WHAT WILL SETTLE DOBBS?*

Clarke D. Forsythe**

A review of ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee Bollinger & Geoffrey Stone eds. 2024)

Dobbs v. Jackson Women's Health Organization[1]—the 2022 Supreme Court decision that overturned *Roe v. Wade*—is one of the most important decisions on constitutional doctrine and precedent since the heyday of the Warren Court. Numerous academic criticisms of *Dobbs* have been published since 2022.[2] *Roe v. Dobbs: The Past, Present, and Future of a Constitutional Right to Abortion* is the first major book, the opening salvo in the campaign to challenge *Dobbs* and keep it *unsettled*—until a future Supreme Court can overturn it—and to propose progressive policy on elective abortion in the meantime.[3]

---

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

** Senior Counsel, Americans United for Life. Mr. Forsythe is the author of ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE (Encounter Books 2013), and of numerous publications criticizing *Roe v. Wade*, including *A Draft Opinion Overruling* Roe v. Wade, 16 GEO. J.L. & PUB. POL'Y 445 (2018).

[1] 597 U.S. 215 (2022).

[2] *See, e.g.*, Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J. F. 65 (2023); Aliza Forman-Rabinovici & Olatunde C.A. Johnson, *Political Equality, Gender, and Democratic Legitimation in* Dobbs, 46 HARV. J.L. & GENDER 81 (2023); Reva B. Siegel, *Memory Games*, 101 TEX. L. REV. 1127 (2023); Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111; Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs *'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99 (2023).

[3] Justice Stephen Breyer also has a chapter criticizing *Dobbs* in his new book. READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, *NOT* TEXTUALISM (2024).

The book's twenty chapters address many themes, including stare decisis, history, the role and legitimacy of the Supreme Court, speculation about *Dobbs*'s impact on women's lives, and public policies that progressives might support in Congress or the states. *Roe v. Dobbs* could be viewed as an abortion-specific appendix to *The Constitution in 2020*, a 2009 book edited by Professors Jack Balkin & Reva Siegel, two of the contributors to *Roe v. Dobbs*, which brought together progressive scholars to design "a powerful blueprint for implementing a more progressive vision of constitutional law in the years ahead."[4] *Roe v. Dobbs* is likewise designed to bring together progressive legal academics who, in the words of co-editor Professor Lee Bollinger, share "the shock of that reality which pervades nearly all of the essays in this volume": that "the spirit of the Warren Court" will not "continue . . . in the next few decades."[5] Of the twenty-five contributors to the volume, twenty-three are progressives, and two are conservatives.

The co-editors are well-qualified to convene these academics. Bollinger clerked for Chief Justice Warren Burger during the second term that *Roe v. Wade* and *Doe v. Bolton* were considered by the Court, 1972-73.[6] During the same term, co-editor Professor Geoffrey Stone of the University of Chicago clerked for Justice William Brennan.[7] They joined the Court during the summer between the *first* round of arguments in *Roe* and *Doe* before seven Justices in December 1971 and the *second* round of arguments before a full bench in October 1972 (after Justices Lewis Powell and William Rehnquist were confirmed).

I. THE BACKSTORY TO *ROE V. WADE*

Dobbs cannot be accurately understood without a thorough understanding of *Roe* and *Doe*. Bollinger and Stone don't acknowledge, much less tell, the backstory to *Roe* and *Doe*, nor do the contributors to the volume. But that background is essential to understanding the *Roe* and *Doe* opinions and

---

[4] THE CONSTITUTION IN 2020, *available at* https://www.goodreads.com/en/book/show/6463833.

[5] ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 339 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024).

[6] *List of Law Clerks of the Supreme Court of the United States (Chief Justice)*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States_(Chief_Justice) (last visited June 18, 2024).

[7] *List of Law Clerks of the Supreme Court of the United States (Seat 3)*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States_(Seat_3) (last visited June 18, 2024).

to evaluating the arguments made in *Roe v. Dobbs* because of the procedural, evidentiary, and adjudicative rules that the *Roe* Court evaded in its rush to reach the result.

As I document in my book, *Abuse of Discretion*,[8] the full Court originally took *Roe* and *Doe* in April-May 1971 *not* to address abortion, but to address the application of *Younger v. Harris*[9]—whether state court criminal defendants can take their cases into federal court—to the procedural scenarios of *Roe* and *Doe*.[10] Just before the 1971 Term began, a crisis erupted in the Court when Justices Hugo Black and John Marshall Harlan both abruptly retired in September 1971 due to ill health. That reduced the number of Justices to seven and flipped the balance of the Court. The temporary majority saw this as an opportunity to use *Roe v. Wade*[11] and *Doe v. Bolton*[12] to sweep away state abortion laws before President Richard Nixon, whom several of the Justices loathed, could fill the Black and Harlan vacancies with what were expected to be conservative Justices.[13] Their plan is laid out in Justice Brennan's December 30, 1971, memorandum to Justice William

---

[8] CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* (2013).

[9] 401 U.S. 37 (1971).

[10] FORSYTHE, *supra* note 8, at 17-24; *see also* BOB WOODWARD AND SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 165 (1979)

> He [Douglas] knew also that the two cases now before the Court [*Roe v. Wade* and *Doe v. Bolton*] did not signal any sudden willingness on the part of the Court to grapple with the broad question of abortions. They had been taken only to determine whether to expand a series of recent rulings limiting the intervention of federal courts in state court proceedings. Could women and doctors who felt that state prosecutions for abortions violated their constitutional rights go into federal courts to stop the state? And could they go directly into federal courts even before going through all possible appeals in the state court system? Douglas knew the Chief wanted to say no to both these jurisdiction questions. He knew the Chief hoped to use these two cases to reduce the number of federal court cases brought by activist attorneys. The two abortion cases were not to be argued primarily about abortion rights, but about jurisdiction.

Id.

[11] 410 U.S. 113 (1973).

[12] 410 U.S. 179 (1973).

[13] *See, e.g.*, David Savage, *Roe Ruling: More Than Its Author Intended*, L.A. TIMES (Sept. 14, 2005), https://www.latimes.com/archives/la-xpm-2005-sep-14-na-abortion14-story.html (quoting Mark Tushnet, clerk to Justice Thurgood Marshall during the deliberations in *Roe v. Wade*: "All they wanted was to get those laws ["Texas-type laws"] off the books," Tushnet said. "They were not thinking long-term with an overall vision.").

Douglas, which he drafted after the first round of arguments, about how to justify a right to abortion.[14]

But the case selection was terrible. In choosing *Roe* and *Doe*, instead of any of the twenty or more other abortion cases percolating in the federal courts, the temporary majority chose two cases with no adversary proceeding or evidentiary record on abortion.[15] Deciding on the application of *Younger v. Harris* would have required no evidentiary record on abortion. But because they were bent on rushing to decide the abortion issue before Nixon could fill the vacancies, the Justices decided to use *Roe* and *Doe*.[16] Consequently, virtually everything in Justice Harry Blackmun's opinion was derived from his own research or interest group briefs filed in the Supreme Court for the first time.[17] For example, Justice Blackmun's claim that state restrictions on abortion may lead to "specific and direct harm medically diagnosable even in early pregnancy," which Professor Erwin Chemerinsky touts in his *Roe v. Dobbs* chapter, was based on no evidence and no record, and Blackmun cited no data.[18] Professor Stone once told me that the Justices decided to strike down the abortion laws when they learned about back-alley abortions. But

---

[14] William J. Brennan, Memorandum re: Abortion Cases, No. 70-40 (Dec. 30, 1971), *in* WILLIAM J. BRENNAN PAPERS, Box I: 285, Folder 9, (Library of Cong.) (quoted in FORSYTHE, *supra* note 8, at 22, 362 n.11 (2013)). *See also* Opinions of William J. Brennan, October Term 1971, *in* WILLIAM J. BRENNAN PAPERS, Box II: 6, Folder 14, pp. 39, 40 (Libr. of Cong.) ("In Conference, according to Justice Brennan's notes, it seemed to be generally agreed that the jurisdictional and other procedural hurdles to reaching the merits could be overcome in one way or another.") (cited in FORSYTHE, *supra* note 8, at 362 n.11).

[15] Randy Beck, *Self-Conscious Dicta: The Origins of* Roe v. Wade*'s Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 511-12 (2011).

[16] The four Justices wanted to hear the cases and vote before the vacancies could be filled. They were able to do that on December 13. But the new majority (with newly-confirmed Justices Powell and Rehnquist) voted to rehear the cases in the fall of 1972.

[17] *See* Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIA. L. REV. 21, 36-37 (1978). Judge Friendly wrote:

> The Court's conclusion in *Roe* that "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth" rested entirely on materials not of record in the trial court, and that conclusion constituted the underpinning for the holding that the asserted interest of the state "in protecting the woman from an inherently hazardous procedure" during the first trimester did not exist.
>
> If an administrative agency, even in a rulemaking proceeding, had used similar materials without having given the parties a fair opportunity to criticize or controvert them at the hearing stage, reversal would have come swiftly and inexorably.

Id. at 37.

[18] *Roe*, 410 U.S. at 153.

while they might have learned about back-alley abortions from the *New York Times* or at a Washington cocktail party, they didn't learn it from any factual hearing or evidentiary record in *Roe* or *Doe.*

The lack of any evidentiary record had several serious legal consequences. First, it set the stage for two rounds of confused oral arguments, both featuring a dearth of coherent constitutional analysis.[19] Notably, the word "viability" wasn't mentioned once in four hours of argument. The original draft opinions through 1971 and 1972 focused on twelve weeks gestation (the end of the first trimester) as the proposed limit to the proposed abortion right. Only after the second round of arguments in October 1972—in which no party or amicus raised viability as the line to draw—did the Justices begin to negotiate among themselves about what line they were going to draw, and they settled on the viability rule a month before releasing the opinions.[20] This is just one signal that *Roe* was entirely result-oriented. The temporary majority first decided to invalidate abortion laws nationwide, and only then did it decide how to justify and write a decision accomplishing that goal, which took the Justices through 1972 and resulted in a re-argument in October 1972.

Second, virtually half of the Court's opinion in *Roe* is legal history, and because there was no record or evidentiary hearing to draw on, that history came from Justice Blackmun's own research and from interest group amicus briefs.[21] But that history was quickly debunked.[22] Indeed, Justice Blackmun dropped any defense of his historical account in *Roe* by the time *Webster v. Reproductive Health Services* was decided in 1989.[23]

Third, the basic reasoning in *Roe* is a simple *ipse dixit*. The Court declared that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[24] This statement is derivative of Justice Brennan's *ipse dixit* in *Eisenstadt v. Baird*: "If the right of

---

[19] FORSYTHE, *supra* note 8, at ch. 3. The transcripts and the original audio of the oral arguments are available at https://www.oyez.org/cases/1971/70-18 (*Roe v. Wade*) and https://www.oyez.org/cases/1971/70-40 (*Doe v. Bolton*).

[20] *See* Beck, *supra* note 15, at 520-26.

[21] *Roe*, 410 U.S. at 129-62.

[22] *Dobbs*, 597 U.S. at 252 & n.38 and accompanying text; JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 689, 748, 872, 1053-54 (2006). A revised edition of Dellapenna's book was published in 2023, but I refer to the first edition throughout.

[23] 492 U.S. 490, 537-60 (1989) (Blackmun, J., concurring in part and dissenting in part). Blackmun didn't expressly concede the weakness of his historical account, but he didn't defend it after *Roe*.

[24] *Roe*, 410 U.S. at 153.

privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[25] Although Professor Nancy Cott, a contributor to *Roe v. Dobbs*, considers this "significant,"[26] it is not legal reasoning; it is a diktat.

Fourth, the super-structure of *Roe*—the ban on state prohibition of abortion until after viability, the trimester system, deference to abortion providers, the viability rule, the gradation in regulation as gestation progresses, the unlimited "health" exception after viability—was based on the medical assumption that "abortion is safer than childbirth."[27] Without an evidentiary record, Blackmun tentatively asserted that "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth."[28] But later in the opinion, he reasserted this assumption as the "now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[29] As with the legal history, however, this assertion was based on Justice Blackmun's own research or interest group amicus briefs. There were no reliable American data in 1971 or 1972 to support the proposition, so Blackmun instead cited numbers from Soviet bloc countries in the 1950s.[30] But the seven medical sources that Blackmun cited to support this key medical assumption were shallow and unreliable,[31] and as Dorothy Beasley, the attorney for Georgia in the *Doe* case, emphatically told the Court, the claimed data were not part of the record.[32] The Court later—in *Akron v. Akron Center for Reproductive Health*[33] and again in *Planned Parenthood v. Casey*[34]—acknowledged that *Roe* was based on "assumptions."

Professor Michele Goodwin's chapter in *Roe v. Dobbs* reminds us that this is how abortion law was litigated with *Roe* as the reigning law: instead of

---

[25] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[26] ROE V. DOBBS, *supra* note 5, at 207, 214.

[27] *Roe*, 410 U.S. at 149.

[28] *Id.*

[29] *Id.* at 163.

[30] FORSYTHE, *supra* note 8, at 163-70.

[31] *Id.* at 159-70.

[32] *Id.* at 97, 162.

[33] City of Akron v. Akron Ctr. For Reprod. Health, Inc., 462 U.S. 416, 430 n.12 (1983) ("[T]he State retains an interest in ensuring the validity of *Roe*'s factual assumption that 'the first trimester abortion [is] as safe for the woman as normal childbirth at term.'").

[34] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) ("We have seen how time has overtaken some of *Roe*'s factual assumptions.").

parties submitting reliable data that could be tested in the adversarial process, interest groups filed amicus briefs in facial challenges to fill the information vacuum and establish national policy. Goodwin claims that Blackmun "undertook a rigorous empirical review," but her only support for this claim is Blackmun's statement that state abortion restrictions may cause "[s]pecific and direct harm medically diagnosable even in early pregnancy" (the same quotation Chemerinsky praises).[35] Goodwin quotes a Guttmacher Institute article from 2003, a statement by Dr. Alan Guttmacher from 1967, and unsubstantiated claims about Cook County Hospital in Chicago to lend support to Blackmun's conclusion, but none of these claims, nor any data, were part of any factual hearing or evidentiary record in *Roe*.[36] "Deaths," Goodwin claims about the pre-*Roe* era, "were particularly acute among women of color."[37] Again, she supplies no data, nor do her sources. And she claims that "the United States is now the deadliest country in the industrialized world in which to be pregnant."[38] Again, no data.

Finally, *Roe* was a sweeping decision. *Roe* legalized abortion for any reason, at any time during pregnancy.[39] If the Court had been more modest and stuck to the original draft opinions limiting the abortion right to the first twelve weeks—the end of the first trimester—could *Roe* have been more strongly supported by public opinion and thereby become more settled over five decades?[40]

The Court made itself the national abortion control board, taking control of the issue and of every regulation of every clinic from coast to coast. This had a negative impact on the Court, on American politics, and on federal judicial nominations. These negative effects kept *Roe* unsettled for nearly fifty years and significantly contributed to the incoherence, unworkability, and contentiousness of abortion law.[41]

By almost any objective measure, *Roe* was the most controversial Supreme Court decision of the 20th century, perhaps the most controversial since

---

[35] ROE V. DOBBS, s*upra* note 5, at 201 (citing *Roe*, 410 U.S. at 153); *see supra* text accompanying note 18.

[36] ROE V. DOBBS, s*upra* note 5, at 201 & n.53.

[37] *Id.* at 201.

[38] *Id.* at 202.

[39] *Dobbs*, 597 U.S. at 252 n.40 (describing the sweeping scope of *Roe* and *Casey*). *See also* FORSYTHE, *supra* note 8, at 1 nn.1-2 and accompanying text.

[40] *See also* Randy Beck, *Fueling Controversy*, 95 MARQ. L. REV. 735 (2011).

[41] *See generally* Clarke Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and* Roe v. Wade*: An Introduction*, 18 AVE MARIA L. REV. 48 (2020).

Dred Scott. Professor Michael McConnell makes this point in his chapter in *Roe v. Dobbs*.[42] Polls showing that respondents support *Roe* have been unreliable because, as a 1990 Gallup poll made clear, most Americans have no clue what *Roe* did or meant.[43] The fifty years of controversy, starting with these legal defects, kept *Roe* unsettled. And if a precedent is unsettled, stare decisis does not oblige the Court to stand by it; rather, it requires the Court to reexamine the unsettled precedent to decide how to settle the law.[44]

This context, which is not apparent on the face of any of the *Roe* opinions, is necessary for any thorough analysis of *Roe*, its progeny, and its legacy. Yet it is ignored by virtually all the contributors to *Roe v. Dobbs*. Indeed, according to Bollinger, *Dobbs* was a "brazen overturning" which exhibits an "attitude of hostility, even mockery toward the *Roe* Court" and "reflects a breach of judicial norms of respect."[45] Stone sees *Dobbs* as "the product not of a principled approach to law but of aggressive and illegitimate politics," and he argues that "in a system based on stare decisis, it is clear that *Dobbs* was the product not of judicial integrity but of the aggressively partisan distortion of our judicial process."[46] Readers can better evaluate the validity of these statements and the arguments throughout *Roe v. Dobbs* if they understand how *Roe* came to be, but they will have to look elsewhere to find that history.

II. WHY *ROE* WAS UNSETTLED & WHY THAT MATTERS

Roe v. Wade was decided in 1973. One of the most potent and widely-deployed critiques of the *Dobbs* majority is that it allegedly violated the principle of stare decisis by declining to stand by a forty-nine-year-old precedent. But this critique misses a critical point. The common law maxim advising deference to precedent is not simply "stare decisis"—as it is usually taught in law schools—but *stare decisis et quieta non movere*. That means to "stand by the decisions and not disturb what is settled."[47] Stare decisis is not just about standing by previous decisions; it is about settling the law.

---

[42] ROE V. DOBBS, *supra* note 5, at 101.

[43] *See* JAMES DAVISON HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR 87 (1994) ("After twenty years of ceaseless commentary in the media and heated debate by political pundits, almost half of all Americans still admit to having no knowledge of what *Roe* accomplished, and most of the rest get it wrong.").

[44] *See infra* Section II.

[45] ROE V. DOBBS, *supra* note 5, at 339.

[46] *Id.* at 340.

[47] Clarke D. Forsythe & Regina Maitlen, *Stare Decisis, Settled Precedent, and* Roe v. Wade*: An Introduction*, 34 REGENT U. L. REV. 385, 386-87 (2022).

Over the past two centuries, the Supreme Court has employed several factors to determine whether the law is settled on a particular point, including acquiescence by the Court, criticism by lower court judges, and criticism by the bar or academics.[48] The Justices often distinguish "settled" from "unsettled" law,[49] and they periodically conclude that existing rules are "unworkable."[50] Stare decisis analysis is not the special province of abortion law; there

---

[48] *See generally id.*

[49] *See, e.g.*, Vidal v. Elster, 602 U.S. 286, 325 (2024) (Sotomayor, J., concurring in the judgment) (referring to "settled First Amendment precedent"); Great Lakes Ins. SE v. Raiders Retreat Realty Co., 601 U.S. 65, 80 (2024) (Thomas, J., concurring) (referring to "settled practice" governing maritime insurance); Kirtsaeng v. Wiley, 568 U.S. 519, 544 (2013) (Breyer, J.) ("[T]he law has not been settled for long in Wiley's favor."); District of Columbia v. Heller, 554 U.S. 570, 578 n.3 (2008) ("[I]n America 'the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.'"); Wyoming v. Houghton, 526 U.S. 295, 309 (1999) (Stevens, J., dissenting) (referring to a "settled distinction between drivers and passengers"); Bragdon v. Abbott, 524 U.S. 624, 645 (1998) (saying canon applies when "judicial interpretations have settled the meaning of an existing statutory provision"); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J.) ("[I]t is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system."); Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963) (Black, J.) ("It is now settled that States 'have power to legislate . . . .'"); SEC v. Chenery, 332 U.S. 194, 200 (1947) ("[I]t was also clear that the Commission was not bound by settled judicial precedents . . . ."); Watson v. Maryland, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day . . . ."); Patterson v. Kentucky, 97 U.S. 501, 504 (1878) ("By the settled doctrines of this court . . . ."); Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.) (referring to "the objects of the legislative power, and to restrain its exercise within marked and settled boundaries").

[50] *See* Forsythe & Morrison, *supra* note 41, at 52-53 n.26 (citing Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019) ("The state-litigation requirement has also proved to be unworkable in practice."); Carpenter v. United States, 138 S. Ct. 2206, 2224 (2018) (Kennedy, J., with whom Thomas & Alito, JJ., joined, dissenting) ("draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other"); *id.* at 2244 (Thomas, J., dissenting) ("[T]he *Katz* test also has proved unworkable in practice."); Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1987 (2017) ("In practice, the distinction [between the Board's 'jurisdictional rulings and the Board's procedural or substantive rulings for purposes of allocating judicial review authority between district court and the Federal Circuit'] may be unworkable."); Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 392 (2015) (Scalia, J., with whom Roberts, C.J., joined, dissenting) (preemption rule "will prove unworkable in practice"); Salinas v. Texas, 570 U.S. 178, 190 (2013) ("[N]ot persuaded . . . that applying the usual express invocation requirement where a witness is silent during a noncustodial police interview will prove unworkable in practice."); Williams v. Illinois, 567 U.S. 50, 114 (2012) (Thomas, J., concurring) ("[A] primary purpose inquiry [for extrajudicial statement under the Confrontation Clause] divorced from solemnity is unworkable in practice."); Christian Legal Soc'y Ch. of the Univ. of Cal. v. Martinez, 561 U.S. 661, 699 n.1 (2010) (Stevens, J., concurring) ("This proposition [distinction between religious status and belief] is not only unworkable in practice but also flawed in conception.").

are general principles about whether and when the law is settled that the Court applies in many and varied contexts.

Though most contributors to *Roe v. Dobbs* assume that *Roe* was settled right up until *Dobbs* was decided in 2022, numerous factors ensured that *Roe v. Wade* remained unsettled throughout its forty-nine-year reign. *Roe*'s unsettled state was significant for the *Dobbs* Court's stare decisis analysis.[51] But some of the contributors to *Roe v. Dobbs* have difficulty understanding Justice Samuel Alito's arguments in his *Dobbs* opinion about *Roe*'s unsettled state because they do not deal forthrightly with *Roe*'s flaws.

One reason *Roe* was unsettled is that it was controversial from the beginning. Several contributors attempt to rewrite the history of the outcry against *Roe*. Professor Bollinger claims, relying on Professor Siegel, that the outcry didn't happen immediately.[52] Professor Linda Gordon likewise claims that, "when *Roe* was decided, few thought it controversial."[53]

But Professor John Hart Ely's famous criticism was made in 1973,[54] the very year *Roe* was decided. And then-Judge Ruth Bader Ginsburg said in 1992 that the Court had moved too far too fast in deciding *Roe* when and how it did.[55] Justice Blackmun himself repeatedly predicted to his colleagues before *Roe* was issued that the Court would be criticized for the decision.[56] Numerous constitutional amendments—twenty-seven by Professor Mary Ziegler's count—were introduced in Congress within weeks to overturn

---

[51] *See, e.g.*, *Dobbs*, 597 U.S. at 226 (criticizing *Roe*'s historical rationale for finding a constitutional right to abortion); *id.* at 228 (arguing that *Roe* reads like a statute); *id.* (pointing out that *Roe* was criticized by a "prominent constitutional scholar," criticized by other Justices, and decided by a divided Court); *id.* at 229 (*Roe* "sparked a national controversy that has embittered our political culture for a half century."); *id.* (pointing out that *Casey* was sharply divided); *id.* (suggesting *Casey* did not reaffirm *Roe*'s reasoning or rationale); *id.* at 230, 280 (arguing that *Casey* did not settle *Roe*); *id.* at 230 (noting that twenty-six states had asked the Court to overrule *Roe* and *Casey*); *id.* at 231 (arguing that the right to abortion is not deeply rooted in the nation's history or tradition); *id.* at 241 (referring to "*Roe*'s faulty historical analysis"); *id.* at 278 ("*Roe*'s reasoning was exceedingly weak," and scholars call it "totally unreasoned."); *id.* at 280-86 (opining that *Casey*'s rules and standard of review are unworkable); *id.* at 280 (saying *Roe*'s "test is full of ambiguities and is difficult to apply").

[52] ROE V. DOBBS, s*upra* note 5, at xviii.

[53] *Id.* at 225.

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

[55] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992).

[56] FORSYTHE, *supra* note 8, at 3-4.

Roe.[57] Within three years of the *Roe* decision, more than forty states had enacted conscience-protection laws.[58] The Church Amendment—the first federal conscience law—was introduced on March 8, 1973, and it passed on June 18, 1973, five months after *Roe* was decided in January.[59] Congressional hearings on federal constitutional amendments were convened in 1974-75 and again in 1981-83. And dozens of state abortion laws were passed in 1973-75.[60] Last but not least, twenty-five states joined Mississippi in asking the Court to overrule *Roe* and *Casey* in the *Dobbs* case.[61] Attributing the unsettlement to isolated "conservative segments," as some authors suggest in *Roe v. Dobbs*, disregards these significant institutional responses that kept *Roe* unsettled.[62]

---

[57] ROE V. DOBBS, s*upra* note 5, at 231 ("There were twenty-seven personhood amendment proposals circulating in Congress by August 1973."). Even that does not account for *all* the amendments filed in response to *Roe*. There were at least thirty-four abortion-related amendments introduced in 1973 and approximately 330 introduced between 1973 and 2003. *See Human Life Amendments: 1973-2003*, NAT'L COMM. FOR A HUM. LIFE AMEND., https://www.humanlifeaction.org/downloads/sites/default/files/HLAlst7303.pdf (last visited Oct. 25, 2024) (listing amendments compiled from the Library of Congress, the Congressional Record, and the Congressional Information Service).

[58] Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 43 n.16 (2008) ("Conscience clauses arose contemporaneously with *Roe v. Wade*. . . ."); Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177 (1993); M. David Bryant, *State Legislation on Abortion After* Roe v. Wade*: Selected Constitutional Issues*, 2 AM. J.L. MED. 101, 116 (1976).

[59] The Church Amendment, Pub. L. No. 93-45, § 401(b), (c), 87 Stat. 91 (1973) (codified at 42 U.S.C. § 300a-7); *The History and Effect of Abortion Conscience Clause Laws*, CONG. RES. SERV. (Jan. 29, 2010), https://www.everycrsreport.com/reports/RL34703.html ("In 1973, Congress passed the first conscience clause law, commonly referred to as the Church Amendment, in response to the U.S. Supreme Court's decision in *Roe v. Wade* . . . .").

[60] *See generally* JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES (1979); LYNN D. WARDLE, THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES (1980); DELLAPENNA, *supra* note 22, at 837-38, 877-79, 881, 941-42; Beck, *Fueling Controversy*, *supra* note 40; Bryant, *supra* note 58, at 101 ("Over the past three years, a great volume of legislation on abortion has been produced by state legislatures in an attempt to fill the vacuum created by the United States Supreme Court's 1973 decision in *Roe v. Wade*."); Joseph P. Witherspoon, *The New Pro-Life Legislation: Patterns and Recommendations*, 7 ST. MARY'S L.J. 637 (1976); Richard Wasserman, Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 COLUM. L. REV. 237, 254-63 (1974).

[61] Those states were Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

[62] ROE V. DOBBS, *supra* note 5, at xxi. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381 (1985) ("I earlier observed that, in my judgment, *Roe* ventured too far in the change it ordered. The sweep and detail of the

Ignoring this and other evidence that *Roe* was unsettled, the *Roe v. Dobbs* contributors argue that *Dobbs*' overturning of *Roe* came as a surprise; Professor Khiara Bridge even attributes the overturning to the Court's "mendacity," as though it were a sneak attack on an unsuspecting public.[63]

But these expressions of surprise and charges of deception are not credible. Virtually every national election since 1976 has occasioned predictions of *Roe*'s demise if one candidate prevails. Likewise, every Supreme Court abortion case since 1973 launched aggressive direct mail operations, seeking to stoke fears (or hopes) that *Roe* could fall. If anything, the crescendo only grew over time. In 2016, the Republican presidential and vice-presidential candidates frankly told the public of their aim to have *Roe v. Wade* overturned, and the Democratic candidate raised the alarm about the same possibility in an effort to secure support.[64] In 2019-2020, several states passed laws to expand or restrict the legality of abortion based on the publicly declared fear that *Roe* would be overturned. In 2022, there were no reasonably settled expectations that *Roe* would survive. *Dobbs* did not overturn settled law or upset reasonable reliance interests.

Professor McConnell—one of the two conservative contributors to *Roe v. Dobbs*—offers a more realistic appraisal of stare decisis and thus a more balanced assessment of *Dobbs*. He first points out that the "legal reasoning of the *Roe* opinion was exceptionally weak."[65] He further adopts the

---

opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures."); MARIAN FAUX, *ROE V. WADE*: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL xv-xvi (1988) ("The decision generated an enormous amount of political activism among supporters and opponents of legal abortion, partly because no one expected that the opinion would be so sweeping. *Roe v. Wade* made abortion legal literally overnight everywhere in the United States. Stunned antiabortion activists immediately set about organizing a campaign to overturn the decision. Meanwhile, pro-choice activists, who had believed that the decision would end any controversy over abortion, were equally shocked when this did not happen. Countless battles have been fought over *Roe v. Wade*, and the war still rages.").

[63] ROE V. DOBBS, *supra* note 5, at 127.

[64] *Id.* at 156 (contributor Richard Re noting that "Trump accomplished exactly what he promised the electorate"); *id.* at 384 n.96 (citing Aaron Blake, *Trump Makes Clear* Roe *is on the Chopping Block*, WASH. POST, July 2, 2018). *See also, e.g.*, Claire Landsbaum, *Mike Pence says* Roe v. Wade *Will be Overturned If Trump is Elected*, THE CUT (July 29, 2016), https://www.thecut.com/2016/07/mike-pence-says-roe-v-wade-will-be-overturned.html; *Pence: 'I believe we'll see Roe vs. Wade consigned to the ash heap of history,'* DEMOCRATIC NAT'L COMM. (July 10, 2018), https://democrats.org/news/pence-i-believe-well-see-roe-vs-wade-consigned-to-the-ash-heap-of-history/ (citing numerous statements in 2016 by Mike Pence in support of overturning *Roe v. Wade*).

[65] ROE V. DOBBS, *supra* note 5, at 101.

traditional understanding that stare decisis is a presumption rather than an iron-clad rule. "Viewed realistically," he argues, "'our practice' cannot support a strict version of the doctrine."[66] Now that *Roe* has been overturned, McConnell suggests, the Justices should reassess the doctrine of stare decisis afresh.

Professor Richard Re aims to defend Chief Justice Roberts's concurrence in the judgment in *Dobbs* by arguing for what he calls "gradualism."[67] Re's argument rests on three assumptions: (1) abortion is a fundamental right, (2) the errors of *Roe* did not require its overruling, and (3) *Dobbs* harms women who desire abortion. A fourth assumption—that *Roe* was settled and *Dobbs* caused unexpected disruption—shows why Re's analysis fails to address the real situation that faced the *Dobbs* Court as it considered whether overturning the decades-old precedent would truly upset settled expectations.

Re's concessions alone show that there was a widespread expectation that *Roe* might be overturned in the years leading up to *Dobbs*, undercutting the notion that the overturning of *Roe* was a shocking break with a settled status quo. "After *Casey*," he notes, "political contestation around abortion had continued for another thirty years."[68] "Curtailing or overruling *Roe*, after all, has long been an explicit goal of Republican politicians."[69] He acknowledges that, during the 2016 campaign, "Clinton agreed that *Roe*'s fate was hanging in the balance."[70] Also in 2016, "Trump famously, or infamously, declared, 'if we put another two or perhaps three Justices on [overruling *Roe*] will happen."[71] Re even admits that the oral argument in *Dobbs* supplied adequate notice of the decision to come.[72]

Other evidence demonstrates that these expectations existed in the legal academy and state capitals too. During a town hall at the National Constitution Center in September 2019, Kathryn Kolbert, the attorney who argued *Planned Parenthood v. Casey*, and Professor Ziegler, a contributor to *Roe v.*

---

[66] *Id.* at 108.

[67] *Id.* at 140 ("Should Gradualism Have Prevailed in *Dobbs*?"). *Cf.* Kevin C. Walsh, *The Elevation of Reality Over Restraint in* Dobbs v. Jackson Women's Health Organization, 46 HARV. J.L. & PUB. POL'Y 915 (2023).

[68] ROE V. DOBBS, *supra* note 5, at 154.

[69] *Id.* at 155.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 144.

Dobbs, confidently declared that "this Court will overturn *Roe v. Wade*."[73] And in the years just before *Dobbs*, Delaware, Nevada, Massachusetts, Illinois, New York, Vermont, and Rhode Island passed legislation to *expand* abortion access,[74] with legislative sponsors publicly declaring that they feared *Roe* would be overturned. Finally, the draft opinion in *Dobbs* was leaked on Monday evening, May 2, 2022, alerting the public to the forthcoming decision.

Re acknowledges that "*Dobbs* finds an especially strong foundation in democratic constitutionalism,"[75] by which he means many voters opposed *Roe* and their presidential candidate of choice appointed Justices whose votes overturned it. Yet he still urges gradualism that would have left *Roe* in place with modifications, without any argument that *Roe* was correctly decided as an original matter. Re fails to establish that *Roe* was settled to a degree that the historic common law maxim *stare decisis et quieta non movere* would counsel against overturning it.

The contributors to this book tell a story in which the peaceful, settled reign of *Roe* is suddenly and unexpectedly disrupted by a Supreme Court that drops *Dobbs* out of nowhere. To put it mildly, this story does not comport with our political, legal, legislative, and electoral history since 1973.

III. THE HISTORY OF ABORTION AND ITS REGULATION

Justice Blackmun's account of the history of abortion law in *Roe* took up nearly thirty pages of his opinion.[76] *Dobbs*'s response to *Roe*'s history takes up approximately a dozen pages plus two appendices compiling 19th-century state statutes totaling nearly thirty pages.[77] The history of abortion and its regulation was a major part of the reasoning that was held to justify a constitutional right to abortion. The errors in *Roe*'s telling of that history contributed to the *Dobbs* majority's rationale for holding that there is no such right.

Though *Roe*'s manifold historical errors have been identified and critiqued over the past fifty years, numerous authors in *Roe v. Dobbs* assume

---

[73] National Constitution Center, *Should Roe v. Wade Be Overturned?*, YOUTUBE (Sept. 24, 2019), https://www.youtube.com/watch?v=ddSsLg7Zj78.

[74] Helen M. Alvaré, *Nearly 50 Years Post-*Roe v. Wade *and Nearing Its End: What is the Evidence that Abortion Advances Women's Health and Equality?*, 34 REGENT U. L. REV. 165, 168 & n.19 (2022) (citing state statutes).

[75] ROE V. DOBBS, *supra* note 5, at 155.

[76] *Roe*, 410 U.S. at 130-62.

[77] *Dobbs*, 597 U.S. at 241-55, 302-30.

the basic accuracy of *Roe*'s version of legal history, both to criticize *Dobbs* and to argue that there is a tradition of a right to abortion. Virtually all of the contributors ignore the fifty years' worth of criticism of *Roe*'s version of the history that has been published by numerous scholars. *Roe*'s supporters' unwillingness to forthrightly address the weaknesses of *Roe*'s historical rationale helps to explain the fragility of *Roe* after fifty years and the weak response of the *Dobbs* dissenters to the extensive and detailed history set forth by the Court. And the reticence of scholars to engage with opposing historical arguments reveals more about the scholars than about the arguments they elect to ignore.

One of the most noteworthy and insightful historical works on abortion is Professor Joseph Dellapenna's 2006 treatise, *Dispelling the Myths of Abortion History*, on which the *Dobbs* opinion draws.[78] Dellapenna's book is a thorough historical investigation into the political, legal, medical, and sociological history of abortion throughout the common law era. In the book, Dellapenna critiques what he calls the "new orthodoxy" of abortion history, which modern scholars take for granted. Dellapenna's well-sourced history contradicts Justice Blackmun's history—and that accepted by most modern scholars—at numerous key points. He produces abundant evidence that, contrary to Justice Blackmun's assumptions in *Roe*, no abortion techniques existed that were safe and effective before the second half of the 19th century, abortion was a common law crime, numerous states adopted statutory prohibitions of abortion at all stages of development before the Civil War, the statutes were adopted to protect both prenatal human beings and women's health, and elective abortion was never considered a right in American law before the 1960s. Anyone relying on *Roe*'s version of history should grapple with the challenge posed by Dellapenna's arguments and conclusions.

Yet none of the contributors to Part V of *Roe v. Dobbs*, "Historical Perspectives," engages Dellapenna. The authors don't even mention Dellapenna by name, despite the *Dobbs* Court's numerous citations to his work. Only Professor Cott even cites Dellapenna, but only in passing, in a footnote, without comment or response; it's clear she has never *read* Dellapenna's book.[79]

---

[78] DELLAPENNA, *supra* note 22. Professor Dellapenna's published insights into abortion law and technology stretch back to Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359 (1979). *See also* JOHN KEOWN, ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982 (1988).

[79] ROE V. DOBBS, *supra* note 5, at 403 n.41.

Professor Goodwin claims that states in the 19th century passed abortion laws with racist motives—"as concerns about enslaved Black women and men becoming freed from the grips of slavery loomed"—without citing any source.[80] Other contributors attribute state limits on abortion to Dr. Horatio Storer of Boston, apparently not realizing that most state abortion laws preceded Storer.[81] These authors are either unaware of Dellapenna's work—which could have corrected their misconceptions—or refuse to acknowledge that it exists.

The *Dobbs* opinion addresses a wealth of both common law history and 19th century statutory history, bolstered by the scholarly work of Dellapenna, John Keown, and other legal authorities. The dissenters in *Dobbs* mock the majority opinion because it cites 13th and 14th century common law.[82] But Blackmun's opinion in *Roe* also cited sources, such as Bracton and common law cases, going back to the 13th and 14th centuries,[83] and these were purportedly the basis for his conclusion—now demonstrated to be false[84]—that "it now appear[s] doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus."[85]

Many of the *Roe v. Dobbs* contributors rely on the amicus brief filed by the American Historical Association and the Organization of American Historians (AHA/OAH) in *Dobbs*, but this brief was seriously defective.[86] A key historical assumption of *Roe* was that safe and effective methods of abortion had always been available. But, as Dellapenna has demonstrated in detail,

---

[80] *Id.* at 193. Why protecting black children from abortion or black women from coercion would be racist, Goodwin never explains.

[81] *Id.* at 36-38, 193-94, 228-29.

[82] *Dobbs*, 597 U.S. at 371 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century.").

[83] *Roe*, 410 U.S. at 134-36 & n.26.

[84] *Dobbs*, 597 U.S. at 242-250; DELLAPENNA, *supra* note 22, at 127-52, 195-211. By itself, the prenatal application of the common law born alive rule shows that there was no right to an abortive act. Regina v. Sims, (1601) 75 Eng. Rep. 1075 (K.B.) 1076 (explaining the prenatal application of the born alive rule); Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 583 & n.92 (1987) (quoting Coke); *id.* at 585 (quoting Blackstone).

[85] *Roe*, 410 U.S. at 136.

[86] Brief for Amici Curiae Am. Hist. Ass'n & Org. of Am. Historians in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392). *See* Stephen E. Sachs, Dobbs *and the Originalists*, 47 HARV. J.L. & PUB. POL'Y at *12-15 (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4829599 (critiquing arguments found in the AHA-OAH amicus brief).

there were no reliably safe and effective abortion methods available before the 19th century—most likely the second half of that century.[87] None of the three types of abortion methods—injury, ingestion, and intrusion—that were in use before the 19th century were both safe and effective.[88] The AHA/OAH brief and the *Roe v. Dobbs* contributors ignore this important historical fact. Professor Anita Bernstein—not a contributor to *Roe v. Dobbs*—is one of the few who has forthrightly acknowledged that Dellapenna's exhaustive history is convincing: "Dellapenna argues persuasively that this combination [safety and effectiveness] did not come together until the nineteenth century."[89]

Professor Stone claims that:

> [U]ntil the late 1960s, almost everyone assumed that abortion had been illegal from the beginning of Western history. But as . . . justices—especially Justice Harry Blackmun . . . —looked into the history, this turned out to be completely wrong. To the contrary, abortion had been legal (at least up to the midpoint of pregnancy) throughout Western history— . . . in England in the years leading up to the American Revolution, in the American colonies, and in all the states at the time the Constitution was adopted. Indeed, it was not until the mid-nineteenth century that abortion in America began to be criminalized.[90]

Stone provides no citations for these historical claims, but he says that, "[f]or most of the justices, knowledge of this history was both mind-opening and powerful."[91] But recall that this historical account was never part of any adversary proceeding or evidentiary record in *Roe* or *Doe*, and it was therefore never subject to cross-examination disputing the factual basis for its conclusions. *Roe*'s version of the history relied on what the *Dobbs* Court refers to as the "discredited" historical work of Cyril Means.[92] Stone does not acknowledge or attempt to rebut the *Dobbs* opinion's thorough account of the history.

Likewise, Professor Chemerinsky makes the sweeping assertion that "historically abortions were not illegal in the United States," citing the *Dobbs* dissent but ignoring the majority's historical arguments to the contrary.[93] He

---

[87] DELLAPENNA, *supra* note 22, at ch. 1.

[88] *Id.* at 20, 32-56.

[89] Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 BUFF. L. REV. 1141, 1193 (2015).

[90] ROE V. DOBBS, *supra* note 5, at xvi.

[91] *Id.* at xvii.

[92] *Dobbs*, 597 U.S at 252 n.38 and accompanying text.

[93] ROE V. DOBBS, *supra* note 5, at 75.

also asserts that there is "no consensus as to when human life begins," citing one 2003 article.[94] This completely ignores the evidence marshaled in *Dobbs* as well as several areas of law—prenatal injury law, wrongful death law, and fetal homicide law—which protect the prenatal human from the time of conception.[95] Ignoring those areas of tort and criminal law, Chemerinsky claims the idea that life begins at conception is "based not on consensus or science but on religious views."[96] To the contrary, Dellapenna has marshaled a wealth of evidence showing that advances in medical science convinced the states in the mid-19th century to repeal the common law quickening rule and protect prenatal human life from conception.[97] Chemerinsky also claims that abortion became a crime due to "the agitation of Anthony Comstock,"[98] ignoring the common law that long pre-dated him and the state abortion laws enacted before Comstock arrived on the scene.

Professor Cott's chapter, entitled "Where History Fails," attempts to massage the Court's opinion in *Roe* and make it seem more reasonable, accurate, and credible. She acknowledges that the historical analysis in *Roe* was entirely based on "the sources Blackmun read," "Blackmun's historical reading over the summer" of 1972, and "his historical survey."[99] But she downplays the importance of history to the *Roe* opinion.[100] Instead, she argues, "privacy" was dispositive; "[t]he history served merely as a narrative backup."[101] This ignores Justice Blackmun's own statements that history was the foundation for his constitutional conclusions in *Roe*. In addition, the *Dobbs* opinion demonstrates how essential Blackmun's history was to his reasoning and conclusions, and particularly to section IX of the *Roe* opinion which summarized the standard of review by trimester for state regulations.[102] In addition to her questionable arguments that history was not essential to *Roe*, Cott claims that the "first criminalization" of abortion in the U.S. came in 1821.[103] This was

---

[94] *Id.*

[95] *See generally* Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 141 (2012); Forsythe, *Homicide of the Unborn Child*, *supra* note 84; William J. Maledon, Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME L. REV. 349 (1971).

[96] ROE V. DOBBS, *supra* note 5, at 75.

[97] DELLAPENNA, *supra* note 22, at 257-60 & chs. 3 & 4.

[98] ROE V. DOBBS, *supra* note 5, at 75.

[99] *Id.* at 210.

[100] *Id.* at 211.

[101] *Id.*

[102] *Roe*, 410 U.S. at 164-65.

[103] ROE V. DOBBS, *supra* note 5, at 210.

indeed when abortion was first *codified* by a state (Connecticut) as a crime in American law, but it ignores the fact—noted by the *Dobbs* Court and Dellapenna—that the *common law* that preceded codification long treated abortion as a crime and was adopted by the colonies and states.[104] This superficial historical argument might persuade a non-lawyer who supports a right to abortion; it's difficult to understand how it survived editorial review by some of the top legal academics in the country.

Professor Ziegler too relies uncritically on *Roe*'s version of abortion history without engaging with Dellapenna or other legal scholars who have criticized that version of the history. She cites Leslie Reagan, James Mohr, and the aforementioned AHA/OAH brief in *Dobbs*, all of whose historical claims have been called into question by Dellapenna's scholarship. Instead of dealing with contrary historical data, Ziegler states evasively that "historians contest the degree to which the law" has treated abortion as a crime,[105] and she maintains that "most reject the narrative that Alito adopts [in *Dobbs*]."[106] But this is because, like Cott and Ziegler, these historians have refused to engage Dellapenna's arguments and sources.

Ziegler argues that "[t]he criminalization of abortion figured centrally in the Court's decision to dismantle abortion rights in *Dobbs*."[107] She wants to suggest that this is sinister and should make women afraid. But the history of abortion criminalization is mainly relevant because it contradicts the notion that abortion was ever considered a constitutional right, and it signifies the societal and legal respect given to the prenatal human being through most of American history. Drawing attention to the fact that abortion was a crime throughout American history is a direct response to the claim of the *Roe* Court that abortion was considered a right until the 19th century. The *criminalization* of abortion was a specific, documented, historical legal status, adopted by the common law and then by democratic action in virtually all fifty states. Furthermore, the common law of homicide, stretching back at least to 1600, treated the prenatal entity as a human being.[108] The Court's decision in *Roe* rested on an alleged historical right to abortion; *Dobbs*

---

[104] *Dobbs*, 597 U.S. at 245-46; DELLAPENNA, *supra* note 22, at 211-28 ("The Reception of the Common Law on Abortion and Infanticide in the American Colonies").

[105] ROE V. DOBBS, *supra* note 5, at 228.

[106] *Id.*

[107] *Id.* at 227.

[108] Regina v. Sims, (1601) 75 Eng. Rep. 1075 (K.B.) 1076 (affirming the born alive rule). *See also* Forsythe, *Homicide of the Unborn Child*, *supra* note 84.

pointed out that in fact abortion had been criminalized, and thus, with its historical foundation undermined, *Roe* had to fall.

Roe v. Dobbs's treatment of history is frozen in 1973. Each of its contributors assumes *Roe*'s history to be basically correct and fails to engage either the common law sources, the 19th century statutes that *Dobbs* thoroughly examined, or the exhaustive history described by legal scholars on which *Dobbs* relied.

IV. EQUAL PROTECTION AS AN ALTERNATIVE RATIONALE FOR A RIGHT TO ABORTION

Equal protection is a dominant theme of *Roe v. Dobbs*. Several contributors argue that, now that *Roe* has been overturned, a constitutional right to abortion could be placed on firmer ground by rooting it in the Equal Protection Clause rather than the Due Process Clause of the Fourteenth Amendment.[109] Professor Stone claims that the Supreme Court didn't rest *Roe* on the Equal Protection Clause for the political reason that the Equal Rights Amendment "had been sent to the states for ratification in 1972 and they believed that it would be inappropriate for the Court to interpret the Equal Protection Clause in a way that would effectively render the Equal Rights Amendment redundant."[110] Actually, the equal protection rationale was dismissed in a memo that Justice Brennan sent to Justice Douglas on December 30, 1971, two weeks after the first round of oral arguments in *Roe* and *Doe*.[111] In the memo, Justice Brennan argued for a privacy rationale instead of Justice Douglas's First Amendment rationale and concluded that "the equal protection claims need not be reached."[112]

Professors Cary Franklin and Siegel claim that the *Dobbs* Court's rejection of an equal protection rationale for a right to abortion was "dictum," and thus that there remains a path for a future Court to re-adopt a right to abortion on this new ground without a stare decisis barrier.[113] But though

---

[109] ROE V. DOBBS, *supra* note 5, at 12, 19-21 (Strauss), 22 (Franklin & Siegel),

[110] *Id.* at xxi.

[111] William J. Brennan, "Memorandum re: Abortion Cases, No. 70-40," *supra* note 14 (quoted in FORSYTHE, *supra* note 8, at 22, 362 n.11).

[112] *Id.* at 2-3 ("The gist of those claims is that the Georgia administrative procedures for obtaining an abortion are overly costly. Since I would strike all of those procedures down except for the requirement that the abortion be performed by a licensed physician, the importance of the equal protection claims would seem diminished.").

[113] ROE V. DOBBS, *supra* note 5, at 23 n.8 (citing *Dobbs*, 597 U.S. at 235).

equal protection has been proffered as a rationale for the abortion right in Justice Ginsburg's dissent in *Gonzales v. Carhart*,[114] in numerous amicus briefs in numerous cases by numerous scholars for decades,[115] and in *Dobbs* amicus briefs (including one signed by some *Roe v. Dobbs* contributors on behalf of "Equal Protection Constitutional Law Scholars"[116]), it has never carried the day. The equal protection discussion in *Dobbs* concluded with the Court rejecting it as an alternative *rationale* for the *holding* that the Fourteenth Amendment protects a right to abortion.[117] A court can always address and settle alternative rationales that have been proffered by Justices, parties, or amici, and the *Dobbs* Court did so on this question. The obligation of stare decisis is to settle the law, and leaving the door open to endless arguments about alternative rationales is not a path to settlement.

The argument for a right to abortion grounded in the Equal Protection Clause is based on empirical claims that abortion is necessary for women's health, equality, or autonomy. Yet while many people feel strongly that this is true, there is little reliable empirical data to back up these feelings, as Professor Helen Alvaré has shown.[118] Professor David Strauss argues that a balancing analysis is the best way for courts to address the abortion issue. But conducting such an analysis would require reliable public health data about abortion, which the U.S. does not have on a national basis. There are only

---

[114] 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). Justice Blackmun also identified the Equal Protection Clause as an alternative rationale for an abortion right in *Casey*, 505 U.S. at 928 & n.4.

[115] *See, e.g.*, Anita Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419 (1995). *See generally* Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889 (2011) (responding to many such arguments). *See also* DELLAPENNA, *supra* note 22, at 638 n.68 (citing equal protection advocacy for abortion rights).

[116] ROE V. DOBBS, *supra* note 5, at 347 n.42 (citing Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (No. 19-1392)).

[117] *Dobbs*, 597 U.S. at 236.

[118] Alvaré, *supra* note 74, at 179-81, 198-213 (evaluating the proffered studies, including the so-called Turnaway Study). *See also* Ingrid Skop, M.D., *Fact Check: "Abortion is 14 Times Safer than Childbirth,"* CHARLOTTE LOZIER INST. (Apr. 25, 2024), https://lozierinstitute.org/fact-check-abortion-is-14-times-safer-than-childbirth/; Ingrid Skop, M.D., *Twelve Reasons Women's Health and Maternal Mortality Will Not Worsen, and May Improve, in States with Abortion Limits*, CHARLOTTE LOZIER INST. (Sept. 22, 2023), https://lozierinstitute.org/twelve-reasons-womens-health-and-maternal-mortality-will-not-worsen-and-may-improve-in-states-with-abortion-limitations/.

two organizations that disseminate national data—the Centers for Disease Control and Prevention and the Guttmacher Institute—and reporting to both is entirely voluntary. The *Dobbs* Court disavowed the notion that judges should use such data for setting abortion policy.[119]

Grounding a right to abortion in the Equal Protection Clause—with the balancing analysis and data collection that would require—would not solve the problems of *Roe* and its progeny. The *Dobbs* opinion, in its thorough critique of *Casey*'s balancing analysis, demonstrates that this road would be a dead end.[120] But with the issue of abortion decentralized by *Dobbs* and returned to "the people and their elected representatives," the states are actively engaged in fashioning a variety of policies.[121] Thus, there is reason to believe that Americans may have more reliable empirical data in the years ahead by which to compare contrasting state policies and their impact on women's lives and livelihoods.

V. POLICY ARGUMENTS FOR A RIGHT TO ABORTION

What did the Court really *know* about abortion at the time it decided *Roe* and *Doe*? One of the hallmarks of *Roe* and its progeny is that the Court has repeatedly issued abortion decisions without any evidentiary record on abortion. *Roe* didn't have one because of its strange posture.[122] *Casey* didn't have any facts in the record relating to the reliance rationale that it adopted as a substitute for *Roe*'s historical rationale.[123] Most Supreme Court abortion cases since *Roe* have been facial challenges, evading the need for a factual record about abortion and the actual impact of abortion laws. Abortion litigation has been a fact-free endeavor.

Policy arguments for abortion undergird the opinions of virtually every contributor to *Roe v. Dobbs*: abortion ensures equal opportunity in American society, abortion is health care, abortion is autonomy. For example, Professor Dorothy Roberts' essay is a plea for "the urgency of reproductive

---

[119] *Dobbs*, 597 U.S. at 288-89 (citing competing amicus briefs).

[120] *Id.* at 281-86.

[121] *See generally* Clarke D. Forsythe & Carolyn McDonnell, *The States' Response to* Dobbs, 39 NOTRE DAME J.L., ETHICS & PUB. POL'Y (forthcoming 2025).

[122] *See supra* Section I.

[123] To support the new reliance rationale, the Court cited one page from a book by Rosalind Petchesky, though she had argued that contraception, not abortion, had contributed to women's increased labor force participation. *Casey*, 505 U.S. at 856 (citing ROSALIND PETCHESKY, ABORTION AND WOMAN'S CHOICE 109, 133 n.7 (rev. ed. 1990)).

justice."[124] She favors numerous public policies, including "legislation to curtail mandated reporting, guarantee legal representation for parents, and require informed consent for drug testing of pregnant people and their newborns."[125] But though she speculates that returning abortion to the states will result in bad social and legal outcomes, she cannot connect measurable social ills to *Dobbs*. Roberts claims that the "states that enacted the most severe restrictions on abortion are the ones with the highest child poverty rates, worst healthcare systems, and fewest supports for struggling families" as well as "the highest maternal and infant mortality rates in the nation."[126] But even if Roberts is correct about all this, she is relying on *pre*-Dobbs *data* illustrating conditions that existed *with* Roe *in place*.[127]

Knowledge of abortion's impact on women's physical and mental health is constantly developing as medical science advances and sociological evidence is collected and evaluated. Medical surveys of international populations of women have found an increased risk of pre-term birth, breast cancer, and mental trauma after abortion.[128] Some studies have come to different conclusions, including the so-called Turnaway Study, which is cited by contributors in *Roe v. Dobbs*.[129] However, the Turnaway Study is fatally flawed, using a small and biased sample of women to draw far-reaching conclusions about how abortion affects women.[130]

Dobbs returned responsibility for decisions about how to regulate abortion to "the people and their elected representatives."[131] Hopefully, this will give rise to a more open and better-informed debate about the risks and benefits of abortion. The states and civil society can, unlike the Court, address

---

[124] ROE V. DOBBS, *supra* note 5, at 188.

[125] *Id.* at 188-89.

[126] *Id.* at 186.

[127] *Id.* at 186, 396 & nn.52-54.

[128] Clarke D. Forsythe, *The Medical Assumption at the Foundation of* Roe v. Wade *and Its Implications for Women's Health*, 71 WASH. & LEE L. REV. 827, 873-892 (2014) (citing international studies in three appendices).

[129] ROE V. DOBBS, *supra* note 5, at 178, 374 nn.30-32, 393 nn.10-11.

[130] *See* Alvaré, *supra* note 74, at 180-81, 184-85, 192-96, 201-05; David Reardon, *The Embrace of the Pro-Abortion Turnaway Study*, 85 LINACRE Q. 204 (2018).

[131] *See, e.g.*, *Dobbs*, 597 U.S. at 232 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."); *id.* at 259 ("[W]e thus return the power to weigh those arguments to the people and their elected representatives."); *id.* at 269 ("[T]he Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."); *id.* at 289 ("Our decision returns the issue of abortion to those legislative bodies."); *id.* at 292 ("*Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.").

the causes of elective abortion, seek to reduce elective abortions, offer effective alternatives to abortion, and help women balance work and family. And, also unlike the Court, different states can try different policies. With time, Americans may have the opportunity to see whether and how women flourish in states with unlimited abortion and states with abortion limits.

VI. PROGRESSIVE JUDGING

Comparing *Roe v. Wade* with *Dobbs v. Jackson Women's Health Organization* reveals fundamental differences over how to interpret the Constitution. *Roe v. Dobbs* confirms that the fundamental interpretive gap between progressives and originalists remains as wide as ever.[132] It also confirms that the originalist critique of *Roe* and its methodology was correct. Methodology makes a difference for liberty, republicanism, and self-government.[133] The scholarly criticism of *Roe* was so vast and so fundamental that it spawned a revival of originalism and a conservative legal movement. Professor Bollinger admits that "*Roe v. Wade* came to symbolize this problem"—the "dilemma of constitutionalism"—but *Roe v. Dobbs* evades a frank answer as to how or why.[134]

Bollinger's position is that "the text [of the Constitution] . . . is extremely brief and general . . . barely providing a guide" to interpretation.[135] According to Bollinger, the "extensive, sometimes labyrinthine, doctrines, analytical formulations, and decisions in concrete cases"—all made by judges—are the foundation for our rights.[136] Bollinger dismisses "fictional notions of 'original intent'" as "frozen in a distant past when our notions of right and wrong" were "embedded in error."[137] He offers a caution that "it is vitally important that the Constitution not serve as a contentless charter for justices to implement their personal or political preferences under the guise of doing 'law.'"[138]

---

[132] ROE V. DOBBS, *supra* note 5, at xxi.

[133] *See* Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment On Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

[134] ROE V. DOBBS, *supra* note 5, at xxii.

[135] *Id.* at xxi.

[136] *Id.*

[137] *Id.* at xxii.

[138] *Id.*

But since no methodology is given that would guard against that danger, the concern seems *pro forma*.

Some contributors retreat from addressing the specifics of abortion to argue that *Dobbs* is a threat to some abstract notion of "matters involving the family."[139] But when judges retreat to such abstractions, they free themselves to update the Constitution without democratic input. As Professor Alvaré has pointed out, "the *Dobbs* dissenters—Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan—would also foreclose the influence of the populace upon abortion lawmaking—women as well as men, and those living in the past as well as today and in the future."[140] A progressive approach to judging replaces self-government with judicial administration.

In "*Dobbs*'s Democratic Deficits," Professors Melissa Murray and Katherine Shaw review abortion politics after *Dobbs* and criticize the Roberts Court's election law decisions, especially *Rucho v. Common Cause*,[141] which left the issue of partisan gerrymandering to the democratic process. Their premise is that legislatures are "often the least representative institutions in state government" as a result of partisan gerrymandering.[142] They argue that though *Dobbs* returned abortion to the political process, the same Court's election decisions have exposed "its profoundly limited conception of democracy."[143] *Dobbs* was wrong, they argue, because of "its own narrow and limited vision of democracy as majoritarian politics" and because "*Dobbs*'s appeal to democracy is shallow, underdeveloped, and profoundly cynical."[144] Beyond these epithets, their chapter does not provide much reason to prefer rule by judges to our imperfect but constitutionally prescribed electoral system. *Dobbs* and *Rucho* are consistent, however, in this critical sense: they agree that if the Constitution is silent on a highly charged political issue, the Court should leave the issue to the people and the democratic process—however imperfect they might be.[145]

VII. WOULD WOMEN HAVE VOTED FOR ABORTION IN 1868?

---

[139] *Id.* at 125.

[140] Helen Alvaré, *Denying* Dobbs*, Dodging the Demos*, 60 HOUS. L. REV. 865, 869 (2023).

[141] 588 U.S. 684 (2019).

[142] ROE V. DOBBS, *supra* note 5, at 160.

[143] *Id.* at 159.

[144] *Id.* at 160

[145] *See, e.g.*, Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89 (1988).

The dissenting Justices in *Dobbs* and the contributors to *Roe v. Dobbs* make much of the fact that women didn't vote in 1868, when the Fourteenth Amendment was ratified. They argue that this shows that history at the time of the Fourteenth Amendment should be irrelevant to the question of whether the Fourteenth Amendment protects a right to abortion. This argument is based on the unexpressed assumption that women would have voted for abortion if they could have.

Abundant historical evidence suggests that women would not have supported a right to abortion. But this history has long been ignored. In *Dispelling the Myths of Abortion History*, Dellapenna writes, "historians of the new orthodoxy, particularly those who describe themselves as feminists, tend to project their notions of what women feel and think today onto women of the past, particularly American women of the nineteenth century."[146] As Dellapenna points out, even historian James Mohr "cited a great deal of evidence of a broad social consensus in favor of the criminalization of abortion—including the near unanimous strong condemnation of abortion by nineteenth century feminists."[147] "Susan B. Anthony and Elizabeth Cady Stanton both spoke in terms of child-murder."[148] And contrary to the recent practice—including by some *Roe v. Dobbs* contributors—of conflating abortion and contraception, the "nineteenth century feminists themselves distinguished sharply between the two practices."[149] Paulina Wright Davis, Matilda Gage, Victoria Woodhull, Tennessee Claflin, Sarah Norton, and other leading 19th-century feminists all denounced abortion in strong terms.[150] Dellapenna also surveys the pioneering female physicians of the 19th century who opposed abortion.[151] As he summarizes, "Reading the new orthodoxy of abortion history, one would never guess that the feminists of the nineteenth century were so consistently and so strongly opposed to abortion."[152]

Another recent book reinforces what Dellapenna has said about 19th-century feminists and their views of abortion. In *Pity for Evil: Suffrage, Abortion & Women's Empowerment in Reconstruction America*, the authors examine

---

[146] DELLAPENNA, *supra* note 22, at 372.

[147] *Id.*

[148] *Id.* at 375.

[149] *Id.* at 376.

[150] *Id.* at 379. *See also* MONICA KLEM & MADELEINE MCDOWELL, PITY FOR EVIL: SUFFRAGE, ABORTION & WOMEN'S EMPOWERMENT IN RECONSTRUCTION AMERICA PITY FOR EVIL (2023).

[151] DELLAPENNA, *supra* note 22, at 399-406. *See also* KLEM & MCDOWELL, *supra* note 150.

[152] DELLAPENNA, *supra* note 22, at 387.

the feminist newspaper, *The Revolution*, owned by Susan B. Anthony and edited by Elizabeth Cady Stanton and Parker Pillsbury, and plumb the collections of the papers of feminists and female doctors of the Reconstruction era, including doctors Charlotte Denman Lozier, Marie Zakrzewska, Anita Tyng, and Elizabeth Blackwell.[153] Several, if not all, of these women educated against abortion because of its negative impact on women.[154] The historical record suggests that American women in the 1860s might have supported the restrictive abortion laws proposed in the states at that time; at the very least, it undermines the notion that they universally opposed them.

VIII. THE LIMITS OF *DOBBS*

Several contributors argue that *Dobbs* threatens many other constitutional rights. Professor Strauss, for example, raises the concern that *Dobbs* "will lead to the rejection of other currently established unenumerated rights—in particular, the right to obtain contraceptives and the right to same-sex marriage."[155] Professor Martha Minow of Harvard Law School also attempts to show how *Dobbs* will "unravel" other liberties.[156]

This is answered in at least five ways. (1) The *Dobbs* majority made repeated statements limiting its holding to abortion, which Justice Clarence Thomas—whose concurring opinion has been cited as evidence that the Court will use the reasoning of *Dobbs* to curtail other rights—joined and affirmed. (2) *Roe* itself, which *Dobbs* overturned, had a limited holding which created a "right to terminate a pregnancy."[157] (3) *Dobbs* expressly distinguished other precedents that do not deal with abortion.[158] (4) *Dobbs* emphasized that abortion is a unique act,[159] relying on the same distinction that Justice Blackmun raised in *Roe* and that was reiterated in *Casey*.[160] (5) By the

---

[153] KLEM & MCDOWELL, *supra* note 150. *See also* ERIKA BACHIOCHI, THE RIGHTS OF WOMEN: RECLAIMING A LOST VISION (2021).

[154] KLEM & MCDOWELL, *supra* note 150, at 2, 17, 24, 51, 72-73 (Tyng), 82-83, 196, 202, 207.

[155] ROE V. DOBBS, *supra* note 5, at 15.

[156] *Id.* at 318-38.

[157] *Roe*, 410 U.S. at 153 (The "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *see also id.* at 140. *See infra* note 176 (citing decisions defining right to abortion).

[158] *Dobbs*, 597 U.S. at 290 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

[159] *Id.* at 257, 290.

[160] *Id.* at 157 ("What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the

requirements of *stare decisis et quieta non movere*, a single Justice questioning a precedent—here, Justice Thomas noting in a sole concurrence that precedents like *Eisenstadt* and *Obergefell* rest on shaky legal foundations just as *Roe* did—does not unsettle it.

Jonathan Mitchell, one of the two conservative contributors to *Roe v. Dobbs*, points out that the *Dobbs* Court distinguished *Loving*, *Griswold*, *Eisenstadt*, and other precedents because they didn't involve the taking of human life.[161] Contending otherwise ignores the language and limits of *Roe*, *Casey*, and *Dobbs*. Professors Aziz Huq and Rebecca Wexler—in their provocative and speculative chapter on data privacy and the enforcement of abortion laws—describe *Dobbs* as broadly overruling "the right of privacy over the body."[162] This exaggerated description ignores the fact that *Roe* and *Dobbs* specifically addressed the right to terminate a pregnancy. More importantly, hundreds of state and federal laws that protect privacy remain untouched by *Dobbs* and are enforced or enforceable today.[163]

Another distinction between *Roe* on one hand and *Loving*, *Griswold*, and *Eisenstadt* on the other is how they fare under *stare decisis et quieta non movere* analysis: the Court's decisions conferring rights to interracial marriage and contraception are settled. Even if a theoretical case could be made that *Loving*, *Griswold*, and *Eisenstadt* were wrongly decided, it is difficult to imagine how the other stare decisis factors would be met with regard to those cases. There is no significant division in the Court over their holdings (just their rationale), there is no significant dissent from the bar or the academy, they are not unworkable, they have not been challenged by the states, and there is no litigation campaign to challenge them—all traditional evidence of settlement.[164]

IX. INTERNATIONAL PERSPECTIVES

Professor Mark Tushnet, who clerked for Justice Thurgood Marshall at the time *Roe* was decided, argues that pro-life advocates in the U.S. should

---

life of an "unborn human being.") (citing *Roe*, 410 U.S. at 159 (abortion is "inherently different"); *Casey*, 505 U.S. at 852 (abortion is "a unique act")).

[161] *Id.* at 273; ROE V. DOBBS, *supra* note 5, at 59.

[162] ROE V. DOBBS, *supra* note 5, at 317.

[163] *See, e.g.*, *U.S. State Comprehensive Privacy Laws: Updated April 2024*, LOCKE LORD LLP, https://www.lockelord.com/-/media/files/privacy-and-cybersecurity-resource-center/april-2024-us-state-privacy-laws-chart.pdf.

[164] *See generally* Forsythe & Maitlen, *supra* note 47.

pursue European social welfare policies to reduce abortion and "promote life as much as possible" (a theme that runs through his chapter).[165] He calls this "the Social and Christian Democratic package of abortion-related policies" or "Western European-style abortion policies."[166] Tushnet's is one of the most interesting, thoughtful, and reasonable chapters in *Roe v. Dobbs*.

There is reason to believe that *Roe*—with its one-size-fits-all policy for our large and diverse country—prevented the development of any European-style compromise because it imposed an unlimited abortion license throughout pregnancy that doesn't exist in any Western European country. *Dobbs*, by contrast, would allow such a compromise to develop. Moderate policies that don't endorse the position of partisans on either side—a better concept than the oft-confused use of "compromise"—are more achievable under *Dobbs* than they were under *Roe*. Tushnet argues that "a juridified culture demanding rational consistency" makes moderate policies ("compromises," in his words) "extremely difficult to arrive at."[167] This is a reasonable argument, and it supports the proposition that *Dobbs* is better than *Roe*.

Professor Tom Ginsburg employs the theme of "American exceptionalism" ironically, arguing that the U.S. stands out among the nations for its vices. He characterizes the abortion issue in the U.S. as "five decades of polarized politics of the fetus."[168] Ginsburg is devoted to "proportionality analysis"—the very interest-balancing that failed under *Roe* and *Casey*.[169] It's not clear whether he proposes that judges or the people should do the balancing, but since he scorns politicians because they "have become addicted to the issue" of abortion, it seems that elected representatives would be excluded.[170] Ginsburg appeals to a decision-making process that "delivers on policies supported by a majority of citizens" and proposes that we "find[] ways to bring ordinary Americans together to understand that their views are not as divided as their politics."[171] But if "the complex moral questions around abortion are too important to be left to the politicians," what alternative process is superior

---

[165] ROE V. DOBBS, *supra* note 5, at 243. Professor Mary Ann Glendon, a colleague of Tushnet's at Harvard, offered a similar proposal in her 1988 book, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES.

[166] ROE V. DOBBS, *supra* note 5, at 244.

[167] *Id.* at 254.

[168] *Id.* at 277.

[169] *Id. See Dobbs*, 597 U.S. at 280-86.

[170] ROE V. DOBBS, *supra* note 5, at 277.

[171] *Id.*

to representatives who are accountable to the people at regularly scheduled elections?

Despite Ginsburg's disdain for American constitutionalism and representative government, his international survey is thought-provoking and worth a critical review. It shows that different countries have taken an array of positions on abortion through many different processes.[172] Few have granted a practically unlimited right to abortion by judicial decision—as the United States did under *Roe*—compared to legislation or other processes. Perhaps this means *Dobbs* put an end to American abortion exceptionalism.

X. IMPLICATIONS FOR THE FUTURE

Professor Glenn Cohen, an influential academic and creative and stimulating thinker, has published numerous articles on bioethics from a progressive perspective and is the director of the Petrie-Flom Center for Bioethics at Harvard. He addresses "Reproductive Technologies and Embryo Destruction After *Dobbs*."[173] It is a useful survey of legal limits on reproductive technology in the U.S. and abroad. He focuses on the question of whether *Dobbs* allows state prohibition on human embryo destruction. In fact, the *Dobbs* decision does not change constitutional law that preexisted it,[174] as Cohen seems to agree,[175] and its holding is limited, as *Roe*'s was, to "the right to terminate pregnancy."[176] Furthermore, prohibitions of "embryo destruction," as Professor Cohen frames it,[177] have been addressed for more than a century by prenatal injury, wrongful death, and fetal homicide law.[178] Long before *Dobbs* was decided, and long before modern reproductive technologies came on the market, these areas of law developed in favor of protecting

---

[172] *Id.* at 261-76.

[173] *Id.* at 281.

[174] *See, e.g.*, Clarke D. Forsythe, *Human Cloning and the Constitution*, 32 VAL. U. L. REV. 469 (1998).

[175] ROE V. DOBBS, *supra* note 5, at 283-84 n.16.

[176] *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 921 (2000) ("to terminate her pregnancy") (quoting *Casey*, 505 U.S. at 833, 846, 850, 852–53, 859, 869, 870, 876, 887 ("terminate her pregnancy")); *Akron*, 462 U.S. at 420 n.1 ("terminate her pregnancy"); Harris v. McRae, 448 U.S. 298, 316 (1980) ("the freedom of a woman to decide whether to terminate her pregnancy"); Maher v. Roe, 432 U.S. 464, 474 (1977) ("her freedom to decide whether to terminate her pregnancy"); *Roe*, 410 U.S. at 153 ("a woman's decision whether or not to terminate her pregnancy").

[177] ROE V. DOBBS, *supra* note 5, at 281.

[178] *See generally* Linton, *supra* note 95.

the developing human being from injuries and lethal assaults, whether intentional or negligent.

Cohen argues that "attempts to restrict embryo destruction require resolution of deep and difficult questions of when personhood begins and why."[179] But one's view on whether and when a fetus attains the status of "personhood" need not be definitive for one's view of abortion or reproductive technology. "Personhood" is an ontological and metaphysical concept. In contrast, homicide law, stretching back more than 800 years, is focused on protecting human beings. The human being is a biological and anthropological entity, and protecting human beings has never required resolving difficult metaphysical questions.

What is left out of much analysis of reproductive technology—and virtually all of the discussion of the Alabama Supreme Court's 2024 decision in *LePage v. Center for Reproductive Medicine*[180]—is that women usually get the short end of the stick when it comes to disputes over the custody of embryos.[181] When couples with joint custody of human embryos created through in vitro fertilization divorce or dissolve and courts consider the matter, courts almost always reason that the embryos are property, and they therefore side with the man who wants to destroy them over the woman who wants to preserve or implant them.[182] If embryos were treated as children, and courts applied the best interests of the child standard that is common in custody law, the woman who wants to preserve or implant them—and it is usually the woman who takes that position in such cases—might prevail.

XI. CONCLUSION

Roe v. Dobbs is essential reading for anyone who wants to understand public arguments about abortion after *Dobbs*. The arguments in this book, strong or weak, are and will continue to be very influential in the media, in legislative hearings, and in courts. These are the post-*Dobbs* arguments for abortion, as well as the arguments for overturning *Dobbs* if the Supreme Court's composition changes in the future.

---

[179] ROE V. DOBBS, *supra* note 5, at 295.

[180] LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024).

[181] *See generally* Benjamin C. Carpenter, *Sperm Is Still Cheap: Reconsidering the Law's Male-Centric Approach to Embryo Disputes after Thirty Years of Jurisprudence*, 34 YALE J.L. & FEMINISM 1 (2023).

[182] *Id.*

But if a first-year law student picked up *Roe v. Dobbs*, she would understand nothing about the backstory to *Roe*, the weaknesses of the *Roe* decision, congressional responses from 1973-83, or nearly fifty years' worth of criticisms by judges and scholars.[183] She would assume that *Dobbs* came out of nowhere to overturn—abruptly and without explanation—a fifty-year-old decision that was universally admired and relied on by judges, scholars, political leaders, and the American people. She would never learn of the pre-*Roe* increase in state and federal laws, supported by public opinion, to create equal rights for women, nor that women's economic and professional progress began before *Roe*. She would not learn about the long history between the Fourteenth Amendment and *Roe* that elevated women's rights without enshrining a right to abortion.[184]

Virtually all of the arguments in *Roe v. Dobbs* have been presented to the Supreme Court in amicus briefs filed between *Roe* and *Dobbs*. Many are policy arguments which may now be presented to lawmakers in all fifty states. Many others are claims about the impact of limiting abortion. These claims will be proven true or false as states pass a variety of policies and collect data on outcomes. States that want to defend their abortion laws—permissive or restrictive—will need to develop a sound understanding of public health data and publish it for public evaluation.

The seeming heft of this 450-page book is undermined by the contributors' refusal to engage the historical scholarship of Joseph Dellapenna or that of contemporary feminist legal scholars who have dissented from the proposition that women need abortion for equal opportunity in American society, such as Mary Ann Glendon, Helen Alvaré, and Erika Bachiochi.

Will *Dobbs* become settled and abortion remain an issue for the people and their elected representatives to decide? Or will a future Court take control of the abortion issue once again and return itself to the role of national abortion monitor? "The people and their elected representatives"—through presidential and U.S. Senate elections—will largely determine that.

Dobbs will be settled—if at all—by the same legal and democratic actions that settled *Brown v. Board of Education*: judicial, political, and public acceptance, the latter ultimately demonstrated through democratic actions

---

[183] *See* Clarke D. Forsythe, *A Survey of Judicial & Scholarly Criticism of* Roe v. Wade *Since 1973: Legal Criticism & Unsettled Precedent*, AMS. UNITED FOR LIFE (Jan. 2022), https://aul.org/wp-content/uploads/2022/01/A-Survey-of-Judicial-and-Scholarly-Criticism-of-Roe-v.-Wade-Since-1973.pdf.

[184] *See* Alvaré, *supra* note 74; Bachiochi, *supra* note 115.

including state legislation and electoral acceptance. *Dobbs* returned the abortion issue to "the people and their elected representatives." "Public sentiment," in Abraham Lincoln's words, will govern these issues for the foreseeable future.

Other Views:

- ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee Bollinger & Geoffrey Stone eds. 2024), *available at* https://global.oup.com/academic/product/roe-v-dobbs-9780197760352?cc=us&lang=en&.
- Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99 (2023), *available at* https://www.yalelawjournal.org/forum/the-history-of-history-and-tradition-the-roots-of-dobbss-method-and-originalism-in-the-defense-of-segregation.
- Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J. F. 65 (2023), *available at* https://www.yalelawjournal.org/forum/lessons-from-lawrence-how-history-gave-us-dobbsand-how-history-can-help-overrule-it.
- Aliza Forman-Rabinovici & Olatunde C.A. Johnson, *Political Equality, Gender, and Democratic Legitimation in* Dobbs, 46 HARV. J.L. & GENDER 81 (2023), *available at* https://scholarship.law.columbia.edu/faculty_scholarship/3920/.
- Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111, *available at* https://chicagounbound.uchicago.edu/supremecourtrev/vol2022/iss1/5/.