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ESSAY

PRECEDENT, RELIANCE, AND MORALITY AT THE END OF *ROE V. WADE*

MAX STEARNS*

In an opinion that shook the world, *Dobbs v. Jackson Women’s Health Organization*,¹ ended the right to terminate an unwanted pregnancy announced in the 1973 landmark case, *Roe v. Wade*.² For the majority, Justice Alito declared *Roe* fundamentally flawed from its inception, and, joined by four others, he relegated abortion regulation entirely to the states.³ Chief Justice Roberts, concurring in the judgment, would have retained *Roe* yet ditched its viability line, upholding Mississippi’s 15-week ban, claiming this would allow women to realize they are pregnant and to make a timely choice.⁴

However inadequate and factually dubious the premise—not all women’s cycles operate with clock-like precision and complicating risks are often discovered later—Roberts’s somewhat less devastating opinion might have controlled had Justice Ruth Bader Ginsburg stepped down well before the contrived, Scalia-motivated, then abandoned, Merrick Garland rule.

In a simple concurrence, Justice Kavanaugh, who joined the *Dobbs* majority, declared his respect for the many Justices preceding him who reached a contrary resolution on the ultimate question whether to retain *Roe*.⁵ By contrast, Justice Thomas barred no holds. Thomas declared an intent to

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1. 142 S. Ct. 2228 (2022).
2. 410 U.S. 113 (1973).
3. *Dobbs*, 142 S. Ct. at 2268, 2277.
4. *Id.* at 2310–17 (Roberts, C.J., concurring).
5. *Id.* at 2304–10 (Kavanaugh, J., concurring).

revisit a long line of cases that failed his stringent originalist conception,⁶ while notably omitting *Loving v. Virginia*,⁷ the case that struck down Virginia's anti-miscegenation statute.

This Essay makes three points: (1) the majority's misleading characterization of the reliance argument expressed in the controlling plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁸ is not the most damaging aspect of *Dobbs*; (2) the majority's claim that the right announced in *Roe* has no connection to the historical Constitution is mistaken; and (3) ultimately, *Dobbs* is a deeply troubling exercise in hubris.

Dobbs marks a seismic shift in a half-century's growing recognition of the injustices of subordinating women and fighting for their inclusion on equal terms in the workplace and public life. Before 1973, a woman as primary or coequal breadwinner was uncommon; today it's unremarkable.

This helps explain why Justice Alito's misleading characterization of the *Casey* plurality's central reliance argument is stunning.

Justice Alito for the majority in *Dobbs* states:

In *Casey*, the controlling opinion conceded that 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."⁹

Here is what the *Casey* plurality—the controlling opinion—actually said:

This argument [described above] would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have 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.¹⁰

6. *Dobbs*, 142 S. Ct. at 2300–04 (Thomas, J., concurring).

7. 388 U.S. 1 (1967).

8. 505 U.S. 833 (1992).

9. *Dobbs*, 142 S. Ct. at 2238–39 (majority opinion) (quoting *Casey*, 505 U.S. at 856 (plurality opinion)).

10. *Casey*, 505 U.S. at 856.

This isn't a quibble. Alito misconstrues the controlling *Casey* opinion's central argument.

Even so, this framing, emphasizing the role of women who, especially in the past half century, have assumed a level of stature previously available only to men, while important, misses the strongest moral disapprobation of *Dobbs*. The greater problem involves the rights of vastly larger numbers of women, often girls, and other persons with the capacity to become pregnant,¹¹ who lack the educational, financial, familial, and other resources to extricate themselves from the onslaught of near immediate, and ever more draconian, abortion restrictions.¹² The very women the reliance argument protects are those who can most easily—by careful research and travel plans—avoid the dire choices *Dobbs* is already creating.¹³

Moral culpability isn't synonymous with but-for causation, but on any reasonable understanding, it necessarily includes reckless indifference to conditions forcing the difficult choices the law elects to condemn. I respect persons holding differing views on the ultimate question of abortion's morality. Abortion is unique. It involves a potential human life, on one side, and the health, safety, emotional, financial, and familial needs of the individual who bears it, on the other. The moral question implicated in the long line of cases reassessing *Roe*, now culminating in *Dobbs*, involves more than the ultimate decision to terminate an unwanted pregnancy. It necessarily implicates the complex set of conditions that heighten the risk that individuals capable of doing so will experience unanticipated pregnancies yet lack the resources, financial, educational, or otherwise, to provide themselves and the developing fetus a promising life, or the wherewithal to carry full-term pregnancy with the eventual plan of adoption.¹⁴

11. Kim Wong-Shing, *Abortion Access Doesn't Only Affect Women*, CNET (July 2, 2022), <https://www.cnet.com/health/parenting/abortion-access-doesnt-only-affect-women/>.

12. See, e.g., ARK. CODE ANN. §§ 5-61-301 to -304 (West 2023) (Arkansas Human Life Protection Act passed in 2019 as a "trigger law" and went into effect after the *Dobbs* decision); MO. ANN. STAT. § 188.017 (West 2023) (Missouri Right to Life of the Unborn Child Act passed in 2019 and went into effect after the *Dobbs* decision); S.D. CODIFIED LAWS § 22-17-5.1 (2023) (South Dakota Act categorizing unauthorized abortion as felony effective after the *Dobbs* decision); TENN. CODE ANN. § 39-15-201 (West 2023) (Tennessee "trigger ban" that went into effect after the *Dobbs* decision).

13. See, e.g., Edward Helmore, *10-year-old Rape Victim Forced to Travel from Ohio to Indiana for Abortion*, GUARDIAN (July 3, 2022, 1:55 PM), <https://www.theguardian.com/us-news/2022/jul/03/ohio-indiana-abortion-rape-victim>.

14. Elizabeth A. Mosley et al., *Racial and Ethnic Abortion Disparities Following Georgia's 22-week Gestational Age Limit*, 32 WOMEN'S HEALTH ISSUES 9 (2022); GUTTMACHER INST., FACT SHEET: UNINTENDED PREGNANCY IN THE UNITED STATES (Jan. 2019), https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us_0_4.pdf; Christine Dehlendorf, Lisa H. Harris & Tracy A. Weitz, *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. PUB. HEALTH 1772 (2013).

Laying full responsibility typically on the woman or girl by allowing states to deny any lawful choice, sometimes even in cases involving rape or incest, or a health threat to the mother, is its own deeply problematic moral choice. The moral decision to condone such restrictive abortion laws disregards myriad policy decisions contributing to limited opportunities for quality education; declining social safety nets; unaffordable quality housing; and a lack of adequate healthcare, daycare, food safety, and more. These policy choices correlate to greater incidence of unwanted pregnancies and to adverse consequences when they occur.

The challenges fall hardest on communities of color, where unwanted pregnancies often pose difficulties in placing infants, who risk finding themselves in the problematic cycle of foster care.¹⁵ And, tragically but inevitably, those lacking the means to obtain safe and lawful abortions will seek other, dangerous, alternatives. The *Dobbs* majority's exceedingly narrow conception of responsibility—all rested upon the person seeking to end a pregnancy as if none of these other factors counsel judicial constraint—avoids any moral culpability for the role our legal culture has played in encouraging such tragic circumstances to recur.

Yes, Alito mischaracterized. And yes, the changing societal role of women matters. Women's reproductive choice is essential to gains made in the past half century, and longer. But the deeper moral culpability—creating or condoning conditions encouraging unwanted pregnancies and ending societal responsibility at the moment of a compelled birth—remains.

Justice Alito also claims *Roe* has no foundation in the Constitution. He's wrong there too.

Following Robert Bork's failed nomination for the Supreme Court, he wrote *The Tempting of America*. In it, Bork explained that his originalist methodology allowed *Brown v. Board of Education*,¹⁶ but not *Griswold v. Connecticut*,¹⁷ creating a right of married couples to use contraceptives;¹⁸ *Eisenstadt v. Baird*,¹⁹ extending that right to unmarried couples;²⁰ or *Roe v. Wade*.²¹

Here's Bork's argument: When ratified, and even at the time of *Plessy v. Ferguson*,²² the Fourteenth Amendment rested on two premises, a major

15. Ronald Hall, *The US Adoption System Discriminates Against Darker-Skinned Children*, CONVERSATION (Feb. 21, 2019, 6:43 AM), <https://theconversation.com/the-us-adoption-system-discriminates-against-darker-skinned-children-110976>.

16. 347 U.S. 483 (1954).

17. 381 U.S. 479 (1965).

18. *Id.* at 485.

19. 405 U.S. 438 (1972).

20. *Id.* at 454.

21. 410 U.S. 113 (1973).

22. 163 U.S. 537 (1896).

premise—equal justice under the law—and a minor premise—with rudimentary public education, segregated schools didn’t undermine equal justice. But by 1954, these premises collided, and the minor premise had to yield.

There’s much to criticize there, not least of which includes how African American men denied the right to vote could have had equal justice. And, of course, even that failed to include women who would have to wait over 50 more years to gain the right to vote, and much longer for women of color.²³

Still, consider an analogy that ironically has Bork—the leading originalist until Antonin Scalia assumed the mantle—identifying the moral problem with the *Dobbs* view that cost him a seat on the Supreme Court. (Originalism is now more generally associated with original public meaning, yet Bork’s defense of *Brown* has the same strengths and flaws under that originalist conception.) At the time of ratification, an even more intuitive major Fourteenth Amendment premise was ensuring that primary breadwinners, regardless of such arbitrary considerations as race, could not be denied the opportunity to support their families by being treated as second class citizens. A minor premise was that limiting women to subordinate roles didn’t prevent primary breadwinners from meeting that obligation. At the time, at least in white households, it was exceedingly rare for women to be breadwinners. By 1973 this had begun to change; today it has done so dramatically, with trend lines continuing to favor women in higher education and the workplace.²⁴ And so, the premises, once more, have collided, and the minor premise must yield. Bork’s originalism creates a constitutional foundation for the very right originalists insistently deny.

The moral question whether or when to end a pregnancy is separate from the constitutional question of who is empowered to decide. However one chooses to resolve that query, we must acknowledge the moral abdication of disclaiming societal responsibility for policies that heighten the incidence of unwanted pregnancies and the challenging conditions facing those who seek to end them.

23. See generally ELAINE WEISS, *THE WOMAN’S HOUR: THE FIGHT TO WIN THE VOTE* (2018) (describing the efforts to pass the Nineteenth Amendment); PAULA A. MONOPOLI, *CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT* (2020) (exploring the impacts of the Nineteenth Amendment and the significance of race in the post-ratification period).

24. Jennifer L. Glass, R. Kelly Raley & Joanna R. Pepin, *Mothers are the Primary Earners in Growing Numbers of Families with Children*, COUNCIL ON CONTEMP. FAMS. (Nov. 2, 2021), <https://sites.utexas.edu/contemporaryfamilies/2021/11/02/breadwinning-mothers-brief-report/> (describing research published in the 2021 article Jennifer L. Glass, R. Kelly Raley & Joanna R. Pepin, *Children’s Financial Dependence on Mothers: Propensity and Duration*, 7 *SOCIUS*, Nov. 15, 2021, at 1–11, <https://doi.org/10.1177/23780231211055246>).

Alito is mistaken both on *Casey*'s reliance analysis and on whether abortion rights are meaningfully connected with the Constitution. What's most troubling is the hubris of any single Justice in a 5-4 decision claiming such certainty against the collective judgment of so many—including a majority of Republican-appointed Justices—who struggled with the same question yet came out otherwise (see immediately below).

Justices, by party of appointing President, who supported *Roe* originally or who would retain it (Roman typeface), and Justices, by party of appointing President, who opposed *Roe* originally or would overturn it (*italics*). Counts assembled at the end.

Chief Justices:

Rehnquist (R)

Roberts (R)

Associate Justices:

Douglas (D)

Brennan (R)

Stewart (R)

White (D)

Marshall (D)

Blackmun (R)

Powell (R)

Stevens (R)

O'Connor (R)

Scalia (R)

Kennedy (R)

Souter (R)

Thomas (R)

Ginsburg (D)

Breyer (D)

Alito (R)

Sotomayor (D)

Kagan (D)

Gorsuch (R)

Kavanaugh (R)

Barrett (R)

Jackson (D)²⁵

The Counts:

- Democratic appointed Justices who favored or would retain *Roe*: 6
- Democratic appointed Justices who opposed or would overturn *Roe*: 1
- Republican appointed Justices who favored or would retain *Roe*: 9
- Republican appointed Justices who opposed or would overturn *Roe*: 7

Final note: Over a period of 50 years, of the 7 Republican-appointed Justices who opposed or would overturn *Roe*, out of a larger group of 16 Republican-appointed Justices, 5 formed the *Dobbs* majority.

25. Not included in the following count because she took her seat as Associate Justice post-*Dobbs*.