DOBBS A to Z

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. Let's step back a moment and look at the absurdity that is Dobbs. What falls into the Court's blender is the Mississippi Gestational Age Act, which prohibited abortion after fifteen (15) weeks, except for medical emergency or fetal abnormality. Ninety percent (90%) of abortions in the United States take place in the first trimester, thirteen (13) weeks (Guttmacher Institute). And what pours out of the Court's blender is a State may force women to become mothers and may oppressively restrict the way of life and behavior of women.

2. Forty-one (41) **dissenting** opinions are referenced in the opinion of the Court. Twenty-one (21) additional **dissenting** opinions are referenced in the concurring opinions of Roberts, Thomas and Kavanaugh. Thirty-one (31) of the **dissenting** opinions are from Scalia, Thomas, Rehnquist, Alito and Gorsuch, three of whom are members of the Dobbs majority opinion. Dobbs is an inbred compilation of **dissenting** opinions.

3. If one believes abortion is a sin against God, believes that the issue of abortion is Biblical, then the Constitution will not make it otherwise - a dilemma. To get around the dilemma, Dobbs used a liberty interest scheme modeled after Washington v. Glucksberg (1997) (Rehnquist author). The Due Process Clause of the Fourteenth Amendment reads, *nor shall any State deprive any person of life, liberty, or property, without due process of law*. In the Clause, liberty means the fundamental right of *freedom within society from oppressive restrictions imposed by States on one's way of life, behavior, or political views*. Liberty interest as used in Dobbs is an artifice that tricks many because it includes the word liberty. Liberty interest simply implies the issue may be relevant to liberty, it is not a right, fundamental or otherwise.

4. There was nothing original in Dobbs that justified overturning Roe and Casey. Alito's principal reasoning in Dobbs was taken from C.J. Rehnquist's dissent in Casey, verbatim in places. In the main, Dobbs is Rehnquist, Rehnquist, and Rehnquist supplemented with cherry-picked quotes from Professor John Hart Ely's (died 2003) treatise, *The Wages of Crying Wolf, A Comment of Roe v. Wade (1973*). Alito pointedly omitted Ely's well-known life-long support for abortion

rights, and his endorsement of Casey upholding Roe, and in the last third of his life, his firm stand against overturning Roe and Casey. What distinguishes Dobbs from Roe is (a) a half century of factual reliance on Roe by society and two generations of women, and (b) the composition of the Court – change facilitated by a quid pro quo (votes for Supreme Court justices) between Christian nationalists and former President Trump.

5. Banning the abortion procedure within a state's boundary is one matter, denying women their liberty with oppressive restrictions on their way of life and behavior is a whole other matter.

6. Examples of oppressive state restrictions include: delayed miscarriage care; bounty hunting abortion laws that set neighbor against neighbor isolating women; women seeking abortion in another state are persecuted; anyone helping a woman have an abortion faces prosecution; local ordinances that prohibit using roads and highways to obtain an abortion create atmospheres of fear and make it more difficult to access standard health care; denial of private reproductive health insurance; mandatory pregnancy reporting to state authorities; geofence and keyword cyber warrants demanding GPS data of pregnant women to track their movements; state surveillance of nearly every aspect of a pregnant woman's online life including search histories, messages, health data apps, particularly period trackers.

7. There are about as many spontaneous abortions (clinical miscarriages) each year as there are elective abortions each year. About half of all Americans, particularly men, believe that miscarriage is rare when that is not true. The majority of miscarriages happen for medical or genetic reasons, not life style choices – men are much more likely to believe life style choice is the cause of miscarriage. Studies show 15-20 percent of pregnancies in the United States end in spontaneous abortion (clinical miscarriage), about one million per year, roughly the same number as elective abortions. Spontaneous abortion (clinical miscarriage) does not care if the woman is pro-this or pro-that, nor do state abortion bans. In states focused on preventing abortion, all too often a woman suffering a spontaneous miscarriage must first be cleared of the crime of self-induced abortion before emergency care is provided, or until fetal heartbeat ceases, or until maternal death is close. As with all consequences of Dobbs, marginalized women (low income, young, non-white) who miscarry suffer the most.

8. ("Distrust") *Of course, a woman's freedom to choose an abortion is part of liberty in the Due Process Clause: life, liberty or property shall not be denied without due process of law*.[1] Liberty's substance is not defined by process. Liberty does not need adjectives, it is stand-alone, robust in possibility, and best of all, it is explicit in the Constitution. Women have an explicit Fourteenth Amendment fundamental right to liberty - we all do. Pre-Dobbs, States c

[1] Each citizen is endowed at birth with liberty subject to due process of law for the common good. Re Duke law library: *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*. One more definition: Due Process protects personal autonomy, bodily integrity, self-dignity and self-determination.

ould not 'take' a woman's liberty without commensurate justification subject to heightened review. Dobbs threw that constitutional doctrine out the window when it reduced heightened review to rational review, the lowest level of judicial review; and in the process rendered the Due Process Clause meaningless when the issue is abortion, no matter how seriously a State hurts a woman.

9. "*Distrust"(1980)* became the most cited legal text written in the 20th century (Wikipedia). Alito makes just one minor reference to "Distrust" but its location is a mere four (4) pages after constitutional scholar John Hart Ely castigates the liberty interest scheme employed by Dobbs. Below is what Professor John Hart Ely (died 2003) had to say about liberty interest - and consequently about Dobbs:

    a. *("Distrust") 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 circumstances. 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. Ely's pointed criticism of liberty interest is direct criticism of Dobbs**. Dobbs is ill-disguised premature judgement**, and facially challenged[2].

10. Liberty interest is not the worst of Dobbs. Contending for the worst of Dobbs is its deceit about reliance. Reliance is so important you could forget everything else in the 68-page opinion of the Court and reduce it to reliance. If significant reliance exists, Roe and Casey are upheld, but if reliance does not exist, then Roe and Casey may be overturned. That's the traditional stare decisis doctrine.

[2] A facial challenged law is one that is considered to be always unconstitutional.

a. However, Dobbs was of a different mind: *Stare decisis, the doctrine on which Casey's controlling opinion was based, does not compel unending adherence to Roe's abuse of judicial authority.* As we shall see, Dobbs will decline to consider reliance. We can pretty much guess Alito's rationalization for declining to consider reliance, it would go something like this, *Roe was a case of judicial abuse of power wrongly decided and correction through legislative action, save for constitutional amendment, is impossible, therefore, traditional stare decisis reliance doctrine need not be followed*. Of course, that is judicial power faulting perceived judicial power. The only real change between Roe and Dobbs is the membership of the Court. Row was decided (7-2), Dobbs was decided (6-3).

b. *(Dobbs) Court cases have identified five factors that should be considered in deciding when a precedent should be overruled*. The last of the five identified by Dobbs in traditional stare decisis[3] analysis was reliance. Dobbs heard arguments to the contrary[4] in amicus curiae briefs but these five are what Dobbs said would be considered. Between Roe and Dobbs, two generations of women have lived with reproductive rights secured by liberty in the Due Process Clause of the Fourteenth Amendment. It is ludicrous to question whether two generations of women relied on their reproductive rights; of course they did, how could they not, monthly menses center women's reproductive rights in their lives. Nonetheless, Dobbs overturned Roe and Casey, so how did Dobbs show women and society did not rely on women's reproductive rights in Roe and Casey?

c. **Dobbs declined to rule on reliance,** that's how! Think about that! Let me repeat that, **Dobbs declined to rule on reliance**! Faced with obvious reliance on the one hand and traditional stare decisis doctrine on the other hand[5], Alito created new stare decisis doctrine tailored[6] to overturn Roe and Casey. This new doctrine is wildly irresponsible.

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[3] Stare decisis, meaning in Latin "to stand by things decided," *is a legal principle that directs courts to adhere to previous judgments while resolving a case with allegedly comparable facts*.

[4] Among the more than 140 amicus (friend of the Court) briefings (for and against overturning Roe and Casey), one brief argued that stare decisis deserved "minimal respect" because "Roe and Casey contradicted the stare decisis values of consistency, dependability, and predictability". The argument is if, say, 3 of 4 values are weak, then the last value (reliance) can be ignored. Another brief argued that because the nation is so divided on abortion, the stare decisis factors cited in Casey simply do not apply. Dobbs may have been influenced by these extra constitutional arguments.

[5] (Dobbs) *Our decision today simply applies longstanding stare decisis factors (pg 71).*

[6] *The Court <Dobbs> emphasizes that this decision concerns the constitutional right to abortion and no other right.*

d. This is how Alito created his new stare decisis doctrine: First he split reliance into two parts, traditional tangible reliance, and non-traditional intangible reliance. Then he claimed only traditional tangible reliance would count. Then he misrepresented Casey as "conceding" traditional tangible concrete reliance did not exist and followed that up by characterizing all reliance on Roe and Casey other than tangible to be intangible, and wrapped up by declaring, "*this Court is "**ill-equipped**" to assess general assertions about the national **psyche***". And just like that, **Dobbs declined to consider reliance**!

    i. It's imaginative alright and certainly not what Alito hinted at in his syllabus, but the result is still the same**, Dobbs declined to consider reliance**, zeroing out women's liberty in the process and forcing women to be mothers against their will. This is some really bad stuff. What is really going on?

e. Let's continue to follow Alito's justification for **declining to consider reliance**.

f. (Dobbs) *But this Court is **ill-equipped** to assess "generalized assertions about the **national psyche**." Casey's notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights." When a concrete reliance interest is asserted, courts are equipped to evaluate the claims, but assessing the novel and intangible form of reliance endorsed by the Casey plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone – and in particular, for a court – to assess, namely, the effect of the abortion right on society and in particular on the lives of women. This Court has neither the authority nor the expertise to adjudicate those disputes, and the Casey plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that Courts do not substitute their social and economic beliefs for the judgment of legislative bodies. Our decision returns the issue of abortion to those legislative bodies, and it allows women on both side of the abortion issue to seek to affect the legislative process by influencing public opinion,* lobbying legislators, voting, and running for office.

g. Reliance was kryptonite to the super majority's superpowers, so **Dobbs declined to consider reliance**, all the while pretending they were *applying long-standing stare decisis factors*. Dobbs just kept digging the hole they were in, shaming themselves, and insulting us.

h. What does ill-equipped even mean? Human psyche? (Psyche means the

human soul, mind, or spirit). Why would the six members of the Dobbs majority think it their role to assess the soul of the Nation before evaluating reliance on Roe and Casey? Why is religiosity of the Nation some new stare decisis doctrine when the Court is ill-equipped to assess it? Why are Alito and the majority obsessively fixated on the Nation's soul?

i. The reliance question before Dobbs was, have women and society over the last five (5) decades significantly depended on their reproductive rights in Roe and Casey? It's not a difficult question. Why is religiosity paramount? My answer – you may have a different answer – is **this is as close to honest as Alito and the majority get**. Dobbs is all about advancing a Christian religiosity, about promoting a fundamental right to life from conception, about rejecting abortion is health care, and about rejecting the idea of reproductive rights. Dobbs is just the beginning of this majority's agenda - cutting so many corners, so much deceit, does not happen without an agenda.

j. Lack of authority used as an excuse by the Supreme Court is certainly strange. The Court unquestionably has the authority, and responsibility, to address reliance persuasively. The U.S. Supreme Court wields immense authority, including shaping legal precedents. Dobbs was not tasked with taking "sides" or "assessing the balance of the fetus and the woman", what the Court was tasked with was deciding the straight-forward question of whether women and society significantly relied on Roe and Casey over five (5) decades. To avoid perjury, Alito took the Court equivalent of the 5th amendment and declined to answer the question. A Court that believes it can choose when to turn its power on and when to turn them off is a danger to the Nation.

k. This statement in Dobbs jumped out: *our decision allows women on both side of the abortion issue to seek to affect the legislative process*. The assumption that pro-life women on one side and pro-choice women on the other side are at loggerheads runs throughout Dobbs. Why is it women against women? All women are the losers in Dobbs, no woman gains a thing, all women lose the same rights. Some women who identify as pro-life today will have abortions later for their own good reasons, and many pro-choice women dearly want children, just later (pro-choice is pro-life understood as more than pro-birth). About forty percent of all pregnancies are unintended, and of all unintended pregnancies, about two-thirds result in birth and one-third in elective abortion. All women are at risk of spontaneous abortion (clinical miscarriage) - approximately one million per year in the United States. No, the "sides" are not women versus women – that's someone else's storyline, men versus

women fits the facts much better. Men (J. Barrett self identifies as complementarian) appropriated women's liberty in Dobbs, and it is state legislatures dominated by males that are 'taking' women's liberty with oppressive restrictions on their way of life and behavior. The opinion of the Court says the proper response to its opinion is for women to work harder, a statement that lacks servant leadership, humility, equality and mutual respect, and replaces those Christian values with deceit to enforce those qualities in others.

11. Recall that Dobbs claimed Casey *conceded traditional tangible concrete reliance did not exist,* well, let's compare what Dobbs cherry-picked with what Casey actually said. Casey did not concede that argument, much the opposite.

    a. *(Dobbs) Traditional reliance interests arise "where advanceplanning of great precision is most obviously a necessity." In Casey, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtuallyimmediate account of any sudden restoration of state authority to ban abortions." For these reasons, we agree with the Casey plurality that conventional, concrete reliance interests are not present here*.

    b. (Casey) *"This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions. To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades <Casey was decided in 1992> of economic and social developments, people have organized intimate relationships and made choices that define their view of themselves and their place in society in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."*

12. It is uncontestable[7] that women have actively relied on their abortion rights leading up to D

[7] The U.S. experiences an average of four (4) unintended pregnancies every minute and has about one million miscarriages each year and about the same number of elective abortions each year. All women are affected by abortion bans. Numbers this large over decades are part of the framework of facts within which women's and society's reliance on reproductive rights is indisputable.

obbs, that should not need exposition. In a stunning show of raw power, the majority **declined to consider reliance**, which, ironically, is proof of reliance. The hole the majority dug themselves just kept getting deeper. Objective metrics for reliance do exist, for example, in educational attainment, social participation, income and financial security, health outcomes, stigma (socially bestowed judgement), gender equality, individual agency, etc.

13. (*Dobbs) Roe was also egregiously wrong and on a collision course with the Constitution from the day it was decided. Casey perpetuated its errors, calling both sides of the national controversy to resolve their debate, but in doing so, Casey necessarily declared a winning side. Those on the losing side – those who sought to advance the State's interest in fetal life – could no longer seek to persuade their elected representatives to adopt policies consistent with their view. The Court short-circuited the democratic process by closing it to the large number of Americans who disagreed with Roe*.

    a. Point taken but a woman's liberty to not be forced to become a mother and a woman's liberty to receive emergency miscarriage care as soon as possible were preserved in Casey, those were not errors. It was Dobbs that erased all of the reproductive liberty women had under Roe and Casey; Dobbs just wiped the slate clean forcing a do-over. That sentence, *Roe was also egregiously wrong and on a collision course with the Constitution,* has, I wager, been reported more than any other sentence in Dobbs, adding "egregious" to the vocabulary of many. Whether Roe or Dobbs is more egregious is an open question. Roe was decided 7-2 (Blackmun, Burger, Douglas Jr, Brennan, Jr., Stewart, Marshall, Powell, Jr.) with two dissenting opinions (White, Rehnquist). The Fourteenth Amendment that existed in 1973 (Roe) was the same Fourteenth Amendment in 2022, only the Court composition changed. Whether Roe was egregious or whether Dobbs is egregious is a matter of opinion that boils down to whether the Due Process Clause is interpreted broadly (Roe) or narrowly (Dobbs), in which case, egregious cuts both ways. Hardly any reason to overturn a half century of reliance. Apparently, the collision Dobbs speaks of is Dobbs itself, but Dobbs is an astoundingly bad analysis, so much so that it is more likely than not Dobbs has an undiscussed agenda. But Dobbs did not reveal its agenda, so we are left to ask again, what is really going on?

    b. Under the Constitution, the people have the last say; unfortunately, direct democracy were each citizen votes a single issue up or down (for example, a citizen initiative, also called a plebiscite) is legal in only twenty-six (26) States. That, it turns out, is a serious shortcoming in our Republic. Regardless, Dobbs could have ordered state plebiscites, but did not do that. What a shame. Had the Court ordered plebiscites, I believe the Nation would be in a very different place today. In the remaining twenty-four (24) states, representative democracy is their chosen form of government. In these states, representatives vote, not each citizen. The Tenth Amendment is relevant in this discussion, it reads, *The powers not delegated to the United States by the Constitution,*

nor prohibited by it to the States, are reserved to the States respectively, or to the people. The term e*lected representatives*, which is found throughout Dobbs, is not explicit in the Tenth Amendment. "*To the States*", includes all branches of state government, not just the legislature. A case could be made that Dobbs cut out state courts. As for, "*To the people', it* can only be understood as a plebiscite, which Dobbs consciously or unconsciously did not do. Shame that. Lincoln's words still carry weight, "*that a government of the people, by the people, for the people, shall not perish from the earth*" (Gettysburg Address, 1863). The question persists, what is really going on?

14. *(Dobbs) We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard. Rational-basis review is the appropriate standard for such challenges.*

    (Dobbs) A law regulating abortion . . . . must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development, ... and the prevention of discrimination on the basis of race, sex, or disability.

    a. What a monumental error that rational basis was, it cut off heightened review of any challenge to state regulations effectively scrapping women's Fourteenth Amendment liberty rights, even when women are forced to become mothers against their will. A woman's constitutional right to liberty should never have been sent to the states to administer, her constitutional right to liberty is not dependent on the state in which she lives. Liberty is explicit in the Constitution and a power delegated to the United States to enforce. In violation, the Court gave its imprimatur for states to force women to become mothers and to oppressively restrict their way of live and behavior for no more than a rational reason. That was wrong!

    b. Where is common sense? Rational as a justification for state laws regulating such explosive issues as potential life and women's liberty is ludicrous. Rational might apply to the abortion procedure, but never to the profound moral abortion decision. Dobbs continually errs mixing and matching the procedure and the decision, the two are not the same! Yes, the state has an interest in regulating the procedure, but the state should not be in the business of deciding what to do with a woman's body. Unfettered state control of women's bodies extends to rape, incest, fetal abnormality, miscarriages, emergency care, travel restrictions, health insurance, gender discrimination, discriminatory surveillance, ad nauseum. Dobbs is lopsided towards authority away from individual liberty and the Constitution, what is really going on?

c. To preemptively defend itself, Dobbs tells us:

i. (Dobbs) We do not pretend to know how our political system or society will respond to today's decision overruling Roe and Casey. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly.

ii. *(Dobbs) But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work.*

iii. (Me again) Aborting an unintended pregnancy is a cross the woman must bear, but extraneous public reaction is a rather milquetoast characterization of states forcing women to have children using unfettered oppressive restrictions on their way of life and behavior. The statement, "*We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis",* is considerably at variance with **declining to consider reliance.**

d. All the exculpatory statements in Dobbs point to a Court problem that is déjà vu of Citizen's United. The Robert's Court is alarming detachment from the real-world consequences of its opinions and their damage to democracy and the Republic. Insensitivity on this scale leads to calamity, feeds decomposition of the status quo, fosters isolation, promotes inequality, blurs the distinction between right and wrong, promotes the logicality of ideological thinking, creates fertile ground for terror, and is part and parcel of an inability to alleviate political, social, or economic misery in a manner worthy of man. The reasoning in Dobbs is astoundingly bad and more likely than not foretells worse.

15. *(Dobbs) The goal of preventing abortion does not constitute invidiously discriminatory animus against women*.

a. It is silly to say preventing abortion does not have invidious dimensions when our national argument about abortion seeps in shame, blame, patriarchy, and misogyny. *The need for control is nearly always aimed at women's sexuality* (author unknown). Invoking the word invidious, invites enlarging the elective abortion issue to patriarchy and misogyny throughout history. Today it is so pervasive worldwide that it is the subject of a United Nations program*, Progress of the World's Women, investigating inequality, poverty and violence towards women.*

b. Six months before Dobbs overturned Roe, this Court partially overturned Roe and Casey by green-lighting Texas SB8, the infamously coined "bounty-hunter law". Today that law

and its copycats punish women. That was invidious. That this Court did not think it was discriminatory because it lacked animus is extremely troubling.

16. In Dobbs, the opinion of the Court criticized the dissenting justices at some length, one sequence was notably raw accusing the dissent of not regarding the "*destruction of a potential life as a matter of any significance*"; adding, "*that view is evident throughout the dissent*". That accusation was followed by, "*According to the dissent, the Constitution requires the States to regard a fetus as lacking even the most basic human right – to live – at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that "theory of life".* Adding, "*Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth*."

    a. I understand some of the source of that raw heat and make allowance for it, but Dobbs completely excised the woman, so the allowance dissipates considerably.

    b. The Constitution says nothing about a fetus, but it is pretty clear a fetus is not a person. Nonetheless, most of us are willing to excuse the Founding Fathers for missing prenatal details and feel a certain nerve connection for the new life forming inside a woman, a microcosm of the survival of our species. Roe obviously felt that and invested the fetus with a right to life based on gestational age; fetal rights that Dobbs summarily discarded for the current wild-west patchwork of abortion laws in the states.

17. Dobbs concludes: (We touched on this earlier but let's touch it one more time)

    a. (Dobbs) We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

    b. (Dobbs) A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.

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

    d. (Dobbs) We end this opinion where we began. Abortion presents a profound moral question.

e. Subparagraph 19.b. says abortion is like any health and welfare law. Dobbs repeatedly errs conflating the abortion decision with the abortion procedure. The medical procedure (about half of all abortions today are two pills) is unquestionably a health and welfare issue in which states have a regulatory interest.

f. The decision, however, is the woman's, how can it be otherwise unless the state forces her to be a mother against her will, and the State pays no attention to the Fourteenth Amendment. To voluntarily end a pregnancy is a profound moral decision and I have yet to hear anyone say otherwise. Precisely because the decision is morally profound and because morally profound does not equate to rational something more value laden is needed. Roe thought government needed a compelling reason, which still does not rise to morally profound, but it at least confronted the unavoidable balance of interests among woman, fetus, and government. Roe preserved and protected women's liberty, which is writ large, extant, in the Fourteenth Amendment. Dobbs did not protect women's liberty. Moral dilemmas are best resolved by a free and responsible individual through acts of will. Dobbs erred taking the woman's decision and giving it to the States. **A state that forces women to have children irrespective of the methods of enforcement contracts liberty to a meaningless notion**.

18. The phrase "substantive due process" is used four (4) times in the Opinion of the Court and once in the Dissent. It is used zero times in the concurrences of Roberts and Kavanaugh. Thomas, however, brings up "substantive" due process twenty (20) times in his 7-page concurrence. All the Court, save Thomas, accepted "substantive" due process as Court doctrine. But Thomas is now enamored with Alito's liberty interest cum history of laws sans tradition scheme, saying, *any substantive due process decision is demonstrably erroneous,* precedents like Griswald (contraception), Lawrence (same sex sexual activity), and Obergefell (same sex marriage) should be overturned at the earliest opportunity. Alarm bells should be ringing because **Dobb is the quintessential precedent for overturning each of these precedents.**

19. Alito leveraged "prominent constitutional scholar" John Hart Ely's criticism of Roe ("Wages" 1973) and left the impression Ely was a prominent anti-abortion voice when the truth is the opposite. Ely had serious doctrinal issues with Roe but was not conflicted about a woman's right to control her own body. Below is an excerpt from "Wages".

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. 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). Roe v. Wade seems like a durable decision.

20. In 1996, twenty-six (26) years before Dobbs, Ely wrote, "On Constitutional Ground". In it, he reprinted his letter to the authors of the Casey opinion, Justices Kennedy, O'Conner, and Souter. Keep in mind, Alito called Ely a "prominent constitutional scholar" when Alito cherry-picked Ely's writing in "Wages" and said absolutely nothing about the rest of Ely's life of work, during which he pointedly advised against overturning Roe. Alito's deceit is a red flag, it points to what is really going on. Here then is Ely's letter to the authors of *the opinion of the Court for Planned Parenthood v. Casey (1992).*
    a. *Despite my misgivings about Roe, I've thought for some years it would be a mistake to overrule it.*
    b. *I'm not much of a fan letter writer, but it seemed to me an exception was in order here, since I know you'll receive a lot of grief from true believers on both sides of his one.*
    c. *Your joint opinion is excellent – I guess law professors are allowed to say that occasionally – not only reaching what seemed to me entirely sensible results but <u>defending the refusal to overrule Roe v. Wade splendidly.</u>*
    d. *As you are aware, I thought (and think) Roe was constitutionally indefensible but overruling it now would have been a terrible mistake as well. Our society has indeed bult up expectations on the basis of it, particularly as regards the aspirations of women. And falling 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 <u>weaken the Court's authority immeasurably</u>.*
    e. *The nation is in your debt.*
    f. *My fear, of course, is that I don't think Roe should be overruled because I approve of it politically if not constitutionally, and there may indeed be something there. I also think, as the letter suggests, that Roe has contributed greatly to the more general move toward <u>equality for women</u>, which seems to me not only good but also in line with the central themes of our Constitution.*
    g. *Overruling it now would wreak havoc on that constitutionally legitimate movement.*

21. Some Casey retrospectives:

    a. (Opinion of the Casey Court)*: On the other side of the equation is the interest of the State in the protection of potential life. The* Roe *Court recognized the State's "important and legitimate interest in protecting the potentiality of human life". The weight to be given this state interest, not the strength of the woman's interest, was the difficult question faced in* Roe. *We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the* Roe *Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20*

years of litigation in Roe*'s wake we are satisfied that the immediate question is not the soundness of* Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of* Roe *should be reaffirmed*.

b. (Opinion of the Court)*: The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible*.

c. (Opinion of the Court): *A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.*

22. Women have every right to be very angry with Dobbs, as do we all. Dobbs seized ownership of women's liberty, without any measurable effect on the abortion rate to date. Patriarchy appropriating women's power is getting old.

23. **Your vote matters enormously.**

R. L.

Postscript:

That important question, *what is really going on*, is still out there. Here are my two cents. The Court majority are a mix of Christian nationalist adherents and enablers. Conservative evangelicals have emerged from under the radar to be a political powerhouse with adherents, enablers, and followers in the highest levels of law, government, business, and academia. Christian nationalism's big players are using Trump to advance their agenda of dominionism, a nation governed by Christians and based on their understanding of biblical law. Beginning before 2015, Trump has successfully built a classless mass movement following a script that we can read in Hannah Arendt's book, "*The origins of totalitarianism" (1966). In 2016, Trump* and Christian nationalism's elite big players (Leonard Leo, William Barr, et al) joined forces based upon a quid pro quo of evangelical votes for Supreme Court justices. It all paid off with Dobbs. In 2024, Christian nationalism is, once again, the power powering Trump. Trump and Christian nationalism continue to selfishly use each other to achieve their different ends, but together they threaten to upend the World, something both are okay with. Righteous and self-righteous have merged. In their titanic aspirations, abortion is just a tool.

To end my two cents, a quote from Jeanette Winterson's book, "12 Bytes" (2021), *No one at the end of life, regrets love*. A quote from Cheryl Crow, "Just observe and try to breathe love through your heart. You're here for a nanosecond. Why be an asshole?