

***Dobbs*: A Powerful Opinion with Discrete Weaknesses**

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*“Facts are stubborn things; and whatever
may be our wishes, our inclinations, or the dictates of
our passions, they cannot alter the state of facts and evidence...”*

President John Adams¹

I. Introduction

In *Roe v. Wade*, the Supreme Court of the United States held that women have a constitutional right to an abortion.² Over the following decades, *Roe* was reaffirmed by the Supreme Court in more than ten cases, including *Planned Parenthood v. Casey*.³ For years women have depended on *Roe* in making intimate medical decisions. However, this once constitutionally recognized right recently came to an end in *Dobbs v. Jackson’s Women Health*.⁴

On June 24, 2022, the Supreme Court of the United States corrected course and held that women do not have a right to an abortion under the Constitution.⁵ Although *Dobbs* was properly decided, proponents of the opinion must grapple with some of the Court’s less persuasive reasoning. This paper examines the weaker arguments in the Court’s *Dobbs* decision.

II. Principles of *Stare Decisis*

Stare decisis, meaning “to stand by things decided,” has played a critical role since early American jurisprudence. Justice Story suggested that *stare decisis* was “in full view of the framers of the constitution” and “was required, and enforced in every state in the Union.”⁶ In more recent

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¹ *Adams’ Argument for the Defense: 3–4 December 1770*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016> (last visited June 22, 2023).

² See generally *Roe v. Wade* 410 U.S. 113 (1973).

³ See generally e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992) (reaffirming the core holding of *Roe*).

⁴ See generally *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (overruling *Roe* and its progeny).

⁵ *Id.*

⁶ JUSTICE STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 378 (1833).

times, *stare decisis* has been described as “promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process.”⁷ Nevertheless, *stare decisis* does not wholly bind the Court to earlier decisions.

In *Dobbs*, the Court stated that proper application of *stare decisis* requires an assessment of the “strength of the grounds on which [a case] was based.”⁸ Historically, the Court’s *stare decisis* analysis is not always the same. For example, in *Brown v. Board of Education*, the Court focused largely on the effect of *separate but equal* in “public education in the light of its full development and its... place in American life throughout the Nation.”⁹ After just six paragraphs of analysis the Court found that *Plessy v. Ferguson*’s policy of separate but equal was “inherently unequal.”¹⁰ In contrast, the Court, in *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council*, provides seven pages of analysis before overruling precedent.¹¹ In those seven pages, the Court examined five factors: (1) “the quality of [the previous decision’s] reasoning”; (2) “the workability of the rule it established”; (3) “its consistency with other related decisions”; (4) “developments since the decision was handed down”; and (5) “reliance on the decision.”¹²

In *Dobbs*, the Court examined *Roe* under the same factors announced in *Janus*. While most of the *Janus* factors, ultimately favored overruling *Roe*, one factor did not: “developments since the decision was handed down.”¹³

III. Social Development Since *Roe*

In discussing developments post-*Roe*, the Court specifically addressed *social* developments. Although some social developments post-*Roe* support its overruling, several mentioned by the Court do not. In fact, rather than endorsing these purported social developments affecting the strength of *Roe*, the Court prefaces these developments by stating, “Americans who believe that abortion should be restricted... note...”¹⁴ The Court’s unwillingness to endorse these purported changes speaks to the

⁷ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

⁸ *Dobbs*, 142 S. Ct. at 2244.

⁹ *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 492 (1954).

¹⁰ *Id.* at 495.

¹¹ *See generally* *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council* 138 S. Ct. 2448 (2018).

¹² *See id.*

¹³ *Id.*

¹⁴ *Dobbs*, 142 S. Ct. at 2258.

weakness of these arguments. The *Dobbs* Court specifically addresses attitude changes toward unmarried pregnant women and fetal life, development of safe haven laws, and changes in adoption systems.¹⁵

A. Attitudes Toward Unmarried Pregnant Women

The Court notes that attitudes toward unmarried women pregnant are less harsh today than in 1972.¹⁶ This *may* be true in California and other progressive states; however, this does not hold true in all states.¹⁷ Indeed a recent study indicates that social stigma against unmarried pregnant women continues throughout much of the United States and is especially strong in the South.¹⁸ One study participant shared that community members told her that her “bastard” son was raised in sin.¹⁹ Clearly, the stigma against unmarried pregnant women has not completely changed since 1972.

The stigma against unmarried pregnant women is strongest in states who will likely place strict bans on abortions.²⁰ Why is this important? Because these are the women who, as some may argue, need access to abortion the most. Since *Dobbs* was handed down, the Guttmacher Institute has tracked state laws on abortion.²¹ States such as Alabama, Mississippi, Texas, Arkansas, and others have banned abortion in nearly every situation.²² Unsurprisingly, these are the states with the highest stigma against unmarried pregnant women.²³

With *Dobbs* on the books, social stigma against unmarried pregnant women is likely to increase. In 2009, US News contributor Bonnie Erbe, stated, “[t]here’s no stigma to unwed parenthood anymore, but there should

¹⁵ *Dobbs*, 142 S. Ct. at 2258-2259.

¹⁶ *Id.* at 2258.

¹⁷ *Contra* Marcia A. Ellison, *Authoritative Knowledge and Single Women’s Unintentional Pregnancies, Abortions, Adoption, and Single Motherhood: Social Stigma and Structural Violence*, 17(3) MED. ANTHROPOLOGY Q., 322, 322–347 (2003) (finding that middle-class white women in California who had had an unintended pregnancy, made substantial efforts to avoid related social stigmas).

¹⁸ Whitney Smith et al., *Social Norms and Stigma Regarding Unintended Pregnancy and Pregnancy Decisions: A Qualitative Study of Young Women in Alabama*, 48 PERSPECT. SEX REPROD. HEALTH 73, 73-81 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5022769/> (“Young mothers also face blame and judgment for having a child ‘too young,’ for lacking resources, for entrapping the man involved in the pregnancy, and for being unmarried.”).

¹⁹ *Id.*

²⁰ *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INSTITUTE (Sept 26, 2022),

https://states.guttmacher.org/policies/?gelid=CjwKCAjwp9qZBhBkEiwAsYFsb4TcshxOAE5oAkaN6QJtwjkb0xhzqOK19SSXPgNCIHCQOpsGPPa2OxoChQQQAvD_BwE.

²¹ *Id.*

²² *Id.*

²³ *Supra* note 18.

be.”²⁴ With abortion no longer available to millions of women, people like Erbe may attempt to increase social stigma against unmarried pregnant women.

B. Safe Haven Laws

During oral arguments Associate Justice Amy Coney Barrett indicated that safe haven laws mitigate the need for nationwide access to abortions.²⁵ More directly, Justice Barrett suggested that *Roe* and *Casey* strongly consider unwanted parenthood as an undue burden, but that safe haven laws removed that burden.²⁶ This line of reasoning is dubious for two reasons, (1) adoption was available at the time of *Roe*; therefore, safe haven laws do not change the equation and (2) safe haven laws only address post-birth issues whereas abortion addresses both pre-birth and post-birth issues.

The *Dobbs* opinion makes brief mention of safe haven laws, and the dissent takes due notice.²⁷ The dissent states that safe haven laws are “irrelevant” and do not “reduce[] the health risks or financial costs of going through pregnancy and childbirth.”²⁸ The dissent adds that just as in the days of *Roe* and *Casey*, the majority of mothers, in the absence of abortion access will “shoulder the costs of childrearing.”²⁹ Here, the *Dobbs* Court’s unnecessary reliance on a weak claim only dilutes the strength of the opinion, in part by supplying the dissent with ammunition. Clearly, safe haven laws have had a minimal effect on the abortion landscape.

C. Adoption and Foster Systems

The Court implies that women who put their “newborns up for adoption today ha[ve] little reason to fear that the baby will not find a suitable home.” This is dubious. At the end of 2020 there were approximately 407,000 children in foster care and additional 122,000 children eligible for adoption.³⁰ Furthermore, on average children who are put up for adoption

²⁴ Bonnie Erbe, *Bring Back the Stigma Against Unwed Mothers*, US NEWS (May 13, 2009), <https://www.usnews.com/opinion/blogs/erbe/2009/05/13/bring-back-the-stigma-against-unwed-mothers>.

²⁵ Transcript of Oral Arguments at 56, *Dobbs v. Jackson Women's Health Organization* (19-1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf.

²⁶ *Id.*

²⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2259 (2022); *Dobbs*, 142 S. Ct. at 2339 (Breyer J., Sotomayor J., and Kagan J., dissenting).

²⁸ *Id.* at 2339 (Breyer J., Sotomayor J., and Kagan J., dissenting).

²⁹ *Id.*

³⁰ *Fact Sheet*, CCAI INSTITUTE, <https://www.ccaiinstitute.org/resources/fact-sheets#:~:text=According%20the%20U.S.%20Department%20of,years%20for%20an%20adoptive%20family> (last visited June 22, 2023).

wait four years before a family finds them.³¹ For example, in 2021 Eastern Idaho reached a “crisis” point due to a lack of foster homes.³² Relatedly, child abuse-related calls and deaths surged in Idaho over from 2019-2021.³³

Further undercutting this argument is that adoption systems are not a new development. State governments and private agencies have operated adoption operations long before the days of *Roe*. For example, the Massachusetts Adoption Resource Exchange was founded in 1957, almost twenty years before *Roe*.³⁴ The majority simply cannot say in good faith that adoption services are a recent development. To some extent, adoption agencies have become more crowded than ever before.³⁵

D. Changed Views on Fetal Life

Of all the assertions made by the majority, the assertion that Americans have changed their views on fetal life is the most mindboggling.³⁶ Before *Dobbs*, Gallup reported that 47% of Americans believed that abortion is morally acceptable.³⁷ By comparison, in 1973, 46% of Americans favored the legalization of abortion – a 1% change hardly demonstrates an altered view on fetal life.³⁸

Even without statistics, members of the Supreme Court certainly knew that America was divided in 1973 and remained sharply divided in 2022. Nearly every year, Americans march to the Supreme Court and their State Capitols with signs in hand reading, “my body, my choice,” “right to life,” and “protect *Roe*.”³⁹ It is simply misleading to suggest that Americans have changed their views on the value of fetal life.

³¹ *Id.*

³² Kelcie Moseley-Morris, ‘I Have Not Seen It Like This’: Shortage of Foster Homes in Idaho Reaches Crisis Point, EAST IDAHO NEWS (Nov. 29, 2021), eastidahonews.com/2021/11/i-have-not-seen-it-like-this-shortage-of-foster-homes-in-idaho-reaches-crisis-point/.

³³ *Id.*

³⁴ *History*, MARE, <https://www.mareinc.org/annual-report-fy22> (last visited Apr. 5, 2023).

³⁵ Wm. Robert Johnson, *Historical Statistics on Adoption in the United States, Plus Statistics on Child Population and Welfare*, JOHNSTON ARCHIVE (Nov. 12, 2022), johnstonsarchive.net/policy/adoptionstats.html.

³⁶ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2259 (2022).

³⁷ Megan Brenan, *Record-High 47% in U.S. Think Abortion Is Morally Acceptable*, GALLUP (June 9, 2021), <https://news.gallup.com/poll/350756/record-high-think-abortion-morally-acceptable.aspx>; *But see*, Lydia Saad, ‘Pro-Choice’ Identification Rises to Near Record High in U.S., GALLUP (June 2, 2022), <https://news.gallup.com/poll/393104/pro-choice-identification-rises-near-record-high.aspx>.

³⁸ *Gallup Poll Finds Public Divided on Abortion in First 3 Months*, NY TIMES (Jan 28, 1973), <https://www.nytimes.com/1973/01/28/archives/gallup-poll-finds-public-divided-on-abortions-in-first-3-months.html>

³⁹ *Why Will We Continue to March*, MARCH FOR LIFE, <https://marchforlife.org/national-march-for-life/> (last visited March 23, 2023).

IV. Conclusion

Though correctly decided, *Dobbs*, unfortunately, contains several weak assertions. Defenders of *Dobbs* must grapple with some of the Court's weak reasoning. Though no judicial opinion is perfect, the Court would be wise to avoid weak assertions in future opinions.