The Dobbs Decision: Abortion, Adoption, and the Supreme Court

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The **Dobbs Decision: Abortion, Adoption, and the Supreme Court**

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**ABSTRACT:** An analysis of the Supreme Court *Dobbs* decision, highlighting Amy Coney Barrett’s argument that adoption “takes care of the problem” of abortion.

**KEYWORDS:** adoption, termination of parental rights, safe-haven laws, rhetoric, *Roe v. Wade*, *Casey v. Planned Parenthood*

**THE 6–3 US SUPREME COURT DECISION** in *Dobbs v. Jackson Women’s Health Organization* (2022) overturned the federal legal protection for abortion articulated in *Roe v. Wade* (1973). A key component of the decision came during oral arguments when the court’s then-newest justice, Amy Coney Barrett, argued that the legal process of terminating parental rights guaranteed by safe-haven laws “take[s] care of the problem” of unwanted pregnancies. This shocking idea is anathema to many in the adoption community. It not only minimizes the trauma associated with adoption for birthmothers, relinquished children, and adoptive families, it also implies that proceeding with an unwanted nine-month pregnancy is no big deal; indeed Barrett compares the state’s interest in coercing that pregnancy to the state’s interest in mandating vaccines. While the idea that outlawing abortion will increase “the domestic supply” of infants has garnered a fair amount of interest and discussion, the underlying legal logic at work in *Dobbs* has not been sufficiently analyzed. Before turning to a careful analysis of the decision, it is important to understand the rhetorical performances that precede the decision itself.
The rhetorical framework of the *Dobbs* decision is informed by the wider discussion of abortion in the United States. For example, people who hold *anti*-abortion views describe themselves as “*pro-life.*” This is a strategic description that accomplishes two things. It transforms an “anti” position into a “pro” position, thus eliminating the negativity associated with “anti” positions generally. Second, the phrase “*pro-life*” implies that anyone who seeks an abortion is “anti-life,” or indeed a criminal intent on murder. This sensationalist rhetoric, in turn, reifies the fetus as the life that must be saved, and the pregnant person as a villainous murderer. Finally, the ethical weight of the phrase “*pro-life*” eclipses that of “*pro-choice,*” reducing the latter to something akin to selecting a brand.

Any analysis of rhetorical strategy must also attend to the ways in which some concepts are so thoroughly unmarked they do not enter the debate at all. Currently, the rhetorical framework of the abortion debate ignores the paternal obligations and rights of biological fathers. Among the profound consequences of this omission is that the men who are making laws about abortion are often configured as neutral observers, calmly sorting through complexities as if they have no vested interest in the outcome at all. Since men far outnumber women in legislative and judicial branches of the US government, they often are the primary arbiters of women’s reproductive rights. While “conflict of interest” principles are common in juridical and legislative contexts, they are rarely invoked in abortion decisions. Since men’s roles in human reproduction are so rarely discussed in laws about abortion, we have tended to ignore the fact that the men making these decisions are also parties to them. The failure to account for men’s role in reproduction, rhetorically and sociopolitically, allows jurists and legislatures the privilege of appearing to be neutral and objective about decisions that directly benefit them.

For example, in the wake of *Dobbs,* some states have begun advancing legislation that would create a total ban on abortion, including exceptions for rape and incest. For those who are anti-abortion rights, the exceptions are not needed because, to use the phrasing of Ohio Republican Senator J. D. Vance, “two wrongs don’t make a right.” Not only does this rhetorical formulation suggest a moral equivalence between rapists and their victims, it also helps normalize rape and incest, two vastly under-reported crimes. This erasure relies on the larger omission of men’s role in reproduction at all. While research has shown that approximately twenty-five percent of women seek an abortion during their childbearing years in the United States, no similar study has been done of men who encourage (or discourage) their partners to abort.

On the rare occasions when men’s role in reproduction is acknowledged, new ways to solve the problem of unwanted pregnancy come into view. For example, mandating reversible vasectomies before marriage, or (somehow?) enforcing the use of condoms during ejaculation would likely reduce unwanted pregnancies dramatically. These possibilities are often dismissed as “fringe” or “too radical” before they are even seriously weighed. The routine failure to account for men’s
role in reproduction has supported the underlying misogyny that informs the overall abortion debate. By suggesting that adoption should be seen as a way to “take care of the problem” of abortion, the Dobbs decision uses a rhetorical sleight of hand to overturn a legal precedent that had been continually upheld for fifty years, beginning with Roe v. Wade.

Summary of Roe and Casey

In its 7–2 Roe decision (1973), the US Supreme Court found that abortion prior to fetal viability was constitutional. The jurists grounded their argument in both the Ninth and Fourteenth Amendments. Justice Harry Blackmun, writing for the majority in Roe, argued that women had the right to determine choices about reproduction because such decisions impinged directly on questions of life and liberty. Moreover, Blackmun’s opinion relied on what became called “penumbra rights” anticipated by the Ninth Amendment. The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Recognizing that the ratifiers of the Constitution could not anticipate every future contestation, the Ninth Amendment explicitly declares that new rights may well be added to the Constitution. In Roe, the court ruled that abortion is one such right.

Additionally, the opinion cited the equal protection clause found in the Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Since the consequences of pregnancy were understood to be more life-changing for women than for men in 1972, the law could not force women to maintain a pregnancy against their will since men did not face any equivalent coercion.

Recognizing that fetal life also deserved legal protection, Roe sought to establish a gestational time-line rooted in the viability of the fetus. Since the science of the time indicated that during the first trimester of pregnancy the fetus could not survive independently outside the womb, it did not warrant legal protection. However, states could impose some restrictions on the right to abortion during the second trimester as long as these restrictions did not impose an undue burden on the pregnant woman. During the third trimester, the fetus could survive outside the womb and therefore states could completely prohibit abortion late in pregnancy.

Some two decades later in Planned Parenthood of Southeastern Pennsylvania v. Casey, the Supreme Court upheld Roe. Writing for a 5–4 majority, Sandra Day O’Connor was clear: “The woman’s right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. . . . It is a rule of law and a component of liberty we cannot renounce.” The court upheld four restrictions on abortion enacted by Pennsylvania, invalidating only one. Casey discarded the tri-
mester, gestational framework of Roe, and allowed states to forge restrictions on abortion as long as they did not place an “undue burden” on patients seeking one.

**Dobbs v. Jackson**

In 2018, the Mississippi legislature approved “The Gestational Age Act,” restricting all abortions after fifteen weeks, with no exception for rape or incest. (Exceptions for “severe fetal abnormality” or serious medical emergencies were allowed.) The then-governor of Mississippi, Phil Bryant, eagerly signed the bill. Jackson Women’s Health Organization (JWHO), the only abortion clinic in Mississippi, sued the state, arguing that Roe and Casey legalized abortion prior to viability. The JWHO won its suit in the lower court, a ruling upheld by the Fifth Circuit Court of Appeals in December 2019. The state of Mississippi appealed the Circuit Court’s decision and the US Supreme Court agreed to hear arguments about only the constitutionality of pre-viability abortion restrictions. At the time of the petition, Mississippi did not seek to overturn Roe or Casey. Thomas Dobbs, in his capacity as the chief medical officer of Mississippi, was named as the petitioner in the case. Scott Stewart, Solicitor General of Mississippi, was lead counsel for the state. Stewart had previously served as the Trump administration’s lead immigration lawyer after serving as a clerk for Justice Clarence Thomas in 2016. Stewart had been instrumental in defending the Family Separation Act at the Texas-Mexico border, a point to which we will return. The JWHO was represented by Julie Rinkelman, senior director of US litigation for the Center for Reproductive Rights, who had successfully argued a similar case in 2020, June Medical vs. Russo that helped preserve abortion rights in Louisiana. Rinkelman was joined by the Biden Administration’s Solicitor General, Elizabeth Prelogar, who filed an amicus curiae in support of JWHO and participated in oral arguments.

By the time the US Supreme Court held oral arguments on December 1, 2021, two important changes had occurred. Amy Coney Barrett had joined the court and heard her first case in November 2021, and Mississippi had moved the cut-off line for a legal abortion from fifteen weeks to six weeks. Mississippi was spurred to act because in April 2021, “the Texas heartbeat law” that outlawed abortion after six weeks was enacted. (No reliable medical science supports the idea that fetal viability is possible at six weeks). In September 2021, the Supreme Court refused to block Texas’s ban. The court’s refusal to hear the case prompted Mississippi to change its legal strategy and to argue explicitly for the repudiation of Roe and Casey. Stewart’s opening put the issue forcefully: “Roe versus Wade and Planned Parenthood versus Casey haunt our country. They have no basis in the Constitution. They have no home in our history or traditions. They’ve damaged the democratic process. They’ve poisoned the law” (OA 4). Rather than weighing issues surrounding viability and gestational science, which had been the legal question that determined the Supreme Court’s decision to accept the case, Dobbs now forced a
consideration of stare decisis, the legal principle that guides the court “to stand by things decided.” This legal principle cautions jurists not to overturn precedents unless an extraordinary change in fact or culture has made a previous law unsustainable. (Stare decisis was the principle upheld in Casey.) Otherwise, the court risks its own legitimacy because it seems to be making decisions based on political or ideological whim, rather than from interpreting legal precedent. During oral arguments, Justice Sonia Sotomayor noted that Mississippi changed its legal strategy and asked the court to overrule Roe and Casey “because we have new justices on the Supreme Court” (OA 15). She then asked, “Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?” (15).

Justice Samuel Alito, well known as a strict “originalist,” wrote the majority opinion in Dobbs. Originalists believe that jurists are bound to interpret the intent and climate of the Constitution as written; they are deeply skeptical about extending rights beyond those explicitly named in the Constitution. Those opposed to originalism have advanced what are known as penumbra rights, and have cited the Ninth Amendment to claim that jurists must interpret the Constitution as history changes. Almost all penumbra rights have expanded, rather than restricted, individual rights over the power of the state; contraception, same-sex marriage, and abortion have been found constitutional due to the logic of penumbra rights. Alito discounts the value of such extensions almost entirely: “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but . . . The right to abortion does not fall within this category” (FD 5). For most court-watchers, this aspect of Alito’s argument is familiar. However, Alito’s extensive recourse to the authority of history sits uneasily with Stewart’s dismissal of Roe and Casey as historically outdated and irrelevant. “The march of progress has left Roe and Casey behind. . . . Roe and Casey shackle States to a view of the facts that is decades out of date,” Stewart contends (B 4). In other words, Alito argues that the lack of explicit historical legal approval for abortion means that it is not constitutional, while Stewart says it is precisely because of advances brought about by “the march of history,” abortion is no longer necessary. (Barrett will amplify this point in oral arguments to argue that adoption and safe-haven laws eliminate the need for abortion.) The dissent, written by Justice Sonia Sotomayor and signed by Justices Elena Kagan and Stephen Breyer, points out that when the Fourteenth Amendment was ratified in 1868, women had no legal representation and could not vote. “So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women’s liberty” (FD 14). But the court, following a line pursued by Justice Brett Kavanaugh in oral arguments (OA 43, 77), contends that since the Constitution does not mention abortion, it is up to the states to decide how, and if, they want to regulate it. Kavanaugh takes
the constitutional silence on abortion to mean that it is essentially “neutral” on
the topic. As noted earlier, this recourse to neutrality obscures the different liberty
issues between men and women in pregnancy itself. While jurists in Roe and Casey
found that pregnancy impinges on a women’s liberty in a way it does not impinge
on men’s, they argued that the Fourteenth Amendment made it unconstitutional
for her to be compelled to continue a pre-viability pregnancy she did not want.

Barrett’s Equation

Ignoring all the complexities involved in using gestational viability as a measure
to guide abortion timelines, Barrett proposes a different dividing line to guide
the court. She contends that the relevant dividing line for human reproduction
is between pregnancy and parenting. It is a startling claim. Rhetorically, Barrett
acknowledges “the right to choose” central to abortion debates, but she moves
the location of that choice from pregnancy to parenting, oddly overlooking both
the complex experience of giving birth and the fraught challenges of creating an
adoption plan. Blithely dismissing all of this, Barrett argues that adoption can
“take care of the problem[s]” she associates with abortion.

Barrett contends that since safe-haven laws allow parental rights to be legal-
ly terminated as early as forty-eight hours after birth, the solution to abortion is
adoption. She contends that pregnancy itself is almost incidental and that the real
issue of limiting liberty occurs at parenting, not at pregnancy. Barrett dismisses
the physical, financial, and emotional difficulties of pregnancy and underestimates
the legal, emotional, and psychological complexities of terminating parental rights.
Barrett concedes that pregnancy is “without question, an infringement on bodily
autonomy, you know, which we have in other contexts, like vaccines. However,
it doesn’t seem to me to follow that pregnancy and then parenthood are all part
of the same burden” (OA 57). For Barrett, coercing a nine-month long pregnancy
is equivalent to mandating vaccines. Acknowledging respondents’ arguments that
women’s relationship to reproduction forces them to face hardships that men do
not face, Barrett contends that these hardships stem from parenting—“the obli-
gations of mothering” is how she puts it—but not from pregnancy. For Barrett,
because safe-haven laws allow women to terminate parental rights they “take care
of the problem.” The safe-haven laws, Barrett claims, allow women to participate
in the full life of society in the same manner as men. Parenting is the burden in
need of relief rather than pregnancy.

Barrett suggests that there is no need to haggle over the shifting science of
viability because the right to terminate can be shifted from pregnancy to parental
rights. “And so it seems to me that the choice, more focused would be between,
say, the ability to get an abortion at 23 weeks or the state requiring the woman
to go 15, 16 weeks more and then terminate parental rights at the conclusion.
Why—why didn’t you address the safe[-]haven laws and why don’t they matter?”
THE DOBBS DECISION  177

The respondents point out that both Roe and Casey mentioned adoption but focused especially on the demands and obligations of pregnancy. The better question, perhaps, is why Barrett elevates the safe-haven laws as a crucial factor in the decision to overturn Roe and Casey. In order to override the principle of stare decisis, a new reality must make the old law obsolete or wrong; stare decisis can be set aside if a substantial change in society invalidates the precedent. The majority opinion points out that Brown v. Board of Education (1954) overturned Plessy v. Ferguson (1896) because the principle that “separate but equal” proved to be false. For Barrett, the safe-haven laws should be accorded similar weight. In 1999, Texas passed the first safe-haven law (also known as the Moses’ Baby Law) and, by 2008, all fifty states had enacted similar laws. Barrett posits that these laws represent a substantial societal change on the order of magnitude of rejecting “separate but equal.”

While the court nods approvingly in the direction of safe-haven laws as a kind of “benefit,” in fact, these laws are deeply problematic. The safe-haven laws were enacted in response to infanticide, as a way to address the few sensational instances in which infants were found in dumpsters or otherwise abandoned. Fortunately, wider recognition of postpartum depression over the past two decades has made such rare crimes even less frequent. While all fifty states have passed some version of a safe-haven law, these laws vary widely in detail. For example, North Dakota allows a child up to the age of one to be relinquished, while other states mandate a window of one week after birth. Most safe-haven laws require the immediate termination of parental rights, although a few do allow a “reclamation” interval where the relinquishing parent can reverse their decision. However, the majority of safe-haven laws mandate closed adoptions, making it difficult, if not impossible, for relinquished children to access birth records or other information for the rest of their lives.

Moreover, safe-haven laws are rarely used. (And in at least two of these cases, parents have tried to challenge the constitutionality of the law.) Additionally, the wide differences in how states have approached safe-haven laws have created a kind of improvisatory aspect to the laws that make them seem arbitrary. Nonetheless, the court sides with Mississippi’s argument: “Respondents fail even to mention the universality after Casey of safe-haven laws. Yet those laws—along with adoption more broadly—alleviate what respondents say is the main reason for abortion: that a woman ‘cannot parent another child at the time’” (RB 18). (Notice the rhetorical slippage between “a woman” and the non-gendered verb “parent.” Again, the obligations and rights of paternity are obscured.) Relying on safe-haven laws to overturn Roe and Casey displaces the problems associated with unwanted pregnancy to adoption, while relying on the “happily ever after” adoption narrative that conceals the fraught nature of adoption itself. Retaining the concept of “termination” but moving its object from pregnancy to parental rights, Dobbs suggests that the solution to the ethical difficulties of abortion can be solved on the
apparently ethically-free terrain of adoption. People who understand the trauma of adoption rightly reject this formulation. Thus, Mississippi’s reliance on safe-haven laws to set aside stare decisis and overturn Roe and Casey seems exceptionally weak. So much so, one wonders if the safe-haven laws are a kind of distraction for another agenda altogether.

**Domestic Supply and Adoption**

Alito’s majority opinion includes a footnote citing a CDC study documenting the shortage of “domestic supply” for adoption: “[N]early 1 million women were seeking to adopt children in 2002 (i.e., they were in demand for a child), whereas the ‘domestic supply’ of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent” (FD 34n46). Implicit in Alito’s citation of the CDC study is the idea that adoption is a process focused solely on infants. While it is notoriously difficult to know exactly how many US “waiting” parents there are across private, public, and international adoption agencies, estimates range between one and two million. Currently, about 1.3 million abortions are performed each year in the United States. (Some of these procedures are done because the fetus is not viable so it would be a mistake to convert these numbers into simple calculations of “domestic supply.”) At a glance then, within the capitalist math of supply and demand, outlawing abortion seems to solve the adoption “supply” issue. The court’s decision relies on a kind of fairy tale structure in which unwanted pregnancies can be “saved” by the healing apple of adoption.

The general statement that fewer infants have become available for adoption in the United States over the last several decades is true. Stewart, the lead lawyer for Mississippi in Dobbs, rose to prominence when he worked for the Trump administration on immigration. The Family Separation Policy that prevailed at the Texas-Mexico border allowed thousands of Mexican children to be taken from their families and sent to foster and adoption agencies throughout the United States. Linking the Family Separation Policy with Dobbs, one begins to suspect that the termination of parental rights may be the ultimate goal of Mississippi and other states intent on advancing complete bans on abortion. If terminating parental rights and sending children into adoptive families can be seen as routine rather than exceptional, states will have to spend less to support the poor and their children.

The idea that banning abortion will lead to a large influx of “domestic supply” for infant adoption is misguided. As Sotomayor points out in the dissent, in a study following women who were denied access to abortion, fewer than nine percent choose an adoption plan. Currently, there are approximately 400,000 children in the US foster care system who need parents. Of these, about 115,000 have parents who have had their parental rights terminated, either voluntarily or as the outcome of a Child Protection Services intervention. Most of these waiting children spend, on average, three years in foster care. Approximately ninety percent
of foster children are between the ages of six and fifteen. Most waiting adoptive parents in the United States (approximately seventy percent) are white and Christian.  

The harsh reality of Mississippi complicates an easy equation between waiting parents and pregnant women who seek adoption. As Sotomayor points out: “Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birth-weight, cesarean section, and maternal death. It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion” (FD 42). As of 2019, approximately 200,000 children receive public assistance in Mississippi. In theory, adoption might lower those numbers significantly. In practice, however, the theory does not hold up. The rhetoric, in brief, does not meet the reality of adoption decisions at all. Children of color, especially African American children, are over-represented in foster care nationally. Given the racial demographics of the red states most intent on banning abortion, it seems plausible to conclude that part of the aim is to establish a permanent underclass of black citizens. That such an outcome resembles the basic structure of slavery is no accident.

Rhetoric and the Double

Rhetoric, clearly, has everything to do with covert operations. But are the politics of violence already encoded in rhetorical figures as such? In other words, can the very essence of a political issue—an issue like, say, abortion—hinge on the structure of a figure? (Johnson 29)

Throughout the majority opinion and the dissenting opinion, the term adoption is used in two different senses, with no overt acknowledgement of the difference between the terms. The term initially refers to changes in legal history, particularly in relation to the Fourteenth Amendment. Take this example from Alito’s majority opinion: “Recall that at the time of the adoption of the Fourteenth Amendment, over three-quarters of the States had adopted statutes criminalizing abortion . . .” (FD 29). The adoption of laws and rights is a routine part of legal history; it does not represent an alternative to legal principle. For example, the right to free speech extends to arenas of communication such as the internet that the founders could not foresee. One might even suggest that the internet was adopted into the Constitution and afforded the same protections as broadsheets, newspapers and other communication platforms that the founders anticipated. The court’s decision in Dobbs seems to put all of these extensions at risk, a point Justice Thomas underlines in his concurrence. While the majority decision explicitly insists that “Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion” (FD 7), the dissent raises the alarm about the far-reaching implications of
the rejection of penumbra rights: “Faced with all these connections between Roe/Casey and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.)” (FD 24–25). In other words, the majority opinion is self-contradicting.

The second way adoption is used in the court’s opinion is as an alternative to parenting, as discussed in relation to Barrett’s contributions to oral arguments. By transposing the issue of terminating a pregnancy to terminating parental rights, the court erases the radical difference between choosing to give birth and choosing not to. Ironically, then, by proposing adoption as an alternative to abortion, the court dismisses the experience of an evolving pregnancy as anything special—not to say as anything sacred, one of the usual tenants of Christian-based pro-life arguments against abortion. A pregnancy of fifteen weeks, Barrett claims, is no different from a pregnancy of thirty-six weeks (OA 57). In the court’s final decision, Alito transforms Barrett’s (false) equivalence between terminating pregnancy and terminating parental rights into a rhetorical strategy that enforces the apparently “neutral” logic of terminating parental rights as a way to “zero out” overturning the legal right to terminate a pregnancy prior to viability established in Roe and reaffirmed in Casey. In this way, the Court implies both that adoption can solve the problems they believe are posed by abortion and that adoption’s lack of “domestic supply” problem can be solved by eliminating abortions. This aspect of the ruling was immediately clear and led many white couples to hold signs proclaiming “We will adopt your baby” during protests after the decision was announced. This wish, however, misses what the likely outcomes of this decision will be.

**Rights, Ethics, and Fundamentals**

A clear-eyed view of US legal history makes obvious that constitutional rights should not be left to the whims of often fickle state politicians. As Prelogar argues, “the Court correctly recognized that [abortion] is a fundamental right of women, and the nature of fundamental rights is that it’s not left up to state legislatures to decide whether to honor them or not” (OA 107–08). When the jurists decided to “let the states decide,” they claimed that the court was, like the Constitution, “neutral” on the issue of abortion. And yet all of the opinions, dissents, and concurrences in Dobbs, insist that abortion is different from any other (contested) right because it involves human life. Thus, this specialness would seem to demand something other than “neutrality.” But the court likes this term because it allows the jurists to be seen as somehow impartial, disinterested, above the fray. From this disinterested posture, they also claim that their dispassionate ethical regard for the unborn prompts them to overturn Roe and Casey, while the dissent argues that carrying or terminating a pregnancy is a private decision that the court must
Within this rhetorical matrix, one that extends beyond Dobbs itself, “life” carries more ethical weight than “choice.”

Perhaps more importantly though, this rhetorical matrix tempts the court into a kind of slippage between ethical and pragmatic issues. By bringing adoption and the “domestic supply of infants” explicitly into a legal case about abortion restrictions, the court stumbles and loses the capacity to contend that they are neutral arbiters of abstract rights. That is, by figuring relinquished children as commodities in a supply chain, the court’s very crude and coarse calculations severely diminish its claims to moral superiority.

The transposition of children into commodities written into the Dobbs decision has already prompted states to usher in new legislation to either uphold or restrict abortion. As of October 2022, twenty-six states are trying to pass legislation that will prohibit the procedure entirely, even in situations of medical emergency, rape, and incest. While some adoption agencies anticipate a slight uptick in the number of people seeking to place unwanted children who might have been aborted otherwise, most recognize that the Dobbs decision will not meaningfully increase the “domestic supply” of infants. There is no discernible mathematical equation that will convert abortions into adoptions, despite Barrett’s argument that adoption “takes care of the problem” of abortion. Thus, despite her wishful thinking, terminating pregnancies and terminating parental rights are not equivalent.

What seems most likely to happen is that poor women of color will be unable to obtain abortions in states intent on prohibiting the procedure and that most will likely do their best to parent these children. Pregnancies that cause medical issues for the fetus or the pregnant person will be difficult, if not impossible, to address in some states. There will likely be a surge in the use of the “abortion pill,” and states that protect the right to choose will likely see an increase in the number of people from other states seeking abortions. But Dobbs will not do much to change “the domestic supply” issue cited by the court. Adoption is not a solution to unwanted pregnancy and the distinction between pregnancy and parenting is not trivial. A good friend of mine explained she decided to carry her baby to term when she was denied an abortion because she simply could not bear turning her child over to a state that had shown only contempt and indifference to her prior to her pregnancy. She deeply loves her son but she is clear-eyed about what raising him has cost her, him, and the rest of their family—debts that neither the state nor any pro-life organizations have expressed any interest in paying.

Notes

1. For the rest of this essay, these decisions will be shortened to Dobbs, Roe, and Casey. The final Dobbs decision opinion (including dissents and concurrences) can be found at Alito, et al., “Read the Opinion,” and will be cited as “FD” with the page number in this essay. A transcript of the oral argument can be found here and will be cited as “OA” with the page number and can be found at Alito, et al., “Read: Transcript.” Stewart’s
brief on behalf of Mississippi will be cited as B. Stewart’s reply brief will be cited RB with the page number.

2. For an extended discussion of how this neglect informs the performances of Operation Rescue and other anti-abortion groups, see Phelan.

3. See RAIIN. Approximately fifteen percent of those surveyed said they did not report their rapes because they do not believe police will do anything to help. Another twenty percent did not report because they feared retaliation.

4. In the arguments discussed here, the judges refer to women when discussing pregnancy. However, the phrase “pregnant person” acknowledges that some trans or non-binary people have the capacity to become pregnant and give birth. Since the term “pregnant person” does not appear in either the final decision of Dobbs or in the oral arguments, I will mainly use the terms of the decision and arguments when discussing the case.

5. This is one of the few places in all of law that gives women more rights than men. The biology of human reproduction imposes more burdens on the pregnant woman than on the man. Thus for a man to insist a woman carry a pregnancy to term against her will is to violate her equal protection under the law.

6. Griswold v. Connecticut (1965) held there is a “right to marital privacy” that makes the use of contraceptives legal. Instant v. Baird (1972) gave the same right to unmarried persons. These decisions, as well as Obergefell v. Hodges (2015) and Lawrence v. Texas (2003), all rely on penumbra rights, liberties not explicitly mentioned in the Constitution.

7. The first trimester usually means sometime prior to fifteen weeks gestation.

8. Casey allowed four of the five restrictions imposed by Pennsylvania: informed consent, parental consent in the case of a minor, medical emergency, and full recording requirements for each abortion. It struck down the requirement that a wife must secure her husband’s permission before seeking an abortion.

9. Prior to 2018, Mississippi allowed abortions to occur before twenty weeks.

10. A transcript of the oral arguments can be found at Alito, et al., “Read: Transcript.” For ease of reading, I omit intra-textual citations.

11. For many Christian pro-life proponents, abortion advocates overlook the ethical complexities of abortion, especially in late-term procedures. I have wondered if Barrett, who is a member of People of Praise, a conservative evangelical sect, was trying to provoke the respondents by enacting the same kind of blithe dismissal of the act of giving birth.

12. This reference to Brown seems particularly pointed given that the facts on the ground regarding the racial demographics of Mississippi.

13. See Children’s Bureau for a good overview and summary of all fifty states’ (and Puerto Rico’s) safe-haven laws. Note that only five states have provisions for a non-relinquishing father to petition for custody of the child.

14. For a good summary of the many troubling issues related to safe-haven laws (and safe-haven boxes) see Stop.

15. Dickerson thoroughly documents the family separation policy that led to thousands of Mexican children being taken from their families. Stewart argued that a seventeen-year-old migrant held in a Texas detention center could not leave to obtain an abortion. He lost that case, and the Trump administration did not seek any further abortion bans for pregnant migrants held at the border.
16. See Roberts for an excellent analysis of how racism informs all aspects of the foster care system in the United States.

17. All of these statistics can be found at Adoption Network.

18. Gretchen Sisson, et al. have conducted the most relevant research; Sydney Trent has a nice summary of the relevant research.

19. See Miller and Sanger-Katz.

Works Cited


