THE U.S. SUPREME COURT'S ABORTION DECISION IN *DOBBS*: A BITTER PILL TO SWALLOW

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ABSTRACT

In 2022, the U.S. Supreme Court in Dobbs *ruled six to three that women have no fundamental right to an abortion. This overturned an almost-50-year-old case relied on by women:* Roe. *The Court decided that neither the text of the Constitution, original public meaning, nor precedents supported* Roe. *The Court's decision, however, was flawed.*

The Dobbs *Court relied on historical records from times where women had almost no rights. The Court ignored a host of precedents. Additionally, the Court's decision will likely cause more women to get dangerous abortions, either without doctors, after travel, or not until much later in the pregnancy. This is not pro-life.* Dobbs *also barely discussed women.* Dobbs *has left the country in chaos. Red states, that only permit women to get abortions in emergencies, will force doctors to allow women to become sick before an abortion is administered. This is also not pro-life. The situation will be especially difficult for women with limited resources.*

Further, the U.S. Supreme Court has decided to hear a case regarding the repeated agency approval process for the almost-25-year-old, popular, abortion pill. The pro-life side cherry picked a federal district judge, who was an anti-abortion movement lawyer, to hear the case. And separately, the Alabama Supreme Court ruled that an embryo was a person, which made in vitro fertilization (IVF) temporarily illegal. One of the concurrences relied almost solely on the Bible.

This Article will provide more detail on Dobbs*' flaws, the forthcoming abortion pill case, and the other negative results from the situation.*

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I. INTRODUCTION

In June 2022, the U.S. Supreme Court reversed *Roe v. Wade*, an almost-five-decade-old decision.[1] In 1973, *Roe* determined that laws restricting a woman's right to have an abortion must receive strict scrutiny before viability.[2] In *Dobbs v. Jackson Women's Health Organization*, however, the Court, in 2022, held that women no longer have that right.[3] The Court had already reexamined the issue many times between these cases, but it always upheld the right.[4] The Court ruled in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that laws restricting abortions could not impose an undue burden on a woman's choice to get an abortion or not.[5] This was a modification of *Roe*.[6] *Dobbs* was a stunning, but unsurprising, reversal.[7] President Donald Trump had the good fortune to appoint three Justices to the Court, creating a six to three conservative super-majority.[8] This occurred because the Republican-dominated U.S. Senate arbitrarily refused to grant a hearing to President Barack Obama's last nominee, Merrick Garland.[9]

Ironically, the so-called conservatives are anything but cautious. To give one example, the Court's decision means that male-dominated state legislatures, with many religious, conservative members, will make the decision for women in their states, rather than the individual woman herself.[10] Leaving it to the woman herself

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1. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

2. *Id.* at 164–66.

3. *Dobbs*, 597 U.S. at 302.

4. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S. 215.

5. *Id.* at 878–79.

6. *Compare id.*, *with Roe*, 410 U.S. at 164–66.

7. *See Dobbs*, 597 U.S. at 302 (overruling *Planned Parenthood* and *Roe*).

8. *See* Pamela King & Robin Bravender, *Justices Called Roe Important Precedent, Then Tossed It*, E & E NEWS (June 27, 2022, 6:22 AM), https://www.eenews.net/articles/justices-called-roe-important-precedent-then-tossed-it/#:~:text=Grilled%20on%20camera%20in%20a,keeping%20prior%20rulings%20in%20place [https://perma.cc/8XM6-MG65].

9. Lawrence Friedman, *McConnell's Unconstitutional Blockade of Garland Poisoned Subsequent Proceedings*, THE HILL (Feb. 16, 2022, 2:55 PM), https://thehill.com/opinion/judiciary/594574-mcconnells-unconstitutional-blockade-of-garland-poisoned-subsequent/ [https://perma.cc/Y3SM-FK25].

10. *See Dobbs*, 597 U.S. at 302 (leaving abortion regulation to states).

would allow pro-life women to choose not to abort and pro-choice women to choose abortion if they wish.[11] Indeed, many women with children already have had abortions.[12] This would have been a pragmatic compromise. But *Dobbs* is a case decided by Justices who are "movement conservatives."[13]

This Article will begin by explaining Justice Samuel Alito's majority reasoning in Part II.[14] Part III will show how his decision has had devastating consequences on women, with a special focus on those states that have not allowed exceptions for rape, incest, or the life of the mother.[15] Then it will examine those states that have restricted use of the convenient "abortion pill" (the Supreme Court has now decided it will address the abortion pill issue).[16] Justice Alito's decision is also stunningly impractical by facilitating an irrational patchwork of abortion laws, by establishing an onerous burden on minority and poor women, and by creating confusing criminal law questions related to the right to travel.[17] Part IV will show that he uses a retrogressive, and vague, approach to constitutional interpretation known as originalism, while also doing questionable "law office history."[18] Part V describes his stunning disregard for stare decisis.[19] Part VI briefly concludes.[20]

11. *Compare id.*, *with Roe*, 410 U.S. at 164–66.

12. Margot Sanger-Katz et al., *Who Gets Abortions in America?*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html (Dec. 14, 2021).

13. PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL 101–02 (W.W. Norton & Co. 2007); Robert L. Tsai & Mary Ziegler, *Why the Supreme Court Really Killed* Roe v. Wade, POLITICO (June 25, 2023, 7:00 AM), https://www.politico.com/news/magazine/2023/06/25/mag-tsai-ziegler-movementjudges-00102758 [https://perma.cc/9LFV-J9R3] (blaming "movement judges"). *But see* Andrew Coan, *What Is the Matter with Dobbs?* 18–22 (Univ. of Ariz. James E. Rogers Coll. of Law, Discussion Paper No. 22-24, 2022) (arguing against blaming "recent changes in the Supreme Court's membership").

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part III; All. for Hippocratic Med. v. U.S. FDA, 78 F.4th 210, 256 (5th Cir. 2023), *cert. granted sub nom.* FDA v. All. for Hippocratic Med., No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

20. *See infra* Part VI.

II. THE U.S. SUPREME COURT'S *DOBBS* DECISION

The initial part of Justice Alito's opinion explained that *Roe* and *Casey* must be overturned because abortion lacks any textual or historical foundation in the Constitution.[21] But both cases found that the Fourteenth Amendment's liberty provision implied a right to privacy that covered a woman's reproductive choices.[22] Justice Alito, however, arbitrarily adopted a conservative approach for determining whether an implied fundamental right exists from the U.S. Supreme Court's decision in *Washington v. Glucksberg*.[23] There the Court rejected the argument for a constitutional right to assisted suicide.[24] The Court further created a two-part test.[25] First, the right asserted must have existed historically for a long time.[26] Second, the right must be described with great specificity and narrowness.[27]

He rejected a broader approach to individual autonomy that the Court set forth in *Obergefell v. Hodges* when it endorsed same-sex marriage.[28] *Obergefell* explicitly dismissed *Glucksberg* as limited to its facts.[29] But *Dobbs* ignored that, and determined that the presence of a fetus, "a potential life," was a competing government interest that made *Obergefell* and other cases inapplicable.[30] *Dobbs* also rejected the applicability of the Ninth Amendment or the Equal Protection Clause to justify women's rights.[31]

The Court further determined that British and U.S. history both generally disallowed abortion, which was often criminalized.[32] Justice Alito went back to the thirteenth century in his assessment, though he mocks Justice Harry Blackmun for using old history in *Roe*.[33] The Court quoted several times from a historical opus

21. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 225–27 (2022).

22. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 927 (1992), *overruled by Dobbs*, 597 U.S. 215; Roe v. Wade, 410 U.S. 113, 151–63 (1973) (Blackmun, J., concurring in part) ("Further, when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning—critical life choices that this Court long has deemed central to the right to privacy."), *overruled by Dobbs*, 597 U.S. 215.

23. *Dobbs*, 597 U.S. at 231 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

24. *Glucksberg*, 521 U.S. at 705–06.

25. *Id.* at 720–21.

26. *Id.*

27. *Id.*

28. 576 U.S. 644, 681 (2015).

29. *Id.* at 671.

30. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 262 (2022).

31. *Id.* at 235–36.

32. *Id.* at 246–50.

33. *Id.* at 241–43.

by law professor Joseph Dellapena, who reached pro-life conclusions.[34] Justice Alito also relied on prominent Catholic philosophers Robert George and John Finnis.[35] The reality, however, is that the United States only became especially hostile to abortion in the late nineteenth century and the mid-twentieth century for questionable reasons that will be discussed later.[36]

Next, he explains why stare decisis (the importance of following precedent) does not prevent the decision.[37] He mentioned several famous constitutional cases that the Court reversed such as *Lochner v. New York* and *Plessy v. Ferguson*.[38] He contended that if the Court was wrong initially, it has no reason to stand by the decisions.[39] He emphasized that neither "text, history, or precedent" supports abortion.[40] And even *Casey* rejected *Roe*'s trimester system.[41] Justice Alito and others contended the trimester system looked like a statutory provision.[42] He also quoted supposed progressives such as John Hart Ely as having criticized *Roe*.[43] Further, he argued the viability line is fuzzy[44] and questioned what is an undue burden?[45]

In addition, he said society has no "reliance interest" on an abortion right.[46] And women now have much greater political power than at the time of *Roe*.[47]

34. *See id.* (citing JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 126 & n.16, 134–42, 188–94, 194 nn.84–86 (Carolina Acad. Press 2006)).

35. *Id.* at 251–53, 252 n.38; Brief of Scholars of Jurisprudence John M. Finnis and Robert P. George as Amicus Curiae Supporting Petitioners at 1, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392).

36. *See infra* Part IV.

37. *Dobbs*, 597 U.S. at 265–68.

38. *Id.* (citing Lochner v. New York, 198 U.S. 45 (1905); Plessy v. Ferguson, 163 U.S. 537 (1896)).

39. *Id.*

40. *Id.* at 270.

41. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

42. *Id.* at 270–71 (citing Roe v. Wade, 410 U.S. 113, 163–64 (1973)) (explaining *Roe*'s trimester system determined that a woman had virtually unlimited freedom regarding an abortion in the first three months of pregnancy, that the state had a limited interest in the woman's health in the second three months, and that the state had a compelling interest in the life of the fetus after viability).

43. *Id.* at 278.

44. *Id.*

45. *Id.* at 279–80.

46. *Id.* at 287–88.

47. *Id.* at 288–89.

Ultimately, he said that *Roe* and *Casey* are completely unprincipled.[48] Further, he reasoned that the right to abortion did not play a major role in providing more opportunities for women, ignoring over 100 economists that disagreed in their *Dobbs* Amicus Brief.[49] Justice Alito concluded that the Court should use rational basis review in abortion cases.[50] Most restrictions will be upheld under that standard.

The pro-life scholar and activist Professor Theresa Collett, even compared *Roe* to the disastrous Supreme Court pre-Civil War decision in *Dred Scott v. Sanford* which allowed slavery and declared Blacks to be property.[51] This ignores completely the legitimate interest of the woman compared to a slave owner, and the difference between a human being and a fetus. But this is a movement conservative position. Professor Collet's argument actually analogizes a slave to a mere fetus, which is troubling. She also references the Thirteenth Amendment to support her view.[52] The bottom line is that Professor Collett is pleased with *Dobbs*, but seems to be suggesting that the Court should have declared that life begins at conception, and that the fetus is a person.[53] She also argues that the decision promotes democracy.[54] Yet, the Bill of Rights was designed to prevent majoritarian coercion.[55]

Further, she argues that women who have abortions generally regret the decision.[56] Yet most peer reviewed studies contradict this mental health view, and

48. *Id.* at 240.

49. *See id.* at 288–89.

50. *Id.* at 300–01.

51. Teresa Stanton Collett, *Slavery and the Post*-Dobbs *Abortion Debate*, 71 DRAKE L. REV. (forthcoming 2024) (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 427 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend XIV); Teresa Stanton Collett, Abortion and Slavery: The Recurring Analogy, Address at the Drake Law School Constitutional Law Symposium: The Scales of Justice Tilt Right: Abortion, Affirmative Action, and the Administrative State (Apr. 15, 2023), https://drake.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=1e4d5360-bb63-4d19-9e4e-afd500f299be [https://perma.cc/NH4Y-SG4L] [hereinafter Collett, Symposium Address].

52. Collett, Symposium Address, *supra* note 51.

53. *See id.*

54. *See id.*

55. *See* THE FEDERALIST NO. 10 (James Madison).

56. *See* Collett, Symposium Address, *supra* note 51; *see also* Gonzales v. Carhart, 550 U.S. 124, 159 (2007) ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.").

the pro-life side has a consistency problem.[57] The consistency problem is that she has opposed looking at women's mental health during their pregnancy, even if they become suicidal.[58] Thus, she uses mental health when it supposedly supports her argument but ignores it for the other side, even though women who have babies are 14 times more likely to die than those who have early abortions.[59] Overall, most women feel a sense of relief after having an abortion or a baby.[60]

III. DEVASTATING CONSEQUENCES

Dobbs allows states to ban abortions even in cases of rape, incest, and severe health risks to the woman from pregnancy.[61] Fourteen states have enacted laws that allow almost no exceptions, except for the life of the mother.[62] This contradicts basic American values about treating people humanely. But contrary to what some ignorant politicians once said, the Centers for Disease Control (CDC) found that approximately three million women in the U.S. have gotten pregnant by rape.[63]

57. *See Gonzales*, 550 U.S. at 182 n.7, 183–85 (Ginsburg, J., dissenting) (describing Justice Anthony Kennedy's view as a sexist "shibboleth" and stating "neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have") (citing Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, GUTTMACHER POL'Y REV., Aug. 2006, at 8, 8 (amongst other studies); *see also* Corinne H. Rocca et al., *Emotions and Decision Rightness Over Five Years Following an Abortion: An Examination of Decision Difficulty and Abortion Stigma*, SOC. SCI. & MED., Jan. 2020, at 1, 1–2.

58. *See* Brief of the Prolife Center at the University of St. Thomas as Amicus Curiae Supporting Petitioners at 2–6, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392).

59. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012).

60. Rocca et al., *supra* note 57, at 1–2.

61. *See Dobbs*, 597 U.S. at 302; *see also* Selena Simmons-Duffin, *Raped, Pregnant and in an Abortion Ban State? Researchers Gauge How Often It Happens*, NPR (Jan. 24, 2024, 11:02 AM), https://www.npr.org/sections/health-shots/2024/01/24/1226161416/rape-caused-pregnancy-abortion-ban-states [https://perma.cc/W8S7-HKPR].

62. *Is Abortion Still Accessible in My State Now That* Roe v. Wade *was Overturned?*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/abortion-access-tool/US [https://perma.cc/F8H5-X2GR].

63. *Pregnancy Resulting from Rape*, CDC: VIOLENCE PREVENTION, https://www.cdc.gov/violenceprevention/sexualviolence/understanding-RRP-inUS.html [https://perma.cc/B3BE-N9C9] (June 1, 2020); *see also* Kate Clancy, *Here is Some Legitimate Science on Pregnancy and Rape*, SCI. AM. (Aug. 20, 2012), https://blogs.scientificamerican.com/context-and-

Prominent Professor of Law Michelle Goodwin is one of these women—raped repeatedly by her father.[64] These women are the truly enslaved ones—if we wish to use the reasoning of *Dred Scott* and the Thirteenth Amendment.[65] Some pro-life states allow an exception for the life of the woman, but that poses a logical problem if the fetus is a person.[66]

The reality is that more women will die because they cannot get safe abortions.[67] According to a Harvard Public Health Professor:

> A recent study [in the peer reviewed *Demography* journal] estimated that banning abortion in the U.S. would lead to a 21% increase in the number of pregnancy-related deaths overall and a 33% increase among Black women, simply because staying pregnant is more dangerous than having an abortion. Increased deaths due to unsafe abortions or attempted abortions would be in addition to these estimates.[68]

The horrific history of coat-hanger abortions should not be forgotten.[69]

The new situation will inevitably traumatize many women and girls.[70] Take Nicole Walker who wrote about the abortion she obtained after being raped at age 11: "My life would not have been my own. I would be a prisoner subject to a

variation/here-is-some-legitimate-science-on-pregnancy-and-rape/ [https://perma.cc/A99S-GTWV] (discussing how pro-life politicians made recent ignorant statements that raped women could not get pregnant; Congressman Todd Akin of Missouri was one of these "experts").

64. Michele Goodwin, *I Was Raped by My Father. An Abortion Saved My Life.*, N.Y. TIMES (Nov. 30, 2021), https://www.nytimes.com/2021/11/30/opinion/abortion-texas-mississippi-rape.html.

65. *Compare id.*, *with* Collett, Symposium Address, *supra* note 51 (citing Dred Scott v. Sandford, 60 U.S. 393, 427 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend XIV).

66. *See* Julia Haines, *Where State Abortion Laws Stand Without Roe*, U.S. NEWS (Jan. 31, 2024), https://www.usnews.com/news/best-states/articles/a-guide-to-abortion-laws-by-state.

67. Ana Langer, *The Negative Health Implications of Restricting Abortion Access*, HARVARD T.H. CHAN: SCH. OF PUB. HEALTH (Dec. 13, 2021), https://www.hsph.harvard.edu/news/features/abortion-restrictions-health-implications/ [https://perma.cc/2R7X-LC9H].

68. *Id.*

69. Jessica Valenti, *Abortion by Wire Coat Hanger Is Not a Thing of the Past in America*, THE GUARDIAN (Dec. 15, 2015), https://www.theguardian.com/commentisfree/2015/dec/15/wire-coat-hanger-abortion-stories-united-states [https://perma.cc/VVJ2-ABR5].

70. *See id.*

body's whims—and not *my* body's whims, but the whims of a teenage boy."[71] In Ohio, the law barred a 10-year-old rape victim from getting an abortion.[72] A Florida family was not allowed to abort a fetus with Potter's syndrome, which guarantees the baby, if born, will suffocate and die almost immediately.[73] And Justice Alito's ruling allows bizarre situations, like in Texas, where an ex-husband sued his ex-wife's friends as accessories to an abortion.[74] The women have counter-sued.[75] Then there is the astonishing Texas "bounty" law which pays money to people who identify physicians and others who perform abortions.[76] And pro-life individuals have harassed women seeking abortions, and received praise for murdering abortion doctors.[77]

71. Nicole Walker, *My Abortion at 11 Wasn't a Choice. It Was My Life.*, N.Y. TIMES (Aug. 18, 2022), https://www.nytimes.com/2022/08/18/opinion/abortion-pregnancy-child-roe.html.

72. Andrew Stanton, *'She's 10': Child Rape Victim's Abortion Denial Sparks Outrage on Twitter*, NEWSWEEK (July 2, 2022, 12:36 PM), https://www.newsweek.com/shes-10-child-rape-victims-abortion-denial-sparks-outrage-twitter-1721248 [https://perma.cc/F9GN-X2PM]. To be fair, the Ohio Attorney General later explained she did not have to travel to Indiana to get the abortion; however, clearly she and her family thought otherwise. Amanda Merrell, *Ohio Attorney General Said 10-Year-Old Rape Victim Could Have Had Abortion in Ohio, but State Law Isn't Clear*, ABC NEWS 5 CLEVELAND, https://www.news5cleveland.com/news/abortion-in-ohio/ohio-attorney-general-said-10-year-old-rape-victim-could-have-had-abortion-in-ohio-but-state-law-isnt-clear [https://perma.cc/M54J-22DE] (July 15, 2022, 10:05 AM).

73. Francis Stead Sellers, *Her Baby Has a Deadly Diagnosis. Her Florida Doctors Refused an Abortion*, THE WASH. POST, https://www.washingtonpost.com/health/2023/02/18/florida-abortion-ban-unviable-pregnancy-potter-syndrome/ (May 19, 2023, 5:56 PM).

74. *See, e.g.*, Moira Donegan & Mark Joseph Stern, *Not Every Man Will Be as Dumb as Marcus Silva*, SLATE (May 4, 2023, 1:27 PM), https://slate.com/news-and-politics/2023/05/texas-man-medication-abortion-lawsuit-backfired-explained.html [https://perma.cc/H76L-8WTP].

75. *Id.* ("[T]he women allege that Silva not only knew about the abortion before it happened but in fact knowingly deceived his wife: He didn't just find text messages when he was snooping. He found the abortion pill itself while searching her purse, then, according to the counterclaim, surreptitiously put it back—allowing her to have the abortion without realizing that he knew about it so he could use the threat of liability to coerce her into staying with him.").

76. Dan Solomon, *Texas's Abortion "Bounty" Law Just Lost Its First Test. Here's What That Means.*, TEX. MONTHLY (Dec. 9, 2022), https://www.texasmonthly.com/news-politics/texas-abortion-bounty-law-just-lost-first-test/ [https://perma.cc/6YTN-JX6N].

77. *See, e.g.*, Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1064 (9th Cir. 2002) (en banc).

Many of the new laws also lack clear medical terminology, which leave medical professionals in a quandary, perhaps the goal of these legislators.[78] Thus, numerous doctors have waited until the woman gets sicker than she was originally before they declare a medical emergency and feel safe from prosecution.[79] The number of women getting the potentially deadly infection sepsis has increased because that is what happens when problematic pregnancies continue.[80] In addition, "Dr Lorie Harper, chief of maternal-fetal medicine at the University of Texas at Austin Dell Medical School" stated that the Texas law means physicians "are waiting until heart failure, waiting until hemorrhaging, waiting until a patient needs to be intubated, or is [having organ failure]. Patients have to be a lot sicker before they receive life-saving care—and not every patient who becomes that critically ill will recover."[81] This is not pro-life.

These new laws also create uncertainty about the legality of an Intrauterine Device (IUD), in-vitro fertilization (which is actually pro-life), and the morning-after pill.[82] Further, the line between a miscarriage and a necessary abortion is often not clear, as many scholars and doctors have pointed out, such as Harvard Law School's former Dean, Martha Minow.[83] And the new state laws may not allow the

78. J. David Goodman & Azeen Ghorayshi, *Women Face Risks as Doctors Struggle with Medical Exceptions on Abortion*, N.Y. TIMES (July 20, 2022), https://www.nytimes.com/2022/07/20/us/abortion-save-mothers-life.html. *But see* Kate Zernike, *Texas Judge Says Doctors Can Use 'Good Faith Judgment' in Providing Abortions*, N.Y. TIMES (Aug. 4, 2023), https://www.nytimes.com/2023/08/04/us/texas-abortion-ban-lawsuit-ruling.html (describing a Texas judge that now approved a "good faith" interpretation standard, protecting doctors a bit more).

79. *See, e.g.*, Goodman & Ghorayshi, *supra* note 78.

80. *See, e.g.*, *id.* (discussing a pregnant patient who was denied an abortion until she came back with sepsis).

81. Mary Tuma, *'At Death's Door': Abortion Bans Endanger Lives of High-Risk Patients, Texas Study Shows*, THE GUARDIAN (July 13, 2022), https://www.theguardian.com/world/2022/jul/13/texas-abortion-ban-maternal-health-risk [https://perma.cc/A56U-36DC].

82. Aria Bendix, *Birth Control Restrictions Could Follow Abortion Bans, Experts Say*, NBC NEWS (June 24, 2022, 8:33 PM), https://www.nbcnews.com/health/health-news/birth-control-restrictions-may-follow-abortion-bans-roe-rcna35289 [https://perma.cc/E8JD-D2W2] (suggesting there is a broad medical consensus that an IUD is a contraceptive device that prevents implantation, and therefore is not a form of abortion); *see* LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024) (holding that accidental destruction of cryogenically frozen embryos can fall under wrongful death of minor statute).

83. Martha Minow, *The Unraveling: What Dobbs May Mean for Contraception, Liberty, and Constitutionalism*, *in* ROE V. DOBBS: THE PAST, PRESENT AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee C. Bollinger & Geoffrey R. Stone eds., Oxford Univ. Press forthcoming 2024) (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 393 (2022) (Breyer, J., dissenting)).

ending of tragic ectopic pregnancies.[84] Some seemingly pro-life supporters, such as Justice Clarence Thomas, do not even support a constitutional right to contraception.[85] But ironically, this will only result in more abortions.[86]

Certain smaller hospitals are closing their ob-gyn units as doctors leave and hospital lawyers worry about liability.[87] Numerous physicians have concluded that *Dobbs* has created delays for a pregnant woman to get in at an ob-gyn office.[88] And some ob-gyn clinics in liberal states now have waiting lists due to out of state patients—this is not good for women.[89]

Some states are especially focused on banning one of the safest and simplest forms of abortion—the abortion pill.[90] This is especially problematic for minority and poor women who cannot easily travel to other states.[91] Moreover, there are jurisdictional issues about whether women who must travel, or the facilitators of their travel, will be charged for getting an abortion out of state.[92] This creates a rule of law problem.[93]

The abortion pill regimen became available in 2000.[94] It is now the most popular form of abortion (over 50 percent) and has been found safe, which explains

84. Goodman & Ghorayshi, *supra* note 78.

85. *See Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

86. *See* Valenti, *supra* note 69.

87. Amanda Musa & John Bonifield, *Maternity Units Are Closing Across America, Forcing Expectant Mothers to Hit the Road*, CNN HEALTH, https://www.cnn.com/2023/04/07/health/maternity-units-closing/index.html [https://perma.cc/V4J2-L58G] (Apr. 7, 2023, 7:38 PM).

88. Katrina Kimport, *Abortion After* Dobbs*: Defendants, Denials, and Delays*, SCI. ADVANCES, Sept. 2022, at 2.

89. *Id.*

90. Sean Maguire, *Alaska Among 22 Republican-Led States Joining Lawsuit Seeking to Block Abortion Pill*, ANCHORAGE DAILY NEWS, https://www.adn.com/politics/2023/02/13/alaska-joins-federal-lawsuit-seeking-to-block-abortion-pill/ [https://perma.cc/K6V5-X7HQ] (Feb. 14, 2023).

91. Kimport, *supra* note 88.

92. David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 5 (2023); *see In re* State, 682 S.W.3d 890, 894 (Tex. 2023) (holding that the law prevents a woman from getting an abortion despite a doctor's good faith belief that she fell under the statutory exception); J. David Goodman, *Texas Woman Asks Court to Allow Her Abortion*, N.Y. TIMES (Dec. 5, 2023), https://www.nytimes.com/2023/12/05/us/texas-abortion-lawsuit.html?smid=nytcore-ios-share&referringSource=articleShare.

93. Cohen et al., *supra* note 92, at 25–42.

94. *See id.* at 14.

its popularity.[95] Moreover, the pills are about 95 percent effective with additional procedures occasionally needed.[96] But a cherry-picked lone federal judge in Amarillo, Texas, who previously worked for a pro-life group, invalidated the 23-year-old Food and Drug Administration (FDA) decision permitting abortion pills.[97] The FDA even revisited and liberalized its decision in 2016.[98] And the General Accounting Office in 2008 and 2018 (during the Trump Administration) essentially affirmed the FDA.[99] Ironically, at around the same time as the Texas judge, a federal district judge in the State of Washington upheld the FDA's procedures.[100]

After the Texas federal district judge decision, a U.S. Court of Appeals for the Fifth Circuit panel entered an order granting a partial victory to the pro-life side, but along with a limited stay that favored the FDA.[101] The Fifth Circuit said any pro-life objections going back to 2000 were not relevant, especially given strong public reliance.[102] Nonetheless, some FDA actions starting in 2016 could be

95. Maguire, *supra* note 90.

96. Amy Schoenfeld Walker et al., *Are Abortion Pills Safe? Here's the Evidence*, N.Y. TIMES, https://www.nytimes.com/interactive/2023/04/01/health/abortion-pill-safety.html (Apr. 7, 2023).

97. All. for Hippocratic Med. v. U.S. FDA, 668 F. Supp. 3d 507, 558 (N.D. Tex. Apr. 7, 2023), *aff'd in part*, 78 F.4th 210 (5th Cir. 2023); *see also* Eleanor Klibanoff, *Federal Judge in Texas Suspends FDA Approval of Abortion Pill*, THE TEX. TRIB., https://www.texastribune.org/2023/04/07/texas-abortion-drugs-fda-ruling/ [https://perma.cc/ZZ4C-9EFA] (Apr. 7, 2023, 8:00 PM).

98. Cohen et al., *supra* note 92, at 88 n.485.

99. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-751, FOOD AND DRUG ADMINISTRATION: APPROVAL AND OVERSIGHT OF THE DRUG MIFEPREX 5–8 (2008), https://www.gao.gov/assets/gao-08-751.pdf [https://perma.cc/L2TC-R8EC]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-292, FOOD AND DRUG ADMINISTRATION: INFORMATION ON MIFEPREX LABELING CHANGES AND ONGOING MONITORING EFFORTS 19 (2018), https://www.gao.gov/assets/gao-18-292.pdf [https://perma.cc/L6FF-4YUM].

100. Washington v. U.S. FDA, 670 F. Supp. 3d 1150, 1154–55 (E.D. Wash. 2023) (concluding that FDA procedures for approving the abortion pill were legal); Sarah McCammon, *Judges' Dueling Decisions Put Access to Key Abortion Drug in Jeopardy Nationwide*, NPR, https://www.npr.org/2023/04/07/1159220452/abortion-pill-drug-mifepristone-judge-texas-amarillo [https://perma.cc/234P-6DKM] (Apr. 8, 2023, 5:45 AM).

101. *See All. for Hippocratic Med.*, 78 F.4th at 222–23 (holding a preliminary injunction partially overturned and partially upheld); Sarah McCammon, *U.S. Appeals Court Preserves Partial Access to Abortion Pill, but with Tighter Rules*, NPR, https://www.npr.org/2023/04/13/1169217172/abortion-pill-mifepristone-ruling-texas-judge [https://perma.cc/L2JZ-QL45] (Apr. 13, 2023, 6:33 PM).

102. *See All. for Hippocratic Med.*, 78 F.4th at 222–23.

stopped.[103] Thus, the court prohibited using the mail to distribute the pills and prohibited non-physicians from dispensing them.[104] The Biden Administration then filed an emergency injunction request with the U.S. Supreme Court.[105] Justice Alito granted the temporary injunction which means neither decision from within the conservative Fifth Circuit, limiting the FDA, may be enforced.[106] The Fifth Circuit, however, held a standard oral argument on the pending issues later in May 2023 and the panel seems to favor the position against the pills.[107] The case will now be heard by the U.S. Supreme Court.[108]

Regarding safety specifics, the *New York Times* published a summary of 101 mostly peer-reviewed studies.[109] Out of 124,000 medication abortions, there was one abortion-related death from infection.[110] The FDA reported that about "5.6 million women in the United States took the pills" since 2000, with the number of estimated deaths possibly caused by the pills at .0005 percent, and the number of hospitalizations at 1 percent.[111] It is common for women who use the pill regimen to experience some bleeding, cramping, and nausea, but these are rarely

103. *Id.*

104. *See id.*

105. *See* Danco Lab'ys, LLC v. All. for Hippocratic Med., 143 S. Ct. 1075, 1075 (2023).

106. *Id.*

107. *See All. for Hippocratic Med.*, 78 F.4th at 256, *cert. granted sub nom.* FDA v. All. for Hippocratic Med., No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

108. *See id.*

109. Walker et al., *supra* note 96.

110. *Id.*

111. *Id.*; *see also* Pam Belluck, *Abortions by Telemedicine and Mailed Pills Are Safe and Effective, Study Finds*, N.Y. TIMES (Feb. 15, 2024), https://www.nytimes.com/2024/02/15/health/abortion-pills-mail-safety.html.

hospitalizing side effects.[112] The Texas judge based his opinion on very few studies by comparison.[113] His approach will also create a black market in pills.[114]

IV. CONSTITUTIONAL INTERPRETATION

Justice Alito predominantly used the original public meaning (OPM) approach for the abortion issue.[115] At the Fourteenth Amendment's adoption, most states did not support abortion.[116] And old English law also did not support a women's right in practically any area of society.[117] Further, regarding precedent, he contended no Supreme Court cases justify *Roe* because the other cases do not involve a fetus.[118]

The OPM approach, however, fails on several grounds, as shown in the scholarly article *Originalism is Bunk* by University of Texas Law Professor Mitch Berman, as well as many other articles and books.[119] One practical problem is that when using OPM, the Fourteenth Amendment cannot support *Brown v. Board of Education* or women's equality.[120] On a theoretical level, OPM still leaves many ambiguous situations, allows manipulation of history, and is contrary to the

112. Walker et al., *supra* note 96.

113. *See* All. for Hippocratic Med. v. U.S. FDA, 668 F. Supp. 3d 507, 521–22 (N.D. Tex. 2023), *aff'd in part*, 78 F.4th 210 (5th Cir. 2023); Sophia Resnick, *Study Cited by Texas Judge in Abortion-Pill Case Retracted*, NC NEWSLINE (Feb. 6, 2024, 12:00 PM), https://ncnewsline.com/2024/02/06/study-cited-by-texas-judge-in-abortion-pill-case-retracted/ [https://perma.cc/C9RK-XAXJ] (reporting the most significant study that the judge relied upon is now being debunked, especially in light of the explicitly pro-life group involved; the study's publisher has even now formally published an "expression of concern" about its meeting scientific standards).

114. Klibanoff, *supra* note 97; *see also* Pam Belluck, *Use of Abortion Pills Has Risen Significantly Post Roe, Research Shows*, N.Y. TIMES, https://www.nytimes.com/2024/03/25/health/abortion-pills.html?smid=nytcore-ios-share&referringSource=articleShare (Mar. 25, 2024) (citing a Journal of American Medicine Association publication that shows "[b]efore Roe was overturned [overseas suppliers] provided abortion pills to about 1,400 women per month, but in the six months afterward, the average jumped to 5,900 per month").

115. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 241 (2022).

116. *Id.*

117. *Id.*

118. *Id.* at 270.

119. *See, e.g.*, Mitchell Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 93–96 (2009).

120. *See* 347 U.S. 483, 490 (1954) ("As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education."); *see also* U.S. CONST. amend. XIV (including no contemplation by the Framers about women when they passed the Fourteenth Amendment, though it does have general language).

flexible forward-looking approach that the Framers wanted with their new Constitution.[121] That document was not supposed to be a code stuck in time, as famously stated in cases like *McCulloch v. Maryland*.[122] The respected U.S. Supreme Court Justice Robert Jackson said of originalism: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[123]

But Justice Alito used originalism with history to focus on 1868, the year of the Fourteenth Amendment.[124] His approach was one-sided law office history. The issue is complex, and both sides have historians at their disposal, but Justice Alito did not really acknowledge that.[125] He relied predominantly on an Amicus Brief by impressive pro-life stalwarts, Professors George and Finnis.[126] But the pro-choice side, and the dissent, can rely on publications by impressive scholars and historians like Professor Leslie Reagan,[127] Professor Nancy Cott,[128] Professor

121. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885–88 (1985).

122. 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

123. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

124. Dobbs v. Jackson Women's Health Org., 597 U.S. 125, 250–51 (2022).

125. *See id.* at 223–302.

126. *See* Brief of Scholars of Jurisprudence John M. Finnis and Robert P. George as Amicus Curiae Supporting Petitioners, *supra* note 35.

127. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1943 (Univ. of Cal. Press 2022); LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA (Univ. of Cal. Press 2010).

128. Laura Ansley, *Abortion, Choice, and the Supreme Court*, PERSPS. ON HIST. (July 8, 2022), https://www.historians.org/research-and-publications/perspectives-on-history/summer-2022/abortion-choice-and-the-supreme-court-the-ahas-history-behind-the-headlines-webinar [https://perma.cc/3WQX-YCGC] (discussing Harvard historian Cott's views on abortion and what the Court got wrong about history in *Dobbs*).

Mary Ziegler,[129] Professor James Mohr,[130] Professor Carla Spivack,[131] and Professor Cyril Means.[132] This is quite a group, especially since it has some gender diversity. They concurred that the states never treated abortion as murder, or with the severity suggested by the *Dobbs* majority. Justice Alito's history also contains some errors according to an American Historical Association webinar.[133]

Indeed, Justice Blackmun in *Roe*, and the *Dobbs* dissenters, pointed out that abortion was not a crime before quickening at the original framing.[134] Moreover, women in 1868 could not generally pursue careers, vote, own property, become lawyers, or even stay in a hotel.[135] Modern constitutional doctrines such as the right to privacy and equal protection had not developed.[136] Justice Alito's reliance on 1868 takes him into anti-female legal dinosaur territory.[137] These doctrines came later, as the broad terms of the Constitution were meant to evolve when society changed.

In addition, the new American Medical Association (AMA), led by Dr. Horatio Storer, was largely responsible for the late nineteenth century movement to ban abortions.[138] But many historians contend Dr. Storer and the AMA were trying to facilitate the births of Anglo-Saxon children, and to monopolize the ob-

129. MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT (Yale Univ. Press 2022); MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT (Cambridge Univ. Press 2020); MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE (Harvard Univ. Press 2015).

130. JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY (Oxford Univ. Press 1978).

131. Carla Spivack, *To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England*, 14 WM. & MARY J. WOMEN & L. 107, 107–51 (2007).

132. Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L.F. 335, 336 (1971) (adverting to "the long period during which English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy, from the reign of Edward III to that of George III").

133. Ansley, *supra* note 128; *see also* Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F. 65, 87–88 (2023) (discussing historical errors by *Dobbs* majority).

134. Ansley, *supra* note 128.

135. *See id.*

136. *See id.*

137. *Id.*

138. Erin Blakemore, *The Criminalization of Abortion Began as a Business Tactic*, HIST., https://www.history.com/news/the-criminalization-of-abortion-began-as-a-business-tactic [https://perma.cc/Y5WF-BRZS] (May 15, 2019).

gyn area from predominantly non-white midwives.[139] Justice Alito responded that the Court should not examine a legislature's motives.[140] But that ignores dozens of contrary cases.[141] And there were other times in U.S. and global history when abortion was not viewed harshly, according to the American Historical Association, which supported the pro-choice side of history in *Dobbs*.[142]

Further, the Court should have more vigorously acknowledged that several factors are relevant to constitutional analysis. Phil Bobbitt referred to six modalities: prudentialism, ethics, structure, text, the Framer's view, and precedent.[143] A more recent list of modalities expands the list a bit by including pragmatism, national identity, and historical practice.[144] Justice Alito's opinion barely discussed the actual situation of women at all.[145]

Regarding Justice Alito's mistaken rejection of precedent, the list of substantive due process cases leading to *Roe* is legion.[146] It includes *Myers v. United States*,[147] *Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary*,[148] *Skinner v. Oklahoma*,[149] *Griswold v. Connecticut*,[150] *Eisenstadt v. Baird*,[151] and *Carey v. Population Services International*.[152] Moreover, the Court has reaffirmed *Roe* on many occasions before *Dobbs*, and there are subsequent cases like *Lawrence v. Texas* and *Obergefell v. Hodges* which rely on the right to privacy as derived from liberty.[153]

139. *Id.*; Rund Abdelfatah et al., *Before Roe: The Physicians' Crusade*, NPR (June 8, 2023, 12:15 AM), https://www.npr.org/2023/06/06/1180616572/before-roe-the-physicians-crusade-2022 [https://perma.cc/8NK5-9PZ7].

140. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 255 (2022).

141. *See* Blakemore, *supra* note 138.

142. *Id.*

143. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8 (Oxford Univ. Press 1984).

144. BRANDON J. MURRILL, CONG. RSCH. SERV., LSB10675, THE MODES OF CONSTITUTIONAL ANALYSIS: AN INTRODUCTION 2 (2021).

145. *See Dobbs*, 597 U.S. at 223–302.

146. *See id.*

147. 272 U.S. 52 (1926).

148. 268 U.S. 510 (1925).

149. 316 U.S. 535 (1942).

150. 381 U.S. 479 (1965).

151. 405 U.S. 438 (1972).

152. 431 U.S. 678 (1977).

153. Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

As mentioned, Justice Alito argues that these cases do not involve a potential human being.[154] But that begs the key question: whether the presence of the fetus should dwarf the woman's right to decide her destiny.[155] Thus, Justice Alito's argument is conclusory at best.

The reality is that zygotes, embryos, and pre-viable fetuses are not individual persons.[156] The fetus does not become a person until it is born alive—the born alive rule—under long established British and U.S. common law.[157] The famous British criminal law scholar Glanville Williams explained that the fetus is much less developed than a person, and completely dependent on the woman, thus has fewer rights than a person.[158] Williams is certainly right about the fetus before viability as *Roe* concluded, and Justice Alito did not assert that the fetus is a person.[159] On that point, he agreed with Justice Blackmun in *Roe*.[160]

But perhaps the most practical way of dealing with this issue is to conclude that the moral divide between the two sides on fetal status here will never be bridged, and that the analysis should therefore rely heavily on other factors, such as pragmatic consequences, which the prior section laid out.[161] These factors heavily favor the pro-choice position.

Further, *Dobbs* dismisses any equal protection argument because men cannot get pregnant.[162] But *United States v. Virginia* requires that women be allowed to attend the all-male Virginia Military Institute (VMI), even though women are physically different and require some accommodation.[163] Thus, Justice Alito's argument has been superseded here by the legendary Justice Ruth Bader

154. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256–57 (2022).

155. *See* Glanville Williams, *The Fetus and the "Right to Life,"* 53 CAMBRIDGE L.J. 71, 77–78 (1994).

156. *Id.*

157. *Id.*

158. *See id.*

159. *Compare id.*, *and* Roe v. Wade, 410 U.S. 113, 165–66 (1973), *with Dobbs*, 597 U.S. at 256–57.

160. *Compare Dobbs*, 597 U.S. at 223–302, *with Roe*, 410 U.S. at 133–34.

161. *See, e.g.*, Mark S. Kende, *Constitutional Pragmatism and Abortion*, 69 DRAKE L. REV. 799 (2021); *see supra* Part III.

162. *Dobbs*, 597 U.S. at 236–37.

163. *See* 518 U.S. 515, 556–58 (1996).

Ginsburg's *Virginia* opinion.[164] And three Republican appointed Justices supported *Casey*.[165] This is bipartisan.

V. STARE DECISIS

During his U.S. Senate confirmation hearing, Justice Brett Kavanaugh referred to *Roe* as a case where there is "precedent on precedent."[166] Years earlier, Justice Alito acknowledged *Roe* was an "important precedent" on the books for several decades.[167]

Further, Justice Alito told the Senate:

> [T]he doctrine of stare decisis is "a fundamental part of our legal system." This principle, he explained, "limits the power of the judiciary" and "reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions." Stare decisis, he added, is "not an inexorable command," but there must be a strong "[p]resumption that courts are going to follow prior precedents."[168]

Yet his opinion in *Dobbs* said "*Roe* was egregiously wrong from the start."[169] This is a troubling reversal of his Senate statement.[170] Further, Justice Thomas asserted at his confirmation that he had not thought about or discussed the

164. *See id.*

165. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843–44 (1992), *overruled by Dobbs*, 597 U.S. 215.

166. Tierney Sneed, *Brett Kavanaugh, Who Touted Importance of Precedent During Confirmation Fight, Downplays It as He Considers Reversing Roe*, CNN POL., https://www.cnn.com/2021/12/01/politics/kavanaugh-abortion-precedent-roe-mississippi/index.html [https://perma.cc/X59K-LWHF] (Dec. 2, 2021, 11:30 AM).

167. King & Bravender, *supra* note 8.

168. Geoffrey R. Stone, *Stone on Roberts, Alito, and Stare Decisis*, UNIV. OF CHI. L. SCH. (Oct. 23, 2007), https://www.law.uchicago.edu/news/stone-roberts-alito-and-stare-decisis [https://perma.cc/87DU-P76R].

169. *Dobbs*, 597 U.S. at 268; *see also* The Associated Press, *'Roe was Egregiously Wrong': Read Key Excerpts from Supreme Court Abortion Ruling*, THE OREGONIAN, https://www.oregonlive.com/politics/2022/06/roe-was-egregiously-wrong-read-key-excerpts-from-supreme-court-abortion-ruling.html [https://perma.cc/9BWZ-PXLJ] (June 24, 2022, 3:14 PM).

170. *Compare Dobbs*, 597 U.S. at 268, *with* Stone, *supra* note 168.

correctness of *Roe*, which is hard to believe.[171] The Court's overturning of *Roe* was extraordinary. *Roe* lasted 50 years and many women have framed their personal and professional lives around this opinion.[172] Another important stare decisis factor is workability.[173] Certainly, little has changed regarding the feasibility of abortions.

Stare decisis is also supposed to account for whether legal developments have changed case law dramatically.[174] That had not happened in the abortion area.[175] One of the Court's last abortion cases was *Whole Woman's Health v. Hellerstedt*, which struck down a Texas law unnecessarily requiring that abortion clinics had to become like mini-hospitals.[176] And *Obergefell* is not old.[177] Thus, *Dobbs* is a shot out of the blue that deviates completely from prior case law.[178] By contrast, *Brown* only reversed *Plessy* after many cases had chipped away incrementally at segregation because stare decisis commanded as much.[179] Justice Alito, however, decimated stare decisis by exercising unprincipled, raw judicial power.[180] Even the conservative Chief Justice John Roberts did not agree with how far Justice Alito went in *Dobbs*.[181] Chief Justice Roberts sought a much narrower ruling.[182] The *Casey* Republican plurality of Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter would have been horrified by Justice Alito's catch-all approach.[183]

171. *See Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 222–23 (1991) (statement of Clarence Thomas, Supreme Court Justice Nominee).

172. *See Dobbs*, 597 U.S. at 288–89.

173. *Id.* at 267–68.

174. *Id.* at 395 (Breyer, J., dissenting).

175. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).

176. *Id.* at 627.

177. Obergefell v. Hodges, 576 U.S. 644, 644 (2015).

178. *See, e.g.*, *Hellerstedt*, 579 U.S. at 627.

179. *Compare Dobbs*, 579 U.S. at 215, *with* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

180. The Associated Press, *supra* note 169.

181. *Dobbs*, 597 U.S. at 347–59 (Roberts, J., concurring).

182. *Id.*

183. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992), *overruled by Dobbs*, 597 U.S. 215 ("Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.").

VI. CONCLUSION

Abortion is one of the most controversial issues in U.S. constitutional law and in some other societies. Yet even heavily Christian nations such as Germany and Ireland have essentially legalized abortion.[184] They are not stuck in the past. Also, virtually no foreign nations use an originalist, backwards looking, interpretive methodology or believe such a method is workable. In sum, *Dobbs* is an impractical, movement conservative decision that ignores meaningful aspects of the rule of law.

184. Claire Cain Miller & Margot Sanger-Katz, *On Abortion Law, the U.S. Is Unusual. Without Roe, It Would Be, Too.*, N.Y. TIMES, https://www.nytimes.com/2022/01/22/upshot/abortion-us-roe-global.html (May 4, 2022).