City Research Online

City St George's, University of London

Citation: Loveland, I. (2024). "Oh what tangled webs we weave…" Unpacking (and unpicking) the majority opinion in Dobbs, State Health Officer of the Mississippi Department of Health et al v Jackson Women's Health Organisation et al. British Journal of American Legal Studies, doi: 10.2478/bjals-2023-0009

This is the published version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/31163/

Link to published version: https://doi.org/10.2478/bjals-2023-0009

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to City Research Online policy.

City Research Online: http://openaccess.city.ac.uk/ publications@citystgeorges.ac.uk

Br. J. Am. Leg. Studies 13(1) (2024), DOI: 10.2478/bjals-2023-0009 sciendo

Oh What Tangled Webs We Weave—Unpacking (and Unpicking) the Majority Opinion in *Dobbs, State Health Officer of the Mississippi Department of Health et al. v. Jackson Women's Health Organization et al.*

Ian Loveland*

ABSTRACT

This paper evaluates the majority judgment in the United States Supreme Court in Dobbs v. Jackson Women's Health Organization. It is suggested that much of what is said in the majority opinion ostensibly appears eminently defensible if viewed solely from a narrowly legalistic perspective. But closer analysis suggests that the majority's reasoning has some weaknesses when viewed within that limited paradigm. A further line of inquiry assesses whether adopting such a 'legalistic' approach to the question of abortion rights is in any event an appropriate position for the Court to adopt. The final section of the paper explores two additional contextual issues: the first relates to the personal ethical integrity of some of the majority judges; the second to the adequacy of State political processes as a means to address the abortion rights controversy.

KEYWORDS

Abortion, Dobbs v. Jackson, Roe v. Wade, Stare Decisis, Judicial Lawmaking

CONTENTS

* School of Law, City, University of London

© 2023 Ian Loveland, published by Sciendo.
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 License.

I. Introduction

A recurring fascination of teaching an historically themed LLB or LLM class on the Constitutional Law of the USA is seeing the appalled look on the faces of very able students when they find themselves accepting that there might be perfectly credible jurisprudential reasons for defending aspects of both the method followed and the conclusion reached by Taney, C.J. in his *Dred Scott*[1] opinion. Insofar as one can—and it is a perfectly cogent proposition that one really cannot—strip the slavery dimension from that judgment, one is left inter alia with two interlinked doctrinal assertions. Both of these are eminently plausible in the context of a constitutional settlement formed in reaction—indeed revolution—against a unitary state polity in which sovereign lawmaking power rested in the hands of a bare majoritarian legislature which sat in almost constant session; within which settlement notions of a substantially decentralized federal government system and the allocation of sovereign legislative authority to a lawmaker which both existed normatively (far) above that ordinary governmental system and which was composed in a way that made it very difficult for that lawmaker ever to act, were given clear textual expression as part of that new nation's fundamental law.

The first is that the only legitimate process through which the text *and meaning* of the constitution can be changed is by the exercise of the sovereign's authority in accordance with Article V of the constitution's text. The second, consequential, proposition is that a court in the exercise of a judicial (legislative) review jurisdiction cannot legitimately lend new meanings to[2] the unaltered constitutional text simply because that text now exists in a changed – even a radically changed – political, economic or cultural context. In combination, these concepts presume there to be an effective congruence between the textual form and practical substance of sovereign lawmaking authority.

For pedagogic purposes, Taney's methodology can be placed in stark contrast to the principles developed by his predecessor as Chief Justice, John Marshall. Those ideas, most famously articulated in *M'Culloch v. Maryland*,[3] accept as entirely legitimate a judicial power to find in the Constitution principles which had no express textual basis[4] and to give new meanings to the constitution's text in response to (judicially perceived) changes in the political, social, economic or moral contexts in which that text is now being construed. Within that paradigm, the *de jure* sovereignty of the Article V lawmaker is compromised by what is *de facto* a judicial assertion of the Court's power to provide an alternative constitutional amendment process.

This basic evaluative dichotomy has been played out repeatedly over different moral questions in varying historical epochs. It is a dichotomy which has become evermore complicated with the passage of time as the ebbs and flows of these respective judicial currents become increasingly entangled with the question of how

---

1 109 Howard 393 (1857).

2 A concept which I use to include methods of interpretation which *de facto* (and then for precedential purposes *de jure*) add words into the text.

3 4 Wheaton 316 (1819).

4 "[The Constitution's] nature requires that only its great outlines should be marked, its important objects designated and the *minor ingredients which compose those objects be deduced* from the nature of the objects themselves"; *id.* at 407; (emphasis added).

much weight the Court should attribute to its own rapidly growing body of precedent. Marshall's Court enjoyed the benefit of writing its constitutional jurisprudence on an essentially blank legal page: the precedential landscape facing Taney's Court was at best sparsely populated. That is a luxury which simply has not been available to later Courts. The new deal cases of the 1930s[5] and the desegregation jurisprudence of the 1950s-1960s[6] are both graphic illustrations of the Court suffering, to varying degrees, a crisis of legitimacy occasioned by judgments which either reversed or substantially undermined previously authoritative decisions.

The United States seems to be embracing another such constitutional moment now in relation to what is often (very) loosely termed 'the right' to abortion. The Supreme Court's judgment in *Dobbs*[7] has prompted a tsunami of media comment and speculation both in the United States itself and elsewhere, much of which has presented the judgment as sounding a death knell for abortion provision in the United States by overruling *Roe v. Wade*[8] and also as threatening other 'liberal' Court judgments on contentious social policy issues.[9] The purpose of this article is to examine the majority judgment at several levels of elaboration. The first level is directed towards demonstrating that there is prima facie much to be said – from various 'political' and 'legal' perspectives - in favor of the majority judgment. The second, in essence a rebuttal of the first, addresses intrinsic inadequacies of that prima facie credible majority reasoning. The third is concerned with matters of context, relating both to what we might term the 'constitutional integrity' of the majority Justices per se and to the question of whether the adequacy of State political fora as the means to resolve the abortion question may be substantially compromised in States promoting restrictive abortion regimes by recent legislative initiatives which are intended to make the exercise of voting rights significantly more difficult.

---

5 Contrast *Schechter v. United States,* 295 U.S. 495 (1935), *Louisville Bank v. Radford,* 295 U.S. 555 (1935) and *United States v. Butler,* 297 U.S. 1 (1936) with *NLRB v. Jones and Laughlin Steel,* 301 U.S. 22 (1936) and *United States v. Darby,* 312 U.S. 108 (1940) and *Wickard v. Filburn,* 317 U.S. 113 (1942).

6 Notably *Shelley v. Kraemer,* 334 U.S. 1 (1948) effectively reversing *Buchanan v. Warley,* (1917) 245 U.S. 60 (1917) and *Corrigan v. Buckley,* 271 US 323 (1926): *Brown v. Board of Education* 347 U.S. 438 (1954) effectively if not de jure reversing *Plessy v. Ferguson,* 163 U.S. 537 (1896). On the depth and breadth of the legitimation crisis *Brown* created see the coverage in *Another tragic era?* US News and World Report*,* 4 Oct. 1957.

7 All references to and quotations from *Dobb*s are taken from the slip opinion at 19-1392 *Dobbs v. Jackson Women's Health Organization* (06/24/2022) (supremecourt.gov). That opinion starts the headnote (syllabus) and each individual judgment at p1, so citations here are rendered as *Dobbs*, Majority,1; *Dobbs*, Thomas,3 etc

8 410 U.S. 113 (1973).

9 *See, e.g.,* Karin Brulliard, *The Supreme Court Prompts the Question: Who Gets Rights in America?*, Wash. Post, June 25, 2022 at 07.37p.m., EDT, https://www.washingtonpost.com/politics/2022/06/25/abortion-constitutional-rights/; The Editorial Board, *The Ruling Overturning Roe Is an Insult to Women and the Judicial System* N.Y. Times, June 24, 2022, https://www.nytimes.com/2022/06/24/opinion/dobbs-ruling-roe-v-wade.html. In the United Kingdom, the judgment received substantial coverage in The Guardian (Jessica Glenza, Martin Pengelly & Sam Levin, *US Supreme Court Overturns Abortion Rights, Upending Roe v Wade,* 24 June 2022) and The Times (David Charter, *As Roe v. Wade Is Overturned, What Next for Abortion in the US?*, 24 June 2022).

A. The Mississippi legislation

Strictu sensu, the question before the Supreme Court in *Dobbs* was the constitutionality of various provisions of the Mississippi Gestational Age Act, (now found in Title 41 Chapter 41 of the Mississippi Code; hereafter cited as § 41-41-191).[10] That measure was enacted in 2018. At that time, the party political composition of the Mississippi legislature was 74 Republican to 48 Democrat in the House of Representatives and 31 Republican to 18 Democrat in the Senate.[11] The then Governor, Phil Bryant, was also a Republican.

Mississippi's State constitution[12] (it seems as a matter of inference rather than explicit provision) permits most laws (including the 2018 Act) to be enacted by bare bi-cameral majority and the Governor's assent. The State's Constitution does contain a 'Bill of Rights', which can be amended only by a two thirds majority vote in both chambers, but there is nothing in those provisions which has any obvious bearing on abortion regulation. The 2018 bill passed the House with an 80-31 majority, a few Democrats joining the Republican majority.[13] In the Senate, the vote was 35-14.[14]The Act was therefore not quite a purely partisan measure in the cross-party sense.

The text of the bill was essentially a borrowing of a draft measure promoted by the 'Alliance Defending Freedom' an evangelical Christian pressure group which has been hawking its (inter alia) anti-abortion legal wares around several southern States in recent years.[15] The 2018 Act contains a lengthy preamble which hangs its evangelical moral inspiration on a cluster of legal pegs which can be found poking out of the Court's previous abortion jurisprudence.[16] The gist of the preamble is that very few countries permit non-therapeutic abortion, that medical science now permits us to identify the extent to which, even at early stages of pregnancy, a fetus has recognizable features and developed organs, that later term abortions present significant risk to the 'maternal patient's'[17] physiological and psychological health, and that the mechanical process of performing late term abortions generally deploys—the preamble uses distinctly melodramatic phraseology:

> dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb.

---

10 Mississippi Code § 41-41-191 (2018) - Gestational Age Act; legislative findings and purpose; definitions; abortion limited to fifteen weeks' gestation; exceptions; requisite report; reporting forms; professional sanctions; civil penalties; additional enforcement; construction; severability; right to intervene if constitutionality challenged. For a brief review of the Act's history *see* Adel Hussein, *What to Know About the Mississippi Abortion Law Challenging Roe v. Wade,* N.Y. Times 6 May 2022.

11 Three Senate seats were then vacant.

12 Mississippi_Constitution.pdf (ms.gov).

13 2 Feb. 2018; 0320008.pdf (state.ms.us).

14 6 Mar. 2018; 0640039.pdf (state.ms.us).

15 *See* Amy Littlefield, *The Christian Legal Army Behind the Ban on Abortion in Mississippi,* The Nation, 30 Nov. 2021.

16 The preamble takes the unusual textual step of expressly citing judgments (presumably) to buttress the legal defensibility of the assertions it makes.

17 The Act does not use the term 'mother' to describe the pregnant woman.

> The Legislature finds that the intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.

The Act's main substantive provision is s.4(a):

> Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not perform, induce, or attempt to perform or induce an abortion unless the physician or the referring physician has first made a determination of the probable gestational age of the unborn human being and documented that gestational age in the maternal patient's chart….

The Act (s.3(f)) defines 'gestational age' as day one of the pregnant person's last period. So a 15 week 'gestational age' can arise at just *11 weeks* after conception for a woman or child who has a regular monthly menstrual cycle. People with irregular cycles might hit the 15 week point even earlier in the pregnancy.

The Act does not per se criminalize post-15 week abortions, either on the part of the pregnant woman nor the medical professional performing the procedure. Indeed, s.4(d) expressly forbids the patient from being identified. The Act does not explain how it is to interact with § 97-3-3 of the Mississippi Code, which purports to make performing an abortion procedure (other than to save the life of the mother or where the pregnancy is the result of rape) a crime punishable with up to 10 years imprisonment.[18] Rather than create a new criminal offence, the Act imposes a civil penalty of up to $500 per violation.[19] The more potent sanction is s.6(a), which provides for automatic suspension of the doctor's license to practice medicine in Mississippi if the doctor breaches any of s.4's substantive or reporting provisions. Both of those sanctions are prima facie limited to breaches undertaken 'knowingly or intentionally' by the doctor concerned. The Act does not explain what is meant by either term. Nor does it make any provision for how that question is to be resolved. Notwithstanding the emphasis in the Act's preamble on the 'barbaric' nature of dilation and evacuation, s.4 does not differentiate between methods used to terminate a pregnancy.

The 2018 Act added to an already expansive web of statutory regulation of abortion provision in Mississippi.[20] In 2017 there were reportedly only three specialized facilities in the State offering the procedure. Pressure groups from both sides of the abortion controversy are in broad agreement that in 2017 approximately 2500 abortions were performed in Mississippi, the overwhelming majority of which were chemically rather than surgically induced terminations; (and so likely to have occurred well short of 15 weeks gestational age).[21]

---

18 Miss. Code § 97-3-3 (2018).

19 § 41-41-191 s.4(d)

20 *See, e.g,* 2017 Miss. Code, Title 41, Chapter 41 (setting a 20 week limit on most abortion procures).

21 On the pro-*Roe* side *see* Guttmacher Institute, *State Facts about Abortion: Mississippi,* (June 2022)*;* https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-mississippi. On the anti-*Roe* side *see* Tessa Longbons*,* , *Abortion Reporting: Mississippi* (2019), Charlotte Lozier

Then Governor Bryant had anticipated an immediate legal challenge to the Act's constitutionality: "We are saving more of the unborn than any state in America, and what better thing we could do," Bryant said as he signed the bill. "We'll probably be sued here in about a half hour, and that'll be fine with me. It is worth fighting over".[22] Bryant's prediction was well-founded. The Jackson Women's Health Organization[23] sought an immediate enjoinment of enforcement of the Act before a Federal District Court. This was granted in November 2018[24] and subsequently upheld in the Fifth Circuit Court of Appeals.[25] The case was argued before the Supreme Court on 1 December 2021, and judgment handed down on 24 June 2022. Argument proceeded with the parties' agreement on a much broader basis than simply the defensibility of the Mississippi statute: the primary question placed before the Court was whether *Roe v. Wade* should be overruled.

II. The case for—and against—

After an introductory paragraph acknowledging both the significance of abortion as a moral issue and the 'sharply conflicting views' held on the topic by the American public, Alito, J. began his (5-4 majority)[26] opinion with a withering critique of the substance and methodology of the majority judgment in *Roe* which sustained the conclusion that *Roe* should indeed be reversed overruled and that State abortion regulation in future be subject only to rational basis review:

> Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever such a right, and its survey of history ranged from the constitutionally irrelevant (e.g., its discussion of abortion in antiquity) to the plainly incorrect (e.g., its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.[27]

Institute (Aug. 26, 2021) https://lozierinstitute.org/abortion-reporting-mississippi-2019/; Tessa Longbons, , *Abortion Reporting: Mississippi* (2017), Charlotte Lozier Institute (May 16, 2019) https://lozierinstitute.org/abortion-reporting-mississippi-2017/.

22 Jenny Gathright, *Mississippi Governor Signs Nation's Toughest Abortion Ban Into Law* The Two-Way: NPR, (Mar. 19, 2018) https://www.npr.org/sections/thetwo-way/2018/03/19/595045249/mississippi-governor-signs-nations-toughest-abortion-ban-into-law

23 About Us - Jackson Women's Health Organization abortion clinic in MS (jacksonwomenshealth.com). The JWHO was then the only facility offering surgical abortions in Mississippi. It did not receive any State or municipal funding. Its presumptive fee for a surgical abortion was $700-$800; Fee Schedule - Jackson Women's Health Organization (jacksonwomenshealth.com).

24 349 F. Supp. 3d 536 (S.D. Miss. 2019).

25 945 F. 3d 265 (2019).

26 Joined by Thomas, Gorsuch, Kavanaugh & Coney-Barrett, JJ.

27 *Dobbs*, Majority, 1.

As suggested below, there is considerable force to aspects of that critique. We might however begin with a more cautionary note. *Roe* manifestly did not 'create' a right to abortion in any positive sense. What *Roe* did 'create'—although some commentators might suggest 'found' rather than 'create' is the better descriptor—was a quite expansive set of negative constraints on State power to prohibit abortion in circumstances where qualified medical professionals were willing to provide such a service either gratis or at a price the pregnant woman was willing and able to pay. Neither *Roe* nor any subsequent majority judgment has ever suggested that States are under any legal obligation to provide abortion services. This mischaracterization is common usage when *Roe* is being discussed, and there is no obvious basis to assume that it is being deployed in *Dobbs* as a deliberate attempt to mislead. But, as is discussed further below, distinguishing between positive and negative conceptions of the 'right' is not an insignificant matter.

A. A 'Right to Abortion' Has No Roots in the Constitution's Text, in Political History, or in Judicial Authority

It is impossible to disagree with Alito's assertion that the Constitution's text "makes no mention of abortion".[28] Nor is there scope to reject the *Dobbs* majority's claim that the majority in *Roe* were very imprecise indeed about those parts of the text from which it might be inferred that States were subject to constitutional restraints in relation to their regulation of the issue. Was it the Ninth Amendment? The First? The Fourth or the Fifth? The liberty clause of the Fourteenth? Or a mix of some or all of those sources?[29] *Roe* really does not tell us. And that is certainly a failing which undermines the legitimacy of the majority judgment, in that it places the 'right' much more in the realm of being 'created' rather than 'found' by the Court.

Alito is a little (if not much) less scathing in his treatment of *Planned Parenthood of Southeastern Pennsylvania v. Casey,*[30] which *Dobbs* has also overruled. The *Dobbs* majority accepts *Casey* was methodologically less freewheeling than *Roe* in holding that constraints on State power over abortion provision were rooted solely in the liberty clause of the Fourteenth.[31] Alito and his colleagues do not reject per se the principle that Fourteenth Amendment liberty 'rights'—whether as positive individual entitlements or negative constraints on State power —can exist without an express textual basis. Such rights can exist however only if they can be brought within the confines of the Court's now long-established doctrine of 'ordered liberty'.

The formula is generally credited as having first appeared in the Court's 1937 judgment in *Palko v. Connecticut*[32] in the context of a Connecticut statute creating a situation of double jeopardy for certain criminal offences. Cardozo, J.'s somewhat circular test for whether a particular moral value fell within 'ordered liberty' was that it amounted to "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".[33] *Palko* per se was concerned with the question of whether the Fourteenth might be invoked to incorporate provisions

---

28 *Id*.
29 *Id*, 9-10.
30 505 U.S. 833 (1992)
31 *Dobbs*, Majority, 10.
32 302 U.S. 319 (1937).
33 *Id*, 325. The phrase is taken from *Snyder v. Massachusetts* 291 U.S. 97, 105 (1934).

of the Fifth against the States, but subsequent authority has also used the principle to address issues which have no textual root in the Bill of Rights.

In *Dobbs*, Alito rooted the current understanding of the principle in three recent authorities: *Timbs v. Indiana;*[34] *McDonald v. Chicago;*[35] and *Glucksberg v. Washington.*[36] Alito drew primarily on *Timbs*, presumably because the judgment is (a) unanimous; (b) brief; and (c) authored by Ruth Bader Ginsberg.[37]

Unlike *Glucksberg* (and *Roe*), *Timbs* is actually an incorporation case (of the Eighth) rather than a freestanding Fourteenth 'liberty' case. Alito's reasoning for its deployment in *Dobbs* is that the test for accepting that an entitlement with no express textual basis anywhere in the Constitution is a Fourteenth Amendment liberty must be at least as rigorous as the one used to decide if a provision of the Bill of Rights can be incorporated against the States through the Fourteenth Amendment liberty. The *Timbs* test was briefly formulated: did the claimed entitlement have "deep roots in our history and traditions".[38] Those deep roots were clearly evident in *Timb*s:

> …[I]n 1868 upon ratification of the Fourteenth Amendment…the constitutions of 35 of the 37 States—accounting for over 90% of the U. S. population—expressly prohibited excessive fines….. Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality.[39]

---

34 *Timbs v. Indiana*, 586 U.S. _ (2019); slip opinion at 17-1091.

35 561 U.S.742 (2010), in which the Court by 5-4 (Alito, Roberts & Thomas, JJ. being among the five) held that the Fourteenth incorporated the Second Amendment right to bear arms.

36 521 U.S. 702 (1997), in which the Court unanimously held there was no liberty right preventing a State from prohibiting assisted suicide.

37 In what one assumes is an attempt (albeit a transparently unconvincing attempt) either to rebut criticism that the majority is itself engaging in a partisan political project, or just to discomfit the makers of such criticism, Alito, J. takes the opportunity early in the judgment to note that immediate critiques of *Roe* by John Hart Ely and Laurence Tribe; (respectively *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) and Foreword: *Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973)) indicated that: "even abortion supporters have found it hard to defend *Roe's* reasoning"; (Dobbs, *Majority*, 2). Ely and Tribe as critics of *Roe's* legitimacy are joined at later stages of the judgment by Ruth Bader Ginsburg, Mark Tushnett, Phillip Bobbit and Archibald Cox, all of whom according to the majority were "unsparing in their criticism" of *Roe; (Dobbs,* Majority, 54). The Ginsberg citation (at 3 fn. 4) is to a comment in Speaking in a Judicial Voice, 67 N.Y.U.L. Rev. 1185, 1208 (1992) that "*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue". The other 'liberal' commentators are invoked at 54. The reference to *Timbs* would seem to be another example of this rather clumsy technique.

A cynical observer might wonder if Alito, Gorsuch, Kavanaugh and Thomas joined the opinion in *Timbs* in anticipation of using the judgment in a subsequent abortion case in which the Court would not be unanimous. Alito has a long track record of such opportunism; *see* Charlie Savage, *Decades Ago, Alito Laid Out Methodical Strategy to Eventually Overrule Roe,* N.Y. Times, 25 June 2022.

38 *Timbs*, slip opinion, 2.

39 *Timbs*, slip opinion, 5-6.

The *Dobbs* majority argue in what are overall unassailable terms that a similar conclusion in respect of abortion entitlements is unsustainable. The least convincing element of this historical analysis is its taking issue with the accuracy of many of the historical assertions made by the *Roe* majority, especially *Roe's* majority's assertion that abortion was not recognized as a crime in pre-revolution common law. Alito invokes various seventeenth and eighteenth century English treatises to rebut this conclusion. The critique[40] is prima facie quite plausible, though given that we are here dealing with a pre-democratic era in which it was a perfectly non-contentious common law proposition that a man could not rape his wife because she was legally obliged always to accommodate his sexual advances,[41] one might wonder if the either the pro-choice or pro-life arguments could gain much traction from an 'accurate' reading of that history.

The weight of Alito's historical argument undoubtedly increases as he makes his way towards the near modern era, noting that: "In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy."[42] The relevant statutes are listed in appendix to the majority judgment. After noting a similar trend within States created after ratification of the Fourteenth (the statutes are listed in another appendix), Alito finished his survey with this observation:

> By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother." 410 U. S., at 139….
>
> This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. See id., at 118, and n. 2 (listing States).[43]

He then concluded – again quite credibly that:

> The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions…..
>
> Respondents and their amici have no persuasive answer to this historical evidence.[44]

However in what might be regarded as something of a sleight of hand (since the matter was not raised in *Timbs*), Alito also held that in addition to being firmly rooted in longstanding political practice, an ordered liberty entitlement should

---

40 The passage is at *Dobbs*, Majority, 16-23.
41 *See* the discussion in *R v R (Rape: Marital Exemption)* [1992] 1 A.C. 599.
42 *Dobbs*, Majority, 23.
43 *Id* at 24.
44 *Id* at 25.

also be rooted in a steady and chronologically extensive stream of pertinent judicial authority. Having set this test, Alito then reasoned that the line of judicial authority which the *Roe* majority had invoked to sustain its conclusion that the Constitution implicitly contained privacy entitlements which could be stretched to include limits on a State's capacity to prohibit abortion. Those cases—clustered around an invocation from *Palko* that "only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty"—included, inter alia, *Meyer v. Nebraska*;[45] *Pierce v. Society of Sisters;*[46] *Skinner v. Oklahoma;*[47] *Griswold v. Connecticut;*[48] and *Loving v. Virginia.*[49]

In dismissing these cases as irrelevant to the abortion issue,[50] Alito might readily be thought to be ignoring the proposition that there is nothing particularly contentious about a Court engaging periodically in an interstitial development of judicial authority which takes modest steps to draw previously unconsidered factual situations within the scope of a more expansive organizing principle. Rather than address this issue, the *Dobbs* majority dismissed all of these authorities as "inapposite" because none of them concerned "the critical moral question posed by abortion"; that critical question evidently being that abortion "destroys potential life".[51]

This notion of the 'uniqueness' of abortion as a moral issue is returned to below, in the context of considering whether overruling *Roe* has implications for other recent Fourteenth Amendment liberty judgments. Here we might simply note that this reasoning takes a perhaps rather simplistic view of the idea of precedent and that Alito casts no doubt on the 'correctness' per se of any of those previous judgments: "They do not support the right to obtain an abortion, and by the same token our conclusion that the Constitution does not confer such a right does not undermine them in any way".[52] But that conclusion sends the *Dobbs* majority sailing into distinctly more choppy legal waters.

This element of the *Dobbs'* majority's critique of *Roe*—that Roe has no credible source either in historical practice or in judicial authority—is summed up by Alito's quotation of Byron White's dissent in *Roe,* where White categorized the majority holding as an exercise of "raw judicial power".[53] Alito evidently accords the phrase considerable substantive and/or stylistic weight: it is quoted verbatim at 3, 36, 44, 53, and 69 of the majority opinion. The label is undoubtedly powerful as a piece of rhetoric, but it is being used rather selectively in *Dobbs*.

---

45 262 U.S. 390 (1923); (recognizing/creating a liberty right preventing States outlawing the teaching of German to children).

46 268 U.S. 510 (1925); (liberty right not to be prevented from educating one's children in a private sector school).

47 316 U.S. 535 (1942); (forbidding a State from imposing sterilisation as an element of the punishment for certain criminal offences).

48 381 U.S. 479 (1965); (preventing States from criminalizing the use of contraception by married couples.

49 388 U.S. 1 (1967); (Fourteenth Amendment prevents States from forbidding inter-racial marriage).

50 *Skinner* and *Loving* are perhaps better seen as equal protection cases in any event, and so—subject to the caveat raised in the discussion of *Brown* below—of little direct relevance to liberty issues.

51 *Dobbs*, Majority, 32.

52 *Id*.

53 410 U.S.113, 222 (1973).

Reduced to essentials, the majority opinion seems to be telling us that a claimed 'right' will fall within the Fourteenth's protection of 'ordered liberty' if it is 'recognized' by a substantial super-majority of States for an extensive period of time and if it is supported by a relevant[54] line of judicial authority. This sounds like a perfectly plausible principle. The argument then asserts that *Roe* had neither characteristic, and so is 'egregiously wrong' because it was an exercise in 'raw judicial power'. It also asserts that the inapposite authorities relied on in *Roe* were not 'wrong' per se. So presumably they were not an exercise in 'raw judicial power'.

'Recognition' of a right in this sense must presumably encompass both (positively) protection of a value in State law and (negatively) an absence of State law restriction on that value. It is for example most unlikely that a survey of State law in the 1920s would have shown that many States had for many years expressly identified a parent's right in any positive sense to have her child taught German or any other foreign language. One might very well have found a widespread or near universal absence of prohibition of such an activity. But the Court in *Meyer v. Nebraska*[55] simply asserted, without undertaking any survey of State practice, that:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Two years later, in *Pierce v. Society of Sisters,*[56] the Court also saw no need to examine State practice before concluding that liberty within the Fourteenth encompassed a parental right to educate their children in private sector schools.

Both judgments were also notably lacking in precedential pedigree. If one examines *Meyer v. Nebraska* one finds it wholly devoid of any supportive judicial authority. In *Pierce*, the only authority invoked in support of the Court's substantive liberty conclusion is *Meyer*.[57]

Skinner and *Griswold* have similar characteristics. None of these cases actually pass muster under Alito's *Dobbs'* methodology. They could all credibly be characterized as exercises in 'raw judicial power'. The inference then arising is that Alito's methodology test is just a legal fig leaf, covering—and not very well—the substantive moral preferences of a bare majority of the Court. We return to this issue below. For the moment we might focus attention on a second presumed inadequacy of *Roe.*

---

54 By which Alito seems to mean a series of cases upholding a similar entitlement to the one being claimed in the instant case.

55 262 U.S. 390, 399 (1923).

56 268 U.S. 510 (1925).

57 The other authorities invoked go to questions of standing and ripeness.

B. Roe Was an Exercise in Legislative Rather Than Judicial Lawmaking

There is obvious weight too, at least at first glance, in Alito's characterization of the *Roe* majority's division of pregnancy into three trimesters, during which States were subject to decreasingly severe restraints on their regulatory power, as looking much more like an exercise in legislative than judicial lawmaking.[58] *Roe* promulgated, we are told, "a numbered set of rules much like those that might be found in a statute enacted by a legislature".[59] But that criticism is rather overstated. There is nothing in *Roe* that equates to an expansive code of rules. Rather *Roe* sketches out in broad terms a set of malleable principles which leave the business of filling in the (myriad) details to the realm of State legislation.

Alito is using the 'legislation' label here in a pejoratively evaluative sense rather than simply as a descriptor. The pejorative accusation is in essence that *Roe* foreclosed all scope for State legislative initiatives in respect of abortion regulation. But that is manifestly untrue. States began almost immediately after *Roe* to enact legislation which explored and tested in all sort of ways the room for political maneuver that the judgment left them.[60] That process has continued unabated ever since. *Roe* is a 'perfect' example of what has come to be called a dialogic relationship between a Court exercising a power of legislative judicial review and the legislatures concerned as to the proper boundaries of a claimed constitutional right. That is however a concept that sems to have passed the *Dobbs* majority by.

C. Roe's Ratio Was Undermined by Casey

Alito, J., seems to stand on more solid ground in asserting that *Roe* had not been 'good law'—even in a narrow mechanistic sense—since the Court's 1992 judgment in *Planned Parenthood v. Casey.*[61] Although *Casey* purported to affirm *Roe,* it seemed very clearly to reject the trimester framework and replace it with a simple pre-viability and post-viability dichotomy. *Casey* also 'clarified' the presumed roots of any constraints on State power to restrict abortion as being only the liberty clause of the Fourteenth.

Insofar as one can extract a ratio from the various opinions offered in *Casey*, it would seem to be that States cannot impose 'an undue burden' on women who are seeking an abortion.[62] Writing some thirty years ago, I had suggested that: "[O] n close examination of the judgments [in *Casey*], the argument that *Roe* remains

---

58 Setting students the challenge of drafting 'a *Roe* statute' can make for an instructive class. For a brief overview of the *Roe* provisos *see* Ian Loveland, *Affirming* Roe v. Wade? Planned Parenthood v. Casey, Public Law 14, 16 (1993).

59 *Dobbs,* Majority, 2.

60 *See, e.g.,* the many and varied restrictions (often considered compatible with *Roe*) at issue in *Bellotti v. Baird,* 443 U.S. 622 (1979): *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976): *Akron v. Akron Centre for Reproductive Health,* 462 U.S. 416 (1983): *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989).

61 505 U.S. 833 (1992).

62 For critiques of the judgment *see, interalia,* Michael Moses, *Casey and Its Impact on Abortion Regulation*, 31 Fordham Urban L.J. 805 (2004): Neil Devins, *How* Planned Parenthood v. Casey (*Pretty Much) Settled the Abortion Wars*, 118 Yale L.J. 1318 (2009): Loveland*, supra* note 58.

authoritative on the subject of State control of abortion is quite unsustainable".[63] But this sub silentio overruling of *Roe* by *Casey* does not serve to make Casey a 'correct decision' for the *Dobb*s majority. For Alito, *Casey* is as egregiously wrong as *Roe*.

This is in part because of its evident methodological failings. In the twenty years between *Roe* and *Casey*, all States recognized a 'right' to abortion in the *Roe* sense. But this recognition was of course the result of national judicial dicta, not State political choice. Such (short-lived) roots as abortion then had in the national legal landscape could not properly be taken into account for the purposes of identifying a Fourteenth Amendment liberty entitlement. For the *Dobbs* majority, *Casey* is like *Roe* also to be castigated as being an exercise in legislative rather than judicial lawmaking. But this is not because the *Casey* test was – as was *Roe's* – too complicated in its content, but because it is too simplistic. The notion of an 'undue burden' is so vague as to invite constant questioning by State legislatures. But once again, the idea that an ongoing conversation between the Supreme Court and State legislatures might have constitutional merit is not something that Alito is willing to acknowledge.

D. It's Not Just Roe That Was Wrong

Alito takes some pains in *Dobbs* to place that *Roe* in the company of other supposedly indefensible judgments which have subsequently been overruled, and overruled not because of the passage of time and changing circumstance, but because they were manifestly wrong even when they were decided. The two most prominent examples – both of which, if one wishes to adopt simplistic labels – involve 'liberal' overrulings of 'reactionary' decisions - are *Lochner v. New York*[64] and *Plessy v. Ferguson*.[65] Such judgments were, it seems, exercises in "[f]reewheeling judicial policymaking".[66] The identification of these cases as 'egregiously wrong' decisions on the basis of the *Dobbs* methodology is however profoundly unconvincing.

Prior to 1905 few if any States other than New York had imposed maximum working hours on the occupation of a baker, whether as a matter of criminal or civil law. To work as a baker for such hours at such wages as one (or —in economic reality—one's employer) wished would have been common (perhaps universal) practice throughout the United States from 1787 onwards, and was thus—notwithstanding there being no mention of the individual's right to work as a baker in the text of the constitution—an element of 'ordered liberty'. Nor would one be able to find any significant line of judicial authority controverting that conclusion. One might be forgiven for wondering if the *Dobbs* majority would in fact have lined up quite happily with their *Lochner* predecessors.

Alito's invocation of *Brown v. Board of Education*[67] as a 'correct' judgment which overruled the egregiously wrong decision in *Plessy* also seems to be playing rather fast and loose both with judicial history and judicial methodology. This criticism might be pre-emptively rebutted by noting that *Brown* was *strictu sensu*

63 *Id* at 14.
64 198 U.S. 45 (1905).
65 163 U.S. 537 (1896).
66 *Dobbs*, Majority, 14.
67 347 U.S. 4883(1954).

an equal protection rather than liberty case, but since Alito has chosen the case to buttress his own reasoning in *Dobbs*, it seems quite proper to identify *Brown's* shortcomings for that purpose.

There is manifestly no basis in *Brown* to support the contention that *Plessy* was 'wrong', still less egregiously so, *when it was decided in 1896*. Nor, strictu sensu, did *Brown* overrule *Plessy*. *Brown* simply held the separate but equal doctrine inapplicable to public schooling, not to segregated transport facilities. Moreover it did so—following Marshall rather than Taney's methodology—because the Fourteenth Amendment then (in 1954) was situated in a completely different political and cultural context to the one which prevailed in 1896

> In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[68]

Neither did *Brown* suggest that the meaning of equal protection of the laws in the Fourteenth was to be found in the accumulated practice of many States over many years. Had the Court conducted such a search, it would have found that a great many States (and the District of Columbia)[69] had been for many years-—and were still in 1954-—happy to give legal effect to apartheid legislation which either excluded non-white Americans from public facilities entirely or (in respect of schools) segregated them into often manifestly inferior provision.

Nor could *Brown* be said to rest on any significant line of pertinent judicial authority. None is cited in the judgment: because there was none to cite. To the contrary, the Court had on several occasions shortly before *Brown* expressly applied the separate but equal doctrine in the context of State education provision.[70]

Brown was decided in essence on the basis of the Court's perception, rooted in a modest body of social science 'evidence', that school segregation imposed a sense of inferiority on black students, and that such inferiority should be considered inconsistent with the equal protection clause. There is one might think no better example of "raw judicial power" than Warren, C.J.,'s judgment in *Brown*. Yet *Brown*, according to the *Dobbs* majority, was 'right'; and presumably remains so. It is certainly easy to leap to the accusation that these conclusions are not reconcilable. Methodologically, *Brown* is as far removed from Alito's *Dobbs* template as is *Roe*.

---

68 Id, 492-493.

69 As to which see *Brown's* companion case of *Bolling v. Sharp*, 347 U.S. 497 (1954). *Bolling,* which related to school segregation in Washington D.C., was decided on a liberty basis, there being no equal protection proviso in the Fifth. On the implications of *Dobbs* for *Bolling* see Cass Sunstein, The Enigma of *Bolling v Sharp*, Ius & Iustitium (Aug 17, 2022) https://iusetiustitium.com/the-enigma-of-bolling-v-sharpe/.

70 *See, eg*., *Gong Lum v. Rice* ,275 U.S. 278 (1927): *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938): *Sipuel v. Board of Regents,* 332 U.S. 631 (1948): *Sweatt v. Painter,* 339 U.S. 629 (1950).

E. Abortion Is Unique, So Overruling Roe Does Not Mean Overruling Other 'Liberal' Decisions

A recurrent theme in press coverage of *Dobbs* was that it placed substantial question marks over the continued vitality of other modern and near-modern era Court judgments addressing contentious social policy issues. The most obvious candidate is *Obergefell v. Hodges*,[71] in which a 5-4 majority held that States were required to permit same sex marriages between mentally competent adults. Allusion has also been made to the 2003 judgment in *Lawrence v. Texas*[72] and the 1965 opinion in *Griswold* as candidates for reversal.

Alito took several opportunities in *Dobbs* pre-emptively to refute such assertions, variously at pages 5, 32, 38, 47, 49, 66 and 71. This is where an aspect of the judgment mentioned briefly above perhaps has more traction. According to Alito, abortion is a 'unique' issue because it necessarily 'destroys potential life'. It thus raised moral issues of much greater profundity than were at stake in all these other cases and so there is no basis to think that *Dobbs* affects their continuing vitality.

There is an obvious and profound disconnect in Alito's judgment on this point. For the majority, *Roe* was 'wrong'—and 'egregiously' so—(as presumably also was *Casey*) because of serious flaws in the *Roe* majority's methodology and understanding of the Court's proper constitutional role. Those 'errors' are not tied at all to the substantively 'unique' nature (if such it is) of abortion. They may as readily be found in any judgment which identifies a 'right' which has no textual basis in the Constitution or which has not long been recognized and protected by many State jurisdictions.

Save for the fact that it did not—as *Roe* did—promulgate "a numbered set of rules much like those that might be found in a statute enacted by a legislature", the majority judgment in *Obergefell* has all the methodological flaws that Alito attaches to its *Roe* counterpart. No State had recognized an entitlement to same sex marriage prior to 2000. When *Obergefell* was decided a mere handful of States did so. There was at that time minimal pertinent judicial authority to support such an entitlement. There is no credible basis, if deploying the *Dobbs* methodology, to find that a prohibition on States refusing to recognize same sex marriage is a component of ordered liberty.

Alito was a dissentient in *Obergefell*, on a methodological basis which precisely foreshadows his arguments in *Dobbs*:[73]

> To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U.S. 701, 720–721 (1997). And it is beyond dispute

---

71 576 U.S. 644 (2015). For comment in this journal *see* Ian Loveland, *Liberty, Equality and the Right to Marry under the Fourteenth Amendment*, Br. J. Am. Leg. Studies 6(2) (2017) 241.

72 539 U.S. 558 (2003); prohibiting State criminalization of consensual private sexual activities between same sex participants.

73 *Obergefell v Hodges,* 576 U.S. 644, (slip opinion, Alito 2) (2015).

> that the right to same-sex marriage is not among those rights. See *United States* v. *Windsor*, 570 U.S. ___, ___ (2013) (Alito, J., dissenting) (slip op., at 7). Indeed:
>
> 'In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941…..'.
>
> "What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility." *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (Alito, J., dissenting) (slip op., at 7–8) (footnote omitted).

Alito does not mention in *Dobbs* that he was a dissentient in *Obergefell.* His dissent there certainly conveys the impression that he considered the majority decision to be—how might one best put it—'egregiously wrong'. If such it was, that decision must surely be overruled if *Dobbs* correctly states the nature of the Court's lawmaking role. It seems at best unlikely that Alito has now decided his own dissent in *Obergefell* was itself 'egregiously wrong', and he should therefore overrule his own opinion. His position on the point in *Dobbs* is certainly not candid. The larger question is whether that position is honest.

Justice Thomas was another of the four dissenters in *Obergefell*, subscribing wholeheartedly to Alito's reasoning. Thomas's concurrence in *Dobbs* certainly has the candor and transparency which Alito seems to lack. For Thomas, *Obergefell* was "demonstrably erroneous"[74] and should be reconsidered. It is very difficult to imagine that Gorsuch, Kavanaugh and Coney-Barrett, the post-*Obergefell* appointees, will not be waving that methodological flag with similar enthusiasm in a challenge to *Obergefell* which will surely be triggered in one of the anti-*Roe* States in the foreseeable future. For good measure, Thomas attaches the same label to *Lawrence* and even to *Griswold*. He raises the possibility that similar substantive protections might be found in the privileges and immunities clause, but given that clause relates to aspects of national citizenship and *Griswold, Lawrence* and *Obergerfell* speak primarily to matters of State competence that possibility seems a remote one.[75]

Griswold would likely survive scrutiny under Alito's methodology if he is correct in his assertion that, as a matter of historical record, Connecticut's prohibition of contraception was "an extreme outlier" in terms of State law in the mid-1960s.[76] Although to be true to the *Dobbs* methodology, one presumably also has to ask if

---

74 *Dobbs*, Thomas 3.

75 Roberts, C.J., also dissented in *Obergefell*, on the basis that recognition of same sex marriages was a question that the Constitution left to be resolved by State political processes. Scalia was of course the final dissentient.

76 *Dobbs*, Majority, 35 fn 47.

the Connecticut law had had that outlier status for a protracted period of time. That a super-majority of the States were suddenly seized of the view in 1960 that married couples should be allowed to use condoms and the pill and legislated accordingly would not make such access to contraception a Fourteenth Amendment liberty on the basis of *Dobbs'* methodology. One would have to wait some years—how many Alito does not tell us—for that widespread State practice to harden into a liberty right.

Lawrence v. Texas[77] presents a similarly viable candidate for survival. The majority's reading of political history in *Lawrence* was that same gender sexual activity was not at all criminalized in the United States until the mid-twentieth century. By the late 1970s it was a crime in only nine States, and when *Lawrence* was decided in 2003 three of those nine States had removed such laws from their statute books.[78] Same sex sexual activity would therefore seem to pass muster under the *Dobbs* ordered liberty test; subject to the caveat that the *Dobbs* majority might find a history premised on 'alternative facts' which point to a different conclusion.

There is though a second dimension to the 'abortion is unique' element of Alito's reasoning. In part, the uniqueness is used a stick to beat the *Dobbs* dissentients. As Alito puts it: "The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life".[79] But the *Dobbs* majority is taking a very partial view of abortion's 'uniqueness'.

Abortion is of course a consequence of pregnancy. Pregnancy is also 'unique' in terms of the burdens that are placed on the pregnant person if she is required to complete the pregnancy and give birth. The *Dobbs* majority seems not to recognize this. There is no mention in the majority opinion of the physiological or psychological costs a person might incur if she does not have an abortion. Indeed one might almost be tempted to suggest that:

> The most striking feature of the majority opinion is the absence of any serious discussion of the legitimacy of the interest of a pregnant minor, or the child or woman impregnated by rape, or the pregnant woman who lacks mental competence, in not being required to carry the pregnancy to term.

On its face, the Mississippi statute accords almost no weight to such considerations. Its 'medical emergency' exception is cast in very narrow terms:

> "Medical emergency" means a condition in which, on the basis of the physician's good faith clinical judgment, an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.

---

77 539 U.S. 558 (2003).
78 *Id.* at 570.
79 *Dobbs*, Majority, 37.

Alito's judgment does not engage with this issue at all. Nor does the majority accord any legitimacy (nor even consideration) to more pervasive concerns about the risks of pregnancy to a pregnant person. In the 2010s, post-partum death rates in the USA during or consequent upon childbirth ran at 17 per 100,000.[80] This is substantially higher than in many other western nations. In Mississippi in the 2013-2016 period,[81] the death rate was notably higher than the national average, at 33 per 100,000 births. More starkly still, the maternal death rate in Mississippi for black women was 52 per 100,000 births. None of these issues are canvassed in the majority opinion. The 'uniqueness' of abortion for Alito *et al*, it seems, exists as a concept very much in the eye of the judicial beholder rather than the child or woman who is actually pregnant.

F. A Fetus Does Not Have 'Rights'—Yet

Mississippi's Act makes repeated use of the term 'unborn human being' to describe a fetus. The Act also asserts that the fetus is a human being from the moment of conception. This is of course a recurrent feature of pro-life discourse in the USA. To this point, the Supreme Court has consistently refused to accept that a fetus is per se the holder of legal rights in the context of abortion regulation. That refusal was bluntly stated in *Roe* and in *Casey* and in subsequent litigation. Thus far, the constitutional basis recognized by the Court for State prohibition and regulation of abortion – whatever that prohibition or regulation might be – is the 'right' of a State's 'people' to give tangible legal expression to their moral distaste for the practice through their respective State's lawmaking procedures.

For the Court to acceptance that a fetus is per se the bearer of legal rights – and is so from the moment of conception – would have profound implications not just for States which wish to have very restrictive abortion laws, but also, perhaps even more significantly, for those States which would prefer to have a very permissive legal regime. Crudely stated – if a fetus is a human being then for a person intentionally either to undergo or provide an abortion is prima facie murder.

From that perspective, arguments about 'abortion rights' will shift from being concerned with what a State may not constitutionally prohibit to what a State may not constitutionally allow. The crucial question which will be raised by anti-abortion activists in pro-abortion States will be in what circumstances and to what extent may a State rebut a presumption that the deliberate killing of a 'human being' amounts to murder? More bluntly put, the question will shift from whether States *can* prohibit abortion to whether they *must* do so. The text of the Fourteenth expressly identifies 'life' as a protected entitlement. That is a much less open term than 'liberty'.

---

80 *See* the survey in The Commonwealth Fund, *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, (Nov.18, 2020) https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries.

81 The following figures are taken from the State government's own statistics, so one can certainly assume that they do not exaggerate the reality: Mississippi State Department of Health, Mississippi Maternal Mortality Report 2013-2016, (2019) https://msdh.ms.gov/msdhsite/index.cfm/31,8127,299,pdf/MS_Maternal_Mortality_Report_2019_Final.pdf.

Ostensibly, the majority in *Dobbs* passed up the opportunity to take this step.[82] Alito framed the majority position in this way: "Our decision is not based on any view about when a State should regard pre-natal life as having rights or legally cognizable interests".[83] But that text merits careful consideration. Two words within that phrase that might set alarm bells ringing in pro-choice States: "when" rather than "whether"; and "should" rather than "may". The invitation seems on closer examination a quite obvious one to anti-abortion activists in States where the supposedly conclusive State lawmaking process permits abortion on quite expansive terms.

III. Conclusions

Alito's judgment in *Dobbs* depends for its legitimacy at least in part on its unacknowledged rejection of John Marshall's previously noted suggestion that: "[The Constitution's] nature requires that only its great outlines should be marked, its important objects designated and the *minor ingredients which compose those objects be deduced* from the nature of the objects themselves".[84] *Roe* can sensibly be portrayed as a fine example of a judgment which has 'deduced a minor ingredient' from the Constitution's 'important objectives'. It is therefore not just *Roe* which the *Dobbs* majority are condemning as 'egregiously wrong'. The target is an entire philosophy of legal thought.

A. On the Adequacy of State Political Processes

In one sense, the moral integrity of the majority judgment in *Dobbs* rests on the presumption that if creating extensive—or even modest—entitlements to abortion is a matter about which a State's voters really care, then significant numbers of voters will mobilize politically to support and secure the election of political candidates who will promote and pass laws to that effect; (or if the State's law makes provision for it will pursue that result in a referendum). *De jure*, the United States is no longer in—and has not been for many years—an era when women or non-white or impoverished citizens were formally denied the entitlement to vote in State elections, or when attempts to exercise a formally existing voting right were met with violent or intimidatory tactics of suppression.

Subsequent events lend some force to the integrity of that presumption. The scope of abortion regulation within some States was a fiercely contested issue in the fall 2022 State elections, and there are clear indications that people's voting choices in national elections were significantly influenced by candidates' positions on the question.[85] The rather large elephant in the (Court) room, which was obviously not

---

82 Kavanaugh's concurrence expressly states that the Constitution cannot be construed in a fashion which "outlaws" abortion; *Dobbs*, Kavanaugh 3, 5. He does not explain how one could square this assertion with acceptance of the proposition that a fetus is a person for the purposes of bringing abortion with the reach of murder.

83 *Dobbs*, Majority p29.

84 *Supra* note 4.

85 See the regularly updated post by the New York Times, Abortion on the Ballot, https://www.nytimes.com/interactive/2022/11/08/us/elections/results-abortion.html; Veronica

directly in issue in *Dobbs*, is the staggering raft of voter suppression laws which have latterly (and not so latterly) appeared in—and not one assumes as a matter of coincidence—Republican governed States which also favor very restrictive regulation of abortion.[86] Mississippi is one of those States. Legislation enacted there in 2022 significantly increased the self-identification requirements that were required for people to register for and cast votes in State and federal elections.[87]

When *Roe* was decided, and for many years thereafter, the abortion controversy cut significantly across party lines. But it is now an almost perfectly partisan issue, with Democrats lining up in support of *Roe* and *Casey* and Republicans opposing them.[88] The pursuit of partisan political advantage over political questions other than abortion no doubt underlies recent voter restrictions and reapportionment initiative in Republican States. Legal challenges to such measures will surely be forthcoming. But one might wonder if the *Dobbs* majority will decide that the Constitution is as accommodating of States' preferences as to their voting laws as it to their preferences on abortion.

B. On Judicial Integrity

Observers who are by nature invariably and firmly predisposed to see the best rather than the worst of human nature at work in the governmental process, and who restrict their treatment of *Dobbs* to reading the judgment itself, might incline towards giving Alito *et al* the benefit of the doubt and accept that those judges are indeed principled upholders of the finest traditions of judicial constitutional lawmaking. It is however not difficult to offer a rebuttal to such naivety.

For the *Dobbs* majority, it is essential that *Roe* and *Casey* were *egregiously* wrong in order to justify the assertion that overruling them is consistent with accepted notions of stare decisis. If *Roe* and Casey were finely balanced in doctrinal terms then their overruling by a new Court majority would be transparently an indulgence of 'raw judicial power'. But if a decision is considered to be—as *Roe* and Casey apparently were—'egregiously wrong', then the judges who hold that view presumably did not arrive at it, having immediately previously held a contrary or even significantly different view, as a result of arguments presented to them in court in *Dobbs*. If one of the highest profile of all Supreme Court opinions was in those judges' respective opinions 'egregiously wrong', it must have surely been so

Straqualursi, Devan Col & Pual LeBlanc, *Voters Deliver Ringing Endorsement of Abortion Rights on Midterm Ballot Initiatives Across the US*, CNN Nov. 9, 2022; ps://edition.cnn.com/2022/11/09/politics/abortion-rights-2022-midterms/index.html.

86 For an overview of recent initiatives see Brennan Centre for Justice, *Voting Laws Round-Up: May 2022*, https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022. A similar point might be made about recent reapportionment initiatives (especially for seats in State legislatures) in Republican controlled States. *See, e.g.,* the critique (obviously somewhat partisan) in American Civil Liberties Union, *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, (2021) https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020.

87 [57] H.B. 1510 (Miss.) For an (admittedly partisan) analysis of the Act see American Civil Liberties Union Mississippi, ACLU-MS Statement on HB 1510, https://www.aclu-ms.org/en/press-releases/aclu-ms-statement-hb-1510.

88 Sophia Cal, *The Last Anti-Abortion Democrats*, Axios 27 (May 27, 2022) https://www.axios.com/2022/05/27/abortion-democrats-supreme-court-midterms.

regarded by them for a good many years. Egregious error is not a matter of nuance. It is not a realization which dawns as the product of myriad subtle, interstitial steps on a long and winding road of gradually unfolding judicial enlightenment. It is a bluntly obvious phenomenon, long and firmly held, that there can be *no justification at all* for the conclusion reached.

Consider then the following exchange from Alito's confirmation hearings before the Senate Judiciary Committee in January 2006:

> **Chairman SPECTER**….. Let me come now to the statement you made in 1985, that the Constitution does not provide a basis for a woman's right to an abortion. Do you agree with that statement today, Judge Alito?
>
> **Judge ALITO**. Well, that was a correct statement of what I thought in 1985 from my vantage point in 1985, and that was as a line attorney in the Department of Justice in the Reagan administration. Today if the issue were to come before me … then I would approach the question with an open mind, and I would listen to the arguments that were made.
>
> **Chairman SPECTER**. So you would approach it with an open mind notwithstanding your 1985 statement?
>
> **Judge ALITO**. Absolutely, Senator … .[89]

There is nothing in the *Dobbs* majority opinion to suggest that Alito heard argument with an open mind. He sees no merit at all in any of the propositions advanced in support of retaining *Roe* or *Casey* as good authorities. Perhaps in those 15 years between his confirmation and deciding *Dobbs*, Alito's 'open mind' gave weight to all manner of arguments against his 1985 assertion, and after careful reflection found them all wanting. Perhaps. But what of Gorsuch, Kavanaugh and Coney-Barrett, the three Trump nominees now on the Court, given that Donald Trump had indicated shortly before the 2016 election that he would only nominate Justices who would overrule *Roe*.[90]

Gorsuch's confirmation hearings were held in March 2017.[91] In the course of the hearing, Gorsuch identified Byron White[92] as one of his "'legal heroes"', and lauded Scalia for being a judge who would insist "that the judge's job is to follow

---

89 Committee on the Judiciary United States Senate, Confirmation Hearing on the Nomination of Samuel A. Alito Jr. to Be an Associate Justice of the Supreme Court of the United States, 322 (2006) Serial No. J–109–56.

90 Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC, Wed. Oct. 19, 2016 at 10:00 EDT, https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

91 Committee on the Judiciary United States Senate, Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States, 322 (2017) Serial No. J–115–6; (hereafter Gorsuch, Hearing).

92 *See supra* note.

the words that are in the law, not replace them with those that are not".[93] Gorsuch refused to answer if he considered *Roe* and *Casey* to have been correctly decided.[94]

Kavanaugh was similarly non-committal, a position typified by the exchange quoted below:

> **Senator FEINSTEIN …** So the question comes, and you have said today—not today, but it has been reported that you have said that Roe is now settled law. The first question I have of you is what do you mean by ''settled law''? I tried to ask earlier do you believe it is correct law? Have your views on whether Roe is settled precedent or could be overturned, and has your views changed since you were in the Bush White House?
>
> **Judge KAVANAUGH.** Senator, I said that it is settled as a precedent of the Supreme Court, entitled the respect under principles of stare decisis. And one of the important things to keep in mind about Roe v. Wade is that it has been reaffirmed many times over the past 45 years, as you know, and most prominently, most importantly, reaffirmed in Planned Parenthood v. Casey in 1992…..[95]

Coney-Barret's position during her (2020) confirmation hearings was more palpably evasive: its lack of candor matched perhaps by a shortfall in believability:

> **Senator Dianne Feinstein:** … (34:40) … Do you agree with Justice Scalia's view that Roe was wrongly decided?
>
> **Amy Coney Barrett**: (35:05) Senator, I completely understand why you are asking the question, but again, I can't pre-commit or say yes, I'm going in with some agenda, because I'm not. I don't have any agenda. I have no agenda to try to overrule Casey. I have an agenda to stick to the rule of law and decide cases as they come.[96]

From 'no agenda' to 'egregious error' in just two years might strike some observers as an implausibly rapid journey for an experienced lawyer, professor and judge *bona fide* to have made.

Some years ago, in a rather well-known collection of pamphlets on the subject of constitutional reform, Alexander Hamilton offered the following rationale for entrusting the judges of a proposed Supreme Court with a power of constitutional rather than just legislative interpretation:

---

93 Gorsuch, Hearing, 65.

94 *Id*. at, inter alia, 77, 107, 228

95 Committee on the Judiciary United States Senate, Confirmation Hearing on the Nomination of Hon. Brett M Kavanaugh To Be an Associate Justice of the Supreme Court of the United States, 127 (2018) Serial No. J–115–61.

96 The official Judiciary Committee transcript is not yet available. This exchange is taken from https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-2-transcript. The bracketed figures denote the time into the video recording when the comments were made.

> …[T]there can be but few men [sic] in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge … . [97]

How unfortunate it would be if the egregious—to use an in-vogue term—lack of integrity which latterly afflicted the the holder of the Presidency of the United States might also now be presumed to afflict some members of its Supreme Court.

C. What Next for Abortion Rights ?

Dobbs has manifestly not brought the abortion controversy to an end. Nor has it removed the issue from the courts. Nor is there any realistic prospect that it could ever do so. All that *Dobbs* has done is yank the field of legal battle many steps to the political rights.

Dred Scott provides an unhappy point of reference here. Narrowly construed, the majority holding in *Dred Scott* was that Congress had no power to prohibit slavery in the territories. But that conclusion opened the door to more expansive pro-slavery legal arguments; for example that slave owners in slave States had a legal right to take their slaves with them in transit through or for temporary sojourns in free States and that Congress was under an obligation to enact legislation to enforce those rights against the wishes of free States.

Dobbs does not close the door on future abortion litigation. It just points that litigation in new directions. The notion that anti-abortion activists in pro-choice States will now seek to establish that a fetus is at any point post-conception a 'person' for the purposes of seeking to require rather than permit States to prohibit abortion has already been canvassed. But the less draconian implications of that argument ought to be teased out.

The most obvious—and likely quantitatively most significant—next step will be that States legislate to criminalize possession, supply and use of the morning after pill and any other forms of non-surgical abortion procedure. As noted above, 'chemical' early-stage abortions are much the most significant element of abortions in Mississippi, and presumably in every other State as well. States have always been permitted to prohibit the in-State production of 'dangerous' substances, and to close their borders to such material.[98] The morning after pill may prevent conception, but it can also be effective in terminating an already conceived fetus. The drug mifepristone, though often subsumed under the morning after pill label, is in contrast intended only to terminate existing pregnancies.[99] Its effect would no doubt be seen in some pro-life political circles as being to 'kill' a 'human being'. It strains credibility to think that the *Dobbs* majority would not accept that States

---

97 James Madison, Alexander Hamilton, & John Jay, The Federalist Papers no.78 471 (Clinton Rossiter, ed. 1961).

98 *See, e.g., Munn v. Illinois,* 94 U.S. 113 (1877); *Mugler v. Kansas,* 123 U.S. 623 (1887); *Powell v. Pennsylvania,* 127 U.S. 678 (1888).

99 Mayo Clinic, Morning After Pill, https://www.mayoclinic.org/tests-procedures/morning-after-pill/about/pac-20394730#:~:text=Plan%20B%20One%2DStep%20contains,emergency%20birth%20control%20(contraception).

would have a rational basis for regarding chemical abortion methods as 'dangerous' substances and prohibiting their presence within State borders.[100]

Any such initiatives would be complicated by the fact that morning after pills are licensed by the Federal Drug Administration (FDA), and so presumptively beyond the reach of State regulation. The FDA itself also responded promptly to *Dobbs* by changing its characterization of the pill to one which expressly disclaimed that it triggered abortion.[101] That symbolism is already being put to a legal test. A direct attack has already been made on the legality of the FDA's licensing regime for mifespirstone. In *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration, [102]*a Trump appointed federal district judge enjoined continued distribution of the pill. The Supreme Court subsequently lifted the District Court ban[103] pending an appeal before the Fifth Circuit, which was heard in May 2023. A third element to what pro-choice advocates might see as "parade of [post-*Dobbs*] horribles"[104] will be State legislation which seeks to prevent the State's citizens and/or residents from leaving the State in order to have an abortion elsewhere. That situation will in any event arise de facto in many States without the need for legislation, as many pregnant women will be unable to afford the costs of travelling inter-State. On the present state of the law, it would seem very difficult to envisage that such legislation would survive scrutiny even by the current Court insofar as it attempted to control the movement of mentally competent adult women. Kavanaugh's concurrence in *Dobbs* suggest that it is "not especially difficult" to conclude that such legislation would be invalid because of the "constitutional right to inter-state travel".[105] The matter has already come before the Federal District

---

100 A bill to that effect has already been promoted in the Texas legislature: Rebecca Noel, *Proposed Texas Bill Could Penalize Use of Emergency Contraceptive*, Houston Public Media, 27 February 2023; https://www.houstonpublicmedia.org/articles/news/health-science/2023/02/27/444704/proposed-state-bill-could-penalize-the-use-of-emergency-contraceptive/.

101 *See* Pam Belluk, *The FDA Now Says It Plainly: Morning After Pills Are Not Abortion Pills*, N.Y. Times, December 22, 2022; https://www.nytimes.com/2022/12/23/health/morning-after-pills-abortion-fda.html.

102 United States District Court, Northern District of Texas, Amarillo Division, 7 April 2023; https://storage.courtlistener.com/recap/gov.uscourts.txnd.370067/gov.uscourts.txnd.370067.137.0_12.pdf.

103 21 April 2023; https://reproductiverights.org/wp-content/uploads/2023/04/Supreme-court-order-stay-FDA-4-21-23.pdf. Thomas and Alito JJ. dissented.

104 The phrase is borrowed from Powell, J.'s description in *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 445 (1983) of the way in which Ohio legislation characterised the mechanics of abortion procedures.

105 *Dobbs,* Kavanaugh, 10. Kavanaugh one assumes has in mind here such case as *Crandall v. Nevada,* 6 18 L. Ed. 745 (1867): *Williams v. Fears,* 179 U.S. 270 (1900): *Edwards v. California,* 314 U.S. 160 (1941): *Saenz v. Roe,* 526 U.S. (1999). In *Williams*, Fuller, C.J., stated (at 274): "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty…secured by the Fourteenth Amendment and by other provisions of the Constitution". The obvious "other provision" is the commerce clause. *See generally* Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. Marshall J. Info. Tech. & Privacy L. 639 (2014): Andrew Porter, *Comment: Toward a Constitutional Analysis of the Right to Intrastate Travel* 86 Nw U. L.R. 820 (1992). In the specific context of abortion see Seth Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. Rev. 451 (1992).

court in Texas, which has issued an interim order preventing State authorities from stopping abortion providers providing advice and assistance to women seeking to travel out of State to get an abortion.[106]

But the argument in support of such legislation is much easier to make in respect of a minor —a 13 year old raped by her father perhaps, who as a result of the rape has been placed *de jure* within the care of State authorities and who has no responsible adult to assist here in making an inter-State journey; or the 17 year old pregnant through consensual sex who has the individual mental competence to decide she wants to have an abortion but is the child of anti-abortion parents who are not just unwilling to assist her to do so but prepared to take positive steps to prevent it; or even indeed the child of parents who support her wish to have an abortion in another State. Parental consent laws (albeit with the possibility of a judicial by-pass) were approved by the Court in *Casey*. They are now widespread features of the United States abortion landscape.[107] Their use as an indirect means to block inter-State travel for abortion purposes will surely not be long in coming.

Dobbs does not make State laws prohibiting wholly immune from judicial scrutiny. Such laws will still be subject to rational basis review. The prospects of a successful challenge on that ground are slight at best, and even a successful challenge is likely to be of minimal quantitative significance.[108] It is also very difficult to see any circumstances arising in which an equal protection claim under strict scrutiny review could arise. The *Dobbs* majority was bluntly dismissive of any suggestion that abortion laws raised an equal protection issue because only women can be pregnant.[109] It would seem fanciful to expect that any State will enact abortion legislation that on its face draws any distinction between women and girls on the basis of such suspect categories as their race, religious belief or party political affiliation.

There is no prospect at all of resolution being found through the process of formal constitutional amendment. Nor does the Biden administration seem to have taken seriously suggestions aired after *Dobbs* that the composition of the Court should be altered to create a pro-*Roe* or *Casey* majority.[110] Even if a congressional majority might have been found for such measures prior to the November 2022 elections, and it clearly cannot be found now, Roosevelt's ill-fated proposal to pack the Court to save his new deal legislation stands as a powerful precautionary tale against the advisability of even proposing such a remedy.[111]

---

106 *See* the statement of claim in *Fund Texas Choice v. Paxton* 1:22-CV-859-RP (W.D. Texas (Aust. Div.)) Feb. 24, 2023) https://www.courthousenews.com/wp-content/uploads/2022/08/fund-texas-choice-complaint-usdc-austin.pdf. The interim order is at https://caselaw.findlaw.com/court/us-dis-crt-w-d-tex-aus-div/2193694.html.

107 Guttmacher Institute, Parental Involvement in Minors' Abortions, (2023) https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions.

108 A prohibition on abortion even when the life of the pregnant mother would be put at significant risk by continuing the pregnancy likely would not survive rational basis review.

109 Dobbs, *Majority*, 10-11.

110 *See* the discussion in Norman Eisen & Sasha Matsuki, *Term Limits—A Way to Tackle the Supreme Court's Crisis of Legitimacy*, Brookings Institute, (2022); https://www.brookings.edu/blog/fixgov/2022/09/26/term-limits-a-way-to-tackle-the-supreme-courts-crisis-of-legitimacy/.

111 *See* Franklin D. Roosevelt, *Fireside Chat on the Reorganisation of the Judiciary,* (March 09, 1937) http://www.pbs.org/wnet/supremecourt/capitalism/sources_document4.html.

For those of my/our students in a Constitutional Law of the USA class who are discomfited by finding things to say in favor of Taney's judgment in *Dred Scott*, *Roe* and *Casey* will likely have triggered similar feelings of unease. Neither judgment has clear legal roots. Neither is firmly located in longstanding and widespread political practice. Neither, it might be said, has a strong claim even to be 'law' at all in terms of methodology. But then, perhaps, someone might suggest that 'we must never forget that it is a Constitution we are expounding', and that the Court's role in expounding that Constitution is not simply to defer on such a contentious moral issue to bare majoritarian legislative processes in the States. For many pregnant people in pro-life States, *Dobbs* will surely prove a horrendously problematic judgment. In the more secluded world of the constitutional law classroom it offers a marvelous vehicle for exploring and evaluating the nature of the Court's constitutional role.

See further David Kyving, *The Road Not Taken* 104 Pol. Science. Q., 463, (1989); Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 Pol. Science Q., 267, (1988).