



## ***Dobbs v. Jackson Women's Health Organization:*** **The Overturn of *Roe v. Wade***

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### **Introduction**

On June 24, 2022, the Supreme Court issued its landmark ruling in *Dobbs v. Jackson Women's Health Organization*, overruling *Roe v. Wade*,<sup>1</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>2</sup> and nearly fifty years of federal constitutional travesty that manufactured a woman's right to abort her unborn child.<sup>3</sup> Justice Alito penned the majority opinion, joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. Chief Justice Roberts concurred only in the judgment, while Justices Breyer, Sotomayor, and Kagan issued a joint dissent. The ruling comes after the unprecedented leak of the draft opinion by an unknown individual to the press in May of 2022.<sup>4</sup> Despite the leak, the majority did not waver in overruling *Roe* and *Casey*, and the opinion's text remains largely unchanged. As Justice Alito summarizes:

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.<sup>5</sup>

### **Background**

The Supreme Court first contrived the “right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy” in *Roe* in 1973.<sup>6</sup> In 1992 in *Casey*, the Court clarified that abortion was a substantive due process right and reaffirmed the right to a pre-viability abortion “is the most central principle of

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> 505 U.S. 833 (1992).

<sup>3</sup> *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_\_ (June 24, 2022).

<sup>4</sup> Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, Politico (May 2, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

<sup>5</sup> *Dobbs*, slip op. at 5–6.

<sup>6</sup> 410 U.S. at 153.

*Roe v. Wade*.<sup>7</sup> Accordingly, the Supreme Court crafted the undue burden standard to analyze the constitutionality of abortion regulations. The test was a “shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>8</sup>

*Dobbs* challenged *Casey*'s undue burden standard and *Roe*'s purported abortion right. The case concerned Mississippi's Gestational Age Act, which limits abortions after fifteen weeks gestation to medical emergencies and cases of severe fetal disability.<sup>9</sup> Both the district court and Fifth Circuit Court of Appeals held the Act was unconstitutional, acting as a ban on a woman's right to a pre-viability abortion.<sup>10</sup>

*Dobbs* went before the Supreme Court on the issue of “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional.”<sup>11</sup> *Dobbs* not only implicated *Casey*'s undue burden standard, which relied upon an arbitrary viability line, but also *Roe*'s legitimacy in fabricating abortion as a constitutional right.

There was extensive participation in the arguments for and against *Dobbs*, with more than eighty pro-life *amicus curiae* (“friend of the court”) briefs supporting Mississippi, joined by more than fifty *amicus curiae* briefs supporting Jackson Women's Health Organization.

The Supreme Court heard oral argument in *Dobbs v. Jackson Women's Health Organization* on December 1, 2021.<sup>12</sup> Mississippi argued the Court should reverse *Roe* and *Casey* and return the abortion issue to the states. According to the State,

The Constitution places its trust in the people. On hard issue after hard issue, the people make this country work. Abortion is a hard issue. It demands the best from all of us, not a judgment by just a few of us. When an issue affects everyone and when the Constitution does not take sides on it, it belongs to the people.<sup>13</sup>

Jackson Women's Health Organization, the abortion clinic, contended the Act is “flatly unconstitutional under decades of precedent” and urged the Court to affirm *Roe* and *Casey* under *stare decisis* principles and a social reliance theory.<sup>14</sup> The United States, participating in oral argument as *amicus curiae* in support of the abortion clinic, similarly urged the Court to affirm because “[t]hat guarantee that the state cannot force a woman to carry a pregnancy to term and give birth has engendered substantial

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<sup>7</sup> 505 U.S. at 871.

<sup>8</sup> *Id.* at 877.

<sup>9</sup> Miss. Code § 41-41-191 (2018).

<sup>10</sup> *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 545 (S.D. Miss. 2018); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 274 (5th Cir. 2019).

<sup>11</sup> Petition for a Writ of Certiorari at i, *Dobbs*, 597 U.S. \_\_\_\_ (June 15, 2020).

<sup>12</sup> 597 U.S. \_\_\_\_ (Dec. 1, 2021).

<sup>13</sup> Transcript of Oral Argument at 5, *Dobbs*, 597 U.S. \_\_\_\_ (Dec. 1, 2021).

<sup>14</sup> *Id.* at 47–48.

individual and societal reliance,” and overruling *Roe* and *Casey* would be “a stark departure from principles of stare decisis.”<sup>15</sup>

After months of anticipation, the Supreme Court handed down the *Dobbs* decision on June 24, 2022.

## What *Dobbs* Said

### Majority Opinion

Justice Alito authored the opinion of the Court, joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. The majority “hold[s] that *Roe* and *Casey* must be overruled,” and, accordingly, “return[s] the issue of abortion to the people’s elected representatives.”<sup>16</sup> As the Court recognizes, “*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.”<sup>17</sup>

The Court “begin[s] by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion.”<sup>18</sup> The Court immediately notes that:

*Roe* . . . was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned . . . And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.<sup>19</sup>

Year later, “[t]he *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the ‘liberty’ protected by the Fourteenth Amendment’s Due Process Clause.”<sup>20</sup>

Before delving into its due process analysis, however, the Court forecloses any claim that abortion is protected under the Equal Protection Clause. As the Court writes, “a State’s regulation of abortion is not a sex-based classification and is thus not subject to the ‘heightened scrutiny’ that applies to such classifications.”<sup>21</sup> “[T]he ‘goal of preventing abortion’ does not constitute ‘invidiously discriminatory animus’ against women.”<sup>22</sup> The majority concludes that “laws regulating or prohibiting abortion are not

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<sup>15</sup> *Id.* at 85.

<sup>16</sup> *Dobbs*, slip op. at 5–6.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 11 (citation omitted).

subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.”<sup>23</sup>

The Court then pivots “to *Casey*’s bold assertion that the abortion right is an aspect of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”<sup>24</sup> The Due Process Clause protects rights guaranteed by the first eight Amendments, and, at issue in *Dobbs*, unenumerated fundamental rights. The Court must “ask[] whether the right is ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’”<sup>25</sup> As part of this analysis the Court must “engage[] in a careful analysis of the history of the right at issue.”<sup>26</sup> Yet when the Court “engage[s] in that inquiry [regarding “liberty” in the Fourteenth Amendment] in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.”<sup>27</sup>

The majority then considers the legal history of abortion, concluding that “*Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*’s faulty historical analysis.”<sup>28</sup> At common law, “abortion was a crime at least after ‘quickening’—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.”<sup>29</sup> The Court elaborates that “[a]lthough a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*.”<sup>30</sup> Rather, “common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, [but] none endorsed the practice.”<sup>31</sup>

In the United States, “the historical record is similar.”<sup>32</sup> The Court writes that “[t]he few cases available from the early colonial period corroborate that abortion was a crime . . . And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime.”<sup>33</sup>

The Court then notes that many scholars attribute the quickening line as an evidentiary standard.<sup>34</sup> Nevertheless, “the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century” because it was not in accordance with medicine or the common law.<sup>35</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 12 (citation omitted) (alterations in original).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 14–15.

<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 18.

<sup>31</sup> *Id.* at 19–20.

<sup>32</sup> *Id.* at 20.

<sup>33</sup> *Id.* at 21.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 22.

Citing its well-researched appendix of 19th century abortion laws, the Court notes:

By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. . . . Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910.<sup>36</sup>

As new states entered the Union, “[a]ll of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico).”<sup>37</sup> “By the end of the 1950s, according to the *Roe* Court’s own count, statutes in all but four States and the District of Columbia prohibited abortion ‘however and whenever performed, unless done to save or preserve the life of the mother.’”<sup>38</sup> As the Court finds, “[t]his overwhelming consensus endured until the day *Roe* was decided.”<sup>39</sup>

Accordingly, “[t]he inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.”<sup>40</sup>

The Court next examines whether “the abortion right is an integral part of a broader entrenched right.”<sup>41</sup> In its “mystery passage,” *Casey* had stated “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>42</sup> The *Dobbs* Court rebutted this statement, summarizing that “[w]hile individuals are certainly free *to think* and *to say* what they wish about ‘existence,’ ‘meaning,’ the ‘universe,’ and ‘the mystery of human life,’ they are not always free *to act* in accordance with those thoughts.”<sup>43</sup> “Ordered liberty sets limits and defines the boundary between competing interests.”<sup>44</sup> *Roe* and *Casey* had arbitrarily drawn a line between the interests of a woman seeking an abortion and the interests in prenatal human life. States may seek to draw different lines between these interests.

The Court continues, “[n]or does the right to obtain an abortion have a sound basis in precedent.”<sup>45</sup> Cases involving marriage, contraception, and child-rearing are inherently different from abortion. “Abortion destroys what [*Roe* and *Casey*] call ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn

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<sup>36</sup> *Id.* at 23–24.

<sup>37</sup> *Id.* at 24.

<sup>38</sup> *Id.* (citing *Roe*, 410 U.S. at 139).

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

<sup>40</sup> *Id.* at 25.

<sup>41</sup> *Id.* at 30.

<sup>42</sup> *Id.* (citing *Casey*, 505 U.S. at 851).

<sup>43</sup> *Id.* at 30–31.

<sup>44</sup> *Id.* at 31.

<sup>45</sup> *Id.*

human being.”<sup>46</sup> Finally, although “[b]oth sides make important policy arguments,” abortion proponents have failed to show how the Supreme Court has authority to weigh those arguments.<sup>47</sup>

The majority opinion then notes the dissent is “candid that it cannot show that a constitutional right to abortion has any foundation, let alone a ‘deeply rooted’ one, ‘in this Nation’s history and tradition.’”<sup>48</sup> “The dissent’s failure to engage with this long tradition is devastating to its position.”<sup>49</sup> The dissent “contends that the ‘constitutional tradition’ is ‘not captured whole at a single moment,’ and that its ‘meaning gains content from the long sweep of our history and from successive judicial precedents.’”<sup>50</sup> According to the majority, “[t]his vague formulation imposes no clear restraints on what Justice White called the ‘exercise of raw judicial power,’ . . . and while the dissent claims that its standard ‘does not mean anything goes’ . . . any real restraints are hard to discern.”<sup>51</sup> Finally, “[t]he most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States’ interest in protecting fetal life.”<sup>52</sup> According to the majority, “[t]he dissent . . . would impose on the people a particular theory about when the rights of personhood begin.”<sup>53</sup>

The Court next “consider[s] whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*.”<sup>54</sup> The majority notes “[s]ome of our most important constitutional decisions have overruled prior precedents,”<sup>55</sup> such as *Brown v. Board of Education*,<sup>56</sup> *West Coast Hotel Co. v. Parrish*,<sup>57</sup> and *West Virginia Board of Education v. Barnette*.<sup>58</sup> In a footnote that spans three pages, the Court lists cases that have “overruled important constitutional decisions.”<sup>59</sup> The majority then turns to a five-factor analysis of *stare decisis*. *Roe* and *Casey* fail under each factor.

(1) The decision first analyzes the nature of the Court’s error. Comparing abortion jurisprudence to *Plessy v. Ferguson*,<sup>60</sup> in which the Supreme Court instituted the racist “separate but equal” doctrine,” the Court found “*Roe* was also egregiously wrong and deeply damaging. . . . *Roe*’s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.”<sup>61</sup> The Court continues, “*Roe* was on a collision course with the Constitution

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<sup>46</sup> *Id.* at 32.

<sup>47</sup> *Id.* at 35.

<sup>48</sup> *Id.* (citation omitted).

<sup>49</sup> *Id.* at 35–36.

<sup>50</sup> *Id.* at 36.

<sup>51</sup> *Id.* at 36–37.

<sup>52</sup> *Id.* at 37.

<sup>53</sup> *Id.* at 38.

<sup>54</sup> *Id.* at 39.

<sup>55</sup> *Id.* at 40.

<sup>56</sup> 347 U.S. 483 (1954).

<sup>57</sup> 300 U.S. 379 (1937).

<sup>58</sup> 319 U.S. 624 (1943).

<sup>59</sup> *Dobbs*, slip op. at 41 & n.48.

<sup>60</sup> 163 U.S. 537 (1896).

<sup>61</sup> *Dobbs*, slip op. at 44.

from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people.”<sup>62</sup>

(2) The next factor is the quality of the reasoning. As the Court recognizes, “[*Roe*] was more than just wrong. It stood on exceptionally weak grounds.”<sup>63</sup> As Justice Alito describes:

*Roe* found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to “viability”) was never raised by any party and has never been plausibly explained. *Roe*’s reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.<sup>64</sup>

When the Court revisited the abortion “right” in *Casey*, it “pointedly refrained from endorsing most of its reasoning” and instituted “an arbitrary ‘undue burden’ test.”<sup>65</sup> The Court particularly highlights that “*Roe*’s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong.”<sup>66</sup>

The Court then addresses *Roe*’s flawed analysis of precedents involving constitutional privacy. Even though the “[*Roe*] Court found support for a constitutional ‘right of personal privacy,’ . . . it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference.”<sup>67</sup> The Court continues: “[o]nly the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield,”<sup>68</sup> such as *Pierce v. Society of Sisters*<sup>69</sup> and *Meyer v. Nebraska*.<sup>70</sup> “What remained was a handful of cases having something to do with marriage . . . or procreation . . . . But none of these decisions

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 45.

<sup>64</sup> *Id.* at 45–46.

<sup>65</sup> *Id.* at 46.

<sup>66</sup> *Id.* at 48.

<sup>67</sup> *Id.* at 48–49.

<sup>68</sup> *Id.* at 49.

<sup>69</sup> 268 U.S. 510 (1925).

<sup>70</sup> 262 U.S. 390 (1923).

involved what is distinctive about abortion: its effect on what *Roe* termed ‘potential life.’”<sup>71</sup>

Ultimately, “[t]he scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body,” but failed to “provide . . . any cogent justification for the lines it drew.”<sup>72</sup> The Court continues, “[a]n even more glaring deficiency was *Roe*’s failure to justify the critical distinction it drew between pre- and post-viability abortions.”<sup>73</sup> *Roe* justified the viability line with two sentences: “With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb.”<sup>74</sup> As the *Dobbs* Court recognizes, “clearly, this mistakes ‘a definition for a syllogism.’”<sup>75</sup> Critics of an unborn child’s legal “personhood” have put forward the “essential attributes . . . are sentience, self-awareness, the ability to reason, or some combination thereof.” As the Court explains, “[b]y this logic, it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as ‘persons.’”<sup>76</sup>

Regardless, the Court writes, “it is very hard to see why viability should mark the point where ‘personhood’ begins.”<sup>77</sup> Viability depends upon neonatal care, the quality of the medical facility, and a physician’s determination of the child’s odds of surviving outside the womb.<sup>78</sup> “The viability line, which *Casey* termed *Roe*’s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line.”<sup>79</sup>

“When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*’s reasoning was defended or preserved,” and “[t]he Court also made no real effort to remedy one of the greatest weaknesses in *Roe*’s analysis: its much-criticized discussion of viability.”<sup>80</sup> The *Casey* Court:

either refused to reaffirm or rejected important aspects of *Roe*’s analysis, failed to remedy glaring deficiencies in *Roe*’s reasoning, endorsed what it termed *Roe*’s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*’s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.

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<sup>71</sup> *Dobbs*, slip op. at 49.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 50.

<sup>74</sup> *Id.* at 50 (citing *Roe*, 410 U.S. at 163).

<sup>75</sup> *Id.* (citations omitted).

<sup>76</sup> *Id.* at 51.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 52–53.

<sup>79</sup> *Id.* at 53.

<sup>80</sup> *Id.* at 55.



The majority decision finally notes that “*Casey* also deployed a novel version of the doctrine of *stare decisis* . . . [which] did not account for the profound wrongness of the decision in *Roe*, and placed great weight on an intangible form of reliance with little if any basis in prior case law.”<sup>81</sup>

(3) The Court then looks at the workability of abortion jurisprudence. To begin, the Court recognizes that “*Casey*’s ‘undue burden’ test has scored poorly on the workability scale.”<sup>82</sup> “Problems begin with the very concept of an ‘undue burden.’”<sup>83</sup> The Court cites Justice Scalia’s partial dissent in *Casey*, which recognized that “determining whether a burden is ‘due’ or ‘undue’ is ‘inherently standardless.’”<sup>84</sup> The undue burden standard’s subsidiary rules “created their own problems.”<sup>85</sup> “*Casey* provided no clear answer to these questions” and the Court has argued over the proper interpretation of the undue burden test,<sup>86</sup> such as in *Whole Woman’s Health v. Hellerstedt*.<sup>87</sup>

The majority continues, “[t]he difficulty of applying *Casey*’s new rules surfaced in that very case” when the Justices reached opposite legal conclusions under the same legal test.<sup>88</sup> Similarly, *Casey*’s undue burden standard “has generated a long list of Circuit conflicts.”<sup>89</sup> Among other areas, the Courts of Appeals have split over whether to apply *Hellerstedt*’s novel interpretation of the undue burden standard, parental notification rules, restrictions on dismemberment abortions, whether an increase in time to go to the clinic is an undue burden, prenatal nondiscrimination laws, and the large fraction test.<sup>90</sup> The Court summarizes, “[c]ontinued adherence to that standard would undermine, not advance, the ‘evenhanded, predictable, and consistent development of legal principles.’”<sup>91</sup>

(4) The Court then critiques *Roe* and *Casey*’s negative effect on other areas of law. Noting the “abortion distortion,” Justice Alito recognizes that “*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines.”<sup>92</sup> These areas include the strict standard for facial constitutional challenges, third-party standing, *res judicata*, rules on the severability of unconstitutional provisions, and First Amendment doctrines. Ultimately, “[w]hen vindicating a doctrinal innovation [*i.e.*, a purported abortion right] requires courts to engineer exceptions to longstanding background rules,

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<sup>81</sup> *Id.* at 56.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 57.

<sup>84</sup> *Id.* (citing 505 U.S. at 992).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 58–59.

<sup>87</sup> 579 U.S. 582 (2016).

<sup>88</sup> *Dobbs*, slip op. at 59.

<sup>89</sup> *Id.* at 60.

<sup>90</sup> *Id.* at 60–61.

<sup>91</sup> *Id.* at 62.

<sup>92</sup> *Id.*

the doctrine ‘has failed to deliver the principled and intelligible development of the law that *stare decisis* purports to secure.’”<sup>93</sup>

(5) The final factor analyzes the reliance interests. “Traditional reliance interests arise ‘where advance planning of great precision is most obviously a necessity.’”<sup>94</sup> Yet, even “*Casey*[’s] controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally ‘unplanned activity,’ and ‘reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.’”<sup>95</sup>

*Casey* instead created “a more intangible form of reliance,”<sup>96</sup> finding that:

“[P]eople [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail” and that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>97</sup>

The Court notes that this form of reliance is subjective and the “Court is ill-equipped to assess ‘generalized assertions about the national psyche.’”<sup>98</sup> The Court recognizes there are “impassioned and conflicting arguments about the effects of the abortion right on the lives of women,” but the “Court has neither the authority nor expertise to adjudicate those disputes.”<sup>99</sup> The “[*Dobbs*] decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.”<sup>100</sup> Justice Alito finally notes that “[*Dobbs*] concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”<sup>101</sup>

After finding that abortion jurisprudence fails each *stare decisis* factor, the Court analyzes the impact *Dobbs* will have on the public perception of the Supreme Court. Justice Alito recognizes “that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach.”<sup>102</sup> Nevertheless, “[the Court] cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by

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<sup>93</sup> *Id.* at 63 (citations omitted).

<sup>94</sup> *Id.* at 64.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (citing *Casey*, 505 U.S. at 856) (first alteration added).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 65.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 66.

<sup>102</sup> *Id.* at 67.

any extraneous influences such as concern about the public’s reaction to our work.”<sup>103</sup> *Casey* was wrong to declare the abortion issue “closed,” as “[t]he Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles.”<sup>104</sup> Similarly, “*Roe* ‘inflamed’ a national issue that has remained bitterly divisive for the past half century,” and twenty-six States specifically asked the Supreme Court to overrule *Roe* and *Casey*.<sup>105</sup>

The majority then addresses how “the dissent’s understanding of *stare decisis* . . . breaks with tradition” since the dissent would never overrule precedent unless there are “major legal or factual changes undermining [the] decision’s original basis.”<sup>106</sup> Under this view, “overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black schoolchildren had suffered all its effects.”<sup>107</sup> “[*S*]*tare decisis* is not a straitjacket” for egregiously wrong decisions.<sup>108</sup> Regardless, even under the dissent’s view of *stare decisis*, the majority has pointed out major legal and factual post-*Casey* developments. Finally, unlike the dissent’s assertion, *Dobbs* does not call *Griswold v. Connecticut*,<sup>109</sup> *Eisenstadt v. Baird*,<sup>110</sup> *Lawrence v. Texas*,<sup>111</sup> or *Obergefell v. Hodges*<sup>112</sup> into question.

Justice Alito next turns to the Chief Justice’s concurrence in the judgment. The Chief Justice would uphold Mississippi’s 15-week limit under a “reasonable opportunity” litigation standard but would “leave for another day whether to reject any right to an abortion at all.”<sup>113</sup> No party or *amicus* brief proposed the reasonable opportunity standard and “[t]he concurrence would do exactly what it criticizes *Roe* for doing: pulling ‘out of thin air’ a test that ‘[n]o party or *amicus* asked the Court to adopt.’”<sup>114</sup> According to the majority, “[t]he concurrence’s most fundamental defect is its failure to offer any principled basis for its approach.”<sup>115</sup> If the Court left the issue of whether to overturn *Roe* and *Casey* for another day, it quickly would have another abortion case before it, such as a lawsuit involving cascading gestational limits.

The majority then recognizes that rational basis review is the appropriate litigation standard for abortion lawsuits. “[T]he States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 67–68.

<sup>105</sup> *Id.* at 68.

<sup>106</sup> *Id.* at 69 (second alteration in original).

<sup>107</sup> *Id.* at 70.

<sup>108</sup> *Id.*

<sup>109</sup> 381 U.S. 479 (1965) (recognizing a right of married persons to obtain contraception).

<sup>110</sup> 405 U.S. 438 (1972) (recognizing a right of unmarried persons to access contraception).

<sup>111</sup> 539 U.S. 558 (2003) (recognizing a right to engage in private, consensual sexual acts).

<sup>112</sup> 576 U.S. 644 (2015) (recognizing a right to same-sex marriage).

<sup>113</sup> *Id.* at 7 (Roberts, C.J., concurring in the judgment).

<sup>114</sup> *Id.* at 73 (majority) (citing slip op. at 3 (Roberts, C.J., concurring in the judgment)) (second alteration in original).

<sup>115</sup> *Id.*

cannot ‘substitute their social and economic beliefs for the judgment of legislative bodies.’”<sup>116</sup> “A law regulating abortion, like other health and welfare laws, is entitled to a ‘strong presumption of validity.’”<sup>117</sup> Mississippi’s Gestational Age Act easily passes muster under rational basis review.

The Court concludes: “Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.”<sup>118</sup>

### Justice Thomas’ Concurrence

Concurring in the opinion, Justice Thomas agrees “there is no constitutional right to abortion,” but writes separately to highlight the flaws of substantive due process.<sup>119</sup> The Justice describes substantive due process as “an oxymoron that ‘lack[s] any basis in the Constitution.’”<sup>120</sup> “[T]he Due Process Clause at most guarantees *process* . . . . The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.”<sup>121</sup>

Justice Thomas agrees that abortion is unique and does not implicate other substantive due process jurisprudence,<sup>122</sup> such as *Griswold*,<sup>123</sup> *Lawrence*,<sup>124</sup> and *Obergefell*.<sup>125</sup> Accordingly, “[n]othing in [the Court’s] opinion should be understood to cast doubt on precedents that do not concern abortion.”<sup>126</sup> However, the Justice urges the Court “in future cases [to] reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”<sup>127</sup> Justice Thomas notes the Court should consider whether those rights have support elsewhere in the Constitution, such as in the Privileges or Immunities Clause, but the Court would also need to establish “whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights.”<sup>128</sup> Regardless, “abortion is not [a right] under any plausible interpretive approach [of the Constitution.]”<sup>129</sup>

Substantive due process has “[a]t least three dangers [that] favor jettisoning the doctrine entirely.”<sup>130</sup> First, the doctrine involves policymaking and “exalts judges at the

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<sup>116</sup> *Id.* at 77 (citation omitted).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 78–79.

<sup>119</sup> *Dobbs*, slip op. at 1 (Thomas, J., concurring).

<sup>120</sup> *Id.* at 2 (citations omitted) (alteration in original).

<sup>121</sup> *Id.* (emphasis in original).

<sup>122</sup> *Id.* at 3 (citing majority opinion at 31–32, 66, 71–72).

<sup>123</sup> 381 U.S. 479.

<sup>124</sup> 539 U.S. 58.

<sup>125</sup> 576 U.S. 644.

<sup>126</sup> *Dobbs*, slip op. at 3 (Thomas, J., concurring) (citing majority opinion at 66) (alternations in original).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 3–4 (emphasis in original).

<sup>129</sup> *Id.* at 4.

<sup>130</sup> *Id.*

expense of the People from whom they derive their authority.”<sup>131</sup> Abortion jurisprudence highlights this issue as “50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification.”<sup>132</sup> Second, “substantive due process distorts other areas of constitutional law,” such as the Equal Protection Clause, vagueness, and overbreadth doctrines.<sup>133</sup> As the Justice decries, “[s]ubstantive due process is the core inspiration for many of the Court’s constitutionally unmoored policy judgments.”<sup>134</sup> Third, the doctrine “is often wielded to ‘disastrous ends,’”<sup>135</sup> such as in *Dred Scott v. Sandford*.<sup>136</sup> Justice Thomas concludes, “the Court rightly overrules *Roe* and *Casey*—two of this Court’s ‘most notoriously incorrect’ substantive due process decisions . . . after more than 63 million abortions have been performed . . . . The harm caused by this Court’s forays into substantive due process remains immeasurable.”<sup>137</sup>

### Justice Kavanaugh’s Concurrence

Justice Kavanaugh, concurring in the opinion, writes separately to highlight the Constitution’s neutrality towards abortion and the Court’s role in maintaining this neutral position. The Justice begins by recognizing “[a]bortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life.”<sup>138</sup> Throughout pregnancy, abortion policy weighs one interest over the other.<sup>139</sup>

While the Court “has held that the Constitution protects unenumerated rights that are deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty,” Justice Kavanaugh renounces the notion that abortion fits within this description.<sup>140</sup> The Justice also rejects the argument, as espoused by some *amicus* briefs, that the “Constitution *outlaws* abortion throughout the United States.”<sup>141</sup> Instead, the Justice calls for the Court to be “scrupulously neutral” so as not to disrupt the democratic process by revoking the vote of the people in matters about which the Constitution is silent.<sup>142</sup>

The Justice’s concurrence emphasizes *Casey*’s futile attempt to change the American minds on the abortion issue, which ultimately undermines its precedential force under traditional *stare decisis* factors.<sup>143</sup> The “continued and significant opposition to *Roe*,” illustrated by the twenty-six states that petitioned for its overturning in *Dobbs*

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<sup>131</sup> *Id.* (citation omitted).

<sup>132</sup> *Id.* at 5.

<sup>133</sup> *Id.* at 5–6.

<sup>134</sup> *Id.* at 6.

<sup>135</sup> *Id.* (citation omitted).

<sup>136</sup> 19 How. 393 (1857) (holding that enslaved people were not citizens of the United States and had no government protection).

<sup>137</sup> *Id.* at 6–7.

<sup>138</sup> *Dobbs*, slip op. at 1 (Kavanaugh, J., concurring).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 3.

<sup>142</sup> *Id.* at 12.

<sup>143</sup> See *Casey*, 505 U.S. at 855–56.

“is relevant to assessing *Casey* on its own terms.”<sup>144</sup> Justice Kavanaugh notes that *Casey* created a unique application of *stare decisis* which intended to end the national debate regarding abortion.<sup>145</sup> The outcome of this assessment, the Justice argues, fails to prove what *stare decisis* requires.<sup>146</sup> Rather than settle the debate, laws in over half of the States directly contradict *Roe*.<sup>147</sup> The Justice purports that the continued explicit request to overturn a case decided forty-nine years ago alongside the “negative jurisprudential and real-world consequences” compound to create a strong incentive to overrule *Roe*.<sup>148</sup>

Justice Kavanaugh reaffirms that this decision “does *not* threaten or cast doubt on those precedents” involving contraception and marriage,<sup>149</sup> namely, *Griswold*,<sup>150</sup> *Eisenstadt*,<sup>151</sup> *Loving v. Virginia*,<sup>152</sup> and *Obergefell*.<sup>153</sup> Nor does the decision alter constitutional doctrines regarding interstate travel, due process, or *ex post facto* laws.<sup>154</sup> The Justice notes that while the Court may still review legal questions related to abortion, “those difficult moral and policy questions [regarding gestational limits] will be decided, as the Constitution dictates, by the people and their elective representatives through the constitutional processes of democratic self-government.”<sup>155</sup> Justice Kavanaugh concludes, “the Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral.”<sup>156</sup>

### Chief Justice Roberts’ Concurrence in the Judgment

Chief Justice Roberts concurred in the judgment, agreeing with the majority that Mississippi’s fifteen-week gestational limitation is constitutional, but disagreeing with their decision to overturn *Roe* and *Casey*.<sup>157</sup> The Chief Justice recognizes “the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense.”<sup>158</sup> However, under principles of judicial restraint and *stare decisis*, he would maintain the underlying abortion right.<sup>159</sup>

The Chief Justice details the arbitrariness of *Roe*’s litigation standard: “*Roe* set forth a rigid three-part framework anchored to viability, which more closely resembled a regulatory code than a body of constitutional law. That framework, moreover, came out of thin air.”<sup>160</sup> He notes the parties in *Roe* and *Casey* had not extensively briefed the viability issue, and “[i]t is hardly surprising that neither *Roe* nor *Casey* made a persuasive

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<sup>144</sup> *Dobbs*, slip op. at 9 n.5 (Kavanaugh, J., concurring).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 10.

<sup>147</sup> *Id.* at 9.

<sup>148</sup> *Id.* at 7.

<sup>149</sup> *Id.* at 10 (emphasis in original).

<sup>150</sup> 381 U.S. 479.

<sup>151</sup> 405 U.S. 438.

<sup>152</sup> 388 U.S. 1 (2015).

<sup>153</sup> 576 U.S. 644.

<sup>154</sup> *Dobbs*, slip op. at 10 (Kavanaugh, J., concurring).

<sup>155</sup> *Id.* at 11.

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

<sup>157</sup> *Id.* at 1–2 (Roberts, C.J., concurring in the judgment).

<sup>158</sup> *Id.* at 1.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 2–3.

or even colorable argument for why the time for terminating a pregnancy must extend to viability.”<sup>161</sup> “*Roe*’s defense of the line boiled down to the circular assertion that the State’s interest is compelling only when an unborn child can live outside the womb, because that is when the unborn child can live outside the womb.”<sup>162</sup> *Casey*’s justification of the viability line was hollow, and “the best defense of the viability line the *Casey* plurality could conjure up was workability.”<sup>163</sup>

Since the time of *Casey*, the Court, “has ‘eroded’ the ‘underpinnings’ of the viability line, such as they were.”<sup>164</sup> The Chief Justice notes that in *Gonzales v. Carhart*,<sup>165</sup> the Court “recognized a broader array of interests,” such as societal ethics, the integrity of the medical profession, and clearly distinguishing between abortion and infanticide, in addition to the previously recognized interests in maternal health and protection of, as *Roe* phrased it, “potential life.”<sup>166</sup>

Roberts summarizes that “the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate.”<sup>167</sup> Furthermore, he notes that only a handful of countries permit elective abortions after twenty-weeks’ gestation, including North Korea and China.<sup>168</sup>

After dismissing the viability standard, Roberts proceeds to defend *Roe*’s underlying holding. He first criticizes the Court for considering an issue that was not part of the original grant of *certiorari*. “Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all.”<sup>169</sup> The Chief Justice notes that the Court should not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”<sup>170</sup>

Next, Chief Justice Roberts attempts to resolve the viability issue while still protecting *Roe*’s essential holding. He would institute a new “reasonable opportunity” litigation standard that reviews whether an abortion law “provid[es] an adequate opportunity [for a woman] to exercise the right *Roe* protects.”<sup>171</sup>

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<sup>161</sup> *Id.* at 3.

<sup>162</sup> *Id.* (citations omitted).

<sup>163</sup> *See id.*

<sup>164</sup> *Id.* at 4 (citing *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

<sup>165</sup> 548 U.S. 938 (2006).

<sup>166</sup> *Dobbs*, slip op. at 4 (Roberts, C.J., concurring in the judgment) (citations omitted).

<sup>167</sup> *Id.* at 5.

<sup>168</sup> *See id.* (citation omitted).

<sup>169</sup> *Id.* at 7.

<sup>170</sup> *Id.* at 6 (citations omitted).

<sup>171</sup> *Id.* at 9.

Finally, the majority opinion had cited three landmark constitutional decisions that overruled prior Supreme Court precedents: *Brown*,<sup>172</sup> *Barnette*,<sup>173</sup> and *West Coast Hotel Co.*<sup>174</sup> The Chief Justice distinguishes these cases from *Roe* and *Casey*.<sup>175</sup>

The Chief Justice concludes his concurrence by critiquing both the majority and the dissenting opinions, stating, “[b]oth the Court’s opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share.”<sup>176</sup> Accordingly, Chief Justice Roberts agrees to overturn the arbitrary viability line in upholding Mississippi’s fifteen-week limit, but would not overrule *Roe* and *Casey*.

### Justices Breyer, Sotomayor, and Kagan’s Dissent

Justices Breyer, Sotomayor, and Kagan penned a joint dissenting opinion. Providing an overview of the holdings and legal reasoning of *Roe* and *Casey*, they emphasize the “balance” that *Casey*’s viability line struck between a woman’s interest and the State’s interest in protecting prenatal life.<sup>177</sup> According to the dissent, the majority’s holding is a “one-sided view” that “recognizes only the State’s [interest].”<sup>178</sup>

The dissent begins by critiquing the majority’s originalist approach by emphasizing “it is not clear what relevance such early history [as far back as the 13<sup>th</sup> century] should have,” although some of the “early law in fact does provide some support for abortion rights.”<sup>179</sup> However, the dissent discourages extensive use of the Fourteenth Amendment’s history because it was ratified by men, and thus “not perfectly attuned to the importance of reproductive rights for women’s liberty, or for their capacity to participate as equal members of our Nation.”<sup>180</sup> The dissent asserts “our foundational charter as viewed at the time of ratification . . . consigns women to second-class citizenship.”<sup>181</sup>

The Justices assert that “the Framers defined rights in general terms, to permit future evolution in their scope and meaning.”<sup>182</sup> This approach, the dissent argues, has produced proud moments in the Court’s history such as *Obergefell* and *Loving*.<sup>183</sup> Thus, the “applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents.”<sup>184</sup>

The dissent notes that *Casey* reviewed precedent, settling that “the Constitution places limits on a State’s power to assert control over an individual’s body and most

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<sup>172</sup> 347 U.S. 483.

<sup>173</sup> 319 U.S. 624.

<sup>174</sup> 300 U.S. 379.

<sup>175</sup> *Dobbs*, slip op. at 11 (Roberts, C.J., concurring in the judgment).

<sup>176</sup> *Id.* at 12.

<sup>177</sup> *Dobbs*, slip op. at 6–11 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

<sup>178</sup> *Id.* at 12.

<sup>179</sup> *Id.* at 13 (citation omitted).

<sup>180</sup> *Id.* at 14.

<sup>181</sup> *Id.* at 15.

<sup>182</sup> *Id.* at 16.

<sup>183</sup> *Id.* at 16–17 (citing *Obergefell*, 576 U.S. 644; *Loving*, 388 U.S. 1).

<sup>184</sup> *Id.* at 18.



personal decision-making.”<sup>185</sup> The Justices disagree with the majority that certain precedents “have nothing to do with each other, or with the right to terminate an early pregnancy,” rather asserting that precedents “about bodily autonomy, sexual and familial relations, and procreation are all interwoven.”<sup>186</sup> The dissent renounces the notion that elimination of the abortion right is a “neutral position,” as “neutrality” does not mean leaving everything up to the States.<sup>187</sup> Citing precedents protecting “bodily integrity,” the dissent argues that the choice to terminate a pregnancy, and the choices that follow a pregnancy, is “the essence of what liberty requires.”<sup>188</sup> Further, the dissent criticizes the majority for not speaking to “whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment.”<sup>189</sup> In considering “history and tradition,” the dissent emphasizes that “[t]he State could not now insist on the historically dominant ‘vision of the woman’s role.’”<sup>190</sup>

The dissent next addresses Justice Thomas’ concurrence, in which it contends that the Court’s other substantive due process precedents could be threatened regardless of Justice Thomas’ assurance that nothing in today’s opinion casts doubt on non-abortion precedents.<sup>191</sup> Rather, the Justices “cannot understand how anyone can be confident that today’s opinion will be the last of its kind.”<sup>192</sup> Raising contraception, the dissent considers the lack of a historical right yet concedes that the Court is unlikely to approve bans on contraception.<sup>193</sup>

The Justices raise a *stare decisis* argument: “none of those factors [*i.e.*, changes in legal doctrine, factual changes, or absence of reliance] apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law . . . .”<sup>194</sup> Rather, the dissent believes “tens of millions of American women have relied, and continue to rely, on the right to choose.”<sup>195</sup> In response to the majority stating that *Roe* and *Casey* were “egregiously wrong,” the dissent views this as “nothing more than the new views of new judges.”<sup>196</sup>

In support of *Casey*’s undue burden standard, the dissent contends the test has “given rise to no unusual difficulties.”<sup>197</sup> Rather, the majority is “vastly overstating the divisions among judges applying the standard.”<sup>198</sup> The majority’s substitute standard (*i.e.*, rational basis review) comes with its own issue of how to apply the test.<sup>199</sup> Further, the majority “invites a host of questions about interstate conflicts.”<sup>200</sup> The dissent argues

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<sup>185</sup> *Id.* at 19.

<sup>186</sup> *Id.* at 20.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 21–22 (citations omitted).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 23.

<sup>191</sup> *Id.* at 25–26.

<sup>192</sup> *Id.* at 28.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 31.

<sup>195</sup> *Id.* at 32.

<sup>196</sup> *Id.* at 32–33.

<sup>197</sup> *Id.* at 34.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 35.

<sup>200</sup> *Id.* at 36.

that the majority does not provide adequate legal or factual developments to support the decisions, relying on the medical, financial, and professional burden pregnancy “imposes.”<sup>201</sup> Addressing the majority’s analysis of *Roe* and *Casey*, the dissent differentiates these decisions on the basis that they “were a product of a profound and ongoing change in women’s roles.”<sup>202</sup>

The Justices contend that, without the right to abortion, “women’s opportunities to participate fully and equally in the Nation’s political, social, and economic life” diminishes, and further argue that impoverished women especially rely on such a purported right.<sup>203</sup> The expectation, and in turn reliance, on reproductive control “is integral to many women’s identity and their place in the Nation.”<sup>204</sup> In rebuttal of the majority’s analysis, the Justices argue that “[t]he majority’s insistence on a ‘concrete,’ economic showing” for reliance cannot be “reconciled with our Nation’s understanding of constitutional rights.”<sup>205</sup>

The Justices dispute the majority’s opinion, which they view as based upon “weakening *stare decisis*,” which “in a hotly contested case like this one calls into question this Court’s commitment to legal principle.”<sup>206</sup> Finally, the Justices argue that the decision “undermines the Court’s legitimacy” and constitutional protections are subject to “a new majority, adhering to a new ‘doctrinal school,’ [which] could ‘by dint of numbers’ alone expunge [Americans’] rights.”<sup>207</sup>

## The Road Forward

### Abortion Policy

*Dobbs* unequivocally overruled *Roe* and *Casey* and returned the abortion issue to the democratic process. Abortion policy now depends upon the laws of each state.<sup>208</sup> In *Is Your State Ready for Roe to Go?*, Americans United for Life prepared a comprehensive analysis of the pro-life protections in each state.<sup>209</sup> Some states have pre-*Roe* laws in place that protect women and unborn children at all gestational ages. Other states have prepared conditional laws that spring into effect upon the overturn of *Roe* or the attorney general’s certification that the law may go into effect. Some middle-ground states have pro-life protections, but their abortion-activist state judiciaries have concocted a state constitutional abortion right that limits these life-affirming laws. Yet other states have completely abandoned unborn children, mothers, and families by

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<sup>201</sup> *Id.* at 37–43.

<sup>202</sup> *Id.* at 46.

<sup>203</sup> *Id.* at 49–50.

<sup>204</sup> *Id.* at 51 (citing *Casey*, 505 U.S., at 856).

<sup>205</sup> *Id.* at 54.

<sup>206</sup> *Id.* at 57.

<sup>207</sup> *Id.* at 60.

<sup>208</sup> See *State Spotlight*, Ams. United for Life, <https://aul.org/spotlight/> (last visited June 30, 2022) (providing an interactive map of each state’s pro-life laws and current legislation).

<sup>209</sup> Natalie M. Hejran, *Is Your State Ready for Roe to Go?*, Ams. United for Life (Mar. 16, 2022), <https://aul.org/2022/03/16/is-your-state-ready-for-ro-e-to-go/>.

permitting late-term abortions with virtually no meaningful health and safety safeguards.

Thirteen states have prepared for the overturn of *Roe* by passing abortion conditional laws. A conditional law is a law that remains legally inactive until some statutorily specified event occurs. Americans United for Life has analyzed these statutes and compiled a chart listing the conditions for each law in *Which States Are Ready for a Post-Roe Paradigm?*.<sup>210</sup> *Dobbs* clearly “h[e]ld that *Roe* and *Casey* must be overruled,” which has activated some conditional laws.

### Post-Dobbs Abortion Litigation

In *The Attorney General’s Playbook for a Post-Roe World*, Americans United for Life has prepared an overview to litigation in a post-*Roe* world.<sup>211</sup> Federal courts now will review abortion litigation under a rational basis review. The Court explains: “[u]nder our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history.”<sup>212</sup> Accordingly, “States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot ‘substitute their social and economic beliefs for the judgment of legislative bodies.’”<sup>213</sup> The Court recognizes that:

These legitimate interests include respect for and preservation of prenatal life at all stages of development . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.<sup>214</sup>

Furthermore, “[a] law regulating abortion, like other health and welfare laws, is entitled to a ‘strong presumption of validity.’”<sup>215</sup>

Since *Dobbs* returned the abortion issue to the democratic process, state courts will become the battlegrounds for abortion litigation in our post-*Roe* world. Unfortunately, some state judiciaries have already contrived a state constitutional abortion right. These states include Alaska,<sup>216</sup> California,<sup>217</sup> Florida,<sup>218</sup> Illinois,<sup>219</sup>

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<sup>210</sup> Michael D. Potter, *Which States Are Ready for a Post-Roe Paradigm?*, Ams. United for Life (June 24, 2022), <https://aul.org/2022/06/24/which-states-are-ready-for-a-post-ro-paradigm/>.

<sup>211</sup> Carolyn McDonnell, *The Attorney General’s Playbook for a Post-Roe World*, Ams. United for Life (June 28, 2022), <https://aul.org/2022/06/28/the-attorney-generals-playbook-for-a-post-ro-world/>.

<sup>212</sup> *Dobbs*, slip op. at 77.

<sup>213</sup> *Id.* (citations omitted).

<sup>214</sup> *Id.* at 78.

<sup>215</sup> *Id.* at 77 (citation omitted).

<sup>216</sup> *Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997).

<sup>217</sup> *People v. Belous*, 458 P.2d 194 (1969); *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779 (1981).

<sup>218</sup> *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

<sup>219</sup> *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745 (Ill. 2013).

Kansas,<sup>220</sup> Massachusetts,<sup>221</sup> Minnesota,<sup>222</sup> Montana,<sup>223</sup> New Jersey,<sup>224</sup> New York,<sup>225</sup> and Washington.<sup>226</sup> In Arizona,<sup>227</sup> and New Mexico,<sup>228</sup> the state supreme courts devised constitutional protections for state Medicaid funding for “medically necessary” abortions. Notably, some of these abortion cases have relied upon *Roe* and *Casey*’s flawed legal reasoning, and now are susceptible to a pro-life challenge. In *Planned Parenthood of the Heartland, Inc. v. Reynolds*, for example, the Iowa Supreme Court recently reevaluated, and overruled, its prior decision that contrived a state constitutional abortion right.<sup>229</sup>

### Jurisprudential Impact

In the majority opinion, Justice Alito calls out the “abortion distortion,” explaining that “*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines.”<sup>230</sup> Under *Roe* and *Casey*’s now-obsolete abortion jurisprudence, “no legal rule or doctrine [wa]s safe from ad hoc nullification by [the Supreme] Court when an occasion for its application arises in a case involving a state regulation of abortion.”<sup>231</sup> The abortion distortion mangled:

the strict standard for facial constitutional challenges . . . third-party standing doctrine . . . standard *res judicata* principles . . . the ordinary rules on the severability of unconstitutional provisions . . . the rule that statutes should be read where possible to avoid unconstitutionality . . . [and] First Amendment doctrines.<sup>232</sup>

*Dobbs* has righted the abortion distortion. Going forward, courts will review abortion jurisprudence under a rational basis standard and apply legal doctrines normally to abortion cases.

*Dobbs* has left lingering questions over the proper role of *stare decisis*. *Stare decisis* is Latin for “to stand by things decided,” which, in practice, means courts usually must uphold settled precedents. Thirty years ago, the Supreme Court twisted the doctrine of *stare decisis* when “[t]he *Casey* plurality, while reaffirming *Roe*’s central holding, pointedly refrained from endorsing most of its reasoning,” instituted the novel undue burden standard, and ultimately “relied on an exceptional version of *stare decisis*

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<sup>220</sup> *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019).

<sup>221</sup> *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981).

<sup>222</sup> *The Women of the State of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995).

<sup>223</sup> *Armstrong v. State*, 989 P.2d 364 (Mont. 1999).

<sup>224</sup> *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982).

<sup>225</sup> *Hope v. Perales*, 634 N.E.2d 183 (N.Y. 1994).

<sup>226</sup> *State v. Koome*, 530 P.2d 260 (Wash. 1975).

<sup>227</sup> *Simat Corp. v. Ariz. Health Care Cost Containment*, 56 P.3d 28 (Ariz. 2002).

<sup>228</sup> *Boyd v. Johnson*, 975 P.2d 841 (N.M. 1998).

<sup>229</sup> *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, No. 21-0856 (Iowa June 17, 2022); see Carolyn McDonnell, *Iowa Supreme Court: Abortion Isn’t a “Fundamental Right”*, Ams. United for Life (June 17, 2022), <https://aui.org/2022/06/17/iowa-rules-no-fundamental-right-to-abortion/>.

<sup>230</sup> *Dobbs*, slip op. at 62 (citations omitted).

<sup>231</sup> *Id.* (citations omitted).

<sup>232</sup> *Id.* at 63.

that . . . this Court had never before applied and has never invoked since.”<sup>233</sup> In *Dobbs*, the Justices vigorously debated whether the Supreme Court must adhere to precedent (*i.e.*, *Roe* and *Casey*) under the doctrine of *stare decisis*. The majority analyzed abortion jurisprudence under a traditional *stare decisis* analysis that included five factors: (1) nature of the Court’s error, (2) quality of the reasoning, (3) workability, (4) effect on other areas of law, (5) and reliance interests. In a well-reasoned analysis, the majority found that *Roe* and *Casey* failed each factor.

Concurring in the judgment, Chief Justice Roberts rejected the arbitrary viability line, proposed a “reasonable opportunity” litigation standard, but ultimately argued to keep *Roe* and *Casey* for now. The Chief Justice wanted to incrementally reexamine abortion jurisprudence, and the courts would have a better perspective on the abortion issue once it is “free of the distorting effect that the viability rule has had on our constitutional debate.”<sup>234</sup> The majority notes “[t]he concurrence’s most fundamental defect is its failure to offer any principled basis for its approach.”<sup>235</sup>

For its part, the dissent contends the majority, “[b]y overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law.”<sup>236</sup> According to the dissent, “the Court may not overrule a decision, even a constitutional one, without a ‘special justification.’”<sup>237</sup> “None of those [*stare decisis*] factors [analyzed by the majority] apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.”<sup>238</sup> In rebuttal, the majority describes “the dissent’s understanding of *stare decisis* [] breaks with tradition.”<sup>239</sup> As the majority concludes, “[o]ur decision today simply applies longstanding *stare decisis* factors instead of applying a version of the doctrine that seems to apply only in abortion cases.”<sup>240</sup>

## Conclusion

The pro-life movement has concluded its forty-nine-year battle to overturn *Roe v. Wade* but opened a new chapter in the fight for human life. *Dobbs* returned the abortion issue to the democratic process. Going forward, we must continue to work until the law protects all human beings, from conception until natural death.

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<sup>233</sup> *Id.* at 46.

<sup>234</sup> *Id.* at 12 (Roberts, C.J., concurring in the judgment).

<sup>235</sup> *Id.* at 73 (majority).

<sup>236</sup> *Id.* at 30 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

<sup>237</sup> *Id.* at 31.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 69 (majority).

<sup>240</sup> *Id.* at 71.