

## WHAT IS THE MATTER WITH *DOBBS*?

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*Contrary to its critics, Dobbs v. Jackson Women’s Health Organization is not illegitimate or lawless. It is a highly consequential but fundamentally ordinary example of the inextricable connections between morality and constitutional law. If abortion is akin to murder, Dobbs could not—and should not—have come out any other way. If abortion is essential to personal autonomy and equal citizenship, the case was wrongly decided and should be reversed at the earliest opportunity.*

*The appropriate response to decisions like Dobbs is to criticize the moral judgments underlying them. Depending on the circumstances, institutional responses, such as court packing and jurisdiction stripping, might also be justified. But conflating moral disagreement with lawlessness is both unpersuasive and a distraction from the core issue. It is also a form of crying wolf that risks backfiring when the charge of lawlessness is actually justified.*

### INTRODUCTION

The ferocity of the liberal and progressive reaction to *Dobbs v. Jackson Women’s Health Organization*<sup>1</sup> is matched in American history only by the white Southern reaction to *Brown v. Board of Education*<sup>2</sup> and the pre-Civil War Republican reaction to *Dred Scott v. Sandford*.<sup>3</sup> Some of this righteous fury is obviously grounded in concern over the practical impact of the Court’s decision, especially on those at America’s social, racial, and economic margins. And some of it is grounded in a straightforwardly moral view of abortion’s centrality to personal autonomy and equal citizenship. But much of the critical reaction to *Dobbs* goes a crucial step further, portraying the Court’s decision as *legally* beyond the pale, indeed “lawless” and “utterly

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<sup>1</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>2</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>3</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

unprincipled,”<sup>4</sup> a “right-wing ideological jihad”<sup>5</sup> perpetrated by an implacable conservative majority “only because they can.”<sup>6</sup>

Such arguments imply that *Dobbs* is an affront to the rule of law and a threat to judicial legitimacy that transcends the morality of abortion. More specifically, such arguments imply that *Dobbs* should be regarded as lawless and fundamentally illegitimate even by those who hold the pro-life view that abortion is akin to murder.<sup>7</sup> This claim cannot withstand scrutiny. To paraphrase Abraham Lincoln on slavery, the *Dobbs* majority thinks abortion is wrong and should be restricted—or at least that legislatures can permissibly so conclude. The Court’s critics think abortion is a fundamental human right and should be constitutionally protected. That is the rub.<sup>8</sup>

Of course, the Court and its critics also disagree about the scope of substantive due process—should constitutionally protected liberties be limited by history and tradition or determined by the Court’s “reasoned judgment”?—and the appropriate method of constitutional interpretation. But these disagreements are not essential to the outcome in *Dobbs*.<sup>9</sup> If abortion is akin to murder, it is not—and should not be—constitutionally protected, even under the critics’ understanding of substantive due process

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4 Dahlia Lithwick & Neil S. Siegel, *The Lawlessness of the Dobbs Decision*, SLATE (June 27, 2022), <https://slate.com/news-and-politics/2022/06/dobbs-decision-glucksberg-test-lawlessness.html> [<https://perma.cc/QY2N-TJGH>].

5 Eugene Daniels, *Biden’s Court Commission Appointees: We Told You So on Expanding the Court*, POLITICO (July 7, 2022, 4:30 AM) (quoting Laurence Tribe), <https://www.politico.com/news/2022/07/07/joe-biden-supreme-court-commission-00044401> [<https://perma.cc/2EGB-B67B>]. Apart from the substance, Tribe’s choice of metaphor leaves something to be desired. See *Factsheet: Jihad*, BRIDGE INITIATIVE (Sept. 12, 2017), <https://bridge.georgetown.edu/research/factsheet-jihad/> [<https://perma.cc/X9BX-QJWV>] (“Most Muslims agree that the concept [of jihad] is best understood and practiced as an inner spiritual struggle towards faith and good deeds . . .”).

6 Daniels, *supra* note 5 (quoting Nancy Gertner).

7 See Laurence Tribe, *Deconstructing Dobbs*, THE N.Y. REV. OF BOOKS (Sept. 22, 2022), (“Any argument relegating intimate personal rights to the mercy of political majorities because of their substantive character would have to reject decades of decisions holding that the Liberty Clause does in fact protect at least *some* substantive rights.”). The labels “pro-life” and “pro-choice” are hotly contested, with each side preferring a more pejorative term for its opponents. Rather than take sides in this unifying debate, I use the term that each side prefers for itself.

8 Cf. 4 ABRAHAM LINCOLN, LINCOLN LETTER FROM ABRAHAM LINCOLN TO ALEXANDER STEPHENS (1860), reprinted in THE COLLECTED WORKS OF ABRAHAM LINCOLN 160 (Roy P. Basler ed., 1953) (“You think slavery is right and ought to be extended; while we think it is *wrong* and ought to be restricted. That I suppose is the rub.”)

9 These disagreements are also fully internal to U.S. constitutional law. The Court’s history-and-tradition approach and quasi-originalism may be wrong. I think they are. But both clearly have substantial support in the U.S. constitutional tradition. This is an important point, which the ferocious criticism of *Dobbs* has done much to obscure, but I will not pursue it further here.

and notwithstanding stare decisis.<sup>10</sup> Everything else, in the *Dobbs* decision and the critics' attacks on it, comes back to this issue.

This Essay examines the main arguments advanced by *Dobbs*'s critics and shows that none is sufficient to justify a different outcome unless one holds a pro-choice perspective. My goal in pressing this point is not, in any way, to defend *Dobbs*, which I think wrong, gratuitously cruel, and poorly reasoned in many respects.<sup>11</sup> Rather, my goal is to clarify what divides the Court and its critics—and the limits of critiques that purport to transcend the morality of abortion.

For decades, liberals and progressives have correctly insisted that constitutional law unavoidably implicates moral judgments. More precisely, liberals and progressives have insisted that *any normatively compelling* approach to constitutional law implicates moral judgments. *Dobbs* is the clearest possible illustration. Nearly all the Court's critics regard the quasi-originalist approach of *Dobbs*—which disclaims any role for moral judgment—as normatively unpersuasive. But the question remains whether abortion is protected by the Constitution. The standard liberal and progressive alternatives to originalism can generate an affirmative answer only when paired with a pro-choice perspective.

The same is true for the question of stare decisis. The nature and relative weight of the reliance interests at stake and the importance of correcting the purported error of *Roe v. Wade*<sup>12</sup> are both deeply bound up with the morality of abortion. If the dissenters saw these issues from a pro-life viewpoint, it is very difficult to imagine them voting to reaffirm *Roe*. That does not make the stare decisis argument against *Dobbs* wrong. But like the other critiques, that argument depends on a pro-choice perspective.

Part I summarizes the decision in *Dobbs* and the attacks on its lawfulness and legitimacy. Part II examines each of the main arguments against *Dobbs* and shows that none is persuasive if one adopts the pro-life view that abortion

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<sup>10</sup> Here and throughout, I use “murder” in its technical sense of *wrongful* killing (i.e., not excused or justified).

<sup>11</sup> I will not defend this view here because it is not germane to my argument, but also because the reasons behind it are so banal. Abortion is central to personal autonomy and equal citizenship, and the state's interest in protecting prenatal life is insufficient to outweigh these interests until quite late in pregnancy, with no line more administrable or less arbitrary than viability. In other words, I substantially agree with the liberty and equality arguments of the *Dobbs* dissent, including the judgments of political morality on which they (more or less explicitly) rest. I also agree that these are judgments the Court can legitimately and competently make.

<sup>12</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

is akin to murder or otherwise gravely wrong. Part III explains the broader implications of this conclusion.

Conservatives have often accused liberals and progressives of lawlessness for departing from the Constitution's original meaning or acting on moral premises that differ from their own. These accusations have always rung hollow, and liberal and progressive critics of *Dobbs* should not repeat conservatives' mistake. If constitutional law turns, in part, on moral judgment, it is entirely predictable that justices with different moral convictions will sometimes, perhaps often, reach different results. The appropriate response when the Court goes wrong is to criticize the mistaken moral judgments underlying its decisions, harshly if the situation calls for it. Depending on the circumstances, institutional responses, such as court packing and jurisdiction stripping, might also be justified. But conflating moral disagreement with lawlessness is both unpersuasive and a distraction from the core issue. It is also a form of crying wolf that risks backfiring when the charge of lawlessness is actually justified. One need not look far into the future to imagine such a case arising. If and when it does, liberals and progressives may wish they had exercised more restraint in leveling the charge against *Dobbs*.

A few clarifications are in order before I begin. First, my focus is on the Court's liberal and progressive critics. I will not, therefore, address the *Dobbs* majority's claim (pressed with special vigor by Justice Kavanaugh's concurrence<sup>13</sup>) to be merely neutral on abortion, rather than pro-life. That claim is an outgrowth of the majority's quasi-originalist approach, which at least in theory, requires the Court to defer to the moral judgments—and reservations of judgment—embodied in the Constitution's original public meaning and the history and traditions of the nation.<sup>14</sup> If this approach is

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<sup>13</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2304–10 (2022) (Kavanaugh, J., concurring) (“Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral.”).

<sup>14</sup> I say “at least in theory” because there is ample reason to doubt that originalism lives up to this promise in practice. See, e.g., ERIC SEGALL, ORIGINALISM AS FAITH (2018) (explaining how judges often use originalism as a pretext for reaching decisions aligned with political preferences); see also FRANK CROSS, THE FAILED PROMISE OF ORIGINALISM 5 (2013) (“A stronger case for originalism is simply that reliance on originalism is required for legal decisionmaking . . . . When interpreting another legal text . . . it is typical to use the meanings of the words at the time of its enactment.”); see also Richard Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 34 (2005) (“[V]iewed realistically, the Supreme Court, at least most of the time, when it is deciding cases is a political organ . . . .”). Of course, the decision to embrace originalism over other competing approaches itself requires moral justification and seems likely to be strongly influenced by the justices' moral

correct, the lawlessness critique of *Dobbs* obviously stands on much weaker footing. But the aim of this Essay is to show that the critique fails even under the critics' own, non-originalist views of substantive due process and stare decisis. If the outcome in *Dobbs* is wrong, it is not because the decision is lawless or illegitimate. It is because the pro-choice perspective on constitutional liberty and equality is right.

Second, as I use the term, "pro-choice" is a shorthand for the view that abortion is broadly permissible morally speaking and therefore not legitimately subject to unduly burdensome regulation or prohibition. "Pro-life" is a shorthand for the view that abortion is always, or almost always, a grave moral wrong and therefore legitimately subject to burdensome regulation or prohibition. I recognize, of course, that there is a wide spectrum of views on the moral permissibility of abortion, not only these two. I also recognize that there is a distinction between the morality of abortion and the political morality of abortion regulation. But these shorthands suffice for my purposes. More nuanced views can be plugged into my analysis like values into a mathematical function; the outcome may change but the structure of the analysis does not.<sup>15</sup>

Third, I will not here attempt the large task of comprehensively defining lawfulness and legitimacy or their opposites. The critique of *Dobbs* I am responding to presumes that lawlessness and illegitimacy consist of more than mistaken moral judgment. According to the critics, *Dobbs* not only fails to protect a right fundamental to personal liberty and equal citizenship; it also flouts the law and bedrock norms of judicial legitimacy in ways that transcend the morality of abortion. If the arguments for viewing *Dobbs* as lawless or fundamentally illegitimate all depend on a pro-choice moral perspective, that is enough to show that this critique fails, without a comprehensive definition of lawfulness or illegitimacy. The *Dobbs* majority and the critics disagree on many things, and the critics have persuasively identified many shortcomings in the Court's decision. But the only difference essential to the outcome of *Dobbs* is their disagreement on the morality of abortion.

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judgments on highly salient issues like abortion. See Andrew Coan, *Talking Originalism*, 2009 BYU L. REV. 847, 849 (2009) ("[B]y redefining interpretation to include only originalist interpretation, originalists appear to answer the normative question of how judges should decide constitutional cases. But it is only an appearance.").

<sup>15</sup> I expand on this point below in connection with Chief Justice Roberts's concurrence in the judgment, which attempts to chart a middle course between the majority and the dissent. See *infra* Part II.F.

## I. DOBBS AND ITS CRITICS

As everyone by now knows, *Dobbs v. Jackson Women’s Health Organization*<sup>16</sup> upheld the constitutionality of Mississippi’s ban on abortion after fifteen weeks, expressly reversing *Roe v. Wade*<sup>17</sup> and *Planned Parenthood v. Casey*<sup>18</sup> in the process. Justice Samuel Alito wrote a slashing and unapologetic opinion for the Court, provoking an outraged response from liberal and progressive defenders of abortion rights. This Part briefly summarizes the reasoning of Alito’s opinion and the tenor of the critical response, with a particular focus on critics who have described *Dobbs* as not merely wrong but lawless or illegitimate.

### A. THE COURT’S DECISION

Justice Alito’s majority opinion in *Dobbs* differs very little from the draft that was leaked to the press almost two months before the Supreme Court formally issued its decision. In the most frequently quoted passage, he describes *Roe v. Wade* as “egregiously wrong . . . the day it was decided.”<sup>19</sup> He notes that Justice Harry Blackmun’s opinion in *Roe* has been long been regarded as an embarrassment even by liberals and progressives, and he quotes with approval John Hart Ely’s observation that *Roe* was “not constitutional law” and gave “almost no sense of an obligation to try to be.”<sup>20</sup>

According to Alito, the proper approach to analyzing abortion is the substantive due process analysis of *Washington v. Glucksberg*,<sup>21</sup> which the Court’s conservatives have favored for the past twenty-five years.<sup>22</sup> This approach is fundamentally backward-looking. If a right is not enumerated in the constitutional text or “deeply rooted in our history and tradition,” it is not protected by the Due Process Clause. Alito presents this test as an essential guidepost for the Court and a vital limit on judicial discretion.

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<sup>16</sup> 142 S. Ct. at 2284–85.

<sup>17</sup> 410 U.S. 113.

<sup>18</sup> 505 U.S. 833 (1992).

<sup>19</sup> 142 S. Ct. at 2237.

<sup>20</sup> *Id.* at 2241.

<sup>21</sup> 521 U.S. 702 (1997).

<sup>22</sup> *See, e.g.*, *Obergefell v. Hodges*, 576 U. S. 644, 695 (2015) (Roberts, C.J., dissenting) (explaining that judges must “exercise the utmost care in identifying implied fundamental rights lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court”); *see also* *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (criticizing the majority for recognizing fundamental rights beyond those “deeply rooted in this Nation’s history and tradition”).

Recognizing a fundamental liberty under the Due Process Clause removes the issue in question from democratic debate and transfers its resolution to unelected judges. *Glucksberg*'s "history and tradition" test ensures that this decision is guided by something more solid than the justices' own moral intuitions or "reasoned judgment." Or so Alito argues.<sup>23</sup>

Abortion is obviously not mentioned specifically in the Constitution, and Alito's opinion offers a lengthy historical analysis purporting to show that abortion rights are not deeply rooted in the nation's history and traditions. To the contrary, he contends that abortion was pervasively regulated throughout American history before *Roe*, which invalidated the abortion laws of every state in the country.<sup>24</sup> On this basis, he concludes that abortion enjoys no special protection under the Due Process Clause. State laws regulating abortion are subject merely to rational basis review, which Mississippi's fifteen-week abortion ban easily passes because it is rationally—indeed, integrally—related to the state's legitimate interest in protecting prenatal life, among various other legitimate interests.<sup>25</sup>

This analysis raises many questions, but one of the most pressing and widely discussed is what it implies for the Court's other modern due process decisions. Before *Dobbs*, the Court had largely abandoned the *Glucksberg* test in substantive due process cases.<sup>26</sup> *Lawrence v. Texas* and *Obergefell v. Hodges*, in particular, emphasized that the liberty protected by the Due Process Clause

<sup>23</sup> 142 S. Ct. at 2246–48.

<sup>24</sup> Professional historians have subjected Alito's analysis to withering criticism. See, e.g., The American Historical Association and the Organization of American Historians, *History, the Supreme Court, and Dobbs v. Jackson*, PERSPECTIVES ON HISTORY (Aug. 31, 2022) <https://www.historians.org/research-and-publications/perspectives-on-history/september-2022/history-the-supreme-court-and-emdobbs-v-jackson/em-joint-statement-from-the-american-historical-association-and-the-organization-of-american-historians> [https://perma.cc/TU25-RLCZ] ("Historians might note that the court's majority opinion refers to 'history' 67 times, claiming that 'an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.'"). But few of the critics have seriously contended that constitutionally protected abortion rights were deeply rooted in American history and traditions prior to *Roe*. This is simply a very difficult contention to defend, whatever the complexities and nuances Alito glosses over. But see Aaron Tang, *The Originalist Case for an Abortion Middle Ground* (Sept. 1, 2022) (unpublished manuscript) <https://ssrn.com/abstract=3921358> [https://perma.cc/BT5G-TSMP] (arguing that most states did not regulate pre-quickening abortions at the time of Fourteenth Amendment's ratification).

<sup>25</sup> 142 S. Ct. at 2283–84.

<sup>26</sup> See, e.g., 576 U. S. at 671 (stating that "while [the *Glucksberg*] approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."). This departure from *stare decisis* triggered no charges of lawlessness from liberals and progressives. Rather, they defended it as morally necessary to ensure that deeply rooted prejudices would not cramp contemporary understandings of constitutional liberty. *Id.*

was not frozen in time and should evolve in accordance with changing social views.<sup>27</sup> The rights to marriage equality and same-sex intimacy recognized in these decisions would be difficult or impossible to reconcile with *Glucksberg's* history-and-tradition test. Even the constitutional right to use contraception recognized in *Griswold v. Connecticut*<sup>28</sup> and *Eisenstadt v. Baird*<sup>29</sup> might be vulnerable.<sup>30</sup> Did the *Dobbs* Court mean to call these decisions into question, along with *Roe* and *Casey*?

Alito expressly answers this question in the negative. But he makes no attempt to explain how the unenumerated rights to marriage equality, same-sex intimacy, or contraception can be squared with his backward-looking understanding of substantive due process. Instead, he emphasizes a moral, rather than a historical, distinction between those rights and the right to abortion: “Abortion is different because it destroys what *Roe* termed ‘potential life’ and what the law challenged in this case calls an ‘unborn human being.’”<sup>31</sup> No other substantive due process decision, Alito goes on to say, “involved the critical moral question posed by abortion.”<sup>32</sup>

Having established to his own satisfaction that *Roe* and *Casey* were wrongly decided, Alito proceeds to consider whether *stare decisis* nevertheless requires the Court to adhere to their holdings. Working through a modified version of *Casey's* *stare decisis* factors, he concludes that the answer is no. He places particular weight on the severity of *Roe* and *Casey's* error (“egregiously wrong”)<sup>33</sup> and the quality of their reasoning (“exceptionally weak”).<sup>34</sup> He also criticizes *Casey's* “undue burden” standard as vague and unworkable<sup>35</sup> and dismisses reliance arguments for reaffirming *Roe* and *Casey*. Quoting *Casey* itself, he observes that “reproductive planning could take virtually immediate account of any sudden restoration of state

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<sup>27</sup> See 539 U.S. at 572 (“These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”); see also 576 U.S. at 671 (“If rights were defined by who exercised them in the past then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”).

<sup>28</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>29</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>30</sup> Several commentators have suggested that interracial marriage also belongs on this list, prompting its inclusion in the Respect for Marriage Act, along with same-sex marriage. But bans on interracial marriage involve overt racial classifications, which conservatives as well as liberals view as unconstitutional under the Equal Protection Clause. I therefore put it to one side here.

<sup>31</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct., 2228, 2236 (2022).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2265.

<sup>34</sup> *Id.* at 2265–66.

<sup>35</sup> *Id.* at 2272–73.



authority to ban abortions.”<sup>36</sup> In reaffirming *Roe*, *Casey* invoked a broader conception of reliance involving the organizing of intimate relationships and “choices that define their views of themselves and their places in society.”<sup>37</sup> But Alito dismisses this form of reliance as “intangible” and too difficult for courts to assess empirically. Moreover, considering it would require the Court to weigh “the relative importance of the fetus and the mother,” which Alito argues that the Court has neither the authority nor the ability to do.<sup>38</sup>

The parties to *Dobbs* did not raise the equal protection argument that many advocates of abortion rights have come to see as a better and more persuasive rationale than substantive due process. But several amici, including the United States, did raise this argument, which Alito’s opinion rejects in a single, terse paragraph as “squarely foreclosed by our precedents.”<sup>39</sup> His main citation for this proposition is *Geduldig v. Aiello*, which held that discrimination on the basis of pregnancy is not sex discrimination within the meaning of the Equal Protection Clause.<sup>40</sup> The fact that *Dobbs* itself is squarely foreclosed by the Court’s precedents goes unremarked by Justice Alito, though it has not gone unremarked by his critics.<sup>41</sup>

Four other justices joined Alito’s opinion in full, including Justices Thomas and Kavanaugh, who wrote separate concurring opinions—from the right and the center, respectively. Thomas called on the Court to reconsider all of its modern substantive due process decisions.<sup>42</sup> Kavanaugh insisted that those decisions were safe and that the right to travel would not permit states to ban their residents from seeking abortions in other jurisdictions.<sup>43</sup> He also emphasized his respect for the justices who decided *Roe* and *Casey* and that the Court’s decision was “neutral” on the question of abortion, not pro-life, because the Constitution is neutral.<sup>44</sup> Chief Justice

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<sup>36</sup> *Id.* at 2276.

<sup>37</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

<sup>38</sup> 142 S. Ct. at 2277.

<sup>39</sup> *Id.* at 2245.

<sup>40</sup> *Geduldig v. Aiello*, 417 U. S. 484, 497 (1974).

<sup>41</sup> See, e.g., Michael C. Dorf, *Dobbs Double-Cross: How Justice Alito Misused Pro-Choice Scholars’ Work*, VERDICT (July 6, 2022), <https://verdict.justia.com/2022/07/06/dobbs-double-cross-how-justice-alito-misused-pro-choice-scholars-work> [<https://perma.cc/G8X7-6LNF>] (“Justice Alito chooses to give priority to the precedents he likes.”); Tribe, *supra* note 7 (questioning why the case cited in *Dobbs* to dismiss the Equal Protection Clause argument as “squarely foreclosed by our precedents” was “entitled to greater respect than *Roe*”).

<sup>42</sup> See 142 S. Ct. at 2304 (Thomas, J., concurring) (“Substantive due process . . . has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.”).

<sup>43</sup> *Id.* at 2309 (Kavanaugh, J., concurring).

<sup>44</sup> *Id.* at 2304–05.

Roberts concurred in the judgment only. He would have abandoned the viability rule of *Roe* and *Casey*, while at least for the time being preserving the constitutional “right to choose” abortion on stare decisis grounds.<sup>45</sup> He also criticized the “relentless freedom from doubt” displayed by the majority and the dissent.<sup>46</sup>

## B. THE CRITICAL RESPONSE

Thanks to the leak of Alito’s draft opinion in early May 2022, the outraged reactions to *Dobbs* began well before the decision was formally announced. In a *Washington Post* op-ed published one day after the leak, law professors Barry Friedman and Stephen Vladeck, writing with journalist Dahlia Lithwick, declared: “It is now clear that politics has triumphed over law. . . . This is a political opinion from a political court, one that doesn’t pretend to be anything else. . . . [L]et’s call it what it is: naked power, without the thinnest veneer of a black robe.”<sup>47</sup>

When the decision in *Dobbs* formally issued in late June 2022, the dissent sounded a similar note: “[T]he proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law.”<sup>48</sup> The academic and popular reaction among liberals and progressives was similar in substance but even more caustic in tone. “They did it because they could. It was as simple as that,” wrote *New York Times* columnist and Yale lecturer Linda Greenhouse.<sup>49</sup> Law professors Neil Siegel and Laurence Tribe both turned John Hart Ely’s famously lacerating criticism of *Roe*—cited with approval by Justice Alito—against *Dobbs*: “The decision is not constitutional law and reflects very little sense of a felt obligation to attempt to be.”<sup>50</sup> Many

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<sup>45</sup> *Id.* at 2310–2311 (Roberts, C.J., concurring in the judgment).

<sup>46</sup> *Id.* at 2316–17.

<sup>47</sup> Barry Friedman et al., *Supreme Court Leak Signals the Triumph of Politics over the Law*, WASH. POST (May 3, 2022, 3:34 PM), <https://www.washingtonpost.com/opinions/2022/05/03/supreme-court-abortion-leak-politics-law-overturn-roe/> [<https://perma.cc/LEC8-8PLZ>].

<sup>48</sup> 142 S. Ct. at 2320 (joint dissent).

<sup>49</sup> Linda Greenhouse, Opinion, *Requiem for the Supreme Court*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/opinion/roe-v-wade-dobbs-decision.html> [<https://perma.cc/6BDH-HAYN>].

<sup>50</sup> Neil Siegel, *SCOTUS Abortion Ruling Not Conservative, It’s ‘Radical,’ Says Legal Expert*, DUKE NEWS (June 24, 2022), <https://news.duke.edu/stories/2022/06/24/news-tip-scotus-abortion-ruling-not-conservative-its-radical-says-legal-expert/> [<https://perma.cc/M636-LZ3Y>] (quoting John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973)); see also Tribe, *supra* note 7 (commenting on the *Dobbs* court’s citation of Ely); see also Lithwick & Siegel, *supra* note 4 (commenting on the *Dobbs* court’s citation of Ely); *The Impact of the Supreme Court’s Dobbs Decision*

other liberal and progressive critics echoed these claims, which have come to constitute a prevailing orthodoxy among the legal professoriate (or at least the left and left-leaning members of it—a very large majority).<sup>51</sup>

What stands out most about these critiques of the Court is that they purport to transcend the morality of abortion. Of course, many of the same critics have also passionately defended the right to abortion on moral grounds, and much of the outrage that *Dobbs* has generated among the general public certainly rests on such grounds. But both within and outside the legal academy, it is extremely common to hear *Dobbs* described as not merely wrong but a flagrant and lawless abuse of judicial power. Some of this reaction can be chalked up to atmospheric and the background context against which the decision was made—the refusal of Senate Republicans to hold confirmation hearings for Merrick Garland; Donald Trump’s polarizing and norm-shattering presidency; the sexual assault allegations against Brett Kavanaugh; and the hasty confirmation of Amy Coney Barrett, on the eve of the 2020 election, after the sudden death of liberal icon Ruth Bader Ginsburg. But this is not the whole story.

Building on Justice Breyer’s *Dobbs* dissent, leading progressive and liberal academics (and the political commentators who translate and amplify their views for a general readership) have explicitly and self-consciously mounted

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*on Abortion Rights and Access Across the United States: Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. 13 (2022) (Testimony of Michele Bratcher Goodwin, Harvard Medical School, Center for Medical Ethics), <http://docs.house.gov/meetings/GO/GO00/20220713/114986/HHRG-117-GO00-Wstate-GoodwinM-20220713.pdf> [<https://perma.cc/6C89-TFGB>] (last visited Oct. 27, 2022)) (“[W]hat is at stake relates not only to abortion, but the very principles of the rule of law and American democracy.”); see also *Roe Reversal: The Impacts of Taking Away the Constitutional Right to an Abortion: Hearing Before the Subcomm. on Oversight & Reform of the H. Comm. on Oversight & Investigations of the H. Comm. on Energy and Commerce*, 117th Cong. 7 (2022) (Testimony of Leah Litman, University of Michigan Law School) (July 19, 2022), <https://docs.house.gov/meetings/IF/IF02/20220719/114995/HHRG-117-IF02-Wstate-LitmanJDL-20220719.pdf> [<https://perma.cc/G7EH-8SXE>] (“The *Dobbs* decision, and the overturning of *Roe v. Wade*, jeopardizes our collective ability to make decisions based on law and legal reasoning. This is a challenge for the rule of law in the United States.”); see also *Roe Reversal: The Impacts of Taking Away the Constitutional Right to an Abortion: Hearing Before the Subcomm. on Oversight & Reform of the H. Comm. on Oversight & Investigations of the H. Comm. on Energy and Commerce*, 117th Cong. 31-35 (2022) (preliminary transcript available at <http://docs.house.gov/meetings/IF/IF02/20220719/114995/HHRG-117-IF02-Transcript-20220719.pdf> [<https://perma.cc/S4X2-EXZF>]) (detailing a statement of Leah Litman, Assistant Professor of Law at the University of Michigan Law School).

<sup>51</sup> Of course, it was already—and remains—a prevailing orthodoxy within this subset of the academy that *Roe* and *Casey* were rightly decided because abortion is essential to personal liberty and, even more so, equal citizenship. These are still the most important reasons for opposition to *Dobbs*. But the lawlessness critique has added appreciably to the outraged reaction and also qualitatively changed its character. It merits scrutiny for that reason.

a sustained critique of the decision's basic legitimacy.<sup>52</sup> The arguments they offer in support of this critique do not appear on the surface to have anything to do with the morality of abortion. They are arguments about stare decisis and *Roe* and *Casey*'s place in the fabric of the Court's modern due process doctrine and the legitimacy of overruling prior decisions after a politically motivated change in the Court's membership. The apparent intent and clear effect of these arguments is to cast *Dobbs* as a historic breach of neutral, non-ideological legal principle that threatens—if it has not already destroyed—the Court's fragile legitimacy and, indeed, the rule of law itself.

## II. UNBUNDLING LAWLESSNESS

This is an exaggeration—perhaps understandable, given the stakes, but an exaggeration nevertheless. *Dobbs* is an important decision on a controversial social issue whose correctness turns on the morality of abortion. Even from a pro-life perspective, the decision has many flaws, which its critics have ably pointed out. But none of those flaws is fatal when viewed from that perspective. This Part examines the main arguments advanced by *Dobbs*'s critics and shows that none is sufficient to compel a different result, much less to render the decision fundamentally lawless, unless one adopts a pro-choice view on the morality of abortion.

Stripped to its essentials, the disagreement over *Dobbs* comes down to a moral disagreement over abortion. If it was legitimate and lawful for pro-choice justices to make moral judgments when deciding *Roe* and *Casey*, it was legitimate and lawful for pro-life justices to make moral judgments when deciding *Dobbs*.<sup>53</sup> Those judgments may be wrong, even terribly wrong. I think they are. But they are not any more lawless than the moral judgments that motivated *Roe*, *Casey*, and for that matter the entire modern due process

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<sup>52</sup> Lithwick & Siegel, *supra* note 4; Tribe, *supra* note 7; *see also* Daniels, *supra* note 5 (quoting Laurence Tribe); *Factsheet: Jihad*, *supra* note 5; *see also* Daniels, *supra* note 5 (quoting Nancy Gertner; Tribe, *supra* note 7; Barry Friedman et al., *supra* note 47; 142 S. Ct., *supra* note 44; Greenhouse, *supra* note 49; Siegel, *supra* note 50; Tribe, *supra* note 50; Lithwick & Siegel, *supra* note 50; *The Impact of the Supreme Court's Dobbs Decision on Abortion Rights and Access Across the United States*, *supra* note 50; *Roe Reversal: The Impacts of Taking Away the Const. Right to an Abortion*, *supra* note 50; *Roe Reversal: the Impacts of Taking Away the Const. Right to an Abortion*, *supra* note 50.

<sup>53</sup> I take no position on the role that such moral judgments actually played in the reasoning of the *Dobbs* majority, as compared to the quasi-originalist rationale of Justice Alito's opinion. The point is that pro-life moral judgments could and would have provided a perfectly lawful alternative ground for the outcome in *Dobbs* under the critics' own understanding of substantive due process and stare decisis.

canon—*Griswold*, *Eisenstadt*, *Lawrence*, *Obergefell et al.*—that the critics fear *Dobbs* has put at risk.

#### A. SETTLED LAW

The first and most important argument that *Dobbs* was wrong without regard to the morality of abortion is stare decisis. The details are familiar to anyone who has been paying attention. Before *Dobbs*, *Roe v. Wade* had endured and been repeatedly reaffirmed for almost fifty years, albeit in modified form and never without intense social controversy. Absent special justification, respect for settled law arguably required the Court to follow *Roe* and *Casey*.

Stated at this level of generality, there is no significant disagreement between the *Dobbs* Court and its critics. Most of the conservative justices who joined the majority had dutifully repeated some close approximation of this formula at their Senate confirmation hearings. Several had specifically acknowledged that *Roe* and *Casey* were “settled . . . precedent” or “entitled to respect under stare decisis.”<sup>54</sup> But of course, even settled precedents can and should sometimes be overruled.<sup>55</sup> Here again, the Court and its critics

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<sup>54</sup> See, e.g., *Nomination of Amy Coney Barrett to the U.S. Supreme Court: Questions for the Record*, 116th Cong. 2 (2020) (“*Roe* is a precedent of the Supreme Court entitled to respect under the doctrine of stare decisis.”); see also *Confirmation Hearing on the Nomination of Hon. Brett Kavanaugh To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary*, 115th Cong. 127 (2018) (statement of Brett Kavanaugh) (“[*Roe*] is settled as a precedent of the Supreme Court, entitled the respect under principles of stare decisis”); see also *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary*, 115th Cong. 77 (2017) (statement of Neil Gorsuch) (“It is a precedent of the U.S. Supreme Court. It was reaffirmed in *Casey* in 1992 and in several other cases. So a good judge will consider it as precedent of the U.S. Supreme Court worthy as treatment of precedent like any other.”); see also *Confirmation Hearing on the Nomination of the Hon. Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 318 (2006) (statement of Samuel Alito) (“[T]he doctrine of *stare decisis* is a very important doctrine. It’s a fundamental part of our legal system, and it’s the principle that courts in general should follow their past precedents.”).

<sup>55</sup> This undercuts the now commonplace claims that members of the *Dobbs* majority lied at their confirmation hearings. No liberal or progressive listening closely should have taken comfort in any of their public pronouncements on stare decisis, all of which included caveats sufficient to encompass *Dobbs*. Justice Brett Kavanaugh’s alleged assurances to Senators behind closed doors are a different matter, as is Justice Clarence Thomas’s claim never to have thought about or discussed the correctness of *Roe v. Wade* in a serious way. See 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/67JC-6TS4>] (alleging that then-Judge Kavanaugh assured Senator Susan Collins that “*Roe* . . . has been reaffirmed many times . . . I am a don’t-rock-the-boat kind of judge.”).

are in substantial agreement. The only dispute between them is what the threshold should be for overturning a venerable precedent like *Roe* or *Casey* and whether that threshold was met in *Dobbs*.

As a matter of doctrine, these questions implicate a blizzard of different factors. But the crux of the dispute between the Court and its critics is whether it is more important that the question of abortion be settled or that it be settled right.<sup>56</sup> The critics contend that the reliance interests generated by *Roe* and *Casey* make settlement more important.<sup>57</sup> The Court contends that the egregiousness of *Roe*'s legal error and the gravity of the moral stakes outweigh whatever reliance interests would be compromised by reversing *Roe*.<sup>58</sup>

The first thing to note about this balance is that one side of it turns almost entirely on the morality of abortion. If abortion is an essential precondition to personal liberty or equal citizenship, there would be little or no cost to leaving *Roe* and *Casey* in place, even if they were incorrect as a legal matter. To the contrary, there would be a significant benefit. But if abortion is akin to murder, the costs would be staggering, with nearly a million abortions

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I believe in stability and in the Team of Nine.”); see also *Nomination of the Hon. Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102nd Cong. 222–223 (1991) (“Senator, your question to me was . . . do I have this day . . . a personal opinion on the outcome in *Roe v. Wade*, and my answer to you is that I do not.”). The latter seems extremely difficult to credit, but it is merely a clumsier version of the studious non-answers that have become commonplace at Supreme Court confirmation hearings. The former comes closer to the line of outright falsehood than anything Kavanaugh said in public on the question of stare decisis, but only if the allegations are true, which remains unproven.

<sup>56</sup> Cf. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”); see generally RANDY KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 6 (2017) (“The problem is that the modern doctrine of stare decisis is undermined by principled disagreements among justices acting in good faith.”).

<sup>57</sup> See, e.g., Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845 (2022) (“When precedent is overturned, people’s expectations might be upset and their lives disrupted in ways that undermine their autonomy and offend their dignity.”); Tribe, *supra* note 7 (“[T]he opinion fails to provide any clear secular support for its conclusion that *Roe* was wrongly decided, much less that it was so demonstrably wrong that the reliance of generations of Americans on its basic outlines should have been all but entirely disregarded.”); Friedman, Lithwick & Vladeck, *supra* note 47 (“Countless women will have their lives irreparably altered.”).

<sup>58</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265–77 (2022) (determining that “five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas, and the absence of concrete reliance.”).

performed in the U.S. every year.<sup>59</sup> It is difficult to imagine that any reliance interests or damage to the Court's institutional legitimacy could outweigh the benefits of correcting such a horrifying mistake, as seen from a pro-life perspective.

The second thing to note about the balance is that the reliance interests generated by *Roe* and *Casey* are themselves bound up with the morality of abortion in complex ways. Critics of *Dobbs*, like the *Dobbs* dissenters, emphasize the generations of Americans who have planned their lives around the right to abortion guaranteed in *Roe* and *Casey*. Some of this planning involves tangible costs, such as attending college or purchasing a house or taking a job in a state where access to abortion would be insecure without federal constitutional protection. Some of it is more intangible, encompassing the psychological value of knowing that abortion is available as a backstop in case of an unplanned pregnancy.<sup>60</sup>

The boundary between these two forms of reliance is hazy, and the Court is unduly dismissive of both. But for present purposes, the important point is that the less tangible forms of reliance emphasized by the critics depend, at least in part, on access to abortion being a moral good. If the right that Americans have planned their lives around for generations is the right to commit murder (or an otherwise grave moral wrong), their psychological investment in those plans looks considerably less worthy of respect.<sup>61</sup> It is little surprise, therefore, that the Court concludes the benefits of getting *Dobbs* right exceed the benefits of maintaining the settled precedents of *Roe* and *Casey*. From a pro-life perspective, the former look enormous, while latter look comparatively trifling if they can be characterized as benefits at all.

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<sup>59</sup> See Rachel K. Jones, Jesse Philbin, Marielle Kirstein, Elizabeth Nash & Kimberly Lufkin, *Long-Term Decline in US Abortions Reverses, Showing Rising Need for Abortion as Supreme Court Is Poised to Overturn Roe v. Wade*, GUTTMACHER INST. ABORTION PROVIDER CENSUS (June 15, 2022), <https://www.guttmacher.org/article/2022/06/long-term-decline-us-abortions-reverses-showing-rising-need-abortion-supreme-court> [https://perma.cc/W46M-593K] (“In 2020, there were 930,160 abortions in the United States, an 8% increase from 862,320 abortions in 2017.”).

<sup>60</sup> See, e.g., Varsava, *supra* note 57 (“When precedent is overturned, people’s expectations might be upset and their lives disrupted in ways that undermine their autonomy and offend their dignity.”); see also Tribe, *supra* note 7 (“[T]he opinion fails to provide any clear secular support for its conclusion that *Roe* was wrongly decided, much less that it was so demonstrably wrong that the reliance of generations of Americans on its basic outlines should have been all but entirely disregarded.”); Friedman, Lithwick & Vladeck, *supra* note 47 (“Countless women will have their lives irreparably altered.”).

<sup>61</sup> Cf. Richard M. Re, *Precedent As Permission*, 99 TEX. L. REV. 907, 941 (2021) (“[D]eliberate reliance can easily be recast as ill-gotten gains.”).

Both the Court and its critics point to *Brown v. Board of Education* as a model for how stare decisis should work in watershed cases.<sup>62</sup> *Brown*, of course, unanimously reversed the “separate but equal” doctrine of *Plessy v. Ferguson*,<sup>63</sup> which in 1954 had stood for fifty-eight years.<sup>64</sup> During that period, many U.S. states had erected a comprehensive system of de jure segregation in reliance on *Plessy*, including segregated schools, bathroom facilities, building entrances, elevators, and much more. No one today thinks that these very substantial reliance interests should have stopped the *Brown* Court from overruling *Plessy*. But why? The best answer has two parts. First, the reliance interests generated by *Plessy* were inextricable from the evil of Jim Crow. Second, and more important, the benefits of getting *Brown* right outweighed any conceivable reliance interests on the other side of the scale.<sup>65</sup>

From a pro-life perspective, this makes *Brown* look a lot like *Dobbs*. If abortion is akin to murder, the benefits of correcting *Roe*’s error are almost incalculable, and the reliance interests militating against reversal are strongly tainted by the same moral evil that makes *Roe* egregiously wrong. The critics disagree, pointing out that *Brown* was unanimous, while *Dobbs* was decided by a narrow, ideologically homogeneous majority.<sup>66</sup> The critics also emphasize that *Brown* established a new constitutional right, while *Dobbs* takes

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62 Compare 142 S. Ct. at 2306–09 (Kavanaugh, J., concurring) (arguing that stare decisis is not absolute and listing cases where substantial precedent was overruled, including *Brown*), with *id.* at 2341–42 (joint dissent) (distinguishing the *Brown* decision from the majority’s decision in *Dobbs*); see also Adam Serwer, *Dobbs Is No Brown v. Board of Education*, ATLANTIC (July 8, 2022) <https://www.theatlantic.com/ideas/archive/2022/07/conservative-justices-alito-hypocrisy-dobbs-plessy-ferguson-brown-board-education/661505/> [https://perma.cc/ELK9-TQHC] (calling the analogy between *Dobbs* and *Brown* “flawed”).

63 *Plessy v. Ferguson*, 163 U.S. 537, 553 (1896).

64 Technically, *Brown* merely rejected “[a]ny language in *Plessy v. Ferguson*” applicable to public education. *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954). But subsequent decisions extended *Brown*’s repudiation of *Plessy* to a wide range of other contexts without further explanation. See *Mayor & City Council v. Dawson*, 350 U.S. 877 (1955) (listing public beaches, bathhouses, and swimming pools); see also *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (listing public parks, golf courses, fishing lakes, and recreational facilities).

65 See *Re*, *supra* note 61, at 940–41 (discussing the interplay between reliance interests and merits sensitivity).

66 See 142 S. Ct. at 2316 (Roberts, C.J., concurring in the judgment) (comparing the unanimous opinion in *Brown* with the lack of unanimity in *Dobbs*).



one away.<sup>67</sup> Finally, they argue that *Brown* reflected a tectonic shift in broader social understandings, while *Dobbs* did not.<sup>68</sup>

None of these distinctions is persuasive. The unanimity of *Brown* was practically and symbolically significant, but no one today, and certainly not the critics of *Dobbs*, would contend that a 5–4 or 6–3 decision reversing *Plessy* was essentially lawless or illegitimate. Nor does it make sense to distinguish so sharply between the recognition and elimination of constitutional rights. *Brown* eliminated a state governmental power over race relations that was often conceived as a right by those who wielded it.<sup>69</sup> And *Dobbs* frees states to protect what abortion opponents conceive as the right to life of “unborn children.” From a pro-life perspective, it would be gallingly arbitrary to treat this formal distinction between *Dobbs* and *Brown* as decisive of the stare decisis question. More generally, as liberals and progressives have long understood, individual constitutional rights can do much to constrain personal freedom, while the elimination of individual rights can do much to expand freedom.<sup>70</sup> Think of *Lochner v. New York*<sup>71</sup> and *West Coast Hotel v. Parrish*<sup>72</sup>—or, even more dramatically, the Thirteenth Amendment.<sup>73</sup> A view that categorically privileges individual rights against subsequent reversal makes little sense as either a global matter or in the specific context of *Dobbs* and *Roe*.

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<sup>67</sup> See 142 S. Ct. at 2343 (joint dissent) (emphasizing that the *Brown* Court “protected individual rights with a strong basis in the Constitution’s most fundamental commitments; they did not, as the majority does here, take away a right that individuals have held, and relied on, for 50 years”); see also Sonia Suter & Naomi Cahn, *More Than Abortion Rides on SCOTUS in Dobbs*, BLOOMBERG (May 10, 2022, 4:00 AM) <https://news.bloomberglaw.com/daily-labor-report/more-than-abortion-rides-on-scotus-in-dobbs> [<https://perma.cc/4WVT-Q85T>] (“[T]his decision would probably mark the first time the court overturned precedent to eliminate a liberty right that is central to the regulation of one’s intimate life and family relationships.”).

<sup>68</sup> See 142 S. Ct. at 2341–43 (discussing how previous cases overturning substantial precedent were responding to changing facts and attitudes, but the lack of change in the facts and attitudes around the right to abortion struck down in *Dobbs*).

<sup>69</sup> See, e.g., 102 CONG. REC. 4516 (1956) (“We decry the Supreme Court’s encroachments on rights reserved to the States and to the people contrary to established law and to the Constitution.”).

<sup>70</sup> This insight was, of course, a central tenet of American legal realism, elaborated with especial brilliance by Robert Hale. See generally BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (2001) (studying the work and influence of Robert Hale).

<sup>71</sup> See *Lochner v. New York*, 198 U.S. 45, 58 (1905) (discussing the interplay between personal liberty and freedom of contract).

<sup>72</sup> See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–92 (1937) (discussing the connection between liberty and due process).

<sup>73</sup> See, e.g., Amanda Laury Kleintop, *The Balance of Freedom: Abolishing Property Rights in Slaves during and after the US Civil War* (Sept. 2018) (unpublished Ph.D. dissertation, Northwestern University) (ProQuest) (exploring the history of “white southerner’s resistance to uncompensated emancipation and their defense of their perceived right to own slaves.”).

This leaves the argument that *Brown* was motivated, and legitimated, by a widespread change in social understandings of segregation, while no similar change preceded *Dobbs*. Here, too, it is difficult to believe that the critics really think *Brown* would have been wrong, let alone lawless, to overturn *Plessy* without such an intervening change in public views. *Plessy* was monstrously unjust in 1896, and it remained monstrously unjust in 1954. That was more than sufficient justification for *Brown* to reverse it. From a pro-life perspective, the justification for *Dobbs* to reverse *Roe* is comparably strong.

In his famous defense of *Brown*, Charles Black wrote: “The insignificant error, however palpable, can stand, because the convenience of settlement outweighs the discomfort of error. But the hugely consequential error cannot stand and does not stand.”<sup>74</sup> *Roe* and *Casey* are nothing if not consequential. If they are wrong, as they clearly are from a pro-life perspective, no one should be surprised, or shocked, that stare decisis did not save them. Black declined to rest his defense of *Brown* on stare decisis for this very reason. Liberals and progressives today would do well to reflect on his example.

On the merits, it is by no means clear that the critics are correct that there was no important intervening change of circumstances between *Roe* and *Dobbs*. By most accounts, the justices who decided *Roe* failed to anticipate the furious opposition their decision would provoke.<sup>75</sup> The justices who decided *Casey* hoped, and implicitly predicted, that reaffirming *Roe* would help to settle the raging controversy once and for all.<sup>76</sup> By the time *Dobbs* was decided, this prediction too had clearly been falsified by events. Not only that, but the social movement that grew up in opposition to *Roe* had succeeded in lobbying for the appointment of a Supreme Court majority sympathetic to its views.<sup>77</sup>

Whatever significance one assigns to these changes of circumstance, these are unquestionably important. From a pro-life perspective, they look like powerful reasons for returning the issue of abortion to the democratic process. If judicial fortitude has not settled the abortion controversy, perhaps

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<sup>74</sup> Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960).

<sup>75</sup> See, e.g., L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 723 (2003) (“*Roe* was a most unique divisive case insofar as no one at the time saw it as divisive—recall the blandness of the Rehnquist and White dissents.”).

<sup>76</sup> See *Planned Parenthood of Se. Pa. v. Casey* 505 U.S. 833, 867 (1992) (“[T]he Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”).

<sup>77</sup> See, e.g., MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015) (recounting this history).

the political process will do better at resolving or defusing it. And if liberals and progressives celebrate the popular constitutionalism of the civil rights, feminist, and LGBTQ rights movements, why should the pro-life movement be denied its day in the sun?<sup>78</sup>

In sum, from a pro-life perspective, abortion looks like a paradigmatic example of an issue for which “the discomfort of error” outweighs “the convenience of settlement.” The case looks different from a pro-choice perspective, of course. But as is frequently observed, *stare decisis* has bite only when the precedent in question is wrong.<sup>79</sup> If *Roe* and *Casey* are right that abortion is a fundamental right, the Court should have followed them without regard to *stare decisis*. If they are wrong because abortion is akin to murder, *stare decisis* and respect for settled law are not persuasive arguments against overruling them, much less for regarding their overruling as essentially lawless or illegitimate.

## B. RECENT CHANGES IN THE MEMBERSHIP OF THE COURT

A second argument that *Dobbs* was wrong without regard to the morality of abortion emphasizes the impropriety of reversing an earlier decision solely due to recent changes in the Supreme Court’s membership. On this view, it is one thing for the Court to reverse itself because one or more justices change their minds or in response to some profound change in external circumstances. It is quite another for the Court to reverse itself simply due to a recent change in the Court’s membership, especially one that results directly from a sustained political campaign to reverse a particular decision. In the latter case, the Court’s decisions can only be driven—or appear to be

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<sup>78</sup> See, e.g., Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1908 (2021) (celebrating “the social movement roots of the modern substantive due process cases”); see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 373, 374–75 (2007) (celebrating the influence of social movements on the Supreme Court as “democratic constitutionalism” in action); see also Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947–50 (2003) (similarly discussing the “democratic legitimation” required by the nature of constitutional law).

<sup>79</sup> By “bite,” I mean binding or constraining force, though that is not the only possible function of precedent. In doubtful cases, a prior decision—especially one that has been repeatedly reaffirmed—may also have epistemic value in identifying the correct, or best, answer. See *infra* Part II.E. (discussing other arguments against *Dobbs*). Under the “permission model” of precedent proposed by Richard Re, a prior decision can also identify lawful options a court is permitted, but not mandated, to follow. See Re, *supra* note 61 (exploring what precedent enables as a “permission model,” rather than what it constrains).

driven—by the personal views of its members, not “faithful[] and impartial appl[ication of] the law.”<sup>80</sup> This argument played a major role in the *Casey* plurality’s rationale for reaffirming *Roe* and also features prominently in the *Dobbs* dissent and liberal and progressive criticism of the decision.<sup>81</sup>

The argument has always been a peculiar one. It suggests that political pressure should make the Court less willing than it otherwise would be to correct its erroneous decisions (as understood by the current justices). This is quite an odd way for the Court to show its independence from politics, assuming that is what judicial legitimacy requires. The argument also suggests that the success of a social movement in influencing Supreme Court appointments should make the Court less attentive to the views of that movement, which seems to be in significant tension with liberal and progressive valorization of the Civil Rights, Women’s, and LGBTQ Movements and their influence on constitutional doctrine.<sup>82</sup> Finally, this argument ignores the fact that the Court has been subject to sustained political pressure from both sides of the abortion debate. Would a decision reaffirming *Roe* and *Casey* not appear to the pro-life movement as capitulation in the face of political pressure from the other side?<sup>83</sup> If the Court’s decision will inevitably appear political to some substantial fraction of observers, would it not be better for the justices to decide according to their principled view of the case, including the usual *stare decisis* factors? And why should

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<sup>80</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2320 (2022) (joint dissent).

<sup>81</sup> *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (plurality opinion) (finding that the situation in *Casey* did not present any special reason to overrule the *Roe* precedent); *see also* 142 S. Ct. at 2350 (joint dissent) (describing the adherence in *Casey* to *stare decisis*); *see also* Tribe, *supra* note 7 (arguing that the Supreme Court may use the decision from *Dobbs* as precedent to overturn other rights); *see also* Friedman et al., *supra* note 50 (arguing that the *Dobbs* decision came from a change in the identity of the court rather than a change in the legal principles underlying the right to abortion); *cf.* Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1130 (2023) (describing “political practice” of originalism that produced *Dobbs* through strategic use of appointments power).

<sup>82</sup> *See supra* note 74 (exploring sources that discuss the connection between social movements and constitutional law). For an attempt to resolve this tension by focusing on the equal participation case for abortion rights, *see* Siegel, *supra* note 81.

<sup>83</sup> We know the answer. It would. *See, e.g.*, Nathaniel Blake, *If the Supreme Court Whiffs on Abortion, They’ll Blow Up the Conservative Legal Movement*, THE FEDERALIST (Dec. 7, 2021), <https://thefederalist.com/2021/12/07/if-the-supreme-courtwhiffs-on-abortion-theyll-blow-up-the-conservative-legal-movement/> [<https://perma.cc/QJ3V-QJED>] (arguing that upholding the right to abortion in *Dobbs* would be bending to pro-abortion political pressures); Josh Blackman, *#FedSoc2021 and Dobbs, VOLOKH CONSPIRACY* (Nov. 13, 2021, 3:54 PM), <https://reason.com/volokh/2021/11/13/fedsoc2021-and-dobbs/> [<https://perma.cc/YR77-A4DF>] (discussing different conservative perspectives on the pending *Dobbs* decision and concerns over the Supreme Court’s potential desire to find a middle-path forward).

we assume—or expect the public to assume—that the first decision in time is the principled one, such that any change to that decision is unprincipled and political? Might it not just as easily be the reverse?

It seems especially questionable to apply the logic of this argument across an indefinite span of time. When *Casey* first made the argument in 1992, it already appeared that a majority of the justices believed *Roe* had been wrongly decided as an original matter. In the three decades since, there has never been a clear majority of justices who believed *Roe* to be correctly decided, as opposed to compelled by stare decisis.<sup>84</sup> Over such a long period, it seems inevitable that changes in the composition of the Court will change the principled views of the justices. Indeed, much liberal and progressive work in constitutional theory regards this as a feature, rather than a bug, of the appointment process—a principal, if not *the* principal, mechanism by which living (and popular or democratic) constitutionalism operates.<sup>85</sup>

In combination, these problems with the change-in-membership argument are probably fatal. But even if the argument has force in some circumstances, it can only be presumptive, not conclusive. If *Brown* came before the Court after a major change in personnel attributable to the Civil Rights movement, no one today would suggest that the Court should have reaffirmed *Plessy* unless and until one or more justices changed their minds. The constitutional evil of state-sanctioned segregation was too great. Similarly, had the 2016 presidential election come out differently, no one would—or should—have expected a Court with three justices appointed by Hillary Clinton to reaffirm the Court’s modern qualified or state sovereign immunity jurisprudence. Viewed from a liberal or progressive perspective,

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<sup>84</sup> At least two of the pivotal justices in *Casey*—O’Connor and Kennedy—were previously on record as opposing *Roe*, and the *Casey* plurality opinion famously leans heavily on stare decisis to justify reaffirming *Roe*’s “core holding.” See 505 U.S. at 871 (plurality opinion) (“We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have [reached the same result] as the *Roe* Court did.”); see also *id.* at 876 (“The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent.”). These two pivotal justices were both replaced by members of the *Dobbs* majority, while no dissenting justice in *Casey* was replaced by a *Dobbs* dissenter.

<sup>85</sup> See, e.g., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 566 (2009) (describing—and celebrating—democratic constraints and influences on Supreme Court “above all control of the appointments process by the President and Senate”); see also Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 624–28 (2003) (arguing that the political appointments process weakens the counter-majoritarian difficulty); but see Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CAL. L. REV. ONLINE 437 (2020) (describing and lamenting the increasingly counter-majoritarian character of judicial appointments).

those decisions are too important and too egregiously wrong not to reverse at the earliest opportunity. From a pro-life point of view, *Dobbs* looks the same, only more so.

### C. THE WHOLE POST-*GRISWOLD* EDIFICE

Perhaps the most powerful argument against *Dobbs* is that it is incompatible, indeed irreconcilable, with the whole post-*Griswold* edifice of substantive due process doctrine. Justice Alito's opinion expressly disclaims any designs on, or intent to undermine, precedents other than *Roe* and *Casey*. But the reason he offers for reversing *Roe* and *Casey* is that abortion rights are not deeply rooted in traditions dating back to drafting and ratification of the Fourteenth Amendment. If this is the touchstone of substantive due process, it is difficult to argue that contraceptives, marriage equality, or same-sex intimacy are constitutionally protected.<sup>86</sup>

To dispel this concern, Alito insists that the Court's decision is limited to abortion and does not undermine any other precedent. And to explain this limitation, he points out that abortion is the only one of these rights which could arguably be said to involve the destruction of an innocent human life.<sup>87</sup> That is true, but it has nothing to do with history and tradition. In other words, the stated logic for the Court's reversal of *Roe* and *Casey* and the stated logic for limiting its holding for abortion simply do not align, and the Court offers no explanation for this glaring discrepancy.

This is a serious flaw in Justice Alito's opinion, and it has rightly attracted intense criticism, including unprovable but plausible charges of duplicity and

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<sup>86</sup> I assume, for the sake of argument, that this outcome would justify the critics' charge of lawlessness, though that is not entirely clear. Many decisions the critics of *Dobbs* approve have swept aside large and well-established bodies of constitutional law, more or less in one fell swoop. *E.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937) (overturning precedent and holding that Congress has the authority to regulate intrastate activities that significantly affect interstate commerce); *see also* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (overturning precedent and holding that a minimum wage law for women is valid); *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (overturning precedent and ruling that segregation in public schools based on race is not constitutional). There must, therefore, be some combination of circumstances—legal error, moral injustice, and practical unworkability—that would justify this sort of avulsive change and immunize it against charges of lawlessness. But I will not pursue this question further here.

<sup>87</sup> *See* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258 (2022) (holding that the right to abortion is sharply distinguished from other protected rights because it involves a decision over potential life). I bracket the contested question of where to draw the line between contraception and abortion, without denying its importance.

cynicism.<sup>88</sup> But this flaw is not essential to the outcome in *Dobbs*. From a pro-life perspective, the reversal of *Roe* and *Casey* can be reconciled with other post-*Griswold* substantive due process decisions in two straightforward ways.

First, from a pro-life perspective, *Roe* and *Casey* were wrongly decided even under the “reasoned judgment” approach to substantive due process that those decisions themselves embrace. That approach requires the Court to identify constitutionally protected liberties through the same sort of evolutionary and morally-inflected analogical reasoning that characterizes the common law. This is how the Court’s decisions on parental rights<sup>89</sup> and forced sterilization<sup>90</sup> led to a constitutional right to use contraceptives, which led in turn to a constitutional right to abortion, same-sex intimacy, marriage equality, and so on, with each decision incrementally building on the last.<sup>91</sup>

The Court’s critics contend that *Roe* and *Casey* are such an integral part of this jurisprudential fabric that their reversal would rend it completely.<sup>92</sup> But this claim clearly depends on a pro-choice perspective. The rights to procreate, use contraceptives, abortion, same-sex intimacy, and marriage

<sup>88</sup> See, e.g., Lithwick & Siegel, *supra* note 4 (“[*Dobbs*] articulates a reason for overruling *Roe* out of one side of its mouth, then repeatedly protests that it will not be bound by this reason out of the other side of its mouth.”); see also Tribe, *supra* note 7 (criticizing the *Dobbs* decision and agreeing with its dissenting justices); see also Darren Lenard Hutchinson, *Thinly Rooted*, 65 Ariz. L. Rev. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4193968](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4193968) [<https://perma.cc/3QJL-NTMC>] (criticizing the *Dobbs* decision for applying a “narrow and back-ward looking tradition analysis” that may “imperil many other important rights”); Melissa Murray, *How the Right to Birth Control Could Be Undone*, N.Y. TIMES (May 23, 2022), <https://www.nytimes.com/2022/05/23/opinion/birth-control-abortion-roe-v-wade.html> [<https://perma.cc/S7XH-42DF>] (arguing that *Dobbs* creates a blueprint for overturning the right to contraception and other rights). These charges would be merited if Alito (and perhaps others in the majority) was intentionally laying a foundation for reversing other substantive due process precedents that his opinion expressly purports not to undermine.

<sup>89</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding unconstitutional a Nebraska law that prohibited teaching grade school students any language other than English); see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that the government cannot force parents to send their children to public school).

<sup>90</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (holding that forced sterilization was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

<sup>91</sup> See, e.g., David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 2, 6–7 (2015) (describing incremental, case-by case approach to substantive due process that culminated in *Obergefell v. Hodges*); see also Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1568 (2008) (“[T]he more rationalist or critical approach is not untethered, but builds carefully and incrementally on existing law.”).

<sup>92</sup> E.g., Tribe, *supra* note 7 (“[T]he Supreme Court’s *Dobbs* decision . . . fails to provide any coherent legal analysis of why the right to abortion is not protected by the Fourteenth Amendment.”); see also Murray, *supra* note 88 (discussing how the overturning of *Roe* might threaten access to all contraception); see also 142 S. Ct. at 2319 (joint dissent) (“Either the mass of the majority’s opinion is hypocrisy or additional constitutional rights are under threat. It is one or the other.”).

equality have certain morally salient commonalities. But they also have morally salient differences, including the one Justice Alito emphasizes—that only abortion arguably entails the destruction of an innocent human life. From a pro-life perspective, this difference is certainly sufficient to support a reasoned judgment that abortion is not relevantly similar to other constitutionally protected liberties.<sup>93</sup>

Abortion is also distinguishable from other modern substantive due process rights as a matter of *stare decisis*. Even if the entire post-*Griswold* substantive due process tradition was a wrong turn, the relative costs and benefits of settlement may be quite different for different rights. From a pro-life perspective, the costs of reaffirming *Roe* and *Casey* are, of course, staggering and the countervailing reliance interests are, at least in part, bound up with same moral evil as abortion. This creates a very straightforward case for overruling those decisions.

For marriage equality, same-sex intimacy, and contraception, the error costs are much lower, even plausibly negative since there is no inherent conflict between a pro-life perspective on abortion and support for any of these other rights. On the other side of the balance, all of these rights have clearly generated at least some judicially cognizable reliance interests, and marriage equality has generated reliance interests of the clearest and most profound kind imaginable.<sup>94</sup> From a pro-life perspective, it would be quite plausible to conclude that the benefits of settlement exceed the costs for all of these rights, while reaching the opposite conclusion about abortion. The upshot would be to establish history-and-tradition as the regnant approach to substantive due process going forward, while leaving the Court's past decisions undisturbed, with the sole exceptions of *Roe* and *Casey*.

Justice Alito's opinion does not adopt either of these approaches. But he does make the crucial distinction that both of them turn on—only abortion, among all constitutionally protected liberties, arguably destroys an innocent human life. He also insists, presumably because at least one other member of the majority demanded it, that *Dobbs* does not call any other precedent into question besides *Roe* and *Casey*. For all the criticism this ipse dixit has attracted, it would not be surprising for the Court to stick to it in future cases,

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<sup>93</sup> See, e.g., Robin Maril, *Queer Rights After Dobbs v. Jackson Women's Health Organization*, 60 SAN DIEGO L. REV. (forthcoming 2023) (distinguishing *Lawrence* and *Obergefell* from *Dobbs*).

<sup>94</sup> I do not mean to diminish the reliance interests implicated by *Dobbs*, merely to point out that those interests depend, in significant part, on a pro-choice perspective. So does the conclusion that those interests outweigh the costs of preserving *Roe* and *Casey*'s putative error. Neither of these is true of the reliance interests implicated by the rights to marriage equality, same-sex intimacy, and contraception.



applying *Glucksberg's* history-and-tradition approach solely on a going-forward basis outside the context of abortion. The other post-*Griswold* substantive due process rights are all popular, and none generates anything like the same passion among legal and political conservatives as abortion. Absent big changes in public opinion, the intra-coalitional balance of power in the Republican party, or the personnel of the Court, those rights are probably safe.

In any case, the important point for present purposes is that the post-*Griswold* substantive due process tradition is fully reconcilable with the outcome of *Dobbs* when viewed from a pro-life perspective. Justice Alito's opinion does not adequately explain how or why this is the case, but that is a commonplace failure of judicial craft, not a plausible basis for condemning *Dobbs* as lawless or "utterly unprincipled."<sup>95</sup> One of the closer parallels of recent years is *Lawrence v. Texas*, whose logic fairly clearly extended to marriage equality, as Justice Scalia's dissent and, later, *Obergefell v. Hodges* both recognized.<sup>96</sup> In 2003, when *Lawrence* was decided, this logical implication would have been a bombshell of major proportions. But Justice Kennedy's only answer was to insist that marriage was not before the Court—in other words, no answer at all.<sup>97</sup> Justice Alito actually makes more of an effort to distinguish the other post-*Griswold* cases from *Dobbs*, though far from an adequate one. These are real shortcomings. But in neither case does this problem render the Court's decision lawless.

#### D. JUDICIAL HUMILITY

The final major argument for regarding *Dobbs* as lawless is that it disregards the collective wisdom of many previous justices embodied in *Roe*, *Casey*, and all the decisions that reaffirmed or followed them.<sup>98</sup> Although not usually spelled out explicitly, this is an essentially Burkean argument of the

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<sup>95</sup> See Lithwick & Siegel, *supra* note 4 (arguing that *Dobbs's* decision does not follow legal reasoning grounded in the principles of constitutional law).

<sup>96</sup> See *Lawrence v. Texas*, 539 U.S. 558, 590 (Scalia, J., dissenting) (listing statutes which ban same-sex marriages as one type of state law called into question by the majority opinion); *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015) (explaining that the logic of *Lawrence* does not stop at "intimate association[s]").

<sup>97</sup> 539 U.S. at 578.

<sup>98</sup> See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2319 (2022) (joint dissent) ("[Stare decisis] is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion."); see also Tribe, *supra* note 7 (condemning *Dobbs* for "digging out the ground long built upon by generations of judges, lawyers, and ordinary citizens"); see also Friedman et al., *supra* note 50 (describing how the transformation of the Supreme Court's composition led to the leaked *Dobbs* decision rather than any change in legal principles).

sort that liberals and progressives usually regard skeptically. Of course, that does not mean the argument is wrong. Liberal and progressive skepticism might be misplaced; or abortion rights might be the rare exception where the Burkean argument has real force. But the argument is in at least some tension with liberal and progressive constitutional thinking on substantive due process outside the abortion context. More important, the argument does not convincingly establish that *Roe* and *Casey* were right. Still less does it establish that *Dobbs* was lawless.

The essence of the Burkean argument is epistemic. Individual justices are fallible human beings, but precedents that have survived the test of time embody the wisdom of many justices who have repeatedly considered and reaffirmed them across different social, historical, and political circumstances. An individual justice or even a small group of justices—say, five of them—should think long and hard before concluding that their own fallible judgments are superior to the aggregated wisdom of their collective forebears.<sup>99</sup>

There is obviously something to this idea in the abstract.<sup>100</sup> The problem, as liberals and progressives have long recognized, is that long-standing precedents can survive for bad, as well as good, reasons. In particular, precedents might survive through mindless inertia, without meaningful reconsideration, in which case their survival provides little or no indication of wisdom. Alternatively, precedents might survive over time because the justices with the power to change them were bigoted, biased, or proceeding from mistaken premises. Inertia and bias are not mutually exclusive; they can both contribute to a precedent's survival. The bigger their role, the weaker the epistemic argument for following established precedent.<sup>101</sup>

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<sup>99</sup> See, e.g., Cass R. Sunstein, *Dobbs and the Travails of Due Process Traditionalism* (Harv. Pub L. Working Paper No. 22-14, 2022), <https://ssrn.com/abstract=4145922> [<https://perma.cc/82RR-HCBB>] [hereinafter Sunstein, "Travails"] (describing the Burkean nature of the *Dobbs* opinion); see also Strauss, *supra* note 95, at 55 (arguing that at times following imperfect settled precedent is better than unsettling it); see also Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008) [hereinafter Sunstein, "Traditionalism"] (arguing that traditionalism can create problems); see also Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 187 (2016) ("The strength of a persuasive precedent increases with the number of adoptions as well as the consistency of the views of courts that have considered it.")

<sup>100</sup> One need not be a thoroughgoing Burkean, or a conservative, to recognize this. See Tribe, *supra* note 98.

<sup>101</sup> See, e.g., Siegel, *supra* note 84, at 1128 (arguing that *Dobbs* solidifies norms associated with past status hierarchies); see also Sunstein, "Traditionalism," *supra* note 99 (arguing against the defense of traditionalism).

Ironically, these are exactly the arguments that liberals and progressives make in favor of an evolutionary approach to substantive due process and against Justice Alito's history-and-tradition approach.<sup>102</sup> As *Obergefell* put it, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."<sup>103</sup> From a pro-life perspective, deferring to the justices who decided *Roe* (and those who reaffirmed it through stare decisis) looks very similar: If abortion rights were defined in perpetuity by *Roe*, that decision would serve as its own continued justification and states could never protect the rights of unborn children once denied.

The Court's critics might answer that it is a kind of category mistake to look at this question from a pro-life perspective. The whole point of the judicial humility argument is that the collective wisdom embodied in the Court's precedents is a better guide to the abortion question than the current justices' fallible individual judgments. But this argument is persuasive only if the collective wisdom in question is the product of many independent judgments by trustworthy decision-makers. And the trustworthiness of past decision-makers is difficult or impossible to assess without reference to one's own prior views on the issue in question.<sup>104</sup> Certainly, one reason the justices in *Brown* felt comfortable disregarding the collective wisdom of the many justices who had voted to reaffirm *Plessy v. Ferguson* was that those justices held

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<sup>102</sup> The irony cuts both ways. The traditionalism of the *Dobbs* majority, if applied beyond the abortion context, would upset a nearly sixty-year tradition of evolutionary substantive due process jurisprudence. Even if its application is confined to abortion, *Dobbs* upsets a nearly fifty-year tradition of robust abortion rights. In essence, the majority's view is that substantive due process should evolve in a traditionalist direction; the dissent's view—and the critics'—is that the evolutionary approach of the past sixty years should be frozen in amber. That, at least, is the implication of the judicial humility argument, which is quintessentially small-c conservative. Cf. Charles Barzun, *Dobbs and the Relevance of Experience*, BALKINIZATION (July 1, 2022), <https://balkin.blogspot.com/2022/07/dobbs-and-relevance-of-experience.html> [https://perma.cc/9KVK-7XFW] (noting the "tension between constancy and change" in the *Dobbs* dissent).

<sup>103</sup> *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015).

<sup>104</sup> See, e.g., William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319, 339 (2018) ("[I]n areas beset by deep disagreement, one has reason to be less confident in one's beliefs upon discovering disagreement with one's friends, but not with one's foes."); see also Andrew Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 223 (2007) ("[T]he validity conditions of the epistemic reason are too stringent, and a judge's assessment of them too likely to be influenced by her own prior views, for the argument to carry much weight at all."); see also Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 191 (2007) ("There is a pervasive risk that any judge, asking whether the preconditions for collective wisdom are met, will answer the question affirmatively only when he already agrees with what people think.").

bigoted and unjust views on the very racial question *Brown* required the Court to decide.

From a pro-life perspective, justices before the rise of the conservative legal movement are likely to seem significantly less trustworthy—in the sense of systematically under-representing an important perspective—than the current justices.<sup>105</sup> There is also a strong argument that many of the justices who voted to affirm *Roe* were motivated wholly or partially by stare decisis, rather than a considered and independent judgment that *Roe* was correct. Together, these arguments provide perfectly respectable grounds for the current justices to follow their own independent judgments, rather than humbly deferring to the collective wisdom of past justices. In a counterfactual world in which President Hillary Clinton appointed three justices, liberal and progressive justices would likely have made very similar arguments for overruling the Court's modern qualified immunity and state sovereign immunity precedents, and they would have been right to do so. From a pro-life perspective, the *Dobbs* majority was also right to overrule *Roe* and *Casey*.<sup>106</sup> The problem with *Dobbs*, if there is one, is that the pro-life perspective is wrong.

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<sup>105</sup> See Baude & Doerfler, *supra* note 104, at 340 (arguing that when “strategic voting” occurs, it may lead judges to prioritize the perspectives of “ideological friends rather than [their] methodological friends”). As against this point, it might be observed that multiple members of the *Casey* majority held pro-life views. See *supra* note 84.

<sup>106</sup> Another difficulty with the epistemic humility argument is that *Dobbs* does not directly resolve the legality of abortion but turns that question back to state legislatures and, perhaps, Congress. Both of those decision-making processes involve judgments by far more persons than the prior decisions of the Supreme Court overruled by *Dobbs*. See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1484 (2007) (making this point about common-law constitutionalism generally); see also Baude & Doerfler, *supra* note 104, at 340–44 (arguing for the epistemic relevance of non-judicial votes, decisions, and opinions); see also Sunstein, *supra* note 104 (arguing for the epistemic relevance of public outrage). This is by no means a conclusive refutation of the judicial humility argument; the quality of the judgments in question, and not just the numbers, matters, and perhaps past Supreme Court justices are more trustworthy on this matter than legislators. However, the much greater number of persons involved in the democratic process does raise hard questions for proponents of this argument. See, e.g., Richard S. Myers, *The Virtue of Judicial Humility*, 13 AVE MARIA L. REV. 207, 211 (2015) (invoking judicial humility as an argument for returning abortion to the political process); see also Sunstein, *supra* note 104, at 194 (describing, without endorsing, an epistemic humility argument for Thayerian deference to legislative judgments). But see DAVID LANDAU & ROSALIND DIXON, *DOBBS, DEMOCRACY, AND DYSFUNCTION* (FSU Coll. of L., Pub. L. Res. Paper 2022) <https://ssrn.com/abstract=4185324> [<https://perma.cc/3CEN-M5HR>] (cataloging the many dysfunctions of the democratic process that will decide questions of abortion regulation post-*Dobbs*). I merely flag, and do not attempt to resolve, those questions here.

## E. OTHER ARGUMENTS

The arguments I have discussed thus far are the ones that have figured most prominently in liberal and progressive critiques of *Dobbs* as lawless and illegitimate. But these are far from the only important arguments leveled against the decision. Broadly speaking, the other arguments fall into two categories—textual or doctrinal arguments and moral arguments. These arguments are too numerous to address them at length here, but I do not believe any of them would compel a different outcome in *Dobbs* when viewed from a pro-life perspective. In other words, these arguments, too, ultimately turn on the contested morality of abortion.

1. *Other Textual and Doctrinal Arguments*

In addition to the due process rationale of *Roe* and *Casey*, critics of *Dobbs* have advanced at least three alternative doctrinal arguments against overruling those decisions. The first rests on the Equal Protection Clause and specifically its prohibition on sex discrimination, which critics contend that abortion restrictions violate.<sup>107</sup> The second rests on the Ninth Amendment, which critics contend prohibited the Court from relying on the unenumerated character of abortion rights as a reason for “deny[ing] or disparag[ing]” them.<sup>108</sup> The third rests on the 13th Amendment’s

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<sup>107</sup> See, e.g., Reva B. Siegel et al., *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4115569](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115569) [<https://perma.cc/WH9N-JXGH>] (explaining equal protection arguments for abortion rights). The pre-*Dobbs* literature developing equality arguments as an alternative justification for constitutional abortion rights is voluminous. For a helpful survey, synthesis, and evaluation of their significance, see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 842 (2007).

<sup>108</sup> See Tribe, *supra* note 7 (arguing that the Ninth Amendment’s “deny or disparage” language takes away any claim that “the right to bodily integrity” must be enumerated to be protected); see also Damon Root, *Alito’s Abortion Ruling Overturning Roe Is an Insult to the 9th Amendment*, REASON (June 24, 2022) <https://reason.com/2022/06/24/alitos-abortion-ruling-overturning-roe-is-an-insult-to-the-9th-amendment/> [<https://perma.cc/J9MV-6W6G>] (arguing that unenumerated rights, including the right to abortion, are “entitled to the same respect” as enumerated rights). These popular arguments published in the immediate aftermath of the *Dobbs* decision echo a substantial pre-*Dobbs* academic literature. See, e.g., Allison N. Kruschke, *Finding A New Home for the Abortion Right Under the Ninth Amendment*, 12 CONLAWNOW 128, 130 (2020) (arguing that the Ninth Amendment provides a better path to recognizing abortion rights than the Fourteenth Amendment); see also LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 88 (1990) (“[T]he fact that a right is not mentioned in so many words anywhere in the Constitution is not, and cannot be, a decisive objection.”).

prohibition on slavery or involuntary servitude, which the critics contend that abortion bans violate.<sup>109</sup>

Each of these arguments merits greater attention than I can give it here. But for present purposes, the important point is that none of them is persuasive when viewed from a pro-life perspective. If abortion is akin to murder, that is a compelling reason for restricting it under any plausible theory of sex discrimination or equal citizenship.<sup>110</sup> It is also a compelling reason for refusing to recognize a constitutional right to abortion, without regard to its enumeration or non-enumeration in the constitutional text. The Thirteenth Amendment has been far less litigated than the Fourteenth, but there is no textual or other reason to suppose that its prohibition on slavery and involuntary servitude is more absolute than the Equal Protection Clause. If the latter can be overcome by a compelling state interest, the same should be true of the former. Even if this were not the case, the moral evil of abortion, viewed from a pro-life perspective, would be a compelling reason to exclude abortion regulations from the obviously contestable contours of “slavery and involuntary servitude.”<sup>111</sup>

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<sup>109</sup> See, e.g., Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW.U. L. REV. 480, 483–84 (1990) (arguing that abortion prohibitions compel women to carry children and comparing this compelling to involuntary servitude, which violates the Thirteenth Amendment’s “guarantee of personal liberty”); see also James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 480–81 (2018) (endorsing Koppelman’s argument).

<sup>110</sup> See Sherif Girgis, *Why the Equal-Protection Case for Abortion Rights Rises or Falls with Roe’s Rationale*, 2022 HARV. J. L. & PUB. POLY 13, available at [https://www.harvard-jlpp.com/2451-2/\[https://perma.cc/ETX8-8G2P\]](https://www.harvard-jlpp.com/2451-2/[https://perma.cc/ETX8-8G2P]) (“[T]he premise [equality arguments] share with *Roe* and *Casey* would do most of the work in the equality arguments for abortion.”). But see Siegel et al., *supra* note 107, at 16–18 (arguing that abortion restrictions fail narrow tailoring requirement of Equal Protection even if the protection of prenatal life is a compelling state interest). The nub of Siegel and her coauthors’ argument is that abortion bans are unconstitutionally under-protective of the state’s purported interest in prenatal life, at least in states without robust social safety nets, which constitute a nondiscriminatory means of protecting the same interest. This is a powerful and sophisticated argument but not one that transcends the morality of abortion. If abortion is akin to murder (or even a less serious but still grave moral wrong), states can surely prohibit it without regard to the generosity of their health and welfare programs. For the Court to hold otherwise would dramatically expand judicial scrutiny of state taxing and spending decisions beyond anything contemplated in any prior formulation of the narrow tailoring requirement. This could be the right approach, but it is not required—as opposed to permitted or suggested—by any plausible understanding of existing law.

<sup>111</sup> This is roughly the course the Supreme Court followed in upholding the military draft against a Thirteenth Amendment challenge. See *Arver v. United States*, 245 U.S. 366, 390 (1918) (holding that the draft is not an imposition of involuntary servitude in violation of the Thirteenth Amendment, but rather a “supreme and noble duty of contributing to the defense of the rights and honor of the nation”).

Finally, and most important, a majority of the Supreme Court has never clearly embraced any of these arguments. *Casey* does acknowledge the relationship between reproductive autonomy and equal citizenship, but it stops well short of holding that abortion restrictions violate the Equal Protection Clause.<sup>112</sup> The only full-throated support for this view has come in concurring and dissenting opinions.<sup>113</sup> *Roe* mentions but does not endorse a version of the Ninth Amendment argument, and *Casey* expressly disclaims any reliance on the Ninth Amendment.<sup>114</sup> Neither the Court nor any individual justice has ever mentioned the Thirteenth Amendment in connection with abortion. This does not mean that any of these arguments is wrong. But it is exceedingly difficult to contend that *Dobbs*'s failure to embrace them was lawless.

## 2. Other Moral Arguments

I have not discussed moral arguments for abortion rights rooted in personal autonomy or equal citizenship for one simple reason: Those arguments are entirely consistent with my thesis that the correctness of *Dobbs* turns inextricably on the morality of abortion. I also agree with them on the merits. There are, however, other moral arguments against *Dobbs* that arguably transcend the morality of abortion. These arguments may or may not be correct. But none is persuasive when viewed from a pro-life perspective. Nor does any of them establish that *Dobbs* was lawless or fundamentally illegitimate.<sup>115</sup>

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<sup>112</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1991) (plurality opinion) (mentioning equal participation in social and economic life among the reliance interests protected by *Roe* but otherwise making no reference to equal protection).

<sup>113</sup> *E.g.*, *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 585 (2021) (Sotomayor, J., dissenting) (“[Women’s] ability to realize their full potential . . . is intimately connected to their ability to control their reproductive lives.” (internal quotation marks omitted)) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)); see also 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part) (arguing that the assumption that “women can simply be forced to accept . . . motherhood . . . rest[s] upon a conception of women’s role that has triggered the protection of the Equal Protection Clause”).

<sup>114</sup> The most persuasive Ninth Amendment argument is not an affirmative justification for abortion rights but a parry to the argument that abortion rights are not specifically mentioned in the text. See Tribe, *supra* note 7 (“The Ninth Amendment is not the ‘foundation’ of any group of rights but how constitutional decisions about rights are to be made.”). That may explain why it did not receive more emphasis in *Roe* and *Casey*.

<sup>115</sup> Lawlessness and illegitimacy are obviously distinct concepts, but I fold them together here because both offer possible avenues for criticizing *Dobbs* that transcend the morality of abortion. None of the moral arguments canvassed in this sub-Part can plausibly be characterized as a legal command,

At least three distinct arguments fall into this category. The first holds principles of personal autonomy make abortion morally permissible even if “the fetus is a person, from the moment of conception.”<sup>116</sup> The second holds that the only possible rationale for *Dobbs* is theological—indeed, theocratic—and therefore illegitimate in a liberal democracy.<sup>117</sup> The third holds that the history and traditions *Dobbs* relies on, including the original meaning of the Fourteenth Amendment, were made by men for the benefit of men and cannot legitimately govern abortion rights today.<sup>118</sup> Again, each of these arguments merits more attention than I can give it here, but I will briefly address each in turn.

The first argument, most memorably captured by Judith Jarvis Thomson’s famous violinist thought experiment, takes one element of the pro-life position—fetal personhood—as given for purposes of argument. But it denies the ultimate pro-life conclusion that abortion is morally impermissible, much less akin to murder, in most or all circumstances.<sup>119</sup>

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rooted in precedent or any other authoritative source. But each might be thought to demonstrate the moral illegitimacy of *Dobbs* without regard to the morality of abortion. It is this potential application of these arguments that I seek to refute.

<sup>116</sup> See, e.g., Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48 (1971). Broadly speaking, such arguments analogize abortion to justified self-defense or morally permissible refusal to provide physically taxing and medically hazardous life support to the fetus. Thomson, famously, illustrates her argument with a hypothetical involving an ordinary person involuntarily conscripted to provide physically burdensome life support to world-famous violinist. The violinist is unquestionably a full human person and disconnecting her life support would foreseeably result in her death. But Thomson regards it as obviously morally permissible to do so and concludes that abortion is similarly permissible, even if the fetus enjoys full moral personhood.

<sup>117</sup> See, e.g., Linda Greenhouse, *Religious Doctrine, Not the Constitution, Drove the Dobbs Decision*, NY TIMES (July 22, 2022) <https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html> [<https://perma.cc/M4P3-6A88>] (arguing that the religious doctrine motivated the *Dobbs* decision); Tribe, *supra* note 7 (arguing that *Dobbs* is one of a series of recent Supreme Court decisions which erodes the separation between church and state). For a selection of pre-*Dobbs* arguments along the same lines, see *infra* note 120.

<sup>118</sup> See, e.g., Jill Lepore, *Of Course the Constitution Has Nothing to Say About Abortion*, NEW YORKER (May 4, 2022) <https://www.newyorker.com/news/daily-comment/why-there-are-no-women-in-the-constitution> [<https://perma.cc/4GY3-FD6Z>] (highlighting that there is no recognition of women in the Constitution and no women were present in the process of drafting or ratifying the Constitution); Bernadette Meyler, *Dobbs and the Supreme Court’s Wrong Turn on Abortion Rights*, BLOOMBERG NEWS (June 24, 2022) <https://news.bloomberglaw.com/us-law-week/the-supreme-courts-wrong-turn-on-constitutional-rights> (arguing that women’s lack of representation in the political process in the nineteenth century creates problems for the historical approach taken by Justice Alito in *Dobbs*). For more fully developed arguments along similar lines, see, e.g., Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 262 (1992) (explaining the history of women’s representation and abortion).

<sup>119</sup> Thomson, *supra* note 116, at 48; see also DAVID BOONIN, *A DEFENSE OF ABORTION* (2003) (giving an overview of the arguments in defense of abortion). For powerful personal testimonies in support



From a pro-life perspective, which is defined by its rejection of abortion rights, this makes Thomson's argument wrong *by definition*. If *Dobbs* is wrong because Thomson is right, that is another way of saying that the case against it depends on a pro-choice perspective.

The second argument, that *Dobbs* must stem from religious motivations, raises deep questions about what kinds of moral reasons are admissible in American constitutional law and liberal democratic debate more generally. These questions were already well-worn territory before *Dobbs*,<sup>120</sup> so I will confine myself to a single and straightforward observation: The morality of abortion is no more inherently a theological question than the morality of infanticide. On both questions, religion might be one reason for holding a particular moral view. But on the abortion question, religious arguments are available on both sides.<sup>121</sup> And secular arguments are also available on both

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of this argument post-*Dobbs*, see Charlotte Shane, *The Right Not to Be Pregnant*, HARPER'S, (Oct. 2022) <https://harpers.org/archive/2022/10/the-right-to-not-be-pregnant-asserting-an-essential-right/> [<https://perma.cc/Y9TE-YYHW>] (sharing own experience and gathering opinions and stories in support of abortion); see also Irin Carmon, *I, Too, Have a Human Form*, N.Y. MAG.: INTELLIGENCER (May 19, 2022) <https://nymag.com/intelligencer/2022/05/roe-v-wade-draft-opinion-pregnant-body-erased.html> [<https://perma.cc/N3YM-SVD2>] (discussing own experience with pregnancy and relating it to the *Dobbs* decision).

<sup>120</sup> Most of the pre-*Dobbs* discussion focused on the motivations of abortion-restrictive legislation, rather than a hypothetical Supreme Court decision reversing *Roe*, but the issues are very similar, if not identical. See, e.g., RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 24–28 (Vintage Books 1994) (1993) (discussing how *Roe* begs the question of whether the Constitution should be understood as providing a limited list of individual rights or encompassing abstract ideals, and arguing for the latter); see also JOEL FEINBERG, *Abortion*, in *FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS* 37, 37–38 (1992) (considering the moral claims of a pregnant woman and how they may override a fetus' right to life); see also John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 30–33 (1992) (discussing what a legislative body must recognize before making a decision about abortion access or fetal life); see also JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* (1979) (analyzing generally the history, context, and future possibilities of abortion as a liberty as well as how or why it may be limited); see also Laurence H. Tribe, *Foreword: Toward A Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 18–25 (1973) (discussing the tensions between the role of the government in protecting human life and its separation from religion in the abortion context); see also *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 569 (1989) (Stevens, J., concurring in part and dissenting in part) (arguing that Missouri abortion regulations violated the Establishment Clause).

<sup>121</sup> In fact, *Dobbs* triggered a flurry of lawsuits seeking religious exemptions from state abortion regulations on the ground that some religious believers view abortion as theologically compelled. See, e.g., Jay Michaelson, *Could New Abortion Bans Lose in Court?*, N.Y. MAG., June 26, 2022, <https://nymag.com/intelligencer/2022/06/could-post-roe-v-wade-abortion-bans-lose-in-court.html> [<https://perma.cc/4NM3-ACFU>] (explaining a pathway to abortion access grounded in religious freedom); Madeline Carlisle & Abigail Adams, *Does Religious Freedom Protect a Right to an Abortion? One Rabbi's Mission to Find Out*, TIME, July 7, 2022 <https://time.com/6194804/abortion->

sides.<sup>122</sup> It is certainly not the case that a pro-life perspective can *only* be explained by religious doctrine, as *Dobbs*'s most vehement critics have contended.

The question remains whether some or all justices in the *Dobbs* majority were secretly and illegitimately motivated by religious, rather than secular, reasons. The only honest answer is that I have no idea, but neither do the critics. The true motivations of the *Dobbs* justices are unknown and unknowable, perhaps even to themselves. Justice Alito's opinion certainly does not invoke religious doctrine. Rather, it makes secular arguments, both legal and moral, for reversing *Roe* and *Casey*. Moreover, most accounts of political liberalism acknowledge that religious reasons play a significant and legitimate role in grounding the moral commitments of many citizens and public officials.<sup>123</sup> On John Rawls's account, for example, the demands of "public reason" merely require that religiously grounded moral views be articulated in secular terms that persons of different foundational

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religious-freedom-judaism-florida/ (explaining that because life begins at birth in Judaism, abortion bans prevent Jewish women from practicing their faith). This is not a new argument. *See, e.g.*, Brief of Petitioners and Cross Respondents at 19 n. 27, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006398, at \*36 ("In addition to the 'liberty' guarantee of the Fourteenth Amendment, the right to abortion may be grounded in [the] freedom of religion."). For an illuminating analysis, see Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299 (forthcoming 2023), <https://ssrn.com/abstract=4266006> [<https://perma.cc/TL97-MK8E>]. I sympathize with the religious preferentialism concerns Schragger and Schwartzman raise, but I doubt that the free exercise argument—any more than the liberty and equality arguments—can be disentangled from the morality of abortion. A full analysis of this question is beyond the scope of this paper, however, and I take no strong position on it here.

<sup>122</sup> Compare Thomson, *supra* note 116 (arguing that abortions are morally acceptable), with Nicola Bourbaki, *Living High and Letting Die*, 76 PHIL. 435 (2001) (offering a wholly secular response to Thomson arguing that most abortions are morally impermissible), and Philippa Foot, *Killing and Letting Die*, in Jay L. Garfield and Patricia Hennessey (eds.), *ABORTION: MORAL AND LEGAL PERSPECTIVES* (1984) (offering a different wholly secular, but more equivocal, response to Thomson); *see also* Eric Rakowski, *The Sanctity of Human Life*, 103 YALE L.J. 2049, 2053 (1994) ("Some people regard abortion as wrong because they think God forbids it. But most others . . . believe that a fetus, like an infant, is owed at least part of the respect due the reasoning, self-conscious human being it could become."). The philosophical literature on abortion is too voluminous to comprehend, even illustratively, in a string cite. But in addition to Garfield & Hennessey, *supra* note 122, a number of influential essays are collected in Susan Dwyer & Joel Feinberg (eds.), *THE PROBLEM OF ABORTION* (1997).

<sup>123</sup> As religious conservatives frequently and correctly point out, religion was a major motivating force behind the abolition, civil rights, and anti-war movements. *See, e.g.*, Tribe, *supra* note 108, at 116.

commitments could subscribe to.<sup>124</sup> That is just what Alito’s opinion attempts to do.

Even if the justices in the *Dobbs* majority did act on the basis of illegitimate religious motives, the secular legal and moral arguments offered by Alito’s opinion and the philosophical literature show that it would be quite possible to reach the same outcome without relying on illicit religious grounds. Indeed, as I have already explained, all that is required to justify the outcome in *Dobbs* under the existing “reasoned judgment” approach is a pro-life perspective, which can be defended in entirely secular terms.<sup>125</sup> If that perspective is right, then abortion is not—and should not be—protected by the Constitution. Any persuasive defense of *Roe* and *Casey* must therefore show that the pro-life perspective is wrong. The arguably religious motivations of the justices who decided *Dobbs* do not change this fundamental point.

The third argument focuses on the historic exclusion and marginalization of women in the traditions the Court relies on, including the original meaning of the Fourteenth Amendment. This is a powerful critique, with implications that extend well beyond abortion rights.<sup>126</sup> Defenders of *Dobbs* have a number of responses, including the even more comprehensive exclusion of fetuses from constitutional decision-making processes and the full enfranchisement of women in the elections that will shape the future of

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<sup>124</sup> See JOHN RAWLS, POLITICAL LIBERALISM 137–39 (1993) (arguing that political power should only be exercised in accordance with “common human reason”). This is, of course, a gross oversimplification of a very complex question that is the subject of a vast literature. For a small sampling, see RAWLS AND RELIGION (Tom Bailey & Valentina Gentile eds., 2015); Gerald F. Gaus, *The Place of Religious Belief in Public Reason Liberalism*, in MULTICULTURALISM AND MORAL CONFLICT 19–37 (Maria Dimova-Cookson and Peter M.R. Stirk eds., 2010); Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006); SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA (2002); CATRIONA MCKINNON, LIBERALISM AND THE DEFENCE OF POLITICAL CONSTRUCTIVISM (2002); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988). The stubborn fact remains that the citizens and officials of liberal democracies often act on moral views whose ultimate foundations are religious, in whole or in part. This is not, and cannot be, *ipso facto* illegitimate. To my knowledge, no critic of *Dobbs* has undertaken the difficult—and necessarily speculative—work of showing that the Court’s decision was not merely influenced by the justices’ religious views but *illegitimately* influenced in violation of the tenets of political liberalism properly understood.

<sup>125</sup> See Bourbaki, *supra* note 122 (offering a wholly secular argument against most abortions).

<sup>126</sup> See, e.g., Siegel et al., *supra* note 7; see also Siegel, *supra* note 106 at 839 (“A sex equality analysis of reproductive rights views the social organization of reproduction as playing a key role in determining women’s status and welfare”); see also Siegel, *supra* note 118 (advocating closer scrutiny over whether regulation of women’s role in reproduction reinforces gender stereotypes) 118.

abortion rights post-*Dobbs*.<sup>127</sup> But I will not try to adjudicate this debate here. For present purposes, the important point is that the critique does not transcend the morality of abortion. That is to say, it does not demonstrate that *Dobbs* was lawless or illegitimate—or even incorrect—from a pro-life perspective.

Grant that the history and traditions of the U.S. legal system are irredeemably sexist. Grant that the same is true of the Fourteenth Amendment's original public meaning, and its drafting and ratification more generally. The critics of *Dobbs* still must show that abortion rights merit constitutional protection. And that argument can be sustained under modern due-process doctrine only if the pro-choice perspective is correct and the pro-life perspective is wrong. The critics may answer that the pro-life perspective itself is irredeemably sexist.<sup>128</sup> This could be true, and if it is true, it is a good reason to oppose *Dobbs*. But this is not a route around the morality of abortion; it is a move *within* the moral debate over abortion rights. As such, it takes us right back to where we started. The only persuasive arguments against *Dobbs* depend on a pro-choice perspective.

#### F. ANTICIPATING OBJECTIONS

Before moving on, I should respond to several possible objections. The first is that *Dobbs* is merely one example of a broader trend of judicial extremism and self-aggrandizement,<sup>129</sup> which makes the decision more troubling than it would be standing alone. The second is that the critics' claims should be judged by the standards of political rhetoric rather than the standards of scholarly inquiry. The third is that *Dobbs* can be right even if abortion is morally permissible and wrong even if abortion is morally impermissible. The fourth is that my argument applies only to the outcome of *Dobbs* rather than the Court's reasoning, which is the true object of the critic's attacks. The fifth is that Chief Justice Roberts's concurrence proves *stare decisis* can persuade a pro-life justice against overruling *Roe* and *Casey*

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<sup>127</sup> See, e.g., Girgis, *supra* note 110 at 8 (“From the 1970s onward, the gender gap on abortion has consistently been smaller than on almost any other political issue.”); see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2360 (2022) (emphasizing persistence of abortion bans after the 19<sup>th</sup> Amendment); see also Ely, *supra* note 50, at 933 (“[V]ery few women sit in our legislatures . . . [b]ut *no* fetuses sit in our legislatures.”) (emphasis in original).

<sup>128</sup> See, e.g., Siegel, *supra* note 84.

<sup>129</sup> For a synoptic account and condemnation of this trend, see Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. (2022).

and thus transcend the morality of abortion. All of these objections contain a kernel of truth, but I do not believe any seriously undermines my argument.

The first kernel of truth is that *Dobbs* does not stand alone. Since Amy Coney Barrett joined the Supreme Court in the fall of 2020, the expanded conservative majority has aggressively pushed the law rightward across a wide range of issues and shows no sign of letting up.<sup>130</sup> Quite apart from the result in any individual case, it is quite plausible to criticize the Court for changing too much, too quickly. Many critics of *Dobbs* have made arguments in this vein, and I have nothing to say against them.<sup>131</sup> But the charges of lawlessness and illegitimacy that this Essay focuses on are specific to *Dobbs* and must be judged on that basis. The radicalism (or not) of the Court's other decisions has no bearing on the merit of these arguments.

The second kernel of truth is related. In response to the perceived radicalism of the Court, some critics of *Dobbs* appear to have adopted a more overtly political conception of their own role. Many of the arguments this Essay responds to have appeared not in the pages of academic journals but rather in popular publications or on social media. From there, and by virtue of their ubiquity and repetition, they have seeped into the collective consciousness of the legal academy. Most of the critics advancing these arguments are impeccably credentialed academics. But they are writing or speaking for a broader audience, with the apparent hope of influencing public perceptions of the Supreme Court. The critics themselves might add that they are writing in a moment of acute crisis in American constitutional democracy. All of this makes it fair to ask whether their arguments should be judged by the ordinary standards of scholarly inquiry or instead by the more instrumental standards of political rhetoric.

It is fair to ask, but the question presents a false choice. The alternatives are not mutually exclusive. The critics' arguments can and should be evaluated under both the standards of political rhetoric and the standards of

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<sup>130</sup> See, e.g., Jack M. Balkin, *Abortion, Partisan Entrenchment, and the Republican Party* (Yale L. Sch. Pub. L., Working Paper, 2022) ("U.S. constitutional law has been moving to the right in several areas for a very long time . . . [b]ut the conservative trend appears to have been turbo-charged since 2017").

<sup>131</sup> I do have my doubts that these critics would be expressing the same concerns if a new majority were pushing the law aggressively to the left. But that is highly speculative. Even if true, the speculation would not necessarily constitute an indictment of the "too-far, too-fast" argument. But it would suggest that the argument is grounded more in the ideological content of the Court's decisions than the virtues of judicial moderation or gradualism as such. For an interesting defense of gradualism in *Dobbs* and beyond, see Richard M. Re, *Should Gradualism Have Prevailed in Dobbs?* in *ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION* (Lee C. Bollinger & Geoffrey R. Stone, eds., forthcoming 2023), <https://ssrn.com/abstract=4278625> [<https://perma.cc/R44Y-FC4Y>].

scholarly inquiry. As to the former, I venture some tentative thoughts in the next Part. As to the latter, the critics' arguments both reflect and have helped to create a prevailing orthodoxy within the legal academy. Whatever their merits as political rhetoric, this makes it fair, and important, to subject these arguments to scholarly scrutiny.

The third kernel of truth is that morality and constitutionality are overlapping but distinct issues. One can believe that abortion is morally impermissible in many or most instances, while still believing it should be constitutionally protected because individuals and their doctors are better positioned to make this decision than voters or legislators. One might also believe that the costs of driving abortion underground exceed the benefits. Conversely, one can believe that abortion is morally permissible in most or all instances, while still believing that it should not be constitutionally protected because this sort of contested moral question should be resolved by voters and elected officials rather than judges.<sup>132</sup> We might call these views pro-choice light and pro-life light.

All of this is fully consistent with my argument. For ease of exposition, I have been contrasting a strong pro-life view that abortion is morally impermissible and should not be constitutionally protected with a strong pro-choice view that abortion is morally permissible and should be constitutionally protected. These are by far the most common combinations of moral views on abortion in American political discourse, and they may well be the only two represented on the current Supreme Court.<sup>133</sup> But nothing in my argument depends on these being the only two possible views. The main arguments for and against *Dobbs* are somewhat closer under the

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<sup>132</sup> An originalist (or formalist of another stripe) would add that one might hold any of these views as a private matter, while interpreting the Constitution to embrace the opposite view, rendering one's private views irrelevant. But virtually all of the critics reject originalism, and my focus is the role of moral judgment under the critics' own views of substantive due process, constitutional interpretation, and stare decisis. Those views by no means completely collapse the categories of legality and morality. But on the questions of abortion, substantive due process more generally, and many other hotly contested issues, moral judgment plays a large role in determining the contours of vague constitutional language like "liberty" and "equal protection." It also plays a large role in determining the weight and magnitude of the costs of error and the benefits of settlement under stare decisis. Where this is the case, arguments about constitutional law necessarily implicate moral judgment.

<sup>133</sup> It is a more than plausible conjecture that the six conservative justices oppose constitutional protection for abortion and view it as morally impermissible in most or all cases, while the three liberal justices (assuming Justice Jackson joins this bloc) hold the opposite combination of views. Justices Thomas and Barrett are actually on record to this effect and the *Dobbs* dissenters come quite close to endorsing the moral permissibility of abortion in making the case for its constitutional protection. But for the other justices, this remains merely a very plausible conjecture.

pro-life and pro-choice light views than under the strong versions of those views. In particular, the stare decisis argument for reaffirming *Roe* and *Casey* is somewhat stronger under the pro-life light view (because the error costs of protecting abortion are lower) and weaker under the pro-choice light view (because the error costs are higher). But the basic analysis remains unchanged. Under the critics' own views of substantive due process and stare decisis, the correct resolution of *Dobbs* turns on the morality of abortion, defined to encompass the political morality of abortion regulation.

The fourth kernel of truth is that I have focused almost entirely on the outcome of *Dobbs*, rather than the Court's reasoning. This focus is intentional. The Court's reasoning is subject to many valid, indeed damning, criticisms. And some plausible conceptions of lawfulness do encompass an obligation of principled justification and a willingness to take principles to their logical conclusion, quite apart from the defensibility of the ultimate result.<sup>134</sup> But as Alexander Bickel recognized long ago, this is an ideal the Supreme Court perennially fails to live up to—probably inevitably and possibly for the good.<sup>135</sup> More important for present purposes, few, if any, of the critics merely contend that Justice Alito's opinion is badly drafted—or that it deceptively cloaks a moral judgment in the ostensibly objective guise of originalism and historical tradition. They contend that *any* decision overturning *Roe* and *Casey* would be lawless and illegitimate, without regard to the morality of abortion. It is this claim I have attempted to refute by showing that none of the critics' arguments is capable of compelling a different outcome in *Dobbs* when viewed from a pro-life perspective.<sup>136</sup>

The fifth kernel of truth is that Chief Justice Roberts's concurrence in the judgment complicates—though it does not vitiate—the relationship between moral judgment and stare decisis described in earlier in this Part. Most observers plausibly assume that Roberts holds pro-life moral views. Yet

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<sup>134</sup> See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1958) (arguing that courts must not consider the ultimate result in reviewing legislative action); see also Lithwick & Siegel, *supra* note 4 (arguing that *Dobbs* is lawless due to its unrespectable legal reasoning).

<sup>135</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 58–59 (1962) (noting the lack of principle in Supreme Court decisions). *Lawrence v. Texas* might have come out differently if the Court had felt compelled to openly acknowledge its implications for marriage equality. See *supra* notes 97–98 and accompanying text. And if the *Dobbs* majority had felt constrained to choose between reaffirming *Roe* and extending Justice Alito's history-and-tradition analysis to marriage equality, same-sex intimacy, and contraception, it may well have chosen the latter. It could still do so down the road, but those rights survive for now and seem likely to endure for some time.

<sup>136</sup> Cf. Tribe, *supra* note 120, at 10 (“set[ting] aside the misleading language of *Roe* and focus[ing] instead on the substance of *Roe*'s holding”).

rather than reverse *Roe* and *Casey* “down to the studs,” Roberts would have abandoned their viability rule for assessing regulatory burdens on abortion, while at least nominally preserving the constitutional “right to choose” on stare decisis grounds.<sup>137</sup> If the conventional assumption about his moral views is correct, then Roberts’s opinion might seem to contradict my claim that stare decisis arguments are incapable of transcending the morality of abortion. For Roberts at least, a commitment to stare decisis was stronger than his pro-life views, though not strong enough for him to reaffirm *Roe* and *Casey* in their entirety. And if Roberts set aside his moral judgment to follow settled precedent, at least partially, perhaps the other pro-life justices should have done so as well. Perhaps they were even legally bound to do so, as the critics contend.

Roberts’s opinion does show that the relationship between a justice’s moral judgments and legal views can be complicated. But this illustrates, rather than contradicts, my thesis. The most straightforward explanation for Roberts’s approach is that he judges the error costs of *Roe v. Wade* to be less severe than the majority does. In other words, he holds weaker pro-life views. On the other side of the balance, he judges the risk of damage to the Court’s credibility to be both greater and weightier than the majority does. For a justice with this combination of views, the balance could quite plausibly tip in favor of stare decisis.

Alternatively, Roberts might favor the same ultimate result as the majority but think it better to reach that result over the course of two or three decisions, instead of one fell swoop. “Better” here could mean better for the Court’s institutional standing, which Roberts clearly prizes, or less disruptive for the country.<sup>138</sup> Finally, Roberts might hold strong pro-life views, but hold them with less confidence than other members of the Court. If so, it would

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<sup>137</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2314 (Roberts, C.J., concurring in the judgment).

<sup>138</sup> *See Re*, *supra* note 131 (endorsing Roberts’s approach on roughly these grounds). More cynically, Roberts may have thought his approach better for the political fortunes of the Republican Party, which appears to have been weighed down significantly by the *Dobbs* decision in the 2022 midterm elections. *See, e.g.*, Mary Radcliffe & Amelia Thomson-DeVeaux, *Abortion Was Always Going to Impact the Midterms*, FIVETHIRTYEIGHT (Nov. 17, 2022, 6:00 AM), <https://fivethirtyeight.com/features/abortion-was-always-going-to-impact-the-midterms/> [https://perma.cc/6Q7Y-4H8H] (“Abortion turned out to be a driving force in midterm races across the country.”). An uncharitable observer might sum up Roberts’s position as “all (or almost all) the practical benefits of overturning *Roe* without the headlines.” The fairness of this characterization depends on (1) Roberts’s subjective motives; and (2) the counterfactual question of how quickly and how completely he would have moved to dispatch the vestiges of *Roe* if his approach had been followed. We will probably never know either.



make sense for him to be more hesitant about comprehensively overruling the right established in *Roe* and *Casey* without further deliberation.<sup>139</sup> The important point, for present purposes, is that these are all moral judgments about the significance of competing values.<sup>140</sup> An opinion resting on any of these judgments would not transcend the morality of abortion. It would simply reflect a different balancing of the relevant values than either the majority or the dissent.<sup>141</sup>

### III. IMPLICATIONS

I believe *Dobbs* was wrongly decided. On top of that, Justice Alito's opinion for the majority is gratuitously cruel, lacking in empathy, and poorly reasoned in many respects. But *Dobbs* is not illegitimate or lawless. It is a highly consequential, but fundamentally ordinary, example of the inextricable connections between morality and constitutional law. If abortion is akin to murder, the case could not—and should not—have come out any other way. If abortion is an essential human right, the case was wrongly decided and should be reversed at the earliest opportunity.<sup>142</sup> This

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<sup>139</sup> This is close to what Roberts's opinion actually says, though the doubt he confesses is about the constitutional rather than the moral question, which Roberts himself may or may not see as intertwined. 142 S. Ct. at 2316–17 (Roberts, C.J., concurring in the judgment). This suggests an additional refinement: it is not only the substance of the justices' moral judgments that matters but also their degree of confidence in those judgments. In Roberts's case, a lack of confidence seems to have swayed him in favor of a narrower and more moderate approach, at least if we take his opinion at face value. In another justice's calculus, however, a lack of confidence might militate in favor of leaving the abortion decision in the hands of individuals and their doctors or, alternatively, deferring to the democratic process. Certain passages in the joint dissent suggest the former. *See, e.g.*, 142 S. Ct. at 2320 (joint dissent) (“[I]n the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor.”). Like the other questions raised by Roberts's concurrence, the question of which default rule to adopt in the case of uncertainty—individual liberty, deference to the democratic process, or judicial minimalism—ultimately requires moral judgment.

<sup>140</sup> Of course, I have no idea which, if any, of these judgments actually motivated Roberts. But as with the moral judgments discussed elsewhere in this Part, the important point is that any of them *could have* justified his approach under the critics' views of substantive due process and stare decisis. By contrast, a justice with stronger pro-life views or less regard for the Court's institutional standing or the value of stability in abortion rights would have been justified in voting with the majority.

<sup>141</sup> *Cf. Re, supra* note 131 (endorsing Roberts's gradualism while acknowledging that its merits are matter a prudential judgment not reducible to any simple formula); *see also* Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Bar*, 103 MICH. L. REV. 1951, 2016 (2005) (making a similar point about judicial minimalism in general terms).

<sup>142</sup> I assume, as I have throughout, that the Court's quasi-originalist rationale (along with more orthodox originalist accounts) is unpersuasive. I also assume that the Court has the competence and legitimate authority to recognize constitutional rights that are essential to liberty or equal citizenship—assumptions common to all of the standard liberal and progressive approaches to constitutional law.

is far from the only noteworthy feature of *Dobbs*, but it is the most important, and the Court's critics have done much to obscure it.

The centrality of moral judgment to U.S. constitutional law means that the justices cannot reasonably be criticized for making moral judgments in a case like *Dobbs* where the conventional legal materials leave ample room for it. But the justices can and should be criticized for making bad moral judgments. They can also be replaced with new justices when the opportunity arises. And if they make enough bad judgments on questions of sufficient societal importance, institutional reforms or other forms of constitutional hardball may be justified to reduce the Court's power or change its composition. Meanwhile, charges of lawlessness should not be made lightly or merely on the basis of moral disagreement, particularly at this precarious moment for American democracy. This is a form of crying wolf, with potentially dire consequences.

#### A. HOW TO CRITICIZE THE SUPREME COURT

The best argument against *Dobbs* is not that the Court's decision was lawless. It is that *Roe* was right—more specifically, that *Roe* got the morality of abortion right. The same holds true, with the relevant changes, for most controversial Supreme Court decisions. This is a straightforward implication of the model of constitutional decision-making that liberals and progressives have embraced for decades.

Virtually every liberal or progressive approach recognizes the centrality of moral judgment to constitutional decision-making. Common-law constitutionalism requires moral judgment to decide when to follow and when to deviate from established precedent—and also to apply established precedents to new circumstances.<sup>143</sup> Ronald Dworkin famously placed moral judgment at the center of constitutional interpretation and called on the Supreme Court to serve as a “forum of principle.”<sup>144</sup> Garden-variety living constitutionalism requires moral judgment to adapt the Constitution to changing circumstances and to overcome the bigoted or exclusionary

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<sup>143</sup> See, e.g., Strauss, *supra* note 94, at 7 (“This kind of approach—extending precedent in the direction that seems to make more sense as a matter of morality or good policy—is characteristic of the common law.”).

<sup>144</sup> RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 319 (1996).

attitudes of previous generations.<sup>145</sup> Even Alexander Bickel, with his emphasis on judicial humility and the passive virtues, thought the essential role of the Supreme Court was to discern and articulate enduring moral principles.<sup>146</sup>

The one glaring exception is John Hart Ely, who defended his representation-reinforcement approach as a method for avoiding moral judgment.<sup>147</sup> But liberals and progressives today generally regard this aspect of Ely's argument as an abject, if well-intentioned, failure. Many still embrace the idea of representation-reinforcing judicial review, but they do so on the consequentialist ground that courts are more trustworthy guarantors of the democratic process than elected officials. Virtually no one today thinks courts can perform this role without making moral judgments.<sup>148</sup>

Among mainstream approaches to constitutional law today, only originalism and Thayerism—across-the-board judicial deference to legislative judgments—purport to exclude moral judgment from the legitimate grounds for decision of particular cases.<sup>149</sup> Of course, both of these

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<sup>145</sup> See, e.g., Post & Siegel, *supra* note 78, at 378 (“Legal interpretation of these open-ended provisions typically involves the expression of national values like equality, liberty, dignity, family, or faith[.]”); see also Tribe, *supra* note 120, at 14 (“The message of the Constitution is generally delphic; its application . . . will require the inescapably value-laden striking of various balances among competing considerations”). But see David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 731 (2021) (identifying “fundamentalist arguments that depend on deep philosophical premises or comprehensive normative commitments” as an “anti-modality” in American constitutional discourse). The key to reconciling Pozen and Samaha’s account with the conventional liberal and progressive view that constitutional interpretation unavoidably requires moral judgment is two-fold. First, the qualifiers “fundamentalist,” “deep,” and “comprehensive” require that the moral judgments judges make in the course of interpreting the Constitution be consistent with the tenets of political liberalism—in particular, the requirement that public officials justify their decisions in terms accessible to persons of different comprehensive views. See *supra* Part II.E.2. Second, through the process of “modalization,” Pozen and Samaha acknowledge that anti-modal arguments can be rendered permissible by attaching them to modal arguments. For example, the text of the Due Process Clause or U.S. constitutional traditions might be said to embrace an open-ended concept of liberty requiring judges to make “presentist” moral judgments. *Id.* at 773. Alternatively, such moral judgments might permissibly be presented as a gap-filling tool for resolving indeterminacy within or among the traditional constitutional modalities. *Id.* at 777. The Court’s modern substantive due process cases and their academic defenders all engage, more or less explicitly, in one or both of these forms of modalization.

<sup>146</sup> See Bickel, *supra* note 135.

<sup>147</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>148</sup> See Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 771 (2022) (“A consensus rapidly emerged that many of the “procedural” determinations Ely was depicting rested upon unspoken substantive premises about which minorities deserve protection and what counts as impermissible interference with electoral processes.”).

<sup>149</sup> Justice Alito’s *Dobbs* opinion and Justice Kavanaugh’s *Dobbs* concurrence are exemplary in their pretensions to moral neutrality.

approaches still require normative justification themselves. And it is debatable whether their adherents can, or do, avoid moral judgment in practice.<sup>150</sup> But for present purposes, the more important point is that neither originalism nor Thayerism is helpful to critics of *Dobbs*. Almost no one defends the constitutional right to abortion on originalist grounds,<sup>151</sup> and Thayerism requires courts to uphold virtually all challenged legislation, presumably including abortion restrictions.<sup>152</sup> The only mainstream approaches that support a constitutional right to abortion require moral judgment to generate that result.

Given this state of affairs, it is neither reasonable nor productive for critics to condemn the Supreme Court for making a moral judgment in *Dobbs*. Indeed, one of the main liberal and progressive critiques of originalism has been that it conceals the Court's moral judgments behind a deceptive veneer of objectivity.<sup>153</sup> On this view, there should be nothing at all surprising about Supreme Court justices appointed for their pro-life views incorporating those views into their decisions. To the contrary, this is an entirely predictable byproduct of a system in which moral judgment is central to constitutional law and judicial appointments are a major issue in national politics.

The liberal and progressive view that moral judgment is central to constitutional law is a major reason that judicial appointments are a salient political issue. If the justices' role were purely ministerial or mechanical, as conservatives sometimes suggest, it would not matter who serves on the

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<sup>150</sup> See, e.g., *Dobbs v. Jackson Women's Health Org.* 142 S. Ct. 2228, 2303 (Thomas, J., concurring) (pointing to sixty-three million abortions performed since *Roe v. Wade* as evidence of the "disastrous" consequences of substantive due process). Some versions of originalism also permit judges to exercise moral judgment in the "construction zone" when original public meaning is indeterminate. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 96 (2003) (arguing that "expectation originalism" requires judges to exercise moral judgment in constitutional interpretation). Thayerism might also permit judges to exercise moral judgment in determining what constitutes a clear constitutional error.

<sup>151</sup> But see Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 297–98 (2007) (defending a constitutional right to abortion using a capacious and flexible version of originalism that allows plenty of room for moral and political judgment).

<sup>152</sup> But see Jeremy Waldron, *Denouncing Dobbs and Opposing Judicial Review* (N.Y.U. Pub. L. Rsch., Working Paper No. 22-39, 2022) (criticizing *Dobbs* while opposing strong judicial review).

<sup>153</sup> See, e.g., Siegel, *supra* note 84, at 1134 ("[O]riginalism's claims on constitutional memory too often present the interpreter's value judgments about the law as seemingly objective and expert claims of historical fact to which the public owes deference."); see also Andrew B. Coan, *The Irrelevance of Writeness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1035 (2010) ("[T]he history invoked in originalist opinions may give an insidious veneer of objectivity and passivity to judicial decisions that are in reality the product of political choices."); see also Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 45 (2005) (arguing that judicial decisions do not always center the law and may be made for "reasons of policy or politics.").

Court. But few voters or politicians believe that is how the Court operates, or could operate. Nor should they believe this. It is deeply inconsistent with the Court's history and whole libraries of quantitative political science literature demonstrating that judicial ideology—a rough synonym for moral judgments—is a strong predictor of judicial votes.<sup>154</sup>

Anyone who takes this description of U.S. constitutional law seriously should recognize that moral judgment is a double-edged sword. When liberals or progressives control the Court, they can be expected to push constitutional law to the left. The larger their majority and the further left the median justice, the further and faster they are likely to push. When conservatives control the Court, as they do now, they can be expected to do the same in reverse. This is just how constitutional law works in the U.S.—and how it should work, according to the standard liberal and progressive accounts. It is also the only plausible way that *Roe* and *Casey* could have been justified in the first place.

There are, of course, limits on the extent to which justices can legitimately inject their own moral views into constitutional law. Under every mainstream approach to constitutional decision-making, even Ronald Dworkin's, other legal norms constrain the role of moral judgment. Judicial decisions must have some plausible support in the accepted forms of constitutional argument—text, history, precedent, structure, etc.<sup>155</sup> And it would be a grave breach of legal norms for judges to make decisions primarily for partisan political advantage or on the basis of a bribe.<sup>156</sup> Decisions that violate these norms can persuasively be condemned as lawless. But in the sort of difficult and contested cases that make their way to the Supreme Court, the justices will often enjoy considerable latitude to bend the law toward their sincerely held moral views.

In *Dobbs*, for instance, both the majority and dissenting opinions were plausibly grounded in thoroughly conventional constitutional arguments.

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<sup>154</sup> Strong does not, of course, mean perfect or exclusive. See, e.g., ADAM BONICA & MAYA SEN, *THE JUDICIAL TUG OF WAR: HOW LAWYERS, POLITICIANS, AND IDEOLOGICAL INCENTIVES SHAPE THE AMERICAN JUDICIARY* 26 (2021) (exploring “how judges operate ideologically”); see also ANDREW COAN, *RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING* (2019) (analyzing how judicial decision-making shapes Supreme Court decisions); see also EPSTEIN *ET AL.*, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 8 (2013) (finding that ideology does influence the decision-making of the judiciary); see also MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011) (explaining how law and politics shape the behavior of the justices on the Supreme Court).

<sup>155</sup> Pozen & Samaha, *supra* note 145, at 736.

<sup>156</sup> *Id.* at 753.

That is not to say that those arguments were equally persuasive. But as Part II explained, all of the major arguments against *Dobbs* depend on a pro-choice view. Whatever constraints those arguments might place on the legitimate scope for moral judgment, none of them provides a compelling reason for a pro-life justice to reaffirm *Roe* and *Casey*. Conversely, there are entirely persuasive arguments for the outcome in *Dobbs*, even under the Court's modern evolutionary approach to substantive due process, provided that one holds a pro-life view. Alternatively, holding a pro-life view might strongly incline a justice toward a traditionalist or originalist approach to substantive due process under which *Roe* and *Casey* would clearly count as wrongly decided.<sup>157</sup>

*Dobbs*, then, is not lawless or illegitimate. It is a perfect—and perfectly ordinary—illustration of the centrality of moral judgment to U.S. constitutional law that liberals and progressives have insisted upon for decades. This ordinariness does not, by any means, imply that *Dobbs* was correctly decided or should not be criticized. It does not even imply that *Dobbs* should not be criticized harshly or condemned as extreme. But the best and only way for liberals and progressives to persuasively criticize the result in *Dobbs* is to challenge the pro-life perspective directly.

The point is a general one that extends to most hotly contested areas of constitutional law. There are plenty of good reasons to criticize Supreme Court decisions that do not involve challenging their moral premises.<sup>158</sup> But barring flagrant partisanship or another similarly clear breach of legal norms, such criticism will only rarely undercut the ultimate outcome in the sort of constitutional cases that typically find their way to the Supreme Court. These are, almost invariably, cases in which the conventional forms of constitutional argument afford the justices ample room to draw on their sincerely held moral views. In other words, the Court can lawfully reach more than one result, with the correct decision being determined by moral rather than legal judgment in the conventional sense. Where this is the case,

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<sup>157</sup> See, e.g., Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671 (2018) (arguing that a “broadly consequentialist” defense of originalism “cannot be ruled off limits”).

<sup>158</sup> I have identified (without attempting to defend) several such reasons for criticizing *Dobbs*—its lack of empathy, its shoddy reasoning, its failure to convincingly explain why its rationale does not threaten *Obergefell* and *Griswold*. The flaws of Justice Alito's quasi-originalist approach are another good reason to criticize *Dobbs* that do not involve challenging its moral premises.

any persuasive critique of the result will need to challenge the Court's moral premises directly.<sup>159</sup>

## B. BEYOND CRITICISM

If *Dobbs* illustrates the ordinary functioning of American constitutional review and that system is producing bad or even terrible results, the question naturally arises: Should the system be overhauled? In roughly ascending order of radicalism, the options for reform include prospective term limits; targeted jurisdiction-stripping over particular issues; retrospective term limits; defiance of Supreme Court precedents; Supreme Court expansion or "packing"; comprehensive jurisdiction stripping; and defiance of Supreme Court judgments. Any of these measures could also be employed as threats to induce the Court to moderate its course. But to be effective, such threats would have to be credible.

Does the Court's hard right turn justify significant reforms of this kind? Liberals and progressives have been asking variations on this question since the mid-1990s. But their sense of urgency has greatly increased since Donald Trump's election in 2016 and especially since the leak and subsequent decision in *Dobbs*.<sup>160</sup> The question is entirely fair, but it also presents liberals

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<sup>159</sup> Others who broadly subscribe to this picture of Supreme Court decision-making have concluded that *all* Supreme Court decisions are lawless—even going so far as to argue that the Court is not a court in any meaningful sense. See, e.g., ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 5 (2012) (asserting that the Supreme Court acts like a "veto council much more than a court of law"). I do not endorse this view, though the question is at least partly semantic. The degree of discretion the justices enjoy in constitutional cases certainly distinguishes their work from that of other courts. But there are also many commonalities, and the justices' discretion is subject to important limits, legal as well as institutional. The limits are perhaps most evident in the thousands of cases the Court never hears—and never would hear—because there is no room for reasonable disagreement on the correct result. But they also encompass strong norms against partisan decision-making, bribe-taking, personal favoritism, as well as other more porous anti-modalities. Pozen & Samaha, *supra* note 145. What matters for present purposes is that *Dobbs* runs *no more* afoul of these capacious limits (which do genuinely transcend the morality of abortion) than *Roe* or *Casey* or many other decisions admired by liberals and progressives.

<sup>160</sup> For a sampling of the large and growing literature, see, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021) ("Progressives are taking Supreme Court reform seriously for the first time in almost a century."); see also Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71-72 (2022) (asserting that "the reform proposal that poses the greatest threat to judicial legitimacy and independence: Court-packing" is one that "many progressives advocate [for]"); see also Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020) (addressing Congress's "authority to make incursions into judicial supremacy"); see also Daniel Epps & Ganesh Sitaraman, *How to Save the*

and progressives with numerous severe—and perhaps insuperable—difficulties that *Dobbs* brings into stark relief.

1. *The Case for Significant Court Reform*

Obviously, I cannot comprehensively evaluate the case for serious judicial and constitutional reform here. But that case is closely bound up with the centrality of moral judgment to U.S. constitutional law that is the main focus of this Essay, and it bears further comment for that reason. If responsible constitutional decision-making unavoidably involves moral judgment, why do we entrust that power to an unelected Supreme Court? No one has yet offered a more compelling—or more suitably tentative and qualified—answer to this question than Thomas Grey in his 1984 article “The Constitution as Scripture”:

We should not see federal judges as priests, but as officials given more job security than other civil servants so that they can decide disputes fairly, taking account of a mass of institutionalized rules and precedents. The case for granting them the extra degree of political power they exercise through judicial review rests on nothing more grand than a supposed institutional capacity and professional tendency to view current problems in a temporal perspective slightly broader than the one that runs from today to the next election—an eternally shaky case whose persuasiveness turns, for each generation, on how well the judges’ decisions work out.<sup>161</sup>

If Grey is right, the case for serious reform of the American system of constitutional review in response to *Dobbs* and other recent decisions must be both practical and context-specific. The question is not whether some idealized concept of judicial review is justified according to eternal principles of political morality. It is whether the United States, circa 2023, and for the reasonably foreseeable future, can expect to achieve better results by curtailing the power or changing the composition of the Supreme Court. In asking this question, there is no good reason to abstract away or otherwise disregard salient facts like the ideological and partisan balance on the current Court or the likelihood that this balance will persist for decades, barring some intervening cataclysm.

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*Supreme Court*, 129 YALE L.J. 148 (2019) (explaining how “many Democrats are already calling for changes like court-packing to prevent the new conservative majority from blocking progressive reforms”); see also LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 116 (2004) (discussing court reform efforts as early as the nineteenth century); see also MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6 (1999) (arguing against judicial supremacy).

<sup>161</sup> Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 23-24 (1984).



At first blush, this would appear to ease a major difficulty confronting liberal and progressive advocates of Supreme Court reform. The standard argument pressed by such reformers is that judicial review is inherently conservative. There are obviously exceptions like *Brown*, *Roe*, and *Obergefell*, but the reformers contend that these have unduly transfixed the Court's liberal and progressive supporters. Over the broad sweep of American history, judicial review has systematically favored economic elites and cultural conservatives over the middle and lower classes and the socially marginalized. The Court has not just failed to help the latter groups; it has systematically made it more difficult for legislatures to protect their interests. Or so the reformers argue.<sup>162</sup>

Although oft-repeated, this is a difficult argument to substantiate. Indeed, few professional historians would even attempt it, given the argument's necessarily counterfactual nature and the many changes to American economics, politics, and society over the historical period in question. What would the country have looked like without judicial review? The question is irreducibly speculative. Even if we could be confident in the answer, what do the tendencies of the Supreme Court during the Civil War, Reconstruction, World War I, and Civil Rights Eras tell us about the Court's likely biases in our present digital age and beyond?

These are genuinely difficult questions, but Grey appears to offer reformers a path around them. There is no need, he suggests, to make a grand, transhistorical case against judicial review. It is enough that the Supreme Court appears likely to make the country worse right now and for the reasonably foreseeable future. Sure, liberals and progressives might regain control in twenty or thirty years. But in the meantime, the current

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<sup>162</sup> See, e.g., Written Statement of Nikolas Bowie, *Presidential Comm'n on the Sup. Ct. of the U.S., The Contemp. Debate over Sup. Ct. Reform: Origins and Persps.* (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [<https://perma.cc/CFE2-Y3PJ>] (“[I]f you look at the history of the judicial review of federal legislation, the principal ‘minority’ most often protected by the Court is the wealthy.”); see also Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1922 (2016) (suggesting that “economically libertarian tendencies . . . may be intrinsic to judicial enforcement of civil liberties, regardless of the politics of individual judges”); see also Gerald N. Rosenberg, *The Broken-Hearted Lover: Erwin Chemerinsky’s Romantic Longings for a Mythical Court*, 69 VAND. L. REV. 1075, 1078 (2016) (arguing that “is structurally and inherently conservative”); see also Samuel Moyn, *Resisting the Juristocracy*, BOS. REV., Oct. 5, 2018, <https://www.bostonreview.net/articles/samuel-moyn-resisting-juristocracy/> [<https://perma.cc/4J7E-CXFG>] (“A legal culture less oriented to the judiciary and more to public service in obtaining and using democratic power in legislatures at all levels is the sole path to progress now. In fact, it always has been.”); see also RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* 16 (2007) (highlighting weakness of judicial review as forum for resolving disagreements about rights).

majority will have done untold harm. The country will also be a profoundly different place, in ways that make it extremely difficult to assess the value of liberal and progressive control of the Court two or three decades hence. If liberals and progressives are in a position to retake the Court then, perhaps they will also possess sufficient electoral power to achieve most or all of their essential aims through the political process. Or, more darkly, perhaps the Court's current conservative majority will have already conspired with an authoritarian Republican Party to entrench conservatives in power on a quasi-permanent basis.

In short, the distant future is unknowable. But the present and the more immediate future we can predict with reasonable confidence. From a liberal and progressive perspective, the Supreme Court seems almost certain to make the country worse over this time horizon, sticking by the terrible precedents it has already created—notably including *Dobbs*—and rendering many other harmful decisions. On Grey's view, this is a perfectly defensible argument for serious, perhaps even radical, reform of the Supreme Court.

That argument might appear unprincipled. But judicial review is not an end in itself. It is an instrument for promoting social welfare, a good society, human flourishing, social justice—take your pick. To paraphrase America's original skeptic of judicial review: If the Supreme Court has become destructive of those ends, it is perfectly appropriate for the people to alter or abolish it, and to institute a new system, laying its foundation on such principles and organizing its powers in such form, as shall seem most likely to effect their safety and happiness.<sup>163</sup>

## 2. *The Difficulties Thereof*

Of course, whether the Supreme Court has become destructive of the people's safety and happiness is a matter of perspective. I do not mean that there is no truth of the matter, merely that the question provokes intense disagreement. If the Supreme Court is likely to make very conservative decisions for the next two to three decades, that might persuade liberals and progressives to embrace Court reform, but it will naturally have the opposite effect on most conservatives. Even if conservatives are normatively wrong, because conservatism is normatively wrong, the fact of their predictable

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<sup>163</sup> That skeptic, of course, is Thomas Jefferson, and my paraphrase is of the Declaration of Independence.

opposition has important implications for the feasibility—and, therefore, the desirability—of Court reform.<sup>164</sup>

Most liberal and progressive arguments for Court reform proceed in two simple steps. First, they imagine a world identical to the status quo save for one difference—a less powerful or differently composed Supreme Court. Second, they compare that hypothetical world to the status quo and find it superior relative to some normative baseline.<sup>165</sup> This seems straightforward enough. But it overlooks several important factors: how we get from the status quo to the hypothetical world envisioned by reformers; the strong possibility of failure and backlash; and the dynamic effects that even successful reforms would have on the U.S. political system as a whole during a time of significant instability and polarization. None of these factors constitutes a decisive reason to reject or abandon Court reform. But they merit at least as much consideration as the current and future ideological predispositions of the Supreme Court.

This is not the place for a sustained consideration of that kind. But the reformers and their interlocutors should be asking four broad questions: What is the probability of enacting serious Court reform? What are the risks and costs of pushing for reform unsuccessfully? What are the risks and costs of pushing it successfully? And what virtues of the present system, if any, would successful reform sacrifice?

Unfortunately for the Court's critics, the probability of successful reform is likely to be highest when it is least necessary and lowest when it is most necessary. Indeed, the only situation in which that probability is substantially above zero is one in which liberals and progressives enjoy strong and unified control of Congress and the presidency. These conditions seem quite unlikely to obtain in the near future. But if and when they do, liberals and progressives will have many other means for advancing their preferred policies against an aggressively conservative Supreme Court. At that point, Court reform might be almost superfluous—or at least much less important.

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<sup>164</sup> I bracket for now the many important differences among the Court reform proposals advocated by liberals and progressives in recent years. Broadly speaking, those proposals fall into two categories—reforms that aim to reduce the Supreme Court's power and reforms that aim to change its ideological composition. Compare Doerfler & Moyn, *supra* note 148, with Epps & Sitaraman, *supra* note 156. The former would do little or nothing to counteract the perceived harms of *Dobbs* or other judicial abdications of responsibility for protecting constitutional rights. Indeed, such proposals would make it more difficult for any future Supreme Court to protect individual constitutional rights, though liberals and progressives might still reasonably judge them desirable on balance.

<sup>165</sup> See, e.g., Bowie, *supra* note 162 at 24 (advocating for a more democratic Supreme Court); see also Doerfler & Moyn, *supra* note 148 (promoting reforms that disempower the Supreme Court).

Until then, any push for reform is almost certain to fail. Political capital, legislative time, and public attention are all scarce resources, so this failure would come at some difficult to quantify opportunity cost to other priorities—the harder the push for reform, the more significant the costs. A serious push for reform might also have substantial political costs for liberals and progressives, even when the public is unsympathetic to the Supreme Court ideologically. The current polling on this question is subject to varying interpretations and will inevitably change over time. But Franklin Roosevelt’s court-packing bill illustrates the potential for political disaster even under much more propitious circumstances than any Democratic president is likely to enjoy in the foreseeable future.<sup>166</sup>

However Court reform plays out with the public generally, conservatives seem certain to view any serious effort of this kind as an attempt to rig the basic rules of the constitutional game in favor of liberals and progressives. Coming just at the moment when conservatives have gained firm control of the Court after decades of single-minded effort, this would constitute a provocation of major proportions. At the very least, it seems likely to fuel an already thriving conservative narrative that liberals and progressives are ready and willing to overthrow the Constitution to achieve their aims.<sup>167</sup> Given the intense polarization of the country and the growing threat—and existing reality—of political violence, this prospect ought not to be taken lightly. If Court reform is unsuccessful, there will be precious few, if any, benefits to justify these risks.

A successful push for Court reform would carry many of the same risks. Indeed, the risks might be even greater, since the provocation of reform would be real rather than hypothetical. On the other hand, successful reform would also generate real benefits from a liberal and progressive perspective. Those benefits would be different with different types of reform, but they might be profound, potentially including the reversal of *Dobbs*; the invalidation of partisan gerrymandering; the elimination of the nondelegation doctrine as a threat to the modern administrative state; and much more. These gains, however, seem likely to be short-lived, with

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<sup>166</sup> See JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010) (recounting the steep political price Roosevelt paid for his controversial and ultimately doomed court-packing plan).

<sup>167</sup> Liberals and progressives tend to view this narrative as entirely disconnected from actual events, including Democratic policy proposals. On this view, the marginal effect of Court reform would likely be minimal, if it has any detectable effect at all. This view has some plausibility, but it is entirely speculative. Given the high stakes, this question deserves more careful consideration than it has received.

conservatives enacting countervailing reforms when they regain power. Such a retaliatory cycle has no clear endpoint. This would not only reduce the benefits of reform to liberals and progressives by shortening their duration. It would also constitute a potentially catastrophic flashpoint for political conflict.<sup>168</sup>

Finally, liberal and progressive reformers should not overlook the virtues of the Supreme Court as presently constituted. Even with a strong conservative majority, the Court can be counted on to protect many rights important to liberals and progressives—or at least not to interfere with protection of those rights by lower federal courts. Under some of the most radical proposals for reform, many individual rights that liberals and progressives care about would likely be more vulnerable than they are at present, including the rights of religious minorities, political dissenters, and criminal defendants. Without a judicial backstop, however flawed, these groups would be left entirely to the tender mercies of the political process.<sup>169</sup>

Perhaps even more important is the role of the federal courts in general and the Supreme Court in particular in quashing challenges to the 2020 presidential election.<sup>170</sup> Not all Court reform proposals would threaten this role, but a Court stripped of the power of judicial review or ham-fistedly reconstituted in the ideological image of the ruling political coalition could

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<sup>168</sup> See, e.g., Siegel, *supra* note 160 (arguing that Court-packing would damage the Court's legitimacy and independence).

<sup>169</sup> The current Supreme Court majority is obviously not notably sympathetic to criminal defendants, but there are clearly still some rights of constitutional criminal procedure that the Court will protect, which is probably more than can be said of an unrestrained political process. See, e.g., Suzanna Sherry, *Introduction: Is the Supreme Court Failing at Its Job, or Are We Failing at Ours?*, 69 VAND. L. REV. 909, 911–12 (2016) (noting the Court's defense of habeas rights); ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014); see also Shalev Gad Roisman, *Betting It All: A Response to Doerfler and Moyn's Proposal to Abolish Constitutionalism*, BALKINIZATION, Sept. 13, 2022, <https://balkin.blogspot.com/2022/09/betting-it-all-response-to-doeferler-and.html> [<https://perma.cc/7PZ2-5X8V>] (warning progressives of dangers of relying on democratic process).

<sup>170</sup> See, e.g., William Baude, *The Real Enemies of Democracy*, 109 CALIF. 2407, 2408 (2021) (“The real enemies [of democracy] are those who resist the peaceful transfer of power . . . [s]o we destabilize our current imperfect arrangements at our own peril.”); see also Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J. F. 114, 115 (2021) (“Had[Trump's lawyers] lies not been rejected by the courts, they would have undone the results of a legitimate election, compromising the very foundation of American democracy.”); cf. Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 552 (2018) (identifying court-packing as an important tool of autocratic legalism); see also STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 79–80 (2018) (identifying court-packing as an important tool of autocratic legalism for similar reasons).

probably not have performed it as effectively.<sup>171</sup> Perhaps no issue looms larger in the nation's immediate future. It is not hard to imagine calls for punitive Court reform backfiring and persuading the conservative justices that Democratic electoral victories represent a grave threat to the constitutional order.<sup>172</sup>

How all these considerations balance out is an extremely difficult, almost imponderable, question. But the account of *Dobbs* developed in this Essay helps to illuminate both the enduring allure of Court reform and its many pitfalls. The most persuasive critique of *Dobbs* is that it gets the political morality of abortion rights wrong. The most persuasive argument for significant Court reform is that other institutions—or a differently constituted Court—would make better judgments on this and other moral questions implicated by constitutional law at this particular moment in American history.

Yet for these very reasons, *Dobbs* cannot be deemed lawless. Conservative justices, like liberals and progressives, cannot do their jobs responsibly without making moral judgments in cases like *Dobbs*. The only alternatives are unattractive evasions, like the *Dobbs* Court's quasi-originalism, or abdications like Thayerism that could not justify a constitutional right to abortion in the first place. Meanwhile, conservatives should be expected to oppose Court reform just as aggressively as liberals and progressives support it. Indeed, from a conservative perspective, such opposition is entirely justified. From a liberal and progressive perspective, that opposition may or may not be justified, but it is nevertheless an important reality that affects both the feasibility and the normative case for Court reform.

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<sup>171</sup> Some liberals and progressives obviously think this is exactly the Supreme Court we currently have. On this view, it is no longer a question of whether a packed Court will decide the next election. The only question is which side will have done the packing, Republicans or Democrats. This view has some plausibility. But whatever the current Court's other failings, it has shown itself willing and able to fend off a serious attack on electoral democracy by the justices' copartisans in the White House and Congress. It seems unlikely that a Court packed by Democrats could as effectively quell the same forces in 2024. See Baude, *supra* note 170 (discussing progressive criticisms of an antidemocratic Constitution).

<sup>172</sup> Such claims already pervade conservative media and would likely be amplified greatly if Democrats mounted a serious push for Court reform. It is difficult to imagine this *not* having some impact on the justices and the increasingly ideologically homogenous social networks from which they derive validation and guidance. Cf. LAWRENCE BAUM AND NEAL DEVINS, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 3 (2019) ("[T]he primary influence on [Justices] is the elite world in which the Justices live both before and after they join the Supreme Court.").

## C. THE WAGES OF CRYING WOLF REDUX

It remains to consider the practical downsides of criticizing *Dobbs* as lawless. In addition to being unpersuasive on the merits, this criticism is a form of crying wolf, with potentially dire consequences. In particular, it threatens to encourage future lawless behavior by the Court; to make effective criticism of that behavior more difficult; and to undermine the credibility of the case against *Dobbs*. All of these downsides rest, to a large extent, on empirical conjecture. As such, I am less confident in the arguments in this sub-Part than the others in this Essay. Nevertheless, the empirical conjectures in question strike me as eminently plausible. At a minimum, they should be weighed in the balance against the equally conjectural—and to my eye, less plausible—practical arguments for condemning *Dobbs* as lawless.<sup>173</sup>

John Hart Ely's essay on *Roe v. Wade*, cited by both *Dobbs* and its critics, is famously titled "The Wages of Crying Wolf."<sup>174</sup> The essay is a blistering critique of *Roe*, as Justice Alito emphasizes in *Dobbs*, but its title is actually a rebuke of the Supreme Court's conservative critics. Those critics, in Ely's view, had so often unjustly accused the Court of "Lochnering"—making up constitutional rights out of whole cloth—that they were nearly as much to blame for *Roe*'s lawlessness as the Court.<sup>175</sup> Faced with this onslaught of indiscriminate criticism, the justices could plausibly have concluded that "one might as well be hanged for a sheep as a goat."<sup>176</sup> If the critics were going to condemn the Court for making up constitutional rights no matter what, the justices might as well go ahead and make up some rights "(in a good cause, of course)."<sup>177</sup>

This is the first problem with criticizing *Dobbs* as lawless. If the Court is going to be condemned as lawless for an important and controversial but basically ordinary decision like *Dobbs*, the conservative justices might see less

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<sup>173</sup> These might include any of the following: the intimidation value of throwing the Court a "brush-back pitch" (to pick up the constitutional hardball metaphor); the imperative to turn the rhetorical dial up to eleven to get anyone's attention in an over-saturated media environment; and the greater ease of mobilizing an already outraged audience to oppose future outrages. There is also a question of audience. The mass public may be less sensitive to crying wolf than judges or law professors, and there is a plausible argument that the mass public is more important in this context. These arguments cannot be dismissed out of hand, but they strike me as less plausible than the practical arguments against the lawlessness critique I discuss below.

<sup>174</sup> Ely, *supra* note 50.

<sup>175</sup> *Id.* at 944–49.

<sup>176</sup> *Id.* at 944.

<sup>177</sup> *Id.*

downside to making genuinely lawless decisions—in particular, blatantly partisan decisions—in other contexts. This is an especially serious concern at present when the Court could soon be called on to decide a disputed presidential election in a moment of intense national division. It would certainly do no credit to the Court to respond to unjustified criticism by living up to the critics' worst charges. But the justices are human beings, and this would be an all-too-human psychological response.

The second problem with criticizing *Dobbs* as lawless is closely related. If liberals and progressives level this charge every time the Court makes a decision they disagree with on moral grounds, the charge will quickly lose whatever power to shock that it still possesses. We are probably far along in that process already. The horse may already have left the barn (perhaps in flight from a phantasmal wolf). But liberals and progressives do not help matters by leveling the charge of lawlessness so thunderously and unpersuasively at a highly salient decision like *Dobbs*. When a decision comes along that actually justifies this charge, as it well might in the near future, will anyone listen or care? It is hard to have any confidence, and the critics of *Dobbs* bear some responsibility for that.

Finally, criticizing *Dobbs* as lawless has the potential to undermine the case against *Dobbs* itself. Anyone can see that the critics passionately believe that abortion is a fundamental human right and should be constitutionally protected. If they did not believe this, they clearly would not be criticizing *Dobbs* with anything like the same intensity. Given this reality, the fire and brimstone over the Court's lawlessness will strike many as a distracting and unconvincing rhetorical performance—an exercise in motivated reasoning intended to mask, perhaps even from the critics themselves, the moral disagreement that is the true driver of their opposition to *Dobbs*. The critics have a strong and broadly popular case to make for abortion rights on the merits. They do not need to embellish it with charges of lawlessness, whose unpersuasiveness detracts from the credibility of their case as a whole.

## CONCLUSION

A majority of the Supreme Court used to think abortion was fundamental to personal liberty. Now, a new majority thinks it deeply wrong. From a pro-choice point of view, the current majority's position is no more—and no less—outrageous than the old majority's position was from a pro-life point of view. The question, now as always, is which of those points of view is correct.



Liberal and progressive critics of *Dobbs* have conflated moral disagreement over this question with an existential struggle over constitutional democracy and the rule of law. Such a struggle is indeed under way in the United States today. But it is quite possible to take the side of constitutional democracy while also supporting the outcome in *Dobbs*.

This should comfort, rather than dismay, the Court's critics. In the larger contest at hand, they will need all the help they can get. Justices and citizens who support the outcome in *Dobbs* could well determine the outcome of that contest. However wrong they may be on the question of abortion, it would be both mistaken and foolish—a crime and a blunder—to lump all *Dobbs* supporters with the enemies of constitutional democracy on that account.