



ABORTION:
YOU CAN HAVE CATHOLIC CANON LAW OR YOU CAN HAVE THE CONSTITUTION
BUT YOU CANNOT HAVE BOTH.

References:

- (1) "The Wages of Crying Wolf", 1973, by John Hart Ely (hereinafter shortened to "Wages")
- (2) "Democracy and Distrust", 1980, by John Hart Ely (hereinafter shortened to "Distrust")
- (3) "On Constitutional Grounds", 1996, by John Hart Ely (hereinafter shortened to "Grounds")

1. Sin and redemption are not in the Constitution, neither are the terms unborn life or abortion, but does any of that really matter if abortion is a sin against God and you identify with that higher authority? As it turns out, it matters a lot judged by what Dobbs precipitated at the state level - a wild-west hodgepodge of abortion laws and a reinterpretation of gender roles in society. To the millions of women whose moral convictions oppose abortion, I respect you, Dobbs must seem so welcome. But the machinations that make up Dobbs discredit it; Dobbs is astoundingly bad.
2. Dobbs denied women their liberty under the due process clause of the Fourteenth Amendment (*nor shall any State deprive any person of life, liberty, or property, without due process of law*) when it permitted states to force women to become mothers against their will. Dobbs further denied women their liberty to be free within society from oppressive state restrictions on their way of life and behavior, landing especially hard on women living below the poverty line. The establishment clause of the First Amendment (*Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof*) is being contested by Christian nationalists that seek dominion over the Nation. The Nation has not faced this threat to pluralism before. In 1954, the phrase "under God" was added to the U.S. Pledge of Allegiance, "In God We Trust" was added to currency in 1955 - both pieces of legislation were purportedly due to the Communist threat in the 1950s.
3. Dobbs sent abortion to the states with only one condition, that the States have a rational reason, which is almost any reason, for whatever they wanted to do to women pursuant to Dobbs. The Court self-righteously moved on, ignorant of, or unmoved by, the fact that liberty denied to pro-choice is liberty denied to pro-life. The irony is many young pro-life women celebrated having their liberty taken from them, which refreshes the question, what is really going on?

4. In the entire 236 years since ratification of the Constitution, only fifteen (15)¹ Supreme Court justices have been Catholics. Seven (7) of those fifteen are on this Court, six (6) of the (7) are the Dobbs majority opinion. All six in the majority were vetted by the Federalist Society. The newest justices, Gorsuch, Kavanaugh and Barrett, were nominated by former President Trump. In 2016, Leonard Leo (Federalist Society, Christian nationalist) said a mouthful, "*He <Trump> is the opportunity we have been waiting for*". Trump's nominations of Gorsuch, Kavanaugh and Barrett, were a quid pro quo (conservative evangelical votes for Supreme Court nominations) that was critical to Trump's Presidential win 2016. Normalizing this quid pro quo as 'just' politics' does not deserve our trust.

5. ("*Grounds*"): *The interests of the mother and the fetus are opposed. On which side should the State throw its weight? The issue is volatile; and it is resolved by the moral code which an individual has. (Catholic Canon Law): Abortion is a grave sin, and the only exception is to save the life of the mother. (Pope John Paul II in his Evangelium Vitae, the Gospel of Life (1995)): The decision to have an abortion is often tragic and painful for the mother.* In sum, abortion is a sin, it is painful, it is the woman's decision and her cross to bear. How is it then that Dobbs completely excised the woman, the indispensable person, from its abortion opinion? Pro-life political and social strategy excised the woman to focus attention on the fetus, but why should Dobbs have imitated that political cunning and calculation? What is really going on?

6. Christian doctrine informs much of abortion's controversy. Catholic Canon Law does not have an exception for rape, or incest, or fetal anomaly. (*The Roman Catholic Diocese of Phoenix (dphx.org): The Church teaches that through mercy and love, a non-violent solution for both mother and child is far superior to **helping** a victim of violence (the raped woman) commit violence against her own child through abortion.*
 - a. On the other hand, living and raising a child in an environment of rape and/or incest is well short of mercy or love for the mother, and especially not for the child. Pro-life is a misnomer, it is pro-birth. It is not pro-lifetime, nor is it pro-quality of life, or we would see vastly different policies at both state and federal levels. Divine² birth at conception holds its significance in Christian theology not in the Constitution.

7. Dobbs harmonized with Catholic Canon Law by employing a scheme called liberty interest (sounds like but is not the liberty in the Fourteenth Amendment). Liberty interest is a category or subject, whereas, liberty in the 14th Amendment is a fundamental right of a living person. Forty years before Dobbs in "Distrust", liberty interest was widely condemned by constitutional scholars as a *disaster in both theoretical and practical terms*. Nonetheless, Dobbs used the ploy and concluded the issue of abortion

¹ Justice Gorsuch was raised Catholic but attends and is a member of an Episcopal Church. It is unclear if he identifies as a Catholic as well as belonging to the Episcopal Church (Wikipedia).

² See chart in paper titled, "Roe to Dobbs in a Single Graph".

was not a liberty interest, and on that basis, deprived women of their constitutional Fourteenth Amendment liberty. Dobbs compounded that error by sending abortion to the states with the single condition that the states have a rational reason for whatever they wanted to do to women pursuant to Dobbs. It is unconstitutional to deny anyone their Fourteenth Amendment rights, especially women forced to be mothers against their will, that should have been a no-brainer.

8. Abortion is a moral issue concerned with human character. Unintended pregnancies surely test moral character. The male half of the unintended pregnancy is not the party whose life is on the line. The woman grows the zygote, it is not the other way around. Conception can take hours or days after unprotected sex. After conception, it takes about a week for the zygote, initially one fertilized cell, to travel down a fallopian tube to her uterus at which point it is about 100 cells, now called a blastocyte. If all continues well, potential life grows fast. When the woman first suspects she may be unintentionally pregnant, elective abortion may enter the picture. The embryo (a fetus after about ten weeks gestational age) has no say in the matter. Authority, of one kind or another, cannot decide for the woman unless it forces her to be a mother against her will. Today, within Christian denominations, complementarian versus egalitarian are two sides of a gender issue, which a half-century earlier was known as men's authority versus women's rights. The term women's rights within Christianity is not the same as women's rights under the Constitution. Women's liberty is an underlying theme of the Constitution with an overall arc towards women's equality. By its actions, the majority seems to think otherwise.
9. In a free society, the woman is the ultimate decision maker on whether to be a mother or not, according to her religion, philosophy, or moral code. Enforcement of liberty in the Fourteenth Amendment is a power reserved to the United States (Section 5, 14th Amendment). Dobbs erred when it delegated enforcement of women's liberty to each state.
10. Dobbs' liberty interest cum history of laws sans tradition scheme is the quintessential precedent for how to overturn precedents like contraception, *Griswald v. Connecticut* (1965), interracial marriage, *Loving v. Virginia* (1965), and consensual same sex conduct (*Lawrence v. Texas* (2003)). This is true because the liberty interest analysis ploy in Dobbs lays out how to reach an opinion based entirely on a history of laws, it doesn't matter what the issue is.
11. For some evangelicals, democracy means people of conviction struggling vigorously to advance their beliefs by every ethical and legal means at their disposal. In this effort, religion has appropriated politics. From the religiousinstitute.org (pre-Dobbs):
 - a. *Our church's explanation of the Small Catechism puts the matter well when it says, "The living but unborn are persons in the sight of God from the time of conception. Since abortion takes a human life, it is not a moral option except to prevent the death of another person, the mother." The sin of willfully aborting a child, except in those very rare*

situations where it may be necessary to save the life of the mother, is a sinful act, totally contrary to the will of God.

- b. *Just because something happens to be legal does not make it moral, ethical or right. Abortion is perhaps one of the most dramatic examples of a situation where something is legal but is very much a sin against God. Since 1973, abortions have been legal in the United States. Abortion remains a sin against God, whether or not it is legal in our society; therefore, we must “obey God rather than men” (Acts 5:29). The church needs to inform its members that abortion is sinful and then encourage them, as Christian citizens, to use available legal means to change the law. Christians do not resort to illegal activities³ to change our nation’s laws.*

12. Catholic Canon Law rejects a balance between mother and fetus: *Abortion is a sin against God and failure to foster a culture of life. Catholics who... Serve in public leadership positions have an obligation to place their faith at the heart of their public service; No appeal to policy, procedure, majority will, or pluralism ever excuses a public official from defending life to the greatest extent possible (www.canonlaw.info/ajustpunishment.htm). No balance is the Catholic Canon Law solution found in Dobbs. Balance is the constitutional solution not found in Dobbs.*
13. As much as we need new birth, the guarantee of a new beginning for man, we need the mother. But birth is only the beginning of the mother’s importance, human babies enter the world utterly dependent on caregivers for their every need. Infants are a heavy metabolic burden on the mother before and after birth; at birth the baby’s brain is less than 30 percent of adult brain size. The greatest predictor of success in life is the life into which the baby is born, most often the mother’s life. A mother’s love is not something authority can enforce. The most important thing is for a child to know how deeply loved the child is. Every fetus has a right to life, we all have a right to life, not just to be born but to a long, healthy life, ideally having known love.
14. John Hart Ely called the woman and the fetus “opposites”. Lawrence Tribe (another prominent constitutional scholar) described the woman and the fetus as a “clash of absolutes”. Theology brooks no compromise; life begins at conception. Science says a single cell of forty-six matched chromosomes is the beginning of a human being. Science also says abortion begins at conception, that is, spontaneous abortion begins at conception, due most often to chromosomal abnormalities or maternal reproductive tract abnormalities. Abortion defined exclusively as elective abortion and pro-life defined exclusively as pro-birth is way too narrow. The fetus is not a person in the Constitution, and the woman is not a goddess in Scripture. The Constitution recognizes life begins at mortal birth; Scripture recognizes divine life begins at conception. We are not talking apples and apples.

³ Christian Nationalism’s decisive support for a divisive, authoritarian President Trump to stack the Court with ideologically pure Catholics was morally bankrupt given Trump’s infamous disregard for right and wrong, good and bad, his infamous ignorance of the Bible, and his overt fascism.

15. Balancing the woman's remaining life, say sixty (60) years, with the fetus' remaining gestation, say eight (8) months, is certainly not comparing apples and apples. Pro-life demands mortal life for divine life. But shouldn't pro-life be pro-beginning-of-life and shouldn't pro-choice be pro-beginning-of-remaining-life. Pro-life loses its meaning if baby is just a Safe Haven drop-off; and pro-choice, often a mix of anxiety and dread, loses its meaning if authority forces a woman to be a mother against her will. If the duality of woman and fetus is reimagined as the potential full mortal life of the mother compared with the potential full mortal life of the fetus, we are closer to comparing apples and apples. Pro-birth is a moment in time that is so much more manageable, stageable, and controllable than is a lifetime.
16. Abortion angst is a complex interplay of beliefs, emotions, and societal norms of the mother but shouldn't we also consider the lives of those profoundly impacted by the abortion decision? And who makes that crucial, moral decision, the woman with her doctor, or authority? Authorities' intervention in decisions about what happens to people's bodies is quite scary. Is abortion policy something to be decided by vote? If by vote, should elected representatives⁴ vote or should direct democracy, a plebiscite, decide? The mutually exclusive culture war between the pseudo groups of pro-this and pro-that is a tragedy that has not helped to better our lives. On the other hand, "*No one, at the end of life, regrets love*" (Jeanette Witherspoon).
17. Maybe we should be looking at lifetimes from the other end. Aborting the fetus ends potential life, but we all die. Justice O'Connor (died 2023), in her dissent in Glucksberg (1997), wrote, "Death will be different for all of us". That should focus our minds some. We die of old age, or terminal illness, or accident, or natural catastrophe, or bad luck, or by our own hand, and sometimes we take a life so another may have a life or create yet another life. It is short-sighted to think only in terms of prenatal life, we should be thinking in terms of mortal lifetimes. And, we should not be afraid of the word abortion, instantaneous abortion (miscarriage) it is a fact of life⁵.
18. Defined broadly with an open mind, sexuality's role in human conduct and people's experiences of the methods they use to manage their fertility in conjunction with their experiences of pleasure and sexuality, extends consideration of why abortion cannot be legislated or adjudicated into nonexistence. The only mention of sexuality in Dobbs are statements that abortion is different from intimate sexual relations because abortion involves unborn life. Such narrow thinking fails to grasp that sexuality is an important part of life and who we are.

⁴ Elected representatives are representative democracy. The Constitution invests ultimate power in the People, and the best way to know what the People think on a particular issue is direct democracy, a plebiscite, a direct vote of the People on a single issue.

⁵ *For women in their early twenties, spontaneous abortion <occult and clinical> is nearly as common as live births". "After the mid-twenties, spontaneous abortion is the norm rather than the exception". "Spontaneous abortion is an intrinsic and overarching component of human reproduction. It is the most common outcome of conception across a woman's lifetime". (Source: *The high abortion cost of human reproduction*, William R Rice, University of California, Santa Barbara, 2018).*

19. *People always act on incentive. Take away women's control over their own bodies and you take away their future. Hope is the engine for imagining a better future (Marge Piercy).* Dobbs' silence on women's autonomy speaks volumes about how far this Court intends to restrict women's autonomy. Which takes us back to the question, what is really going on?
20. The First Amendment's "breathing space" Justice William Brennan first spoke of in 1963 is gradually disappearing under the rubric of "religious freedom". It's true the exact text string "separation of church and state" is not in the Constitution: *Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof*; but the idea of pluralism, including religious and secular pluralism, animates the Constitution. The United States Constitution is an experiment that tests a hypothesis, the separation of church and state, pluralism, and governance of, by, and for the People. Against this Christian Nationalism seeks a new moral order, an awakening. When the principle of action is the logicity of ideology, democracy suffers.
21. In some states, as the force of law is increasingly used to ban abortion, the reality is growing that those laws are not about saving potential life but about saving a perceived way of life, a life of Christian patriarchy and purity. There are better ways to improve everyone's way of life than separating into tribes along state lines. It's becoming urgent that we give them more of our attention.
22. History leaves no doubt everything is changing all the time. Drafters of the Constitution added provisions permitting it to be revised in the unknown future. But what if your religious belief is fixed, provides all the guidance you need in life, answers your most important questions, utterly rejects abortion as murder, comforts you in this life and beyond. What then, or more to the point, what now?

R. L.

(Everybody wants free will, to do one thing or another thing, to have one outcome or another outcome; free wills are constantly obstructing one another so that, inevitably, what emerges is something no one willed (Friedrich Engels).