of the substantive due process jurisprudence have] never [been] fully clarified,” Chief Justice Rehnquist opined that an objective history and tradition approach providing a “careful description’ of the asserted fundamental liberty interest” might help clarify this area of the law.<sup>35</sup> While Rehnquist’s approach has become the predominant analysis for the conservative justices’ substantive due process analysis, it has not always been followed.<sup>36</sup>

Regarding this theory that implied rights must be objectively rooted in our Nation’s history and tradition, Justice Alito concluded that its application was wrongly decided, if not decided at all, in past abortion cases.<sup>37</sup> Much of the majority opinion, as well as a lengthy appendix cataloguing state laws criminalizing abortion that existed at the time of the ratification of the Fourteenth Amendment in 1868, discussed why the underpinnings of *Roe* and *Casey* were and continue to be wrong.<sup>38</sup> While Justice Alito’s opinion may have had some modicum of legal support had it been written in 1973, this train had long ago left the station. After fifty years, Justice Alito’s historical justification for overruling *Roe* is pure pretext.

The dissent elucidates the majority opinion’s fallacy. According

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*Privacy*, 86 VA. L. REV. 1045, 1054 (2000) (discussing Justice Harlan’s dissent in *Poe* and the concept of implied right of privacy and ordered liberty). *Poe* is distinguished from *Griswold* because the plurality opinion in *Poe* dismissed the case on justiciability grounds. See *Poe*, 367 U.S. at 508-09; *Griswold v. Connecticut*, 381 U.S. 483, 484 (1965).

33. *Glucksberg*, 521 U.S. at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)) (setting out the substantive-due-process analysis standard). The concept of fundamental rights and liberties that are implicit in the concept of ordered liberty was first articulated in *Palko*. 302 U.S. at 325 (determining those rights that are applied to the states through the Due Process Clause of the Fourteenth Amendment).

34. *Glucksberg*, 521 U.S. at 720-21.

35. *Id.* at 722-23.

36. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 593-97 (Scalia, J., dissenting) (2003); *Obergefell v. Hodges*, 576 U.S. 644, at 718-20 (Thomas, J., dissenting).

37. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240-43 (2022).

38. *Id.* at 2285-2300.

to this historical analysis, the Court must look at the language of the Constitution, specifically the word “liberty” in the Fourteenth Amendment, and apply the same meaning or understanding of that term as the ratifiers of that Amendment.<sup>39</sup> To be sure, the ratifiers of the Fourteenth Amendment were all men; women were not yet recognized as “free and equal citizens.”<sup>40</sup> The dissenting Justices distilled the majority opinion to a “core legal postulate,” which is “that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did.”<sup>41</sup>

It is dubious whether the conservative justices joining the majority opinion would cling to this constitutional principle of judicial decision-making in other contexts. In the Second Amendment context, the Court in *District of Columbia v. Heller* found an individual right to keep and bear arms based on history and tradition;<sup>42</sup> however, when it comes to deciding what type of firearms may be regulated, who can carry a firearm, under what circumstances, and in what locations, it remains to be seen whether this historical approach will apply.<sup>43</sup> Applying the reasoning employed in *Dobbs*,<sup>44</sup> any weapons not used by the militia in 1788, when the Constitution was ratified, should not be protected from government regulation, an outcome that seems unlikely given the pro-gun Conservative majority on the Court.<sup>45</sup> The hypocrisy of these irreconcilable outcomes suggests that the

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39. *Id.* at 2323 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (“[T]he majority [improperly] makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in ‘1868, the year when the Fourteenth Amendment was ratified?’”).

40. *Id.* at 2318.

41. *Id.* at 2324.

42. 554 U.S. 570, 595 (2008).

43. See Isaac Chotiner, *The Historical Cherry-Picking at the Heart of the Supreme Court’s Gun-Rights Expansion*, NEW YORKER (June 23, 2022), <https://www.newyorker.com/news/q-and-a/the-historical-cherry-picking-at-the-heart-of-the-supreme-courts-gun-rights-expansion> [<https://perma.cc/566Z-522Q>].

44. See *Dobbs*, 142 S. Ct. at 2246 (“[T]he Court has long asked whether the right is ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’” (alteration in original) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019))).

45. 45 N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (striking down a New York law that required applicants for concealed carry to show proper cause in their application and holding that “the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home”).

“history and tradition” analysis cannot be applied consistently and earnestly by the Court.

By its very nature, legal analysis grounded solely in “history and tradition” may yield untenable outcomes, and admittedly, the Court may justify different applications based on the difference between express and implied rights. Certainly, the Framers could not possibly have anticipated the internet or how the First Amendment Free Speech Clause would apply to unimagined technology. Yet it is readily accepted that the First Amendment protects internet speech. In light of the ever-changing world, the majority’s opinion, insisting that 1868 history and tradition must apply to twenty-first century reproductive rights, is nonsensical.

Next, the *Dobbs* majority justified overruling *Roe* after a cursory discussion of five factors it must consider when contemplating a departure from stare decisis.<sup>46</sup> These factors are: “the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.”<sup>47</sup> The Court discussed all five factors and concluded that they did not counsel against overruling the *Roe* and *Casey* precedents.<sup>48</sup>

Justice Alito’s discussion of stare decisis began with the interests that stare decisis serves: (1) protecting interests of those who have relied on past decisions, (2) reducing incentives for challenging settled precedents, and (3) protecting the integrity of the judicial process.<sup>49</sup> The Court concluded its analysis of stare decisis with a discussion of the third interest: protecting the integrity of the judicial process.<sup>50</sup> In addressing the concern that the public will see the *Dobbs* decision as a result of social and political pressures, Justice Alito did little to instill confidence that this decision was based on anything other than a change of justices sitting on the Court.<sup>51</sup> Harkening back to previous substantive due process cases, Justice Alito suggested that past opposition to controversial

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46. 142 S. Ct. at 2265.

47. *Id.*

48. *Id.* at 2265-78

49. *Id.* at 2261-62.

50. *Id.* at 2278-79.

51. *See id.*

implied rights cases supported the conclusion that *Dobbs* was based on principle, not politics.<sup>52</sup> Chief Justice Roberts, in his concurrence, and the dissenting Justices, exposed this thinly-veiled attempt to explain the decision as anything other than political.<sup>53</sup>

Indeed, Chief Justice Roberts accused the majority of abandoning *stare decisis* simply because they believed the cases were wrongly decided.<sup>54</sup> The dissenting Justices' criticism was more scathing. "The Court reverses course today for one reason and one reason only: because the composition of this Court has changed."<sup>55</sup> He continued: "The majority has no good reason for the upheaval in law and society it sets off."<sup>56</sup> Stating that *stare decisis* is "a doctrine of judicial modesty and humility,"<sup>57</sup> he found that the Court's opinion flouted both those qualities.

The most defensive opinion addressing *stare decisis* was Justice Kavanaugh's concurrence. This defensiveness was not surprising because during his confirmation hearing, Justice Kavanaugh assured senators and the American people that he respected *stare decisis* and recognized *Roe* as established precedent.<sup>58</sup> Nonetheless, Justice Kavanaugh submitted that, over the last 100 years, every one of the forty-eight justices who have sat on

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52. *Id.* at 2279 ("*Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* 'inflamed' a national issue that has remained bitterly divisive for the past half century. And for the past 30 years, *Casey* has done the same.... Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise 'raw judicial power'"(internal citations omitted) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in part))).

53. *See id.* at 2310-11 (Roberts, J., concurring); *id.* at 2317-18 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

54. *Id.* at 2314 (Roberts, C.J., concurring).

55. *Id.* at 2320 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

56. *Id.* at 2319.

57. *Id.*

58. Amy Wang, *Kavanaugh, Who Told Senate Roe v. Wade Was "Settled as Precedent," Signals Openness to Overturning Abortion Decision*, WASH. POST (Dec. 1, 2021, 6:59 PM), <https://www.washingtonpost.com/politics/2021/12/01/kavanaugh-who-told-senate-roe-v-wade-was-settled-precedent-signals-openness-overturning-abortion-decision/> [<https://perma.cc/B88Y-226J>]; Carl Hulse, *Kavanaugh Gave Private Assurances. Collins Says He "Misled" Her*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/roe-kavanaugh-collins-notes.html> [<https://perma.cc/NP3Y-NKF4>] (reporting that Senator Susan Collins and Senator Joe Manchin felt betrayed after Justices Kavanaugh and Gorsuch testified under oath that they respected *Roe v. Wade* as settled legal precedent).

the Court since 1921 have voted to overrule precedent.<sup>59</sup> Despite the invoked litany of overruled precedents, neither Justice Kavanaugh nor Justice Alito, in a nearly three-page footnote, acknowledge the distinct reality that no overruled precedent has ever abolished a previously-recognized constitutional right.<sup>60</sup> Even more disingenuous was Justice Kavanaugh's attempt to recast his vote to overrule *Roe* as returning the Court to a position of neutrality.<sup>61</sup> Suggesting that overruling a fifty-year precedent that established a constitutional right protecting women's bodily autonomy evidences the Court's neutrality defies logic. Neutrality would have been to maintain the *status quo*, not to unravel a fifty-year-old constitutionally protected right.

Finally, both Justice Kavanaugh's concurrence and the majority opinion praised their decisions for returning the controversial issue of abortion to the states and the people.<sup>62</sup> Justice Kavanaugh stated that the *Dobbs* decision does not outlaw abortion.<sup>63</sup> While Justice Kavanaugh's point was technically correct, the dissenting Justices countered that the federal government could ban all abortions from the point of conception with no exceptions for rape or incest.<sup>64</sup> Further, numerous states have passed "trigger laws" in anticipation of the *Dobbs* decision to ban abortion in some capacity.<sup>65</sup> Some of those state laws ban all abortions, even those that result from rape or incest, unless necessary to save the life of

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59. *Dobbs*, 142 S. Ct. at 2307 (Kavanaugh, J., concurring).

60. *See id.* at 2263 n.48.

61. *See id.* at 2306.

62. *Id.* at 2308-09.

63. *Id.* at 2305.

64. *Id.* at 2318 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

65. Jesus Jimenez, *What Is a Trigger Law? and Which States Have Them?*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html> [<https://perma.cc/AAR8-JDRE>] (explaining that, prior to the *Dobbs* decision, thirteen states had passed "trigger laws" either banning abortion completely or placing severe restrictions on abortions immediately following the publication of a Supreme Court decision overruling *Roe v. Wade*); Jessica Winter, *The Dobbs Decision Has Unleashed Legal Chaos for Doctors and Patients*, NEW YORKER (July 2, 2022), <https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients> [<https://perma.cc/C3QX-DQDX>] (explaining that in the aftermath of the *Dobbs* decision, triggering numerous state laws that ban or severely restrict abortion procedures leaves doctors and patients not knowing what is legal).



the pregnant person.<sup>66</sup> Many more states are poised to pass their own abortion restrictions, meaning half the states may deny women any reproductive rights.<sup>67</sup>

A political map of the United States published less than a week after the release of *Dobbs* paints a picture of a balkanized America.<sup>68</sup> The map highlights by color those states that have completely banned or substantially restricted abortion; those states likely to do the same in the near future; and those states that continue to protect women's right to choose, revealing geographic regions or clusters of states that have shown hostility for women's rights by banning or substantially restricting abortion.<sup>69</sup>

As the dissenting Justices pointed out, a well-settled principle of individual liberty is that the "Constitution ... puts some issues off limits to majority rule."<sup>70</sup> Speaking about core constitutional concepts of individual freedom and what it means to be an American, the dissenting justices reminded us that, as free people, we do not place decisions about private, intimate choices in the hands of majorities and government officials.<sup>71</sup> "However divisive, a right is not at the people's mercy."<sup>72</sup>

Justice Thomas's concurrence was clear and transparent. He has always maintained that the Fourteenth Amendment's Due Process Clause protects processes and procedures when individuals are subject to government infringement of life, liberty, or property.<sup>73</sup>

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66. Megan Messerly, *Abortion Laws by State: Where Abortions Are Illegal after Roe v. Wade Overturned*, POLITICO (June 24, 2022, 11:58 AM), <https://www.politico.com/news/2022/06/24/abortion-laws-by-state-roe-v-wade-00037695> [<https://perma.cc/ZEG7-PP63>]

(indicating that thirteen states enacted trigger laws for abortion restrictions if *Roe* was overturned and three states including Louisiana, Kentucky, and South Dakota will ban all abortions, except to save the life of the pregnant person).

67. *Id.*

68. Andrew Witherspoon, Jessica Glenza, Noa Yachot & Alvin Chang, *Tracking Where Abortion Laws Stand in Every State*, GUARDIAN (June 28, 2022, 6:00 AM), <https://www.theguardian.com/us-news/ng-interactive/2022/jun/28/tracking-where-abortion-laws-stand-in-every-state> [<https://perma.cc/9FTQ-H3Q7>].

69. *See id.*

70. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2320 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

71. *Id.*

72. *Id.* at 2334.

73. *Id.* at 2301 (Thomas, J., concurring).



In individual rights cases, he eschews the idea that there is a substantive component to the Due Process Clause.<sup>74</sup> In unambiguous terms, Justice Thomas stated, “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous.’”<sup>75</sup>

Writing for the majority, Justice Alito tried to dispel fears that the *Dobbs* decision would threaten the other precedents guaranteeing rights regarding contraception and same-sex intimate and marital relationships.<sup>76</sup> The majority distinguished the abortion cases from *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* because the abortion cases involved “potential life.”<sup>77</sup> Alito offered another point of reassurance: “Each precedent is subject to its own *stare decisis* analysis, and [ ] factors ... like reliance and workability are different for these cases than for our abortion jurisprudence.”<sup>78</sup> We should take little comfort from Justice Alito’s words of assurance.

As Justice Scalia said in *Lawrence v. Texas*, judges necessarily carry legal questions to their logical conclusion.<sup>79</sup> Just as *Lawrence v. Texas* paved the path for *Obergefell*,<sup>80</sup> *Dobbs* may lay the foundation to overturn long-established precedents regarding the right to contraceptives, same-sex intimacies, and marriage. In the dissent, the dissenting Justices warned of Justice Scalia’s “prophecy” in *Lawrence* that constitutionalizing same-sex intimacies would lead to same-sex marriage, cautioning that just as rights can expand, they can contract.<sup>81</sup> “[L]ogic and principle are not one-way ratchets ... because whatever today’s majority might

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74. *Id.* (reiterating the notion that “substantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution’” (alteration in original) (quoting *Johnson v. United States*, 576 U.S. 591, 607-08 (2015))).

75. *Id.*

76. *Id.* at 2257-58 (majority opinion).

77. *Id.*

78. *Id.* at 2281.

79. 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

80. *Obergefell v. Hodges*, 576 U.S. 644, 662-78 (2015) (citing the *Lawrence* decision thirteen times).

81. *Dobbs*, 142 S. Ct. at 2332 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

say, one thing really does lead to another.”<sup>82</sup>

Moreover, based on the majority’s idle reverence for *stare decisis* and its application of the five factors as justification for overruling *Roe*, Justice Alito’s off-handed statement about the other precedents weighing differently on the reliance and workability factors offers little comfort. Justice Kavanaugh’s concurrence also makes empty assurances that the public has nothing to fear with respect to those other substantive due process precedents that Justice Thomas described as “demonstrably erroneous.”<sup>83</sup> Without explanation, Justice Kavanaugh emphasized the Court’s promise that overruling *Roe* does not threaten those other precedents.<sup>84</sup> Yet he never expressly stated that he would not apply *Dobbs*’ logic and principle to the question of whether the other substantive due process/implicit rights cases should also be overruled.<sup>85</sup>

These shallow assurances that the abortion cases are different raises other concerns about the *Dobbs* majority’s reasoning. As much as the majority and Justice Kavanaugh’s concurrence deny taking a moral position on abortion, the emphasis on potential life to distinguish the abortion cases from the other precedents suggested otherwise. Indeed, the *Casey* Court criticized the *Roe* decision for its failure to give more weight to the states’ interest in potential life.<sup>86</sup> Still, the Court did not abandon the need to balance the interest to protect women’s choice and the states’ interest to protect fetal life, until *Dobbs*. Justice Kavanaugh champions the *Dobbs* decision and the fact that the Court will no longer have to weigh or balance these interests. He seems to suggest that courts should not weigh competing interests, but that is precisely what the Court does in the context of speech,<sup>87</sup> searches and seizures,<sup>88</sup>

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82. *Id.*

83. *Id.* at 2301 (Thomas, J., concurring).

84. *Id.* at 2309 (Kavanaugh, J., concurring).

85. *See id.* at 2304-10.

86. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872-75 (1992).

87. *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-73 (1942) (balancing the value of the at-issue speech against the benefit of the restriction in developing the fighting words doctrine).

88. *See, e.g.,* Katz v. United States, 389 U.S. 347, 353 (1967) (balancing individual privacy interests against the need for law enforcement to be able to keep the public safe in developing the two-part reasonable expectation of privacy test under the Fourth Amendment).

and other rights-based decisions. The *Dobbs* dissent rightfully questioned whether the majority had adopted “‘one theory of life’ [to] override all ‘rights of the pregnant woman.’”<sup>89</sup> The Court cautioned against this in *Roe*.<sup>90</sup>

By abandoning the constitutional protection for women to determine their own destiny regarding pregnancy, the Court delegated to the electorate the right to define when life begins.<sup>91</sup> This is necessarily a moral question, laden with religious values. Any legal rule premised on a Christian belief about when life begins violates the Establishment Clause because it is spawned from a religious conviction.<sup>92</sup>

Relatedly, the Court’s most recent Establishment Clause and Free Exercise Clause cases narrow the separation between church and state, perhaps foreshadowing an increasingly religious government.<sup>93</sup> Indeed, in *Carson v. Makin*, the Court struck down a tuition-assistance program that prohibited parents living in a district without a secondary school from direct taxpayer dollars to pay tuition for religious schools.<sup>94</sup> The Court determined that excluding religious schools from the benefits of the tuition assistance program was a violation of the Free Exercise Clause.<sup>95</sup> Despite the Establishment Clause’s long-held neutrality principle preventing government coercion of taxpayers to support religious training,<sup>96</sup> the Court held Maine’s program was based on parental choice, not government coercion.<sup>97</sup>

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89. *Dobbs*, 142 S. Ct. at 2320 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (quoting *Roe v. Wade*, 410 U.S. 113, 116 (1973)).

90. 410 U.S. at 132-33 (“The absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became ‘formed’ or recognizably human, or in terms of when a ‘person’ came into being, that is, infused with a ‘soul’ or ‘animated.’ A loose consensus [sic] evolved in early English law that these events occurred at some point between conception and live birth.”).

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

92. *Everson v. Bd. of Educ.*, 330 U.S. 1, 24-25 (1947).

93. See *Carson v. Makin*, 142 S. Ct. 1987, 2008 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426 (2022).

94. *Carson*, 142 S. Ct. at 2008.

95. *Id.* at 2011.

96. See, e.g., *Everson*, 330 U.S. 24-25.

97. *Carson*, 142 S. Ct. at 2011.

In a second case this term, the Court upheld the right of a high school football coach to offer silent prayer on midfield after games.<sup>98</sup> In *Kennedy*, the Court further expanded Free Exercise rights at the peril of the Establishment Clause.<sup>99</sup> The Supreme Court rejected the lower court's reasoning that the coach's free exercise and free speech rights must give way to the school district's interest in avoiding an Establishment Clause violation.<sup>100</sup> The Court repudiated the *Lemon* test and the endorsement test.<sup>101</sup> As in *Dobbs*, in these Free Exercise cases, the Court applied a "historical practices and understandings" interpretation to the Establishment Clause.<sup>102</sup>

Although an in-depth discussion of the *Carson* and *Kennedy* cases is beyond the scope of this Essay, those cases and *Dobbs* reveal a radical transformation of the newly constituted Court. If fundamental principles of liberty and freedom are reduced to historical understandings and practices, we face a future where individual rights and religious tolerance leave Americans frozen in the eighteenth and nineteenth centuries. Those rights and freedoms will be defined by majoritarian values, which tend to be white, male, heterosexual, and Christian.<sup>103</sup>

Rejoicing over the Court's recent religious freedom cases, Representative Lauren Boebert, a Republican from Colorado, said that she is "tired" of the long-standing separation between church and state in the U.S., adding that she believes "the church is supposed to direct the government."<sup>104</sup> At a "Save America" rally,

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98. *Kennedy*, 142 S. Ct. at 2433.

99. *See id.* at 2426-27.

100. *Id.*

101. *Id.* at 2428.

102. *Id.*

103. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2320 (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting) ("But, of course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation.").

104. Brad Dress, *Boebert Says She Is "Tired" of Separation Between Church and State: "The Church Is Supposed to Direct the Government,"* THE HILL (June 28, 2022, 4:52 PM), <https://thehill.com/homenews/house/3540071-boebert-says-she-is-tired-of-separation-between-church-and-state-the-church-is-supposed-to-direct-the-government/> [https://perma.cc/5QVW-CJPU].

Illinois Republican Representative Mary Miller praised the *Dobbs* decision overruling *Roe* as a “historic victory for White life.”<sup>105</sup>

Sociologists write about the “New Right” which transformed the old conservatism of the 1960s and 1970s.<sup>106</sup> As a reaction to the social changes of that time, this new conservative movement enticed the religious right to join their movement with the goal of overruling *Roe*.<sup>107</sup> Aided by the Federalist Society, which advocates for a textualist approach to statutory construction and originalist interpretation of the Constitution, these conservative forces mobilized politically to transform the federal courts and specifically the Supreme Court.<sup>108</sup>

Textualism, Justice Scalia’s hallmark contribution to constitutional law, is a well-recognized approach to statutory construction cases.<sup>109</sup> In fact, in her speech as part of the Antonin Scalia Lecture Series, Justice Elena Kagan said: “we are all

105. Dean Obeidallah, *Opinion: Her “White Life” Slip-up Spoke Volumes. What Followed Was Just as Unsettling*, CNN (June 27, 2022, 3:32 PM), <https://www.cnn.com/2022/06/27/opinions/trump-rally-roe-white-life-miller-obeidallah/index.html> [<https://perma.cc/587F-VR AE>] (later recanting her comment).

106. *See, e.g.*, Jerome L. Himmelstein, *The “New Right”: The Transformation of American Conservatism Since the 1970s*, BREWMINATE (Dec. 21, 2020), <https://brewminate.com/the-new-right-the-transformation-of-american-conservatism-since-the-1970s/> [<https://perma.cc/9MBC-H5NB>].

107. *See id.* (“The New Right made a systematic effort to reach out to new constituencies in many ways ... [for instance,] appealing to voters who were traditionally Democrats but tended to be socially conservative on specific issues, including abortion.”).

108. *See, e.g.*, Emma Green, *How the Federalist Society Won*, NEW YORKER (July 24, 2022), <https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won> [<https://perma.cc/E83N-2CMZ>].

109. *See* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 861-70 (2017) (examining Justice Scalia’s adoption of the textualist approach to judicial decision-making) (citing *Whitfield v. United States*, 135 S. Ct. 785, 789 (2015) (applying statutory text even if inconsistent with Congressional intent); *King v. Burwell*, 135 S. Ct. 2480, 2501-02 (2015) (Scalia, J., dissenting) (applying statutory text even when at odds with the statute’s purpose); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Ore.*, 515 U.S. 687, 725-26 (1995) (Scalia, J., dissenting); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101 (2012); ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 22-23 (Amy Gutmann ed., 1997).

textualists now.”<sup>110</sup> Reading modern statutes according to the words’ plain meaning as commonly understood is present focused, meaning that lawful conduct and enforcement of laws should be judged according to present-day values.

The textualist approach honors both federalism principles and separation of powers. A textual approach focuses on the words of a statute, not on the purpose, policy, or legislative intent (unless the statute is ambiguous).<sup>111</sup> If federal courts are interpreting state statutes, a plain meaning of the statutory words respects the constitutional authority for states to legislate in those areas not specifically granted to the federal government or expressly prohibited to the states.<sup>112</sup> Federal courts are less likely to impose their own policy determinations with a plain meaning approach to statutory construction. Likewise, a textual approach to reading federal statutes prevents the Court from encroaching on the legislative branch and substituting its own judgment on policy or purpose for the statute. Of course, if Congress or a state legislature thinks the Court was wrong in its interpretation, Congress or the State can amend the statute subject to judicial review.

In contrast, a “wrong” understanding of constitutional rights can only be changed by constitutional amendment<sup>113</sup> or by the Court, ignoring *stare decisis* and overruling precedent, as it did in *Dobbs*.<sup>114</sup> Now, a majority of the Court has adopted the originalist view that the Constitution must be read according to the public meaning of the written words, based on the history and traditions of the times when those words were written.<sup>115</sup> This interpretive approach protects no constitutional structural principles, such as

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110. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://youtu.be/dpEtszFTOTg> [<https://perma.cc/3389-5JDE>]; see also Diarmuid F. O’Scannlain, Remarks, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 304 (2017).

111. See Siegel, *supra* note 109, at 867.

112. See U.S. CONST. amend. IX.

113. See U.S. CONST. art. V. It is exceedingly difficult to amend the constitution. Since the adoption of the Bill of Rights in 1791, only seventeen other amendments have been adopted. See *The Constitution: Amendments 11-27*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/amendments-11-27> [<https://perma.cc/LM8A-MSE2>].

114. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242-43 (2022).

115. See, e.g., *id.*

federalism or separation of powers. Further, an originalist approach turns back substantive due process jurisprudence almost one hundred years.<sup>116</sup>

The early substantive due process cases recognized an implied parental right to make decisions about children's upbringing and education without unreasonable or arbitrary government interference.<sup>117</sup> According to those Court decisions, this parental right was protected as a liberty interest under the Due Process Clause of the Fourteenth Amendment.<sup>118</sup>

Forty years later, the Court decided *Griswold v. Connecticut*.<sup>119</sup> A majority of justices could not settle on one constitutional source to find an implied right for marital use of contraceptives; nevertheless, the Court recognized this right as a liberty interest, subject to heightened protection, under the Due Process Clause of the Fourteenth Amendment.<sup>120</sup> The Court entered a new era of substantive due process jurisprudence and required a state to show "a compelling subordinating state interest" when it infringed on such a right.<sup>121</sup> Later, the Court applied this heightened protection from government infringement on implied liberty interests in private decision-making related to contraceptives for unmarried people, abortion, intimate sexual relationships with same sex partners, and same sex marriage.<sup>122</sup>

*Dobbs* has stripped this heightened protection against government infringement for the right to terminate a pregnancy.<sup>123</sup> The Court has already said that protection of prenatal life is a compelling state interest;<sup>124</sup> so, certainly the requirement to show a legitimate state interest to satisfy rational basis, the lowest level judicial scrutiny, can be satisfied. Under this low level of judicial scrutiny, the state must only show that any abortion restriction or

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116. See *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 529 (1925).

117. *Pierce*, 268 U.S. at 534-35 (citing *Meyer*, 262 U.S. 390).

118. *Id.*

119. 381 U.S. 479 (1965).

120. *Id.* at 486.

121. *Id.* at 496 (Goldberg, J., concurring).

122. See *supra* notes 2, 24, 76-77 and accompanying text.

123. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2238, 2242-43 (2022).

124. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992).



even a total ban is reasonably related or not arbitrary and capricious to serve its interest to protect prenatal life.<sup>125</sup> It does not take a legal mind to recognize what this portends for those implied rights cases Justice Thomas labels “demonstrably erroneous.”<sup>126</sup>

Rather than define implied rights as frozen in time as the *Dobbs* majority does,<sup>127</sup> another interpretative approach understands the Constitution to be a living, breathing document, which must be read in light of changing times and societal values.<sup>128</sup> The concept that the Constitution must be read in light of the times dates back over two centuries.<sup>129</sup> Chief Justice Marshall said: “[W]e must never forget, that it is a constitution we are expounding ... intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”<sup>130</sup> Chief Justice Marshall understood that the written Constitution created a structural framework with broad concepts and undefined words that would require changing interpretations to keep up with ever-evolving times and societal values.

While the originalist view has merit as an academic theory, it is divorced from the realities of people’s everyday lives and modern society. As Justice Cardozo eloquently stated, “negligence in the air, so to speak, will not do.”<sup>131</sup> To be more than an interpretive theory, judges’ analyses of the meaning of constitutional phrases and provisions must consider the impact on people. The law must

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125. *Dobbs*, 142 S. Ct. at 2284.

126. *Dobbs*, 142 S. Ct. at 2301-02. (Thomas, J., concurring).

127. *Id.* at 2240 (majority opinion).

128. See, e.g., Jeffrey F. Addicott, *Reshaping American Jurisprudence in the Trump Era—The Rise of “Originalist” Judges*, 55 CAL. W.L. REV. 341, 346 n.20 (2019) (“Liberals and progressives believe that the Constitution is a living, breathing document that should evolve with the times. They want Supreme Court justices to be flexible in interpreting the Constitution and adapting 18th-century language to 21st-century applications.”(quoting Mark W. Hendrickson, *The U.S. Constitution: Living, Breathing Document or Dead Letter?*, FAITH & FREEDOM (May 28, 2009), <https://www.faithandfreedom.com/the-us-constitution-living-breathing-document-or-dead-letter/> [<https://perma.cc/BKK7-LTD5>]); Richard F. Duncan, *Justice Scalia and the Rule of Law: Originalism vs. the Living Constitution*, 29 REGENT U.L. REV. 9, 14 (2016)).

129. *McCulloch v. Maryland*, 17 U.S. 316, 406-07 (1819).

130. *Id.* at 407, 415 (emphasis omitted).

131. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (quoting FREDERICK POLLOCK, *TORTS* 455 (11th ed. 1920). Thank you to my colleague, Professor Chris Ogolla, who was the inspiration for this analogy.



be connected to real people and real circumstances. An interpretation of implied rights frozen in time simply “will not do.”

Finally, the dissenting opinion gives concrete examples of the consequences of overruling *Roe* and the harm that women will suffer.<sup>132</sup> These harms include increasing maternal mortality, widening disparities between Black and white women to the access and quality of health care, shattering educational and career goals, furthering the economic gap in employment in both pay and advancement, lessening the opportunities for women to gain economic independence, burdening women physically and emotionally, and creating fear of prosecution in those states that criminalize abortion.<sup>133</sup> As time passes in a post-*Dobbs* era, other harms, not yet imaginable, may surface. Whether insignificant or titanic, changes in the law often have unintended consequences.

The dissent also addressed the “societal dimension” to overruling *Roe*. “Rescinding an individual right in its entirety and conferring it on the State, an action the Court [took in *Dobbs*] for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight.”<sup>134</sup>

## II. THE CIVIL RIGHTS CRISIS THAT LIES AHEAD

Beyond the impact *Dobbs* will undoubtedly have on women’s reproductive rights, the majority failed to think through the potential consequences of such a drastic and immediate nullification of a constitutional right. The potential impacts of the *Dobbs* decision cannot be reduced to improbable hypotheticals for

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132. *Dobbs*, 142 S. Ct., at 2337 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (contemplating the “host of questions [the majority’s opinion invites] about interstate conflicts”).

133. *Id.* at 2338-39; see also Keon L. Gilbert, Gabriel R. Sanchez, and Camille Busette, *How We Rise: Dobbs, Another Frontline for Health Equity*, BROOKINGS (June 30, 2022), <https://www.brookings.edu/blog/how-we-rise/2022/06/30/dobbs-another-frontline-for-health-equity/> [<https://perma.cc/CKM7-89Q4>] (“[I]n overturning *Roe v. Wade*, the U.S. Supreme Court (SCOTUS) will now not only restrict access to reproductive health care, but will also fuel a public health syndemic, characterized by disease clusters that are shaped by social, economic, and political determinants that lead to health inequalities and injustices.”).

134. *Dobbs*, 142 S. Ct. at 2347 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

a law school classroom; they are real, immediate, and far-reaching. The dissent touched on some of the “geographically expansive effects of [this holding]” and warned of “interjurisdictional abortion wars.”<sup>135</sup>

The plethora of potential legal impacts of *Dobbs* touch upon numerous other constitutional guarantees. For example, states have already questioned the potential interstate commerce implications of the shipment of medications across state lines.<sup>136</sup>

In the First Amendment context, there may also be significant implications in the form of free speech violations from banning advertising in another state<sup>137</sup> or even free exercise violations, such as the Florida synagogue that alleged that an abortion ban after fifteen weeks violated the Jewish faith’s religious practices and the state constitution’s express right of privacy provision.<sup>138</sup> Moreover, a state constitutional amendment or law that bans all abortions and marks personhood at conception would violate the religious practices, and consequently the free exercise rights, of individuals of many faiths.<sup>139</sup>

There are also potential Fourth Amendment implications. Women who own period-tracking applications fear that the government may now start tracking them through cell site location, implicating Fourth Amendment privacy concerns and data privacy breaches.<sup>140</sup>

The *Dobbs* decision will undoubtedly affect the penal code and the criminalization of previously-lawful behavior. For example,

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135. *Id.* at 2337.

136. *Id.*

137. See *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975).

138. *Florida’s New Abortion Law Violates Religious Freedom, A Synagogue’s Lawsuit Says*, NPR (June 15, 2022, 12:18 PM), <https://www.npr.org/2022/06/15/1105229512/florida-abortion-law-synagogue-lawsuit-15-weeks> [<https://perma.cc/U42S-ADCG>].

139. Dayna Ruttenberg, *Why are Jews So Pro-Choice?*, FORWARD (Jan. 30, 2018), <https://forward.com/opinion/393168/why-are-jews-so-pro-choice/> [<https://perma.cc/ZTX5-WV8V>]. The Jewish faith and others believe that if a mother’s life is in jeopardy during pregnancy, the mother’s life should be saved. *Id.* A total ban or early pregnancy restriction on abortion would prevent women who experience life-threatening complications during the pregnancy to follow this religious dictate. *Id.*

140. Geoffrey A. Fowler & Tatum Hunter, *For People Seeking Abortions, Digital Privacy Is Suddenly Critical*, WASH. POST (June 24, 2022, 4:23 PM), <https://www.washingtonpost.com/technology/2022/05/04/abortion-digital-privacy/> [<https://perma.cc/2KDJ-MTG7>].

states with anti-abortion measures will now have license to prosecute doctors performing abortions or prescribing abortion pills, and any doctors offering these services could face the loss of their medical license and, ultimately, the loss of their livelihood. Criminal or civil liability will likely not stop at the physician actually performing any abortion-related service; prosecutors, or even civilians engaged in vigilantism, could pursue individuals who are thought to aid and abet women getting abortions. Depending on the interpretation and determination of any individual prosecutor, behavior such as counseling where abortions are legal, transporting, funding, or even post-abortion support could be subject to criminal prosecution. Finally, women who suffer miscarriages could face criminal prosecution for procuring an abortion for health-related reasons. In fact, even before *Dobbs*, women in this very predicament were arrested and charged for violating abortion bans.<sup>141</sup> Even if the charges were ultimately dropped, the mere fear of prosecution or civil penalties could prevent women from seeking emergency or life-saving healthcare.

Then, there is the potential restriction on interstate travel, negatively implicating privileges and immunities, in conservative states, such as Arkansas where legislators have already proposed bills to criminalize travel across state lines to seek an abortion.<sup>142</sup> Conversely, other states such as California, Oregon, and Washington have vowed to be a safe haven for women seeking abortions and other reproductive health care services.<sup>143</sup> In fact,

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141. Aliyah Tihani Salim & Shivana Jorawar, *Roe Is Over. Prison Sentences Are on the Way.*, NBC (July 3, 2022 5:40 AM), <https://www.nbcnews.com/think/opinion/abortion-laws-punishing-women-supreme-court-ended-roe-rcna36268> [<https://perma.cc/3FGR-6JMG>]; Asha C. Gilbert, *After Miscarriage, Woman Is Convicted of Manslaughter. The "Fetus Was Not Viable," Advocates Say*, USA TODAY (Oct. 21, 2021, 3:19 PM), <https://www.usatoday.com/story/news/nation/2021/10/21/oklahoma-woman-convicted-of-manslaughter-miscarriage/6104281001/> [<https://perma.cc/4A4M-G6EN>].

142. Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022, 8:30 AM), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/> [<https://perma.cc/YKX5-P7HJ>] (reporting that state lawmakers, including an Arkansas state senator, are proposing bills that would criminalize traveling across states lines to seek an abortion).

143. Simone Shah, *What Abortion Safe Haven States Can Do*, TIME (June 27, 2022, 4:45 PM), <https://time.com/6191581/abortion-safe-haven-states/> [<https://perma.cc/A64F-6MPW>].

Washington Governor Jay Inslee preemptively issued an executive directive instructing the Washington State Patrol not to cooperate with out-of-state abortion investigations in case states with abortion bans seek to investigate whether their residents have traveled to the state.<sup>144</sup> These interjurisdictional conflicts present new legal questions related to choice of law and prosecutorial authority.

Finally, and most tragically, bans on abortion will lead to the loss of life. Women desperate to discontinue their pregnancies for a variety of reasons will resort to do-it-yourself abortions, and people will die unnecessarily.<sup>145</sup> Legally, questions will abound as to whether individuals who post how-to videos will be civilly liable for negligent publication or even subject to criminal prosecution.

#### CONCLUSION

Ultimately, the *Dobbs* decision raises many unanswered questions about the future legal landscape and its real-life consequences. As the dissenting Justices warned, Americans who have shaped their lives in reliance on the implied substantive rights guaranteed under the Due Process Clause of the Fourteenth Amendment should not be so secure that those rights will survive *Dobbs*.<sup>146</sup> Many of those intimate, personal choice protections, including the right to use contraceptives, the right to engage in sexual relations with consenting adults of choice, and the right to same sex marriage, were juridically-created rights, and after *Dobbs*, they can be judicially erased.

Looking in the rear-view mirror, the *Dobbs* decision may be remembered as this generation's *Dred Scott* case. The *Taney* Court

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144. Hal Bernton, *Gov. Jay Inslee Says WA State Patrol Won't Cooperate with Other States' Abortion Investigations*, SEATTLE TIMES (June 25, 2022, 11:07 AM), <https://www.seattletimes.com/seattle-news/politics/inslee-protesters-gather-at-wa-capitol-in-response-to-roe-v-wade-decision/> [https://perma.cc/HLX7-LGDG].

145. Sarah McCammon, *With Abortion Restrictions on the Rise, Some Women Induce Their Own*, NPR (Sept. 19, 2019, 12:00 PM), <https://www.npr.org/2019/09/19/759761114/with-abortion-restrictions-on-the-rise-some-women-induce-their-own> [https://perma.cc/5BCV-47S9].

146. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2303 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

thought its decision would end the conflict between states on the issue of slavery; instead, it ignited a civil war.<sup>147</sup> Likewise, the *Dobbs* majority, and a Roberts Court legacy, may believe it resolved the abortion controversy; instead, it has fanned the flames of an already divided country. The dissent concluded “with sorrow—for this Court, ... for the many millions of American women who have today lost a fundamental constitutional protection,” and for the fear that the Court is not yet done with stripping Americans of long-held fundamental liberty interests now at the “mercy” of the people.<sup>148</sup> We, too, feel sorrow. If *Dobbs* sparks abortion wars, let them be litigious, not bloody; fought in courts and legislative chambers, not in the streets of America.

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147. See Robreta Alexander, *Dred Scott: The Decision That Sparked a Civil War*, 34 N. KY. L. REV. 643, 643 (2007) (citing DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN LAW & POLITICS* 712 n.24 (Oxford University Press 1978)); *Slaughter-House Cases*, 83 U.S. 36, 73 (1872). *But see Dobbs*, 142 S. Ct. at 2303 (Thomas, J., concurring) (exclaiming, in the context of his opinion that substantive due process often yields “disastrous ends” that “[w]hile *Dred Scott* ‘was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox,’ ... that overruling was ‘[p]urchased at the price of immeasurable human suffering’” (quoting *Obergefell v. Hodges*, 576 U.S. 644, 696 (2015) (Roberts, C.J., dissenting); then quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in judgment)).

148. *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor, & Kagan, JJ., dissenting).