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## Big Bad *Roe*

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## BIG, BAD ROE

by B. Jessie Hill\*

Now that *Roe v. Wade*<sup>1</sup> is gone, what should replace it? This moment presents a rare opportunity to re-imagine the right to reproductive autonomy, given that the longstanding constitutional framework governing that right has been tossed out the window. On the one hand, scholars and activists have long argued that “*Roe* is not enough”—that it represents a relatively impoverished, negative-rights understanding of reproductive freedom, that it never guaranteed true autonomy to a large swath of the population (especially poor and low-income people), and that real reproductive freedom must be based in a more robust framework grounded in reproductive justice.<sup>2</sup> On the other hand, advocates have also recognized the urgent need to preserve what can be maintained of the abortion right in the short term. Much of this latter work has been carried out through state-court litigation, instituted in wake of the *Dobbs v. Jackson Women’s Health Organization* decision, seeking to vindicate the right to abortion under state constitutional provisions that can be understood to protect a similar right to reproductive privacy.<sup>3</sup> In those

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1. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_, 142 S.Ct. 2228 (2022).

2. See, e.g., Abigail Burman, *Abortion Sanctuary Cities: A Local Response to the Criminalization of Self-Managed Abortion*, 108 CAL. L. REV. 2007, 2050–51 & n.242 (2020); see generally Yvonne Lindgren, *From Rights to Dignity: Drawing Lessons from Aid in Dying and Reproductive Rights*, 2016 UTAH L. REV. 779, 826-29 (2016).

3. See, e.g., *Planned Parenthood Great Nw. v. State*, No. 49615, 2023 WL 110626, at \*1 (Idaho Jan. 5, 2023) (holding that the Idaho Constitution does not protect a right to abortion); *Planned Parenthood S. Atl. v. State*, No. 2022-001062, 2023 WL 107972, at \*1 (S.C. Jan. 5, 2023) (holding that the South Carolina Constitution’s protection for privacy encompasses abortion and striking down

cases, *Roe* is seeing a revival, as some courts are embracing *Roe*'s general framework and strict scrutiny standard.

If state courts begin to recognize the existence of a constitutional right to reproductive autonomy under state constitutions, they must decide what the right looks like. Neither courts nor advocates are writing on a blank slate, given the substantial body of federal case law dealing with the right to abortion, as well as the existing state constitutional framework of individual rights protections; they will need to make arguments familiar to judges working within the U.S. legal tradition, based in doctrine and precedent. Thus, in several cases currently being litigated in state courts, advocates have argued for a fundamental right to terminate a pregnancy, urging courts to adopt a strict scrutiny standard for analyzing abortion restrictions under the state constitution.<sup>4</sup> A fundamental right to abortion, protected by strict scrutiny, of course looks very much like the rule adopted by *Roe*.

In light of this potential resurgence of a *Roe*-like standard in the state courts, it makes sense to ask whether *Roe*'s doctrinal framework is worth resurrecting. To be sure, *Roe* came under heavy criticism by the Supreme Court in *Dobbs*. But not only conservatives have bashed *Roe* over the years: one of *Roe*'s most prominent critics is a liberal intellectual, the legal scholar John Hart Ely, who famously attacked *Roe*'s reasoning in a much-cited essay entitled *The Wages of Crying Wolf: A Comment on Roe v. Wade*.<sup>5</sup> Justice Alito's majority opinion in *Dobbs* gleefully cited Ely's criticisms, as if to suggest that *Roe* simply *must* be wrong, since *even* such a prominent liberal has found it lacking.

Part I of this essay gives a brief overview of the *Dobbs* Court's use of Ely's famous article and discusses Ely's critique in more detail. Then, Part II considers whether *Roe*, as an example of constitutional doctrine, really merits such harsh criticism. It answers this question in part by comparing *Roe*, and Ely's criticisms of *Roe*, to *Dobbs* itself.

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the state's ban on abortion after approximately six weeks of pregnancy); Prelim. Inj. Order, *Preterm-Cleveland v. Yost*, No. A2203203 (Hamilton Cty. Comm. Pl. Oct. 12, 2022) (granting a preliminary injunction against Ohio's ban on abortion after approximately six weeks of pregnancy because it was likely that it violated the Ohio Constitution). Some state constitutions, such as South Carolina's, have explicit textual protections for privacy, unlike the federal Constitution. *E.g.*, *Planned Parenthood S. Atl. v. State*, 2023 WL 107972 at \*8 ("South Carolina is one of only ten states to include a specific right to privacy in its constitution."). While some litigation proceeds under these provisions, other cases seek to establish a right to privacy under state constitutional equivalents of the federal Due Process Clause, Equal Protection Clause, or other state provisions without federal equivalents. *See, e.g.*, *Johnson v. State*, Civ. Action No. 18732 (9th Dist. Wyo. Aug. 10, 2022) (locating the right to abortion in the Wyoming state constitution's health care freedom amendment).

4. *See supra* sources cited note 3.

5. 82 Yale L.J. 920 (1973).

# I. WHAT SHARP TEETH YOU HAVE! ALITO’S AND ELY’S CRITICISMS OF *ROE*

Only three paragraphs into the *Dobbs* opinion, Justice Alito introduces Ely and his biting criticism of *Roe* (which Ely had coupled with the protestation that he himself was personally pro-choice). Summarizing Ely’s criticism of the viability line, Alito states:

The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*’s reasoning. One prominent constitutional scholar wrote that he “would vote for a statute very much like the one the Court end[ed] up drafting” if he were “a legislator,” but his assessment of *Roe* was memorable and brutal: *Roe* was “not constitutional law” at all and gave “almost no sense of an obligation to try to be.”<sup>6</sup>

Later, in explaining why *Roe*’s reasoning was not just wrong, but so egregiously wrong as to make it unworthy of *stare decisis*, Alito invokes Ely again, together with another liberal lion—Laurence Tribe—by quoting Tribe, quoting Ely’s criticism of the viability line as “mistaking a definition for a syllogism.”<sup>7</sup> Then, after a lengthy attack on *Roe*’s reasoning, Alito wraps up his explanation of *Roe*’s wrongness by returning to the earlier Ely quote, together with a string cite to a number of legal scholars—most or all of whom have lamented that, while of course they agreed with *Roe*’s outcome, they had to admit that it was extraordinarily weak as an example of constitutional reasoning.<sup>8</sup>

Ely, who died in 2003, was one of the most important constitutional theorists of the modern era.<sup>9</sup> Formerly on the faculties of Yale, Harvard, and Stanford, among others,<sup>10</sup> he was perhaps most well-known for his classic book, *Democracy and Distrust*, which laid out a new and highly

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6. *Dobbs*, 142 S. Ct. at 2241 & n.2 (quoting Ely, *supra* note 5, at 947).

7. *Id.* at 2268 (quoting Laurence Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4 (1973)). It is noteworthy that, while the Tribe article cited by the Court agreed with Ely’s criticisms of *Roe*, it nonetheless defended *Roe*’s outcome, the viability line, and substantive due process doctrine as constitutionally defensible. *See, e.g.*, Tribe, *supra*, at 53 (“[A]t least the essence of *Roe*, unlike that of *Lochner*, entails an allocation of roles that can be traced –albeit with the uncertainties inevitable in all such matters—to premises grounded in the Constitution.”).

8. *Id.* at 2270-71 (citing the liberal scholars Laurence Tribe, John Hart Ely, Archibald Cox, Mark Tushnet, Philip Bobbitt, and Akhil Amar).

9. *See, e.g.*, Aviam Soifer, *Ely the Transgressor*, 117 HARV. L. REV. 1753 (2004) (“Top-of-the-charts citation counts hardly capture John Hart Ely’s formidable role in American constitutional law.”).

10. *Id.*

influential theory of judicial review.<sup>11</sup> His liberal-leaning politics were well-known, but so was his independent streak.<sup>12</sup>

Because Ely's essay is one of the most well-known attacks on *Roe* as constitutional doctrine, and because it is repeatedly cited in Alito's opinion, this essay focuses primarily on Ely's arguments. I argue that Ely's criticisms are unfair and have had undeserved influence in producing the conventional wisdom that *Roe* is a "bad" constitutional decision. Ely's most salient criticisms are grounded in egregious misconceptions about abortion and pregnancy. In fact, it is unsurprising that Justice Alito embraced Ely's criticisms so enthusiastically, since Alito's *Dobbs* decision and Ely's article seem to share many of the same assumptions about abortion and its relationship to women's lives.<sup>13</sup> Moreover, whatever the validity of Ely's criticisms in 1973, when *The Wages of Crying Wolf* was published, they are based on a body of precedent that has evolved considerably since then and therefore cannot be taken as reliable statements about constitutional law today. Finally, Ely's criticisms suffer from a flaw that he purports to identify in the *Roe* opinion—they are based on his own moral assumptions rather than constitutional reasoning.

Ely's argument focuses primarily on what he sees as the insufficiently justified outcome in *Roe*. The thrust is that the *Roe* opinion failed to explain both why the Constitution protects a right to abortion and why the pregnant person's right outweighs the interests of the fetus, noting that it is not sufficient simply to prove that fetuses are not constitutional persons under the Fourteenth Amendment.<sup>14</sup> Thus, Ely both took issue with the state's identification of a broad constitutional privacy right, which he found insufficiently grounded in text, structure, or precedent,<sup>15</sup> and argued against what he viewed as the Court's moral judgment that the rights of a pregnant adult trump the interests of, or in, a fetus or embryo. He also took issue with the framing of the right in *Roe* as a "privacy" right.<sup>16</sup> Ely then briefly attempted, and failed, to distinguish *Roe*'s reasoning from that contained in the long-repudiated line of cases associated with the so-called *Lochner* era, in which the Supreme Court used the doctrine of substantive due process to recognize a set of

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11. Henry Paul Monaghan, *John Ely: The Harvard Years*, 117 HARV. L. REV. 1748, 1749-50 (2004).

12. See generally Adam Liptak, *John Hart Ely, a Constitutional Scholar, Is Dead at 64*, N.Y. TIMES, Oct. 27, 2003.

13. The word "women" is used as shorthand here, since not only women can become pregnant.

14. Ely, *supra* note 5, at 926.

15. *Id.* at 926-30, 934-37.

16. *Id.* at 931-33.

economic rights that generally protected powerful corporate interests over the interests of employees.<sup>17</sup> Ely argued that neither *Roe* nor *Lochner* provided a “coherent account” of why heightened scrutiny should apply to the right it identified.<sup>18</sup> Ely’s essay ends with a reflection on the legal academy’s tendency to “cry wolf” by claiming to identify *Lochnerism* in any disfavored decision issued by the Supreme Court, such that it fails to recognize or draw sufficient attention to the true *Lochnerism* of *Roe*.<sup>19</sup>

One of Ely’s main criticisms of *Roe* is that it invents a new constitutional right and thereby preempts legislative judgments about whether and when abortion should be permitted. Of course, this criticism resonates with Ely’s general approach to constitutional law, which reflects his view that judicial review should largely be applied to reinforce rather than undermine democratic decision making.<sup>20</sup> Thus, Ely compared abortion to other activities that legislatures self-evidently have the ability to criminalize—such as “the use of ‘soft’ drugs” or “homosexual acts between consenting adults”—which can, in Ely’s view, similarly “stunt the preferred life styles” of individuals.<sup>21</sup> This is because of a “societal consensus,” Ely suggested, that such “behavior...is revolting or at any rate immoral.”<sup>22</sup>

This passage immediately presents a number of problems for anyone relying on Ely’s analysis today. First, of course, its language is offensive, reflecting a complete inability to comprehend the degree of harm, intrusion, and oppression that individuals experience when their bodies and futures are conscripted by the state, or when their very identity is stigmatized and declared criminal by the state. Indeed, this sort of breezy seventies-vintage male chauvinism<sup>23</sup> permeates Ely’s essay: he describes

17. *Id.* at 937-43.

18. *Id.* at 943.

19. *Id.* at 943-49.

20. JOHN HART ELY, *DEMOCRACY & DISTRUST* 87-88 (1980); see generally Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in A Democracy*, 96 N.Y.U. L. REV. 1902, 1906-07 (2021) (arguing that “Ely had the big idea that judicial review could be democracy-promoting, but he argued his case on faulty premises” because his theory “bore significant influence of the traditions and the cultural forces Ely argued against”).

21. Ely, *supra* note 5, at 923; see also *id.* at 932-33 (observing that “[o]ur life styles are constantly limited, often seriously by governmental regulation,” although “many of us would prefer less direction”). In speaking of “preferred life styles,” Ely was quoting Justice Douglas’s concurrence in *Roe*, in which he argued that “[e]laborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future.” *Roe*, 410 U.S. at 214 (Douglas, J., concurring). In belittling what is at stake with the right to abortion, Ely ignored the “radically different and undesired future” part of this passage.

22. Ely, *supra* note 5, at 923.

23. Thanks to Marc Spindelman for gifting me this particular turn of phrase.

abortion bans as “cramp[ing] the life style of an unwilling mother,” and then later labels forced pregnancy and childbirth an “inconvenience” and an “annoyance.”<sup>24</sup> To say that Ely fails to grasp what is at stake for people who are forced to carry an unwanted pregnancy to term hardly captures the deep ignorance underlying these passages, not to mention the casual sexism of Ely’s language.<sup>25</sup>

Another problem with Alito’s reliance on Ely’s reasoning is that, whether or not Ely’s criticism was correct as a matter of constitutional doctrine in 1973, it is surely incorrect today. In claiming that *Roe* was invented without any basis in existing law, Ely’s article quickly skims over the *Roe* Court’s invocation of *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Skinner v. Oklahoma*, *Griswold v. Connecticut*, and *Eisenstadt v. Baird*. It relegates the discussion of *Meyer*, *Pierce*, and *Skinner* to a single footnote and reads *Skinner*, in which the Court declared the right to procreate “fundamental” and “one of the basic civil rights of man,”<sup>26</sup> as turning on the fact that the state could not articulate a plausible reason for the distinction it drew in its mandatory sterilization law for a subclass of felons, thus suggesting that *Skinner* really should have been a rational-basis case rather than a strict-scrutiny case.<sup>27</sup> Similarly, Ely insisted that *Griswold* be read only as a case about the unenforceability of proscriptions on the *use* of contraception, and not a case recognizing a general constitutional right to contraception.<sup>28</sup> Whatever the status of Ely’s readings in 1973, they do not hold up today, and certainly not after *Lawrence v. Texas* and *Obergefell v. Hodges* not only recognized the broad scope of the constitutional right to decisional autonomy but also re-entrenched the *Roe* and *Casey* decisions as bedrock constitutional law.<sup>29</sup> Indeed, *Roe*’s citation of the constellation of cases dealing with the right

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24. Ely, *supra* note 5, at 932 n.81. Ely also seems to suggest that the right to end a pregnancy should be considered separately from the right to kill a fetus, suggesting that even if the former is protected, the latter should not be. *Id.* In other words, he wrote as though the killing of a fetus is in almost all cases a separate act from terminating the pregnancy. Of course, only in the extremely rare situation of post-viability abortion does ending a pregnancy not also automatically entail the death of the fetus.

25. See also NeJaime & Siegel, *supra* note 20, at n.192 (“Ely’s dismissiveness suggests that he was not seriously open to the question of whether the liberty claims of women and gays and lesbians were proper subjects for judicial review.”).

26. 316 U.S. 535, 541 (1942).

27. Ely acknowledged that *Skinner* “did suggest it was applying a higher equal protection standard than usual,” but argued that the reason for this heightened scrutiny was unclear, because the state was unable to come up with even a plausible justification for the distinction” drawn by the Oklahoma law. Ely, *supra* note 55, at 931 n.79.

28. *Id.* at 929-30.

29. *Obergefell v. Hodges*, 576 U.S. 644, 667-68 (2015); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

to autonomous decision-making in matters affecting one's family and relationships has aged significantly better than Ely's criticism of it.

Justice Alito must simply skip over all of this subsequent history to arrive at *Dobbs*. Not only that, but Justice Alito must also willfully ignore Ely's own later approval of *Planned Parenthood v. Casey*, which was also overruled by *Dobbs*. Indeed, in a letter to the Justices who wrote the joint opinion in *Casey*, written shortly after *Casey* was decided, Ely praised that opinion and particularly its embrace of *stare decisis*. Ely recognized the reliance interests that *Roe* had created, particularly for women ("Our society has indeed built up expectations on the basis of it, particularly as regards the aspirations of women").<sup>30</sup> Crucially, also he also praised the Justices' concern for the Court's legitimacy in adhering to *Roe*: "[F]alling into a pattern whereby presidents appoint justices with the essential promise that they will overrule particular cases, and then having them dutifully proceed to do so, would weaken the Court's authority immeasurably."<sup>31</sup> This glossing over of Ely's views of *Casey* is characteristic of *Dobbs*'s selective and ahistorical approach.

Finally, Ely's article engages in the same problematic moral *ipse dixit* that Justice Alito embraces during one of the *Dobbs* opinion's weakest moments. Ely's article savages the *Roe* Court for assuming a woman's interest must be weightier than the state's interest in the potential life of the fetus, at least prior to viability.<sup>32</sup> Ely objected to the balancing of interests in general, but he also clearly thought that the balancing calculus was done incorrectly. In proving his point, Ely repeatedly assumed that fetuses are human beings that are equal in value to pregnant adults. For example, Ely stated that abortion "ends (or if it makes a difference, prevents) the life of a human being other than the one making the choice," clearly suggesting the fetus's life and the pregnant person's life are equivalent.<sup>33</sup> Later, the article acknowledges that women are under-represented in legislatures and that laws disadvantaging them should be viewed with particular skepticism but then adds, "But *no* fetuses sit in our legislatures."<sup>34</sup> Thus, while Ely explicitly denied that his

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30. JOHN HART ELY, ON CONSTITUTIONAL GROUND 305 (1996). He then emphasized in his later-written commentary on that letter to the Justices, "I also think, as the letter suggests, that *Roe* has contributed greatly to the more general move toward equality for women, which seems to me not only good but also in line with the central themes of our Constitution." *Id.*

31. *Id.*

32. *Id.* at 923-26.

33. *Id.* at 924.

34. *Id.* at 933. And again: "Compared with men, women may constitute such a 'minority'; compared with the unborn, they do not. I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses



argument relied on fetuses being considered persons under the Constitution,<sup>35</sup> it is very difficult to understand Ely's argument here in any other terms. At a minimum, it assumes that the fetus is a human being with equal moral stature to the pregnant person, even if not a "person" for purposes of the Due Process Clause. Thus, again and again, Ely simply assumes the conclusion that he wishes to reach, and that he faults the *Roe* Court for declining to embrace, which is that the fetus's interests are at least as weighty as the pregnant person's.

A strikingly similar moment arrives in *Dobbs* when Alito insists that only abortion, and no other substantive due process right, is threatened by the *Dobbs* ruling. Even though contraception and same-sex marriage, for example, derive from the same body of doctrine as *Roe*, Alito argues that only abortion destroys a "potential life."<sup>36</sup> Because none of the other cases on which *Roe* and *Casey* relied involve the "critical moral question posed by abortion," Justice Alito explains, "[t]hey are therefore inapposite."<sup>37</sup> This move by Alito is deeply problematic, given that the legal methodology he has just set forth—looking first at the text of the Constitution to see whether it mentions abortion and then examining history and tradition to see whether abortion has long been a protected right—nowhere says that judges should also include moral judgments in determining the existence of a constitutional right.<sup>38</sup> More importantly, even if it did, this moral judgment upon which Alito stakes *Dobbs*'s claim that abortion is not only different from other exercises of personal and bodily autonomy, but *significantly* different, such that it must receive different legal treatment, is baldly stated without any legal support and without any recognition that large swaths of Americans may not share the

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as one, I'd expect no credit for the former answer." In addition, it's not clear why the fetus's supposed status as a discrete and insular minority would mean that women are *not* a discrete and insular minority; Ely provided no explanation his assumption that the two possibilities are mutually exclusive.

35. *Id.* at 926 ("[T]he argument that fetuses lack constitutional rights is simply irrelevant. . . . That the life plans of the mother must, not simply may, prevail over the state's desire to protect the fetus simply does not follow from the judgment that the fetus is not a person.").

36. *Dobbs*, 142 S. Ct. at 2258.

37. *Id.*

38. Indeed, Alito's opinion even disclaims the idea that any purported moral motive for abortion bans should be considered relevant to their constitutionality or their rootedness in history and tradition. *Dobbs*, 142 S.Ct. at 2256 ("[W]e see no reason to discount the significance of the state laws in question based on . . . suggestions about legislative motive."). This shortcoming may simply be an example of a larger problem with the Court's new historical methodology—namely, that it provides no way of knowing which features of historical laws or practices make them relevant or irrelevant, comparable or incomparable, to the contemporary law or practice that the Court is evaluating.

same moral intuitions.<sup>39</sup> Indeed, *Roe*'s ultimate strength derives from the fact that it—unlike its critics—assumes disagreement about the moral status of the fetus and also assumes that individuals, rather than legislators, are the best suited to resolve the question of that moral status and how it should figure into the decision whether to end or continue an unwanted pregnancy.<sup>40</sup>

At bottom, then, both Ely's critique of *Roe* and Alito's embrace of it are fundamentally unpersuasive. It is worth noting, however, that these are not the only criticisms of *Roe*. Some (including Ely) have pointed out, for example, that *Roe* lays out specific rules more resembling legislation than judicial decision-making; and that Justice Blackmun's opinion engages in a lengthy historical exegesis that is largely irrelevant to the ultimate decision. All of these criticisms are worth considering further. The next Part therefore argues that, as a specimen of constitutional argumentation, *Roe* is not a bad decision.

## II. HOUSES MADE OF STRAW OR BRICK? *ROE* AND *DOBBS* AS CONSTITUTIONAL DOCTRINE

What makes a judicial opinion an example of "constitutional law," as opposed to something else (which Ely and Alito suggest it is)? There may be more answers to this question than there are constitutional scholars. Nonetheless, I'll venture some possible markers of an opinion that looks like "constitutional law," as opposed to, say, freewheeling policymaking.

First, U.S. constitutional law—at least as we have known it for the past several decades—operates largely by means of tests and levels of scrutiny.<sup>41</sup> Although the Court's commitment to such tools may be fading,

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39. In addition, as Marc Spindelman points out in a forthcoming article, this statement is not even an accurate statement of the law on its own terms. In order to avoid the conclusion that *Dobbs* undermines a broad swath of substantive due process doctrine by suggesting that no other rights involve terminating a human life, Alito simply ignores the right-to-die cases, *Cruzan v. Director, Mississippi Dep't of Health* and *Washington v. Glucksberg* (to the extent it implied a right to terminal sedation). Marc Spindelman, *The Gambit and the Gap: Glucksberg and the Lawlessness of Dobbs' Originalism* (unpublished manuscript, on file with the author).

40. See *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) ("At 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."), *overruled by Dobbs*, 142 S.Ct. 2228 (2022); Tribe, *supra* note 7, at 32 (arguing that *Roe* is a case about allocation of decision-making authority and suggesting that *Roe* may be seen as "embodying the concept that some types of choices ought to be remanded, on principle, to private decisionmakers unchecked by substantive governmental control").

41. See generally Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997); see also Mitchel de S.-O.-l'E. Lasser, "Lit. Theory" Put to the Test: A

one generally reads modern cases involving constitutional rights with the expectation that the Court will apply a recognizable test such as rational basis, intermediate scrutiny, or strict scrutiny. In addition, and relatedly, one generally hopes that a Supreme Court opinion interpreting the Constitution will contain sufficiently clear rules that state actors will have some ability to conform their conduct to the Constitution in the future.<sup>42</sup> Beyond this, most constitutional decisions are a more or less eclectic mix of methods—or what Philip Bobbitt calls “modalities”: structural, textual, ethical, prudential, historical, and doctrinal.<sup>43</sup> Perhaps embracing these modalities to an extent, *Dobbs* criticizes *Roe* repeatedly for “fail[ing] to ground its decision in text, history, or precedent.”<sup>44</sup>

Yet, measured against these standards, it is clear that *Roe* straightforwardly applied the constitutional modalities and applied a recognizable level of scrutiny in a way that would provide guidance for the future. In choosing strict scrutiny as the test to apply, *Roe* maintained consistency with the treatment of other constitutional rights and introduced a degree of predictability into the analysis. Arguably, once the Court switched to the “undue burden” test of *Planned Parenthood v. Casey*, the doctrine became less predictable as courts struggled to apply this new standard that did not appear to rely on the usual elements of means-end fit.<sup>45</sup> On the other hand, as every student of constitutional law is aware, strict scrutiny places a heavy burden of justification on the government and creates a presumption of unconstitutionality—which makes it easily administrable in the mine run of cases.

*Roe* also used the same modalities of interpretation that Bobbitt identified and that Alito complained it failed to deploy. First, history. The *Roe* Court began its substantive discussion of abortion with a long historical overview, stretching back to ancient Greece. While Justice Alito described the discussion as “irrelevant,” it seems clear that the historical overview was meant to inform the Court’s analysis of the state interests

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*Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 HARV. L. REV. 689, 702 (1998).

42. See, e.g., Fallon, *supra* note 41, at 81.

43. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8 (1982); cf. LEE J. STRANG, *ORIGINALISM’S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION* 162-63 (2019) (acknowledging the eclecticism of American legal precedent while arguing that it is undergirded by originalism).

44. *Dobbs*, 142 S. Ct. at 2266, 2272.

45. As Erwin Chemerinsky has explained, a fundamental rights analysis usually proceeds by asking four questions: 1) Is there a fundamental right? 2) Is it substantially burdened or infringed? 3) Is there a sufficient justification for the government action? 4) Is there a close enough means-end fit? ERWIN CHEMEKINSKY, *CONSTITUTIONAL LAW* 906 (6th ed. 2020). The undue burden test, however, appears to end the inquiry after the second question.

involved in restricting abortion.<sup>46</sup> The historical discussion also informs the sort of “ethical” reasoning that Bobbitt points to as a recognizable modality of constitutional interpretation—defined not as moral argumentation but as argumentation derived from a sense of American culture or *ethos*.<sup>47</sup> *Roe*’s broad survey of historical, medical, and cultural sources is aimed at deriving a sense of American attitudes and beliefs toward abortion and their evolution over time. Much like the historical discussion in *Dobbs* itself, *Roe*’s is wide-ranging, full of generalizations, and open to interpretation. But this is nothing new for Supreme Court opinions. In fact, the contemporary Supreme Court’s historical narratives have been subjected to significant criticism and have often provoked rich counter-histories from the dissent.<sup>48</sup>

Second, precedent. After reviewing the history of legal and cultural attitudes toward abortion, the *Roe* Court turned to whether there was a fundamental right to terminate a pregnancy. As alluded to above, the *Roe* Court cites a body of precedent stretching back to *Union Pacific Railroad Co. v. Botsford*,<sup>49</sup> a case often cited to establish the existence of a right to bodily integrity. The Court also draws a line connecting *Roe* to longstanding and unquestioned precedents vindicating the constellation of rights to autonomy in making decisions pertaining to family life, such as *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Skinner v. Oklahoma*, as well as *Griswold*. Not only these, but also *Eisenstadt v. Baird*—a case that anticipated *Roe* by emphasizing that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”—clearly and perhaps inexorably laid the groundwork for *Roe*.<sup>50</sup>

And what about text? No one claims that the Constitution contains an enumerated right to privacy or uses the word “abortion.” But that does

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46. *Dobbs*, 142 S.Ct. at 2240; *Roe*, 410 U.S. at 147 (“Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.”).

47. BOBBITT, *supra* note 43, at 94.

48. See, e.g., *D.C. v. Heller*, 554 U.S. 570, 640–87 (2008) (Stevens, J., dissenting); *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. \_\_\_, 142 S.Ct. 2111, 2181–90 (2022) (Breyer, J., dissenting).

49. 141 U.S. 250 (1891).

50. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Indeed, *Roe* had already been argued in the Supreme Court (but held over for re-argument) at the time *Eisenstadt* was decided, suggesting that *Eisenstadt* was written with *Roe* in mind. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 542 (1994) (noting that the law clerks to Justice Brennan, who authored *Eisenstadt*, immediately recognized the potential significance of that sentence for abortion).

not make privacy doctrine atextual. *Griswold* was in many respects a textual decision—as the State of Mississippi itself acknowledged in its *Dobbs* brief.<sup>51</sup> But interestingly, it is Mississippi that engages in atextual argument in an attempt to salvage *Griswold* while destroying *Roe*, when it insists on reading *Griswold* as a case about the Fourth Amendment. “In invalidating a state law regulating the use of contraceptives,” the brief asserts, “*Griswold* vindicated the textually and historically grounded Fourth Amendment protection against government invasion of the home—which would likely have been necessary to prosecute under the statute.”<sup>52</sup> Of course, this is manifestly not what *Griswold* said; instead, *Griswold* invoked the First, Third, Fifth, and Ninth Amendments alongside the Fourth, noting that all of these constitutional rights bring with them “penumbras” beyond their core guarantees that have long been recognized as inevitable inferences from the textual protection itself.<sup>53</sup> The state’s *Dobbs* brief thus ironically puts forth an overtly atextual defense of *Griswold*.

Moreover, both the *Griswold* Court’s “penumbras” discussion and the *Roe* Court’s invocation of that precedent, along with the Fourteenth and Ninth Amendments, can be understood as a form of structural argumentation, according to which the overall structure of the Constitution points to an embrace of limited government, in which certain areas are marked off as beyond the reach of state control.<sup>54</sup> For example, in the federalism case *Printz v. United States*, the Court eschewed the necessity of a specific, narrowly worded textual hook in the Constitution for the anti-commandeering principle, looking instead to the “structure of

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51. Brief for Petitioners at 15, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (“*Griswold v. Connecticut*, on which *Roe* relied and which applied the most expansive approach to the right of privacy among pre-*Roe* cases, finds grounding in text and tradition.” (citation omitted)).

52. *Id.* at 15-16. See generally Marc Spindelman, *Mississippi’s Originalism: Dobbs v. Jackson Women’s Health and the Attack on Sexual Freedom*, AM. PROSPECT, Oct. 19, 2021.

53. *Griswold v. Connecticut*, 381 U.S. 479, 481-85 (1965). While the term “penumbra” may be an odd one, the notion that certain constitutional provisions protect conduct that is not specifically enumerated within those provisions—for example, that the First Amendment protects a right to expressive association despite not naming a freedom of association—is not particularly controversial. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000) (describing the First Amendment right of expressive association).

54. Some state courts have affirmatively adopted a canon of reading the constitution holistically, such that constitutional rights need not and arguably should not rest on a single textual hook. Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001, 1001 (2021). On this view, the fact that a constitutional right is implicit in multiple constitutional provisions is a strength rather than a weakness.

the Constitution,” as well as to precedent, in expanding the scope of that doctrine.<sup>55</sup>

Finally, the trimester framework, including its viability line, comes under intense attack in *Dobbs*. Indeed, this has been perhaps the greatest point of criticism since *Roe* was decided. The viability line is attacked as arbitrary, and the trimester framework as a work of judicial legislation that cannot be derived from any text of the Constitution.<sup>56</sup> The trimester framework, while perhaps overly rigid, is not simply created out of whole cloth: rather, it is a fairly conventional application of strict scrutiny. The Court identified the end of the first trimester as the point at which the state’s interest in the patient’s health became compelling, because it understood second-trimester abortions to be riskier than first-trimester abortions, based on the facts before the Court at the time.<sup>57</sup> (Of course, these facts could be undermined by later developments, and were, but the strict scrutiny framework was able to adapt accordingly.)<sup>58</sup> Similarly, the Court identified the third trimester—which corresponded roughly with the point of viability—as the point at which the state’s interest in fetal life became compelling, and because of this, bans on abortion (with appropriate exceptions) would be narrowly tailored to advancing that interest.<sup>59</sup> It is possible to criticize the particular application of this framework in *Roe*, as well as its articulation of rules that seem almost legislative in nature. But the overwhelming focus on the legislative quality of *Roe*’s trimester framework simply misses the fact that it is a straightforward application of strict scrutiny—a test well known to constitutional doctrine.<sup>60</sup>

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55. *Printz v. United States*, 521 U.S. 898, 918, 925 (1997). Even setting the text aside, the use of substantive due process to protect unenumerated rights is nothing new—the word “marriage” does not appear in the Constitution either.

56. *Dobbs*, 142 S. Ct. at 2237-38 (“Without any grounding in the constitutional text, history, or precedent, *Roe* imposed on the entire country a detailed set of rules for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation.”)

57. *Roe*, 410 U.S. at 163-64.

58. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439 (1983) (striking down a requirement that all second-trimester abortions be performed in a hospital, because the medical evidence no longer supported the requirement), *overruled in part by* *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). The same could be said of the viability line, which moves earlier in pregnancy as medical technology improves; this adaptability is a strength rather than a weakness of the viability line.

59. *Roe*, 410 U.S. at 163-64.

60. *Roe* did go beyond the Texas law before it in applying strict scrutiny. That is, it did not stop at applying that test to Texas’s near-total abortion ban, but instead provided guidance for how other sorts of abortion restrictions might fare under strict scrutiny. Its decision to do so is hardly surprising, however, given that it was considering the constitutionality of a more nuanced set of abortion

Moreover, while the *Dobbs* Court repeatedly criticizes the use of viability as a marker, along with the Court's failure to explain it, the alternative of throwing up one's hands and walking away hardly seems like a satisfying or appropriate one. The task of courts is often to draw lines, and viability as a line has much to recommend it. It is a concept that has at least some meaning and significance to medical professionals. As Laurence Tribe points out, it is also the point at which ending a pregnancy does not inherently require destruction of the fetus and as such, it reflects an easily understood moral intuition about the point at which the fetus may have interests separate from the pregnant person's.<sup>61</sup> And regardless whether one agrees with the viability approach, it would be an abdication of judicial responsibility to simply give up on the task of identifying rules for the analysis of abortion restrictions once the Court has identified a constitutional right to terminate a pregnancy.<sup>62</sup> Suggesting that there cannot be any constitutional right at all simply because it is difficult to draw a clear line around its limits is like saying that there should be no right to free speech because it may be hard to distinguish protected from unprotected speech in borderline cases.

Furthermore, the *Dobbs* Court itself has not left us with a clear set of rules regarding abortion, either, whatever its pretensions. A slew of unanswered constitutional questions remain, such as whether abortion restrictions must protect patients against health risks, and to what extent; whether states can ban interstate travel for seeking an abortion; whether spouses and partners can be given a right to veto a person's abortion decision; whether states can retroactively apply *Dobbs* to punish abortion providers; and whether states can ban contraceptives that they consider to be abortifacients because they have a post-fertilization effect. Indeed, while Justice Kavanaugh suggested that the questions remaining open after *Dobbs* are "not especially difficult as a constitutional matter,"<sup>63</sup> these legal questions are in fact hotly debated.<sup>64</sup> Moreover, while Justice Kavanaugh seemed to assume it was obvious that an abortion ban must, at a minimum, contain an exception to protect the pregnant person's life—observing that even Justice Rehnquist, dissenting in *Roe*, shared this

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regulations under Georgia law at the same time it was considering *Roe*. *Doe v. Bolton*, 410 U.S. 179 (1973) (decided the same day as *Roe*).

61. Tribe, *supra* note 7, at 27-28.

62. As the plurality stated in *Casey*, "Liberty must not be extinguished for want of a line that is clear." *Casey*, 505 U.S. at 869.

63. *Dobbs*, 142 S.Ct. at 2309 (Kavanaugh, J., concurring).

64. See, e.g., Will Baude, *Legal Questions About Abortion After Dobbs*, REASON.COM, July 8, 2022.

view<sup>65</sup>—it is puzzling to say the least that Justice Alito’s majority opinion in *Dobbs* makes no mention of this idea. Instead, Alito ended his majority opinion by explaining how the “rational basis” test would be applied and listing interests that would be considered “legitimate,” but with no intimation whatsoever that the patient’s life must still be protected.<sup>66</sup> Thus, even taking the majority’s criticisms of *Roe*’s workability on its own terms, it is not clear that the *Dobbs* Court’s cure is better than the disease.

### III. CONCLUSION

As state courts begin to grapple with suits seeking to vindicate a right to reproductive autonomy under state constitutions, it is time to re-examine the well-worn critiques of *Roe*. Many of these critiques fall apart on closer examination, as *Roe* is revealed to be a constitutional decision that is grounded in text, structure, history, and precedent and that straightforwardly applies a doctrinal test that is well-known to, and well-understood by, constitutional lawyers. Indeed, strict scrutiny is the default test that courts apply to infringements on constitutional rights, and it has not proven unworkable. Whereas *Casey*’s undue burden test was subject to manipulation by hostile courts, resulting in doctrinal whiplash at times,<sup>67</sup> the same is not true of strict scrutiny. And while a full defense of the strict scrutiny standard is beyond the scope of this short essay, it is worth noting that strict scrutiny has been embraced by numerous state courts before and after *Dobbs*, which have observed that the abortion right is closely associated with other fundamental rights unquestionably subject to strict scrutiny, such as the right to refuse medical treatment and the right to procreate.<sup>68</sup> Thus, this essay argues that it is the criticisms of *Roe*, rather than *Roe* itself, that have failed to stand the test of time.

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65. *Dobbs*, 142 S.Ct. at 2306 n.2 (citing *Roe v. Wade*, 410 U. S. 113, 173 (1973) (Rehnquist, J., dissenting)).

66. *Id.* at 2283-84 (majority opinion).

67. Compare *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016), as revised (June 27, 2016) (holding that *Casey* required balancing the benefits and burdens of a law), with *June Med. Servs. L. L. C. v. Russo*, 591 U.S. \_\_\_, 140 S.Ct. 2103 (2020) (Roberts, J., concurring) (“Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.”).

68. See *supra* cases cited note 3; *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); *Armstrong v. State*, 989 P.2d 384 (Mont. 1999).