LIBERTY INTEREST, DUE PROCESS CLAUSE, REHNQUIST
CHALLENGE TO LEGITIMACY OF DOBBS: CAN A PREGNANT WOMAN, OR ANYONE, BE DENIED DUE PROCESS OF LAW IN THE FOURTEENTH AMENDMENT?

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. Dobbs was too important to not investigate it. I wound up answering three questions: (1) is Dobbs well-reasoned, (2) if not, why not, and (3) what to do? The opinion of the Court is 68 pages, the dissent is 66 pages. Public job approval of the Court is at its lowest in its 235-year history.

2. We cannot change Dobbs, that die is cast. Abortion, the decision and the procedure) was sent to the States carte blanche – each State to act as it wishes. At the state level, abortion is now a wild-west patchwork of policies. Hopefully, seeing how Dobbs was put together, the practiced deceit, how astoundingly bad it is, will arouse people to vote and reject this Court's hidden agenda. We vote with our attention. Your vote matters enormously.

3. Post-Dobbs my interest sharpened as states banning abortion seemingly did anything they wanted to do to women to prevent abortion, a woman's liberty be damned. The liberty I am talking about is the explicit, Fourteenth Amendment liberty, found in the Due Process Clause. Liberty is a fundamental, constitutional right with a clear, unambiguous definition: *the freedom within society from oppressive restrictions imposed by authority on one's way of life or behavior, or political views*; it is the liberty every citizen possesses at birth. It was the Court's duty to protect women's liberty, not completely excise the woman and her liberty.

4. The Court majority overturned Roe and Casey because they wanted to, and no one could stop them. Hoist with its own petard, the majority impeached itself, raising questions about what constitutes "*good Behaviour*" (Article III, Constitution). Alito did not do it alone. Roberts in his concurring

opinion says he would have decided Dobbs more narrowly - which is still concurrence, and Thomas is, well, Thomas - *seething anger behind a veneer of conventional behavior* ("D.C. Unmasked & Undressed" by Lillian McEwen, 2011). Kavanaugh's concurring opinion incorrectly pleads the Constitution is neutral, messaging, don't blame me; and Gorsuch and Barrett's silence underscores the majority's shared religiosity. Was it well reasoned? No. Was it on constitutional grounds? No. So, what to do? A plebiscite (direct democracy) would be nice, a direct vote of the people on the singular issue of abortion (one issue, one citizen, one vote); unfortunately, only twenty-six (26) states allow direct democracy (citizen's initiatives or a referendum process)[1]. Dobbs does not even hint at direct democracy, instead, Dobbs sent abortion to State "elected representatives", which is representative democracy. Representative democracy injects a lot of politics, and money, and (today) religion between a citizen and her/his elected representative – the two may not think alike on the single issue of abortion.

5. 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,* is more than a guarantee of fair procedures. To this clause, Court opinions have added a substantive dimension: *substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose*. For context, here is the 1996 Congressional testimony of prominent constitutional scholar John Hart Ely (I introduce him several paragraphs below): *Roe was the only clear excursion into substantive due process we have witnessed since the 1930s. One year after Roe, it seemed to me it could be reversed without threatening an entire fabric of doctrine. I would say it isn't today, which in my opinion argues strongly for not overruling Roe.*

6. (Dobbs – Alito was the author) *The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely – the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution but any such right must be deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty*. [The underline is mine, to emphasize key words. This is typical on all papers on this website]

    a. With that opening declaration, Dobbs eliminated from further consideration a woman's right to her explicit liberty in the Due Process Clause in the Fourteenth Amendment, and abruptly pivoted from the woman's liberty to whether the issue of abortion is a fundamental right. To make the pivot, Alito tallied a history of abortion laws and determined abortion was not a fundamental right and in the proverbial blink of an eye denied women access to the protection in the Due Process Clause. Alito created a precondition to access the Due Process Clause, which summarized is abortion must satisfy ordered liberty, and the way to know that

[1] Republican trifecta states (states where both houses of the legislature and the governorship are controlled by Republicans) are passing laws to circumvent direct democracy by requiring citizen initiatives to meet geographic requirement that will make it very difficult to get future citizens initiatives on the ballot.

was by tallying abortion laws. However, any precondition to access the Due Process Clause is at variance with the primacy of the Constitution, which does not place any restriction on application of the Due Process Clause, save due process of law. The clause has universal application. Bottom line, Dobbs made it constitutional for states to ignore women's liberty and force women to be mothers against their will, most likely with the justification the states are preserving potential life. This moves the foci of abortion to the Establishment Clause in the First Amendment: *Congress shall make no law respecting the establishment of religion.*

b. Dobbs erred in sending enforcement of women's liberty to the States, which Dobbs did by virtue of mandating all States can defend themselves from constitutional challenge if they have a rational reason for their actions. The Fourteenth Amendment, Section 5, reads: *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article (Fourteenth Amendment)*. Meaning the power to enforce liberty in the Due Process Clause is delegated to the United States, not the States, and this Court's delegation of that power to the States was wrong.

c. Dobbs erred when it sent both the abortion decision and the abortion procedure to the States. The abortion decision is the woman's, how can it be otherwise unless forced by the State. Despite Dobbs, the Fourteenth Amendment remains the law of the land and a State should still need a compelling interest to justify 'taking' the woman's liberty; no doubt, the interest would be to preserve the life of her fetus. The duality of woman and fetus is unavoidable. Roe accepted the challenge of the unavoidable duality and balanced it. Dobbs took a much narrower view of matters and undid Roe, temporarily ducking the duality, but it will resurface. Catholic Canon Law, not the Constitution, lays down the inflexible law that from the moment of conception potential life[2] may never be aborted except to save the life of the mother. Dobbs obeyed Catholic Canon Law, not the Constitution[3].

d. When Alito talks about history and tradition, he appears to have his cited precedent, Washington v. Glucksberg (1997)[4] in mind. Rehnquist was the author of Glucksberg and his primary holding was, *A state is permitted under the Fourteenth Amendment to pass a law prohibiting assisted suicide*, and his principal reasoning was, *Fundamental rights and liberties are objectively deeply rooted in this Nation's history and traditions*. Dobbs says much the s

[2] Beginning with conception, the four states of fetal development are Zygote, blastocyst, embryo, and considered a fetus at about ten weeks gestational age = eight weeks fetal age.

[3] The Church is silent on spontaneous abortion (miscarriage). There are about one million spontaneous clinical abortions (miscarriages) each year and about the same number (one million) elective abortions each year.

[4] Washington state prohibited assisted suicide. That was contested and the District court as well as the Appeals court ruled the state's prohibition violated patients' Fourteenth Amendment rights. Washington appealed to the Supreme Court which reversed the lower courts (author: Rehnquist).

ame thing, except for the Nation part. Otherwise, Glucksberg and Dobbs have little in common, their facts are not comparable. The difference between the end of life and the beginning of life is a lifetime, and that makes all the difference in the world. The terminally ill quickly die, whereas abortion carries the certitude of seriously changing untold lifetimes, with variable results. Dobbs shows scant interest in the difference between assisted suicide and abortion (more on this later). What it does shows is Dobbs cited Glucksberg as precedent, not for its similarity with abortion, but for its opinion that the Due Process *Clause protects those fundamental rights and liberties which are objectively rooted in this Nation's history and tradition.* Dobbs took this and turned it into, the Due Process Clause does not protect abortion because it is not a fundamental right, ending application of the Clause to the issue of abortion. That was also wrong. The Clause protects, or should have protected, women's fundamental right to liberty, which is a separable matter from the abortion procedure.

e. A close reading of Glucksberg (1997) shows Rehnquist used more circumspect language than does Dobb: (Rehnquist, pgs 720-721) *Our Nation's history, legal traditions, and practice thus provide the crucial "guideposts" for responsible decision-making that direct and restrain our exposition of the Due Process Clause*. Alito cited the same pages in Glucksberg (pgs 720-721) but transposed "guideposts" into "must be", making "must be" a dubious mandate. "Must be" might have held up if an analysis of tradition had supported it, but Dobbs did not even consider tradition let alone the Nation's tradition, leaving Dobbs as nothing more than a "legal" history of abortion laws. Note that "legal" is a significant modifier to history, like "funny" history would be. To be clear, the Nation's history and tradition in Dobbs is a hollow claim, it is nothing more than a "legal" history without consideration of the Nation's history or consideration of the Nation's traditions. A Nation's tradition is customarily defined as open-ended and includes customs and beliefs passed from generation to generation viewed in light of evolving social norms, of which Alito says nothing**.**

7. Before proceeding further, let's fully introduce Professor John Hart Ely[5] whom Alito calls a "*prominent constitutional scholar"* – and I whole heartedly agree. Dobbs references "Wages" five t

[5] **John Hart Ely** (December 3, 1938 – October 25, 2003) was an American legal scholar known for his studies of constitutional law. He was a professor of law at Yale Law School from 1968 to 1973, Harvard Law School from 1973 to 1982, and Stanford Law School—where he served as dean—from 1982 to 1996, and at the University of Miami Law School from 1996 until his death. Ely was one of the most widely cited legal scholars in United States history, ranking just after Richard Posner, Ronald Dworkin, and Oliver Wendell Holmes, Jr., according to a 2000 study in the University of Chicago's *Journal of Legal Studies*. Ely was best known for his book *Democracy and Distrust* (1980), which was widely regarded as the most important academic work in two generations on American constitutional law, and was the most cited legal scholarship from 1978 to 2000.[2][1] In the book, Ely expounds a theory of constitutional interpretation known as political process theory. The theory suggests that judges ought to focus on maintaining a well-functioning democratic process and guard against systematic biases in the legislative process. (Wikipedia**)**

imes, cherry-picking quotes from Ely' famous treatise, *The Wages of Crying Wolf, A Comment on Roe v. Wade*" (1973).

8. Below are excerpts from "Wages" (1973), in which Ely supports Roe's result but criticizes its lack of clear thread from values in the Constitution. I have underlined what Alito cherry-picked. This sets the stage for the irony of Alito praising Ely's credentials when it suits Alito's purpose (overturning Roe), when the very same Ely in "Distrust" (1980) that castigates the liberty interest analysis method used in Dobbs (described further below), and renders Dobbs into trash.

    a. *(Ely) To the extent "progress" is to concern the Justices at all, it should be defined not in terms of what they would like it to be but rather in terms of their best estimate of what over time the American people will make it—that is, they should seek "durable" decisions.*

    a. (Ely) Roe is a case in point. Certainly, many will view it as social progress. (Surely that is the Court's view, and indeed the legislatures had been moving perceptibly, albeit too slowly for many of us, toward relaxing their anti-abortion legislation). Even in the unlikely event someone should catch the public's ear long enough to charge that the wrong institution <judiciary versus legislature> *did the repealing, they have heard that "legalism" before without taking to the streets[6]. Nor are the political branches, and this of course is what really counts, likely to take up the cry very strenuously: The sighs of relief as this particular albatross was cut from the legislative and executive necks seemed to me audible." "But I doubt one will: Roe seems like a durable decision.*

    b. *It is, nevertheless, a very bad decision not because it will perceptibly weaken the Court - it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's - it doesn't. It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.*

9. We are about to get deeper into implicit fundamental rights and the liberty interest scheme used in Dobb to deny access to the Due Process Clause, so now is a good time to review the difference between explicit liberty and liberty interest. Liberty is a noun; it attaches to a person; it is a fundamental right of the person that it is explicitly stated in the Fourteenth Amendment. Liberty interest connotes the idea that an issue has a right to the fundamental right of liberty. In Dobbs, abortion, the procedure, was evaluated considering the history of abortion laws and Dobbs determined abortion did not have a liberty interest, therefore, the Due Process Clause was not relevant. This effectively turned liberty interest into a prequalification to access the Due Process Clause. Doubly unfortunately for women and the Nation, Dobbs concluded liberty interest also meant women did not have a separable right to liberty, to be *free within society from oppressive*

[6] Professor Ely did not foresee the emergence of Christian nationalism into a political power. Opposition to Roe helped fuel its growth.

restrictions imposed by States on their way of life, behavior, or political views. On that score, Dobbs is facially unconstitutional. The modern source of liberty interest appears to be C.J. Rehnquist (died 2005). He held that the Due Process Clause only required heightened review if the issue to be adjudicated was a liberty interest. For Rehnquist, the idea of first classifying an issue as a liberty interest was a way to 'cut to the chase' and decide if the Court needed to give the state statute much thought at all. If the issue was not a liberty interest, the state only needed a rational reason to enforce the issue. And the way to decide whether an issue was a liberty interest was to answer the question, was the issue implicit in ordered liberty, or rephrased, was the issue a necessity for maintaining social order, and the way to do that was to decide if the issue (abortion in our case) was closely aligned with the Nation's history and with the Nation's traditions. That was Rehnquist's idea. Dobbs purports to follow it but makes a mess of it for the simple reason abortion is not assisted suicide. Reducted, Dobbs did the unthinkable and substituted the subjective profound moral issue of abortion with an objective tally of abortion laws.

a. Dobbs declined to consider the Nation's history and Dobbs certainly did not consider the Nation's traditions. That left Alito's entire justification for appropriating women's explicit Fourteenth Amendment liberty and women's autonomy over their own bodies on a legal history of abortion laws, the majority of which turned out to be a thirty (30) page appendix of State statutes criminalizing abortion in 1868 - the year the Fourteenth Amendment was ratified. Appropriating women's explicit Fourteenth Amendment liberty with such insensitive and cruel disregard for women requires an answer not found in Dobbs.

b. Alito knew all about the scholarly condemnation of the liberty interest scheme he used. Obviously, he could think of no better way to overturn Roe and Casey than to use the scheme, which ironically is solid evidence of Roe and Casey's merit.

10. Dobbs includes just one quote from "Distrust" (1980). A quote that is of little consequence, except for where it is found in "Distrust" and that is very significant because it is a mere four (4) pages after renown constitutional scholar Ely castigates the liberty interest scheme in Dobbs:

    a. *("Distrust") Substantive due process is a contradiction in terms* that *does turn out to matter, because of the negative feedback effect the notion of substantive due process seems to be having on the proper function of the Due Process Clause, that of guaranteeing fair procedures. Until recently <1980>, the general outlines of the laws of procedural due process were pretty clear and uncontroversial. The phrase "life, liberty or property was read as a unit and given an open-ended, functional interpretation, which meant that the government couldn't seriously hurt you without due process of law. What process was "due" varied, naturally enough, with context, in particular with how seriously you were being hurt and what procedures would be useful and feasible under the circumstance. But if you were seriously hurt by the state you were entitled to due process. Over the past few years, however, the Court has changed all that, holding that henceforth, before it can be determined that you are entitled to "due*

process" at all, and thus necessarily before it can be decided what process is "due," you must show that what you have been deprived of amounts to a "liberty interest" or perhaps a property interest. ***What has ensued has been a disaster, in both practical and theoretical terms. Not only has the number of occasions on which one is entitled to any procedural protection at all been steadily constricted, but the Court has made itself look quite silly in the process – drawing distinctions it is flattering to call attenuated and engaging in ill-disguised premature judgments on the merits of the case before it. The line of decisions has been subjected to widespread scholarly condemnation which suggests that sometime within the next thirty years we may be rid of it.***

b. Forty-two (42) years after "Distrust", the Court is still not rid of the liberty interest scheme used to deny access to the Due Process Clause. **Dobbs is the exact same ill-disguised, premature judgement, practical and theoretical liberty interest disaster condemned by Professor Ely.** Dobbs declared its evolution of the liberty interest scheme to be "*that important precedent*", which all but promises more ill-disguised, premature judgements to come, most likely in the realm of intimate relations (sexual relations, marriage, contraception).

c. From his grave, prominent constitutional scholar John Hart Ely condemns the reasoning in Dobbs in the harshest language decency permits. Professor Ely supported a woman's right to choose, his critique of Roe was not of its result, but of the pathway to its result. Professor Ely's castigation of the reasoning in Dobbs is altogether different, it is a clear facial[7] challenge to liberty interest as used in Dobbs, and so, to Dobbs in its entirety. What the majority triumphantly called "*that important precedent*" (liberty interest cum history of laws) should worry everyone because it is a bellwether inflection point away from the Constitution.

11. Alito made this snarky comment in Dobbs: *But despite the dissent's professed fidelity to stare decisis, it fails to seriously engage with that* ***important precedent*** *<liberty interest cum history of laws> which it cannot possibly satisfy.* What is scary about that snarky statement is the majority actually believes its liberty interest scheme is an important precedent. My hope, like John Hart Ely's, is that no one would ever use such a liberty interest scheme again. A hope that is, I fear, out the window.

12. Dobbs does not pass the commonsense threshold. A history-of-laws should not be the crucial test to decide access the Due Process Clause. If it was, the test should have been valid at any point in our Nation's history, and it clearly was not. How to explain, with prior laws alone, the abolition of slavery (Thirteenth Amendment, 1865) or women's suffrage (Nineteenth Amendment, 1920)? You cannot. Of course, amendments are legislative actions, not judicial renderings but my point about what it

[7] Facial means apparent from the face of the statute. In Dobbs, the liberty interest scheme acts as a prequalification to access the Due Process Clause, cutting women off from the protection of the Due Process Clause. A woman's right to liberty in the Fourteenth Amendment is a power reserved to the United States Congress to enforce. The Court failed to preserve that.

takes to understand the complexity of evolving societal mores remains valid. If instead, we look forward rather than backward using Alito's history-of-laws test, we should be able to parse out life in 2050, which many on Wall Street, or any street, would dearly love to be able to do. The future is unknowable, except that it will not be the past. Dobbs is so commonsensically wrong it once again begs the question, what is really going on?

13. Dobbs cited Glucksberg as precedent, so let's look further into Glucksberg (Rehnquist, author). Rehnquist[8] is clear about how he viewed liberty interest. It's unfortunate Rehnquist is the modern source of liberty interest, but it can at least be argued he did little damage in Glucksberg. With Dobbs, it is a totally different story, the damage is immeasurable.

a. What follows is very instructive. Rehnquist defines his idea of liberty interest and sets up the precedence that Alito modeled with tragic consequences.

b. (Here is Rehnquist in *Glucksberg) This approach <liberty interest> tends to rein in the subjective elements that are necessarily present in due process judicial review. In addition, by establishing a threshold requirement that a challenged state action implicate a fundamental right before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case*.

c. And that "*avoiding complex balancing*" is the problem. The fundamental right at issue is the woman's right to liberty to make the abortion decision and for *freedom within society from oppressive restrictions imposed by States on her way of life and behavior*. If you are seriously hurt by the state, as women forced to be mothers against their will, surely are, then you are due heightened review. State regulation of the abortion procedure is the prerogative of the State.

d. Professor Ely's castigation of liberty interest in "Distrust" – *a disaster in both practical and theoretical terms* - is as true of Glucksberg as it is of Dobbs. The difference between Rehnquist in Glucksberg and Alito in Dobbs is Rehnquist 'got away' with using liberty interest because (a) seriously hurting the terminally-ill is morally corrupt, unthinkable, and (b) prescription death is very rare relative to total population. Alito 'got away' with liberty

[8] What we do not know is whether Rehnquist was using Glucksberg to seed a pathway to overturn Roe and Casey. Rehnquist dissented in both Roe (1973) and Casey (1992). He was appointed by Nixon as Associate Justice in 1971 and known as a stanch conservative who favored a conception of federalism that emphasized the Tenth Amendment's reservation of powers to the states. He was appointed Chief Justice in 1986 (Died 2005). We know Rehnquist's feelings about Roe, he shared them in his dissent in Casey (1992): "*It is our duty to overturn Roe"*.

interest for the sole reason the membership of the Court was politically changed to redress religious grievances and because Alito only needed to sell it to the three newest members of the Court, not to the American People. Dobbs has seriously hurt all women of reproductive age, now and for all future generations. The deceit in Dobbs is unexplained, what is really going on?

e. It was Rehnquist's decision to frame Glucksberg (1997) in liberty interest terms: *They <Glucksberg, et al> assert a liberty interest protected by the Fourteenth Amendment's Due Process Clause which extends to a personal choice by a mentally competent, terminally ill adult to commit physician assisted suicide.* Rehnquist's reasoning:

   i. *In our view, however, the development of this Court's substantive-due-process jurisprudence . . . . has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment – never fully clarified, to be sure, and perhaps not capable of being fully clarified –* ***have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition"****. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specifically protected by the Due Process Clause includes the rights to marry, Loving v. Virginia; to have children, Skinner v. Oklahoma; . . . . . .* ***. and to abortion, Planned Parenthood of Southeast Pennsylvania v. Casey.***

   ii. *(Rehnquist quoting Casey) "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 where they formed under compulsion of the State". (Rehnquist) By choosing this language, the Court's opinion in Casey described, in a general way and in light of our prior cases,* ***those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions , or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment."***

   iii. Dobbs also quoted the very same words in Casey but conspicuously left out "**ordered liberty**", then used that omission as justification to overturn Roe and Casey. *(Dobbs) License to act on the basis of such beliefs . . . <see paragraph above> . . . may correspond to one of the many understandings of "liberty" but it is certainly not "**ordered liberty**". Our Nation's historical understanding of **ordered liberty** does not prevent the people's elected representatives from deciding how abortion should be regulated.*

   iv. **All stop**! Dobbs refutes its own precedent, Glucksberg, which relied on Casey, which upheld Roe, which stated Casey was a **concrete example** of a liberty *so fundamental to our concept of constitutionally* ***ordered liberty*** to be specifically

protected by the Due Process Clause of the Fourteenth Amendment. Let's review that one more time: (a) Dobbs cited Glucksberg as precedent, (b) Glucksberg cited Casey (which upheld Roe) as a special precedent, and (c) Dobbs overturned Roe and Casey, which was cited as precedent by its precedent. That makes no sense at all. Deceit on this scale, this blatant, signals premeditation, and once again begs, what is really going on?

v. Which is worse: (a) Dobbs pulling the wool over our eyes, or (b) Dobbs not aware of its error, or (c) Dobbs really believing what it wrote? All three are bad.

f. We still have the mega problem that assisted suicide is not abortion. Yes, both deal with life, one the end, the other the beginning, that much is true; but their frequency and their scale, the total lifetimes affected, the wholeness of their impacts on society make comparison impossible. Abortion's impact on the Nation dwarfs that of assisted suicide. Alito modeled <u>how</u> Rehnquist reasoned Glucksberg using liberty interest and made a total mess of it. **Assisted suicide is not abortion**, the two cases are so dissimilar that red flags are waving all over.

i. To further aid understanding, here are some differences between assisted suicide and abortion. After Glucksberg (1997) sent assisted suicide back to the state of Washington and after Washinton passed *Initiative 1000, Washington Death with Dignity Act (2008),* Washington reported a total of 2,341 prescription deaths between 2009 and 2022. In 2022, there were 363 prescription deaths, which in a state population of 7.7 million equates to 47 prescription deaths per 1,000,000 population. For comparison, per million population, Oregon had 66 prescription deaths in 2022, Colorado 54, and Vermont about 26. Clearly, the incidence of assisted suicide is a very small number compared to total population.

ii. In 2020, there were 930,160 abortions in the United States (Guttmacher Institute), which is 2,820 abortions per million population. By incidence, abortion is 5900 percent more prevalent than assisted suicide. But the disparity is far greater than that, we have yet to begin to factor in <u>lifetimes</u> of impact and how do we even do that!

iii. The liberty rights of the dying are certainly important but in terms of years of <u>liberty</u> rights denied those of the terminally ill are insignificant compared with women's <u>liberty</u> rights denied. Alito modeled Rehnquist's <u>liberty interest</u> cum history of laws scheme right down to not weighting the individual (dying patient in Glucksberg versus pregnant woman in Dobbs) and messed up royally. Overturning fifty years of women's liberty based on stuff like we find in Dobbs is a tragedy, maybe a crime.

14. It is worth asking, how relevant to Dobbs is the precedent cited in Glucksberg, Moore v. City of East Cleveland (1977)? In Glucksberg, Rehnquist once again chose to frame matters in terms of liberty interest: *The Court <Moore> had limited liberty interests to those that were deeply rooted in the nation's history*. Oddly, the phrase liberty interest does not appear in the Moore opinion of the Court (J. Powell, author). Powell writes of "governmental interest", "community interest", "state interest", "personal interest", "City's interest", but no liberty interest. Powell wasn't thinking liberty interest, but Rehnquist clearly was. Rehnquist appears to be the modern source of liberty interest.

15. (Dobbs) *It is impossible to defend Roe based on prior precedent because all of the precedents Roe cited, including Griswold and Eisenstadt <contraception and unmarried couples>, were critically different for a reason that we have explained: None of those cases involved the destruction of what Roe called "potential life."*

    a. If potential life is materially different from all the cases Roe cited, then Alito citing Glucksberg as precedent is also impossible to defend because Glucksberg was a case about assisted suicide and Glucksberg's precedent, Moore, was a case about the sanctity of the family, both of which are critically different from Dobbs because neither involved the destruction of potential life. So great is Alito's predilection to overturn Roe that he over-reaches and loses track of his own narrative. Alito appropriated women's liberty and risked the Court's authority and the Republic's well-being to promote what? Retribution, ideology, religion?

16. Because Glucksberg has nothing to do with potential life, it is proof that Dobbs cited Glucksberg for how (liberty interest) Rehnquist reached his opinion, not what the issue was. Alito erred because the what does matter. Assisted suicide is not abortion, a terminally ill patient is not a pregnant woman. Dobbs effects the lifetime of every woman alive and yet to be born. Dobbs is now the quintessential precedent for how to overturn other important precedents like **contraception, interracial marriage, same-sex marriage, and private consensual sex (Loving v. Virginia (1967), Griswold v. Connecticut (1965), Lawrence v. Texas (2003), and Obergefell v. Hodges (2015).**

    a. How Dobbs overturned Roe and Casey boils down to (a) compile laws of the issue and if the preponderance of those laws can be argued as opposing the issue, then (b) the issue fails as a liberty interest and (c) the issue cannot access the Due Process Clause' heightened review, regardless of how seriously anyone is hurt. How liberty interest was decided was decisive, what the issue was did not matter. Against this reality, Dobbs added this paragraph:

        i. (Dobbs): *And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision 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.*

ii. Dobbs uses two sentences to try to erase its entire analysis. Dobbs cannot divorce itself so easily from its liberty interest cum history of laws sans tradition scheme with a note to pay the scheme no attention. Cast doubt is exactly what Dobbs does. We all must worry about the Court's future use of liberty interest. Having willfully used it once with tragic consequences, the majority are more likely than not to use it again.

17. All women have good reason to be angry as hell with Dobbs, we all do, it is astoundingly bad. Turn your anxiety into anger and vote. **Your vote matters enormously**.

R. L.

("Women, life, liberty" – chant by Iranian women protesting Iran's theocracy)