Cambridge Quarterly of Healthcare Ethics (2023), 32: 3, 310–322
doi:10.1017/S0963180122000822

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

The *Dobbs* Decision: Can It Be Justified by Public Reason?

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Abstract

John Rawls has held up as a model of public reason the U.S. Supreme Court. I argue that the *Dobbs* Court is justifiably criticized for failing to respect public reason. First, the entire opinion is governed by an originalist ideological logic almost entirely incongruent with public reason in a liberal, pluralistic, democratic society. Second, Alito's emphasis on "ordered liberty" seems completely at odds with the "disordered liberty" regarding abortion already evident among the states. Third, describing the embryo/fetus from conception until birth as an "unborn human being" begs the question of the legal status of the embryo/fetus, as if an *obiter dictum* settled the matter. Fourth, Alito accuses the *Roe* court of failing to exercise judicial restraint, although Alito argued to overturn *Roe* in its entirety. In brief, the *Dobbs* opinion is an illiberal, disingenuous, ideological swamp that swallows up public reason and the reproductive rights of women.

Keywords: abortion; public reason; liberalism; John Rawls; *Dobbs*; ordered liberty; *Roe v. Wade*; reasonable values; pluralism

Introduction

The U.S. Supreme Court rendered its decision in the case of *Dobbs v. Jackson Women's Health Organization* on June 24, 2022. As anticipated, it overturned *Roe v. Wade.* Justice Samuel Alito wrote the majority opinion. His basic contentions were that (1) "the Constitution makes no express reference to a right to obtain an abortion," nor (2) is the right to obtain an abortion "rooted in the Nation's history and tradition," nor (3) is having access to abortion "an essential component of 'ordered liberty,'" nor (4) does an alleged privacy right or liberty right ground access to abortion as a fundamental right, nor (5) does the doctrine of *stare decisis* speak against overturning *Roe,* nor (6) are the criteria for applying *Roe* in practice "workable" due to excessive ambiguity. Alito also contends (7) that overruling *Roe* and *Casey* "will not upend concrete reliance interests." He concludes that *Roe* was "egregiously wrong and on a collision course with the Constitution from the day it was decided." He adds, "The [*Roe*] Court short-circuited the democratic process by closing it to the large number of Americans who disagreed with *Roe.*"[1]

John Rawls has held up as a model of public reason the U.S. Supreme Court.[2] To what extent is that true in the case of *Dobbs*? I will argue that the *Dobbs* Court is justifiably criticized in many respects for failing to be respectful of public reason. First, the entire opinion is governed by an originalist ideological logic almost entirely incongruent with public reason in a liberal, pluralistic, democratic society. Second, Alito's emphasis on the need for "ordered liberty" seems completely at odds with the "disordered liberty" regarding abortion that has already emerged within and among the states. Third, describing the embryo/fetus from the moment of conception until birth as an "unborn human being" begs the question of the legal status of the embryo/fetus, as if an *obiter dictum* settled the matter. Fourth, although Alito accuses the *Roe* court of failing to exercise judicial restraint, that same criticism may justifiably be leveled against Alito in arguing to overturn *Roe* in its entirety. Fifth, Alito accuses the *Roe* and *Casey* courts of declaring a "winning side" and a "losing side," thereby subverting a democratic decision process that ought to be left to legislative bodies in the states. However, it is readily arguable that the *Roe* court allowed both sides to

be winners in that critics of abortion were free to encourage their adherents to refrain from seeking abortions, whereas proponents of abortion rights were free to exercise those rights. That is, the coercive powers of the state were not used to impose a particular practice on either side in the debate, which is in keeping with a commitment to public reason in a liberal pluralistic society. The *Dobbs* decision will allow individual states to declare winners and losers. Alito's view in this case is either misguided or disingenuous.

What Is Public Reason?

Each of the above points requires further elaboration and defense. However, we first need to spell out Rawls' conception of public reason and its function in protecting the foundations of a liberal, pluralistic, democratic society. Rawls does not see himself advocating for some utopian society to which we ought to aspire. Instead, he takes as his starting point the most fundamental values that are already embedded in our liberal culture. Rawls asks, "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?"[3] In other words, if there are these deep religious and moral disagreements regarding the political foundations of our society, how can we possibly expect to live peaceably with one another? As noted, this challenge is for Rawls a practical political problem, not a matter of irreconcilable competing ideologies. What is necessary is a shared conception of justice "specifying fair terms of cooperation between citizens regarded as free and equal, and as fully cooperating members of society over a complete life, from one generation to the next."[4] How will we get to those fair terms of cooperation, especially regarding something as controversial as abortion?

Those fair terms of cooperation will require reasoned and informed discussion respecting everyone as free and equal citizens, which is to say that the agreements are entered freely, not because of manipulation or coercion. Those agreements will express their shared and public political reason. "But to attain such a shared reason, the conception of justice should be, as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm."[5] Rawls describes what he refers to as "public or political reason" as "freestanding," which is to say that it is not dependent on any metaphysical or philosophical or religious conceptions, what he generically refers to as "comprehensive doctrines."[6]

Public reason is the method for solving fundamental public problems that *citizens as citizens* (as explained below) must embrace to address fundamental political problems. It may be thought of as a common language or a common perspective. Public reason appeals "only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."[7] Public reason requires that citizens bracket their commitments to specific "comprehensive doctrines," and instead justify their political judgments on the basis of political values that all reasonable citizens can be expected to recognize, irrespective of their comprehensive doctrinal commitments. There are numerous such values integral to the functioning of a liberal, pluralistic, democratic society, even though the interpretation and application of any of these values in specific political contexts may generate reasonable disagreement. Such disagreements are in principle resolvable, which is not the case when disagreements are rooted in competing religious or ideological doctrines.

Public reason does not come "fully stocked" with specific beliefs and values in the way that Catholicism or libertarianism or Marxism would come "fully stocked." However, that does not mean public reason is contentless. The content of public reason accrues over decades in response to a range of political, social, legal, economic, and ethical problems that are the object of political controversy and that require a policy response because some public interest is at stake. Rawls writes, "Whether public reason can settle all, or almost all, political questions by a reasonable ordering of political values cannot be decided in the abstract independent of actual cases.... For how we think about a kind of case depends not on general considerations alone but on our formulating relevant political values we may not have imagined before we reflect about particular instances."[8]

As noted above, Rawls sees public reason drawing its content from the liberal democratic culture already endorsed and lived by its members. That liberal democratic culture is a matter of social construction for which there will be many *reasonable* (not true) answers. What is being constructed are the basic structures of society, constitutional essentials, and responses to political problems related to those constitutional essentials. Keep in mind that constitutional essentials are not created and fully specified at a single point in time (contrary to constitutional originalists, such as the former Justice Scalia). What would the right to privacy have meant to the Founders of the United States at the Constitutional Convention in 1787 where there were no smartphones or "listening devices"? What would our Founders have to say about the scope of procreative liberty, including the use of preimplantation genetic diagnosis or the creation of artificial wombs? Should these medical interventions be constitutionally protected, perhaps subject to various degrees of regulation but not justifiably banned outright? The very asking of these questions makes clear that our Founders had given no thought to these questions but that we would need to be engaged in ongoing construction of reasonable responses to these controversial questions.

Liberalism and Public Reason

A liberal society is committed to respecting the equal freedoms and equal rights of all its citizens. A liberal society recognizes that many reasonable values may be used to construct a fulfilling life for any individual. In a liberal society, no value is superior to all other values in all social contexts, nor is there some hierarchy of values that a liberal society embeds in all its social policies and social practices. A liberal society, for example, will encourage its citizens to make more healthy dietary choices rather than less healthy choices (and may offer guidance in this regard), but a liberal society will not ban all fast-food restaurants, nor will it observe or regulate the frequency with which its citizens choose to consume fast food each month. A liberal society will allow advocates for healthier living to promulgate their views through multiple forms of social communication. A liberal society will allow both vegetarians and meat lovers to advocate for their respective views, although this must be done in a way that does not violate the equal political rights and liberties of their competitors. Thus, if vegetarians were to become a majority in our society, they could not justifiably use their majoritarian status to ban the production, sale, and consumption of meat products. No imaginable rationale claiming to be a public interest could justify such a policy without undermining profoundly the liberal character of our society. Meat lovers are not violating the rights of anyone else (unless one takes the metaphysical or moral position that animals have rights), nor are they undermining some significant public interest, nor does their behavior make for a substantially less just society.[9] Hindus might be offended by the widespread consumption of beef in our society, and both Jews and Islamists might be offended by the widespread consumption of pork. However, banning the production, consumption, and sale of beef and pork to satisfy these religious beliefs would again be profoundly illiberal.

We might well have a healthier society if the consumption of meat were prohibited. However, that would require regarding "health" as some sort of superior political value. Why stop with the consumption of meat? Why not ban twinkies, chocolate chip cookies, and sugar-coated cereals? Why not require the daily consumption by everyone of spinach, broccoli, and Brussel sprouts? As a liberal society, we permit smoking cigarettes, although they are clearly more destructive to health than any of the foods listed above. However, we do justifiably ban smoking cigarettes in confined public spaces, such as planes and restaurants and offices. The justification is the public interest that is at stake, that is, the health of nonsmoking others in those enclosed spaces who have no reasonable way of defending their health in those circumstances.

Why must public reason be "freestanding," divorced from all comprehensive doctrines? Rawls points out as a fact of our political culture that it is *reasonably pluralistic.* This is not a temporary state of affairs. It is a permanent feature of any democratic culture. What this implies is the potential for disagreement regarding numerous political problems, perhaps very widespread and consequential political problems, such as abortion. Some specific resolution may be congruent with some comprehensive doctrines and

incongruent with others. In either case, a resolution will mean the formulation and legitimation of a public policy that can be coercively enforced by government, likely to the disadvantage of adherents of the incongruent comprehensive doctrine. What Rawls recognizes is that the use of the coercive powers of government must be justified to everyone who might be affected by the use of those coercive powers. This is what Rawls refers to as the liberal principle of legitimacy. He defines that principle as follows: "Our exercise of political power is fully proper when it is exercised in accordance with a constitution, the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."[10]

It is important to be clear regarding what Rawls is both affirming and not affirming in this passage. First, that constitution may be thought of as the embodiment of a political conception of justice, which is freestanding, not a product of any comprehensive doctrine. Second, that constitution is a product of our common reason or public reason, again, unencumbered by any comprehensive doctrine. The "our" in this case are free and equal citizens seeking fair terms of cooperation. Note that these free and equal citizens are *seeking* fair terms of cooperation. This is an ongoing process, as opposed to a process that was settled by our Founding Fathers 250 years ago. This is what the former Justice Breyer refers to "active liberty" in seeking to characterize the judicial philosophy that ought to govern the role of justices on the Supreme Court.[11] These are the most basic elements of a liberal society.

Public Reason and the Role of Being a Citizen

What does it mean to behave *as a citizen* for Rawls? Rawls writes, "Public reason is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizenship. The subject of their reason is the good of the public: what the political conception of justice requires of society's basic structure of institutions, and of the purposes and ends they are to serve."[12] Although this may sound harsh and insensitive, public reason must not be contaminated by the private goals or expectations of specific religious groups or advocates for some comprehensive doctrine.[13] The focus of public reason, and the responsibility of each of us when we are functioning as citizens, must be public interests, interests that each and every citizen in a liberal society has. Recall that public policies always have a coercive element built into them. That element of coercion can be justified only if the goal of the policy is to protect or enhance some public interest, including basic human rights. Perhaps the clearest example of such public interests would be environmental interests, clean air, and clean water. Everyone benefits from the protection of those interests. However, these are interests that we, as individuals, cannot adequately protect in the face of powerful corporate interests willing to sacrifice environmental interests for the sake of enhanced profits. To correct that situation, to establish fair terms of cooperation, and to prevent the health of many from being sacrificed for the sake of private profit, the coercive power of government is necessary.

Finally, being a citizen is a distinct social role with its own rights and responsibilities. It requires putting aside other social roles and identities that might not be compatible with the role of being a citizen charged with seeking reasonable fundamental political agreements. Citizens as citizens are responsible for articulating the details of a political conception of justice, especially in relation to emerging biomedical technologies that are seen as being ethically and politically controversial, such as in vitro fertilization (IVF), preimplantation genetic diagnosis of eight-cell embryos, or genetically altering embryos.[14] Some of that controversy might be attached to specific religious beliefs. Those elements of the controversy will need to be settled within the confines of specific religious communities, as opposed to seeking to impose a resolution reflecting religious commitments more broadly on those outside that religious community. From the perspective of a liberal pluralistic society, that would be both rational and reasonable. This brings us back to the *Dobbs* decision and its assessment from the perspective of public reason.

Public Reason and the *Dobbs* Opinion

We start with the claim that the *Dobbs* opinion is rooted in an originalist ideological logic. The problem with any ideological perspective is that it represents a straitjacket on public reason, the consequences of which are policy choices that are neither democratic, nor fair, nor reasonable, nor rational. Thus, Alito

calls attention to the fact that there was no right to an abortion prior to the latter part of the twentieth century. Alito writes, "Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy."[15] He adds that the rest of the States followed suit shortly thereafter. More generally, Alito contends with respect to any proposed novel right that "the Court has long asked whether the right is 'deeply rooted in [our] history and tradition,' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[16] A bit later Alito adds, "Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the 'liberty' protected by the Due Process Clause because the term 'liberty' alone provides little guidance."[17] Alito then goes on to cite what he calls "eminent common-law authorities," such as William Blackstone, Edward Coke, and Matthew Hale, all of whom describe abortion as criminal in the seventeenth and eighteenth centuries. He even cites a thirteenth-century treatise by Henry de Bracton.

No doubt all these historical citations are factually correct. However, the most relevant question is why any of these historical facts ought to have normative force in a radically different social and political context that characterizes today's world. If history and tradition are accorded such normative force, we would still have slavery and racial segregation. It is worth recalling that many of the authors of the Constitution were themselves slave holders.[18] Some of our constitutional authors had personal qualms about the legitimacy of slavery, but they apparently failed to capture those qualms in the Constitution itself. What should originalists conclude from that?

Perhaps the strongest criticism of originalism is that it would give constitutional legitimacy to the proverbial "dead hand of the past." Andrew Coan calls attention to a passage from Thomas Jefferson in a letter to James Madison (September 6, 1789) in which Jefferson writes, "I set out on this ground, which I suppose to be self-evident, 'that the earth belongs in usufruct to the living': that the dead have neither powers nor rights over it…. No society can make a perpetual constitution."[19] Coan goes on to call attention to "a large body of nonoriginal precedents that dictate what the Constitution means in practice."[20] He mentions that if the Constitution were construed in strict federalist terms, then Social Security, Medicare, the Clean Water Act, and the federal minimum wage would all be struck down, that is, left to state discretion. This would have disastrous consequences for the elderly, the environment, and desperate workers with minimal bargaining power.

Public reason, following Rawls and former Justice Stephen Breyer, would call attention to emerging public interests over the past 100 years, national in scope, related to massive technological and economic changes in the healthcare system, in manufacturing and risks to the environment, and in the overall nature of our economy that could never have been imagined by our constitutional authors who were mostly rural farmers. Those public interests, the health and welfare of the elderly, for example, would be left to random and inadequate charitable efforts rather than Social Security and Medicare, if we were constitutionally restricted to addressing these needs as they would have been addressed in eighteenth-century rural America. Consequences in the present ought to matter when it comes to interpreting the Constitution's role in addressing a policy conflict in the present. The dead experience nothing. The dead have no health concerns, no economic concerns, and no political concerns. The virtue of public reason as an approach to interpreting and applying the Constitution is that it uses the common sense of citizens in the present, the experiences of citizens in the present, the best methods of reasoning for addressing public problems in the present, the best relevant scientific evidence in the present, and common values that all reasonable citizens can endorse because those values are neither inextricably embedded in any religious or ideological perspective nor reflective of social experience in the distant past. With that, we return to Justice Alito and the *Dobbs* decision.

Abortion, Public Reason, and Unfettered State Legislative Action

Alito contends that a major flaw in the *Roe* decision is that it cut off democratic debate about abortion. I have a hard time believing that is factually correct, given the intensity of debate about abortion over the past 50 years as well as legislative efforts to reshape the *Roe* decision in practice. I take it that what Alito means is that the federal decision preempted numerous state restrictions on access to abortion when the

states should have retained the right to decide how to regulate, permit, or forbid abortion under a range of circumstances. That is where Alito wanted democratic debate to occur with a resulting proliferation of policies governing access to abortion. We might see Alito as appealing to the standard political notion that the states should be the "laboratories of democracy." In other words, lots of alternative policies can be tried to address some political problem so that we can see what works best. This idea has a very pragmatic ring to it. However, the necessary assumption behind this proposal is that none of these state experiments would be allowed to violate the Constitution of the United States. Thus, rapists could not be castrated in some states as an object lesson because that would violate the prohibition regarding cruel and unusual punishment. The critical question we need to ask is what sort of restrictive policies regarding abortion in the various states would be judged as violating some portion of the Constitution. The argument I wish to make is that it is not obvious that any of the most punitive and most restrictive policies would be found to violate any provision of the Constitution, *given the Dobbs ruling.* This should certainly be problematic from the perspective of public reason and a liberal, pluralistic society. Consider some examples.

A case was reported of a woman in Wisconsin who was carrying a fetus with anencephaly. She wanted to terminate that pregnancy, which may have been late in the second trimester. But that request suddenly became illegal in Wisconsin, and the clinic canceled her appointment. Her physician wrote that "forcing her to continue the pregnancy was cruel and risked complications."[21] Should the Supreme Court intervene to prevent this cruelty and potential medical tragedy? This is not punishment; hence, no Eighth Amendment violation. Furthermore, the cruelty is just in the mind of the physician. Wisconsin would not have violated anything in the Constitution; hence, women with pregnancies that would end with the death of the baby at or near birth had to endure that outcome. Her physician was concerned about medical complications. However, lots of medical procedures involve the risk of serious complications; nothing unconstitutional there. Such outcomes hardly seem compatible with compassionate public reason. What precisely is the public interest that would justify such outcomes?

Another case has garnered considerable media attention. This involved a 10-year-old girl who was raped in Ohio who sought to have an abortion. Ohio law made that illegal. An Indiana physician, Caitlin Bernard, performed that abortion in Indiana, where it was still legal.[22] Several "consumers" in Ohio filed suit in Indiana demanding all the medical records associated with that case. That suit has the support of Attorney General Todd Rokita in Indiana. Dr. Bernard has refused to provide those records, citing the legally well-established privacy rights associated with the physician–patient relationship.[23] That case is in the middle of being litigated, as I write. However, we can readily imagine the case going to the Supreme Court and the Court ruling in favor of the Indiana Attorney General, claiming that there is no constitutionally protected right of privacy (which had been one of the legal pillars in the *Roe* opinion, which had been dismissed as mistaken in the *Dobbs* opinion).

What should the Supreme Court do when it comes to women driving across state lines in order to obtain an abortion? Several states are seeking to put in place legislation that would prevent that from happening or that would punish anyone who either sought an abortion elsewhere or who assisted someone seeking an abortion in another state.[24] For example, the Thomas More Society is drafting model legislation for state lawmakers that would allow private citizens to sue anyone who helps a resident of the state obtain an abortion in another state. This approach is based on a Texas law that does something very similar. How do we imagine the U.S. Supreme Court should assess such laws? This would seem to be a very easy call. The Court could point out that millions of patients every year cross a state line to obtain medical care elsewhere for all sorts of reasons. However, that assumes they are crossing a state line to get legal medical care. Of course, abortion is legal in this other state. That would seem to end the discussion. However, several state legislative bodies are seeking to put in place laws that would give the fetus from the moment of conception the status of a person. In addition, because the fetus would have personal status, it would be a crime, the crime of murder, to deliberately terminate the life of that fetus at any stage of a pregnancy. It would be legally intolerable if residents of one state could "commit murder" in another state and not be held to account. This would put the U.S. Supreme Court in something of a constitutional bind.

The *Dobbs* Court has granted extraordinarily broad authority to every state to legislate as it wished regarding the regulation of abortion. The *Dobbs* Court has suggested that it would make no formal pronouncement as to the legal status of the fetus, although the Court did not object to the language of the Mississippi statute that described the fetus as an "unborn human being." I now ask the reader to imagine this case of state line crossing being brought before the Supreme Court. In theory, the Supreme Court could strike down that law, in effect saying women were not committing murder when they crossed a state line to obtain an abortion. To reach that conclusion, however, the Court would have to effectively overrule a state legislature that would have ruled the fetus was a person. That would seem to be directly contrary to what the *Dobbs* Court had ruled. If the fetus were not a person with a right to life, then what would the legal status of the fetus be in the eyes of this Supreme Court? It would be legally inadequate, though perfectly congruent with the requirements of public reason, for the Court to say that this was a private judgment to be made by individuals in the privacy of their conscience, or the privacy of their religious community. The Court would simply be agnostic in the matter. However, it might not be that simple, given the *Dobbs* decision.

In overruling some state legislature, the Court would be saying "we have no idea what the moral or metaphysical status of the fetus might be, but it is not a person, and therefore, obtaining an abortion in another state is not murder." Of course, the Supreme Court could rule in the opposite direction and affirm the right of the state to charge a woman who crossed a state line to obtain an abortion with murder and to charge the physician providing the abortion with being an accessory to murder. In that case, the Supreme Court would be affirming the personal status of the fetus, perhaps from conception, as several states are seeking to affirm. This too would not be in accord with the *Dobbs* decision and at least some language suggesting that the Court was agnostic in the matter.[25] Of course, the Court could assert that it was no longer agnostic, that the fetus should be regarded as a person from the moment of conception. However, that would represent a legislative act, the sort of thing that conservative judicial philosophy would always oppose.[26] In fact, one of the main criticisms by the *Dobbs* Court of the *Roe* Court was that that Court had engaged in constitutionally inappropriate judicial activism, which is why Alito could write that the *Roe* Court "was egregiously wrong and on a collision course with the Constitution from the day it was decided."[27] If the Court did embrace such a change of course in addressing the issue of women crossing state lines to obtain an abortion, then what would be the implications of such a decision for states that were much more liberal with respect to permitting abortion? To say the least, it would result in a politically and legally unstable situation, which public reason would abhor. How can we imagine a particular practice in one state being regarded as murder (with decades of prison time as punishment), whereas in an adjoining state the very same practice is perfectly legal, *and all of this would be occurring within the bounds of a single political community?*

Mindful of this last state of affairs, it is easier to understand why advocates for more liberal abortion policies are seeking Congressional approval for laws that would codify *Roe* as national policy while advocates for outlawing abortion entirely are also seeking an amendment to the U.S. Constitution that would grant personal status to a fetus from the moment of conception, thereby outlawing abortion under virtually all circumstances.[28] If abortion liberals were to win the day with Congress, how would we imagine the *Dobbs* Court would react to the various challenges that would certainly be brought before it? On the one hand, a legitimate democratic majority would have put that federal law in place. That would seem to warrant the blessing of that Court. On the other hand, the Court could support an appeal based on the claim that this represented an unnecessary usurpation of the rights of the states to make such decisions. This latter view would have a strong likelihood of success, especially if the Court again pointed to the "history and tradition of the nation" as the appropriate source for governance in these matters. This would then be another instance of the "dead hand of the past" regulating the life of our political community, as opposed to living, liberal, pluralistic, democratic hands in the present. Again, public reason is about the best scientific evidence in the present, the best reasoning and experience in the present, and the most relevant reasonable political values in the present that all can accept as reasonable.

The point of the prior discussion is that the democratic process needs boundaries, ordinarily provided by a constitution. The *Dobbs* Court would seem to have obliterated those boundaries, most

especially in the matter of personal rights, without affirming some public interest that would justify constraining or obliterating those rights. If states are absolutely free from the perspective of the *Dobbs* Court to legislate any restrictions or penalties they wish regarding abortion, perhaps granting personal status to the fetus from the moment of conception, the consequence in many states will be that pregnant women become hostages to the interests of the fetus at the expense of their own rights and interests. It is hard to believe that this would be a state of affairs that *all could accept as reasonable*, as required by public reason.

Abortion, Public Reason, and Ordered Liberty

One of Alito's major criticisms of the *Roe* decision was that it violated the constitutional requirement for "ordered liberty."[29] Alito writes, "Ordered liberty sets limits and defines the boundary between competing interests."[30] Liberty rights are obviously fundamental in a liberal society. However, Alito regards the concept of "liberty" to be too capacious. He contends that asserting autonomy rights as the basis for an abortion policy is too broad and "disordered," and "could license fundamental rights to illicit drug use, prostitution, and the like."[31] The implication is that there was something "disordered" in the liberties regarding abortion granted by *Roe*. It is unclear precisely what he might have had in mind in this regard. He likely had in mind that women had the right to seek abortion, in at least some circumstances, throughout the duration of a pregnancy for any reason at all. Alito claimed there was no balancing of interests in this case. The interests of the woman counted for everything; the interests of the fetus counted for nothing. That would be disordered liberty. He believed the states could establish ordered liberty in this regard. However, as noted already, several states are seeking to approve constitutional amendments that would grant personal status to the fetus from the moment of conception. The obvious consequence of that would be granting unlimited weight to the interests of the fetus and no weight to the interests of the woman carrying that fetus. That would appear to be "disordered liberty" in the opposite direction, although Alito says nothing that would suggest the Court would need to outlaw such an outcome. On the contrary, as argued above, he would seem to grant unlimited respect to the decisions of state legislative bodies.

I next wish to argue that the problem of "disordered liberty" afflicts the *Dobbs* decision much more deeply than Alito would ever wish to concede. Alito contends that *Roe* and *Casey* have had untoward effects on many other areas of law "and that effect provides further support for overruling those decisions."[32] A further point made by Alito was that "Overruling *Roe* and *Casey* will not upend concrete reliance interests like those that develop in 'cases involving property and contract rights.'"[33] In other words, the *Dobbs* opinion will protect ordered liberty rather than undermine it. However, the actual consequences thus far would seem to put the lie to that claim.

We can begin with the effect of the *Dobbs* opinion in states that have now put in place very restrictive abortion laws, including criminal penalties. Specifically, we call your attention to women diagnosed with cancer or treated with cancer who are pregnant. Many of the drugs used to treat cancer are associated with significantly higher rates of fetal anomalies. "Forcing a patient with breast cancer to carry a pregnancy to term means exposing the fetus to chemotherapy and delaying treatment with appropriate targeted therapies—inherently restricting patients and physicians to a single pathway, even if termination of the pregnancy would permit the pursuit of better therapeutic options in a particular case. Moreover, breast cancer is not the only type of cancer that can affect pregnant patients; similar difficult choices are necessary in treating a pregnant patient with any cancer or similar diagnosis."[34] In other words, women in these circumstances would be faced with an increased risk of premature death from a cancer that was treatable in its early stages but that might prove untreatable several months later.

Apart from an unreasonable restriction on the autonomy rights of such women, restrictive abortion laws in these circumstances represent an unwarranted intrusion into the practice of medicine, that is, seeking to override "physicians' extensive training and understanding of the scientific literature."[35] What is the public interest that would warrant such interference both in medical practice and in the

lives of these unfortunate women? Some activists will argue that the fetus' right to life is that interest. However, in the case of *McFall v. Shimp*, a Pennsylvania Court ruled that one person could not be legally compelled to provide medical treatment to save the life of another.[36] In that case, the plaintiff sought to compel the harvesting of bone marrow from a cousin for a bone marrow transplant needed to save his life. Note that harvesting bone marrow represents much less of a threat to the donor than being compelled to forego medically necessary cancer treatment. This is one example of the type of legal and medical disruption instigated by the *Dobbs* opinion, contrary to the claim of the Court that this opinion represented "ordered liberty" which would not disrupt "concrete reliance interests." We will also observe that it is impossible to imagine how such outcomes would be congruent with public reason, given the interference with scientifically based medical judgments, not to mention widely endorsed reasonable political values. Again, this sort of situation can only come about if the fetus is regarded as a person with a right to life that includes unlimited demands on the life of the woman carrying this fetus. Such a belief is clearly a religious or metaphysical belief embedded in some comprehensive doctrine that in a liberal society should not be imposed on others who do not share that belief using the coercive powers of the state.

Another example of the disruptive effects of *Dobbs* would be in hospital Emergency Departments. In states with the most restrictive abortion laws, laws that included criminal penalties for assisting in any way with the execution of an abortion, physicians in the emergency room would often find themselves either at legal peril or at moral peril. Pregnant patients will enter the emergency room with heavy bleeding suggestive of a miscarriage. This requires emergency management to prevent a life-threatening sepsis. However, they may have attempted to abort themselves, or they might have obtained the drugs for a medical abortion from out of state and the abortion might have been incomplete. In either case, physicians will tell you that these medical states are virtually indistinguishable.[37] Consequently, physicians might hesitate to intervene promptly since they would be subject to criminal prosecution if it was judged that they had assisted with the completion of an abortion. To be clear, physicians would be permitted to intervene to save the life of the mother, no matter how her life came to be in jeopardy. However, Dr. Lisa Harris, associate professor of obstetrics and gynecology at the University of Michigan, asks the critical question, "How imminent must be the risk of death" to provide the necessary legal cover?[38] There might be a 50% chance that the patient would become septic. Would that be sufficient to provide a legal justification? Or must she actually *be septic*, which is unquestionably life-threatening? However, once a patient becomes septic, there is a 50% chance she will die of the sepsis despite heroic medical efforts. Again, considering such outcomes, it seems obvious that the *Dobbs* opinion is disruptive of well-founded medical practice, including the professional norms that govern that practice and that require physicians to protect the best interests of their patients, as opposed to prevailing political interests that would threaten those same patients and their basic rights of privacy and autonomy.

We next consider some of the broader potential implications of the *Dobbs* decision that would be even more disruptive of legal precedents and legitimate medical practice. Alito writes, "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."[39] This may well be Alito's sincere intention, but that intention has no judicial force whatsoever, given Alito's grant of unlimited legislative authority in each state to do as it wishes with anything related to reproductive medicine.

We have noted that several states have already put in place laws that assert the embryo/fetus is a person from the moment of conception with a right to life. It is reasonable to ask what that might mean for couples who can only have children using IVF. Standard medical practice requires that a woman is given a drug that will cause her to hyper-ovulate, that is, produce several ova for fertilization. That will result in the creation of 8 or 10 eight-cell embryos, one or two of which would be implanted. If the implantation is successful, several spare embryos will remain and be stored in liquid nitrogen for an indefinite period of time. It is estimated that there are 500,000 such embryos stored in the United States. Eventually, these embryos will be removed from that liquid nitrogen, and they will be discarded. Others

might be discarded before being stored, especially if they have been genetically analyzed and found to have serious genetic or chromosomal disorders. In either case, states could equate such actions with murder, if laws have been put in place that give personal status to an embryo from the moment of conception. Likewise, research with human embryos would be forbidden since they are discarded after the research has been completed. That is, none are ever used to achieve a pregnancy. Couples that are at risk of having a child with a serious genetic deficiency, such as cystic fibrosis (CF; because each member of the couple carries a CF mutation), may wish to have children without the risk of that deficiency. They would turn to IVF with preimplantation genetic diagnosis to identify embryos with those genetic deficiencies. Those embryos are immediately discarded, which again can be regarded as murder in states with the strictest antiabortion laws.

Some individuals might believe that rights to contraception might not be at risk as a result of the *Dobbs* decision. However, they would be wrong. Some forms of contraception are regarded as being abortifacient, such as the copper coil or so-called "Plan B" that can be used after unprotected intercourse (sometimes rape). In both cases, the womb is made inhospitable to implantation *if conception has occurred.* Whether conception has occurred will never be known, and hence some might choose to argue that no abortion has occurred. Still, all forms of artificial contraception could be banned by an aggressive enough state legislature. Alito might claim that contraception was unaffected by *Dobbs* since the Supreme Court affirmed the *Griswold* decision from Connecticut, asserting that a right to privacy protected the right to purchase and use contraceptive devices. However, *Dobbs* denied there was any constitutionally protected right to privacy, which was one of the pillars of support for the *Roe* decision. Consequently, individual states could ban the sale or use of contraceptives, if, for example, pressure from the Catholic Church demanded such a law. Again, the only fair way to construe these potential outcomes is to see them as disruptive of long-standing medical and legal practices, although none of these practices are "essential to the history or traditions of the United States." Alito could deny that any of these things will happen, but that is more likely to be either wishful thinking or disingenuous thinking. Neither would be justified from the perspective of public reason.

Conclusion

To summarize, the *Dobbs* decision represents an extraordinarily poor example of the use of public reason by the U.S. Supreme Court. Rawls would not have been proud.

Public reason is reasonable because it is not committed to any comprehensive doctrine that could not be accepted by any reasonable person. As we have argued, however, there is nothing reasonable about the consequences for women of the *Dobbs* decision in the various states with very restrictive abortion laws now being put in place.

Public reason is liberal because it respects the right of individuals to make many different choices with respect to living a good life. But the *Dobbs* decision is fundamentally illiberal in that it allows the states to make liberty-constraining choices for its residents (and sometimes beyond its residents) without any liberally justifiable public interest that would warrant those restrictions. Asserting the personal status of the fetus from conception is neither liberally warranted, nor reasonable, nor fair with respect to the consequences for women.

Public reason is essentially pluralistic because there are many reasonable orderings of political values to govern a society and communities within that society. There is no "best" dominant ordering of values. The *Dobbs* Court would seem to be pluralistically reasonable in granting unlimited discretion to state legislatures to establishing policies governing abortion. However, that unlimited discretion, as we have argued, will often have unreasonable effects, which would be condemned by public reason as an unreasonable pluralism. But the *Dobbs* decision fails to offer any criteria for recognizing and de-legitimating such unreasonable consequences (as described above).

Public reason is agnostic with respect to all comprehensive doctrines. The *Dobbs* Court claims to be agnostic as well. But it permits all manner of controversial doctrines, such as the personal status of the

fetus from conception, to be imposed by state legislative bodies. In practice, this represents a disingenuous form of pseudo-agnosticism.

Public reason is responsive to the political problems of the present, using the best scientific evidence and reliable methods of reasoning to find policy solutions that represent fair terms of cooperation. Public reason seeks reflective equilibrium among competing reasonable public values and public interests. Public reason seeks not to disrupt social practices (medical and legal) that are widely regarded as reasonable and legitimate by citizens who are free and equal. However, as argued above, the *Dobbs* Court is profoundly disruptive and illiberal with regard to the social consequences it has provoked. It is justly accused of legitimating disordered, illiberal liberty at the state level.

In brief, the *Dobbs* opinion is illiberal, unreasonable, and unfair. It is essentially incongruent with public reason. It embraced ideological positions from the moment of its conception. This opinion should have been aborted. But it has been born. Perhaps, metaphorically speaking, judicial infanticide would be warranted.

Notes

1. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. [2022]; available at https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf (last accessed 20 Nov 2022). All the quoted materials are from the first five pages of the *Dobbs* decision, which is referred to as "the syllabus."
2. Rawls J. *Political Liberalism*. New York: Columbia University Press; 1996:231–40.
3. See note 2, Rawls 1996, at 27.
4. See note 2, Rawls 1996, at 3.
5. See note 2, Rawls 1996, at 9.
6. See note 2, Rawls 1996, at 10.
7. See note 2, Rawls 1996, at 224.
8. See note 2, Rawls 1996, at 53.
9. Animal rights advocates might dispute this last sentence. However, that would represent one of those metaphysical or philosophic beliefs that was beyond public reason, that is, not something that could be incorporated into coercive, legitimate public policies.
10. See note 2, Rawls 1996, at 137.
11. Breyer S. *Active Liberty: Interpreting Our Democratic Constitution.* New York: Knopf; 2005. Breyer is a critic of what is typically referred to as "originalism" and "literalism" when it comes to interpreting the Constitution for purposes of adjudicating a complex case in the present. The authors of the U.S. Constitution, according to Breyer, could not possibly have anticipated the complex legal problems that would emerge with novel technologies, complex business practices, changing social mores, novel and massive organizational structures, and so on. To be appropriately responsive to these changing social circumstances, judges must be practical and pragmatic (not ideological), attentive to the likely consequences of their decisions, that is, forward-looking, as opposed to seeking congruence with some original intent imputed to the authors of the Constitution.
12. See note 2, Rawls 1996, at 213.
13. This sentence touches on what is referred to as the problem of "religion in the public square." In brief, my critic will ask, "Why must citizens functioning as citizens put aside the deepest values that shape their lives for the sake of public reason and the creation of public policies that represent fair terms of cooperation?" This is a complex issue that has elicited considerable discussion that cannot be addressed in this essay. However, I have addressed the issue in another book. Fleck LM. *Bioethics, Public Reason, and Religion*. New York: Cambridge University Press; 2022.
14. Needless to say, Rawls' expectation would be that justices anywhere in the judicial system, but especially on the U.S. Supreme Court, would be expected to function *as citizens* and put aside their personal religious or ideological beliefs when rendering their judgments.
15. See note 1, *Dobbs* 2022, at 5.

16. See note 1, *Dobbs* 2022, at 12.
17. See note 1, *Dobbs* 2022, at 12.
18. Historians have noted that 10 of the first 12 Presidents of the United States were slave owners.
19. Coan A. The dead hand revisited. *Emory Law Journal Online* 2020;**70**:1–12, at 3; available at https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1036&context=elj-online (last accessed 13 Nov 2022).
20. See note 19, Coan 2020, at 4.
21. Cha AE. Physicians face confusion and fear in post-Roe world. *Washington Post* 2022 June 28; available at https://www.washingtonpost.com/health/2022/06/28/abortion-ban-roe-doctors-confusion/(last accessed 19 Nov 2022).
22. To be clear, one of the most restrictive laws regarding abortion in the country went into effect on September 15 in Indiana. However, it was blocked a week later by an injunction that another judge put in place until the legality of that law is reviewed in January 2023. Gibson C. She provided an abortion to a 10-year-old. She is still fighting for her patients. *Washington Post* 2022 Oct 27; available at https://www.washingtonpost.com/parenting/2022/10/27/abortion-doctor-indiana-caitlin-bernard/ (last accessed 19 Nov 2022).
23. Bellware K. Doctors says she shouldn't have to turn over patients' abortion records. *Washington Post* 2022 Nov 19; available at https://www.washingtonpost.com/politics/2022/11/19/caitlin-bernard-rokita-lawsuit/ (last accessed 20 Nov 2022).
24. Kitchener C, Barrett D. Antiabortion lawmakers want to block patients from crossing state lines. *Washington Post* 2022 June 30; available at https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/ (last accessed 20 Nov 2022); Bloche MG. Medicalizing the constitution. *New England Journal of Medicine* 2022;**386**:2357–9.
25. Alito wrote: "Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth…." See note 1, *Dobbs* 2022, at 29. However, on that same page, Alito writes, "There is ample evidence that the passage of these laws [outlawing abortion] was instead spurred by a sincere belief that abortion kills a human being."
26. If we follow the reasoning of the *Dobbs* Court, then in order to justify affirming the personal status of the fetus, the Court will have to appeal to "history and tradition." History and tradition would demonstrate many laws prohibiting abortion, but none of those laws explicitly affirmed the personal status of the fetus. In other words, the Court would not have any grounding in law for asserting the personal status of the fetus.
27. See note 1, *Dobbs* 2022, syllabus at 5.
28. Carlisle M. Fetal personhood laws are a new frontier in the battle over reproductive rights. *Time Magazine* 2022 June 28; https://time.com/6191886/fetal-personhood-laws-roe-abortion/ (last accessed 20 Nov 2022). Note that "at least six states have also introduced legislation to ban abortion by establishing fetal personhood, according to the Guttmacher Institute, a research group that supports abortion rights."
29. See note 1, *Dobbs* 2022, at 12, 14, 31–2.
30. See note 1, *Dobbs* 2022, at 31.
31. See note 1, *Dobbs* 2022, at 32.
32. See note 1, *Dobbs* 2022, syllabus at 6.
33. See note 1, *Dobbs* 2022, syllabus at 6.
34. Christian NT, Borges VF. What *Dobbs* means for patients with breast cancer. *New England Journal of Medicine* 2022;**387**:765–7, at 766; see also Suran M. Treating cancer in pregnant patients after *Roe v. Wade* overturned. *JAMA* 2022;328:1674–6.
35. See note 34, Christian 2022, at 767.
36. See *McFall v. Shimp* 10 Pa. D. & C. 3d 90 (July 26, 1978).
37. Harris LH. Navigating loss of abortion services—a large academic medical center prepares for the overturn of *Roe v. Wade*. *New England Journal of Medicine* 2022;**386**:2061–3; see also Watson K, Paul M, Yanow S, Baruch J. Supporting, not reporting—emergency department ethics in a

post-*Roe* era. *New England Journal of Medicine* 2022;**387**:861–3; Paltrow LM, Harris LH, Marshall MF. Beyond abortion: The consequences of overturning *Roe*. *American Journal of Bioethics* 2022; **22**(8):3–15.

38. See note 37, Harris 2022, at 2061–2.

39. See note 1, *Dobbs* 2022, at 66.

Cite this article: Fleck L. M (2023). The *Dobbs* Decision: Can It Be Justified by Public Reason? *Cambridge Quarterly of Healthcare Ethics* 32: 310–322, doi:10.1017/S0963180122000822