

## THE ELEVATION OF REALITY OVER RESTRAINT IN *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

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In *Dobbs v. Jackson Women's Health Organization*,<sup>1</sup> the Supreme Court buried the constitutional right to abortion that it brought forth in *Roe v. Wade*<sup>2</sup> and breathed new life into in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>3</sup> Justice Alito's opinion for the Court completely overruling *Roe* and *Casey* is an outstanding jurisprudential achievement. Alito not only completely dismantled *Roe* and *Casey* before burying them, but also countered Chief Justice Roberts's imprudent reliance on judicial restraint and held together a majority divided over the continuing validity of other precedents.

The hallmark of Justice Alito's opinion in *Dobbs* is legal-reality-based decisiveness. In legal reality, the Constitution supplies no right to abortion. The Court decisively determined that in *Dobbs*. The majority's unflinching prudence in confronting grave institutional error powerfully contrasts not only with the Chief Justice's institutionalist instinct for appeasement, but also with the three dissenting Justices' inability to learn from or even acknowledge the errors of the Court's abortion jurisprudence. The doctrinal

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1. 142 S.Ct. 2228 (2022).
2. 410 U.S. 113 (1973).
3. 505 U.S. 833 (1992).

reasoning in *Dobbs* traces directly back to the original dissents in *Roe*<sup>4</sup> and the dissenting opinions of Chief Justice Rehnquist and Justice Scalia in *Casey*.<sup>5</sup> The majority opinion's continuity with the law as recognized and declared by shifting numbers of Justices over time is entirely to its judicial author's credit, for *Dobbs* is a judicial opinion, not a chapter in a chain novel. Justice Alito's authorship of the opinion for the Court in *Dobbs* should contribute to his judicial legacy over time as significantly as Justice Blackmun's authorship of the opinion for the Court in *Roe* detracted from his. But whether *Dobbs* enhances or detracts from Justice Alito's judicial legacy over time will depend on the relative corruption or perfection of the culture of constitutional adjudication in which that legacy is received and assessed.

I. PARTIAL DOCTRINAL HARMONIZATION IN THE KEY OF  
*GLUCKSBERG*

The sole question presented in *Dobbs* was whether the Constitution forbids all pre-viability prohibitions of abortion. At issue was the constitutionality of a state law that prohibited abortion after fifteen weeks' gestational age. As between the challengers and the state, the right ultimate outcome in *Dobbs* was not difficult to discern. Governing doctrine purporting to establish a right to abortion through viability was so unmoored from the law of the Constitution that there were multiple potential paths to decision, none uniquely correct.<sup>6</sup> A first way to take the measure of *Dobbs* is by comparing the path taken in Justice Alito's opinion for the Court with the paths not taken as set forth in the concurring opinions.

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4. 410 U.S. at 171 (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

5. 505 U.S. at 944 (Rehnquist, C.J., dissenting); *id.* at 979 (Scalia, J., dissenting).

6. One wishing to evaluate this assertion can review the briefs and opinions in *Dobbs*. For an explanation of "the law of the Constitution," in comparison and contrast with authorized developments, unauthorized developments, and unauthorized departures, see Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 142–49 (2016).

Alito's clear-eyed judiciousness in addressing the enormous errors of *Roe* and *Casey* contrasts sharply with Chief Justice Roberts's squinting solo concurrence. Roberts's proposal was *partial* overruling (which also would have amounted to partial upholding). Roberts would not have decided—at least in this case—that the Constitution confers no right to abortion. Instead, he would have described the previously announced right to abortion as something along the lines of “a reasonable opportunity to choose.”<sup>7</sup> Because the Mississippi law was not unconstitutional as measured against a right defined as a “reasonable opportunity to choose [abortion],” Roberts would have upheld the challenged law but then decided nothing more. His guiding principle here, he said, was “judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more.”<sup>8</sup>

The fundamental problem with this approach, Alito reminded Roberts, is that “we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.”<sup>9</sup> In contrast with the abortion right ensconced in *Roe* and extended in *Casey*, Roberts's “reasonable opportunity to choose [abortion]” rule would have been a new right with a new rationale. It also would have been as much a partial affirmation of *Roe* and *Casey* as a partial overruling. But Roberts did not “attempt to show that this rule represents a correct interpretation of the Constitution.”<sup>10</sup> Whatever short-term benefits might result from leaving details of the new right's reach undecided would soon be dissipated by the need to address

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7. Roberts wrote: “Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability.” 142 S.Ct. at 2310 (Roberts, C.J., concurring). Applying this newly described constitutional right to abortion, Chief Justice Roberts pointed out that “Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered ‘late’ to discover a pregnancy. I see no sound basis for questioning the adequacy of that opportunity.” *Id.* at 2310–11.

8. *Id.* at 2311.

9. *Id.* at 2283 (majority opinion) (quoting *Citizens United v. FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring)).

10. *Id.* at 2282.

abortion laws of other states.<sup>11</sup> The question of how much “the turmoil wrought by *Roe* and *Casey* [should] be prolonged” by the Court was a matter for prudential judgment.<sup>12</sup> Informed by the experience of almost fifty years under the *Roe* regime, Justice Alito and his four colleagues in the majority appropriately determined that “[i]t is far better—for this Court and the country—to face up to the real issue without further delay.”<sup>13</sup>

Alito was right. Earlier in the Term, the Court had already split over Texas’s Heartbeat Act with Roberts siding with the *Dobbs* dissenters.<sup>14</sup> It seems unlikely he would later change his assessment about the unconstitutionality of Texas’s Heartbeat Act and other state laws like it. After all, Roberts in *Dobbs* touted as a comparative advantage of his approach that “under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent.”<sup>15</sup> Roberts’s “reasonable opportunity to choose [abortion]” was probably where he would have ended up after *Dobbs* as before. Given how the Texas cases went, that is where he already was.

One also cannot appropriately appraise Roberts’s appeal to restraint without evaluating the legal justice of the constitutional right to abortion that Roberts would have left in place. The Court’s decisions in *Roe* and *Casey* resulted in judicial occupation of a domain in which the federal judiciary had no right to be. There is nothing judicious about advocating restraint in returning that domain to those with lawful authority. If an invader were to cross a border and occupy territory properly belonging to someone else, there would be something fundamentally misguided about

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11. *See id.* at 2283 (“If we held only that Mississippi’s 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The ‘measured course’ charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer.”)

12. *Id.*

13. *Id.*

14. *See Whole Woman’s Health v. Jackson*, 142 S.Ct. 522 (2021).

15. 142 S.Ct. at 2316.

appealing to “occupier’s restraint” in justifying the unlawful occupier’s refusal to cede back all the ill-gotten territory. The requirement to return lawmaking authority to lawmakers relates back to the legal injustice of the earlier decisions taking it from them.<sup>16</sup>

Justice requires rendering to each his or her due. The final judgment part of this aspect of justice was easy in *Dobbs*, even according to Roberts. The Mississippi law’s challengers who brought the case were not entitled to any judicial relief. “I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis,” Roberts wrote. “That line never made any sense.”<sup>17</sup> That takes care of what the abortionists bringing the case were due: nothing. The government’s due on the other side of the *v.* is where Roberts diverged from Alito. Under Roberts’s redefinition of the constitutional right to abortion, state governments would receive back lawmaking authority for the period from fifteen weeks’ gestational age until viability. Under Alito’s analysis for the Court, however, this was too grudging. The divide between Roberts and Alito was partially a question of justice, inasmuch as it was a question of what the State as party to the case was due. But it was more a question of prudence, inasmuch as prudence is the intellectual and moral virtue that “applies universal principles to the particular conclusions of practical matters.”<sup>18</sup>

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16. The extent of the Court’s arrogation to itself of authority belonging to the people plays an important part in the majority’s *stare decisis* analysis. In explaining the way in which “*Roe* was on a collision course with the Constitution from the day it was decided” and that “*Casey* perpetuated its errors,” Justice Alito notes that “those errors do not concern some arcane corner of the law of little importance to the American people.” 142 S.Ct. at 2265. “[T]he Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.” *Id.* This preferential option for the people is appropriate for authority rooted in popular sovereignty. See, e.g., J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 27–29 (2022) (explaining the transmission of authority through the Constitution as justified by popular sovereignty).

17. *Dobbs*, 142 S.Ct. at 2310 (Roberts, C.J., concurring).

18. THOMAS AQUINAS, *SUMMA THEOLOGIAE* II-II, Q.47 art. 6 (Fr. Laurence Shapcote, O.P., trans., John Mortensen & Enrique Alarcon, eds., 2012).

Coming into *Dobbs*, the Supreme Court's "substantive due process" jurisprudence contained significant tensions. In the vintage years of substantive due process that began with *Casey* in 1992 and ended with *Dobbs* thirty years later, there were three principal lines of substantive due process doctrine. One was the line of substantive due process doctrine that emerged over the 1970s and 1980s and received its canonical formulation in the 1997 decision of *Washington v. Glucksberg*.<sup>19</sup> A second line was the abortion-specific substantive due process doctrine that the Court set forth in *Casey*'s 1992 repackaging of *Roe* and applied in the Court's many abortion cases after. A third line ripened into maturity with *Lawrence v. Texas* in 2003,<sup>20</sup> from seeds sown in 1996 with *Romer v. Evans*.<sup>21</sup> This line, which bore fruit most prominently in the 2015 decision of *Obergefell v. Hodges*,<sup>22</sup> has principally been applied to extend rights related to sexual intimacy between persons of the same sex.

The most straightforward way to understand *Dobbs* doctrinally is that the decision eliminates the abortion-specific *Roe/Casey* line of substantive due process. The result is a partial harmonization of the doctrine that brings the outlier of abortion into the *Glucksberg* domain. The doctrinal harmonization is only partial, though, because *Dobbs* does not disturb *Lawrence* or *Obergefell*.<sup>23</sup> Significant tension therefore remains, for *Glucksberg* and *Lawrence* are plainly incompatible approaches to substantive due process.

Division over what to do with remaining substantive due process doctrine outside of *Glucksberg* was manifest in the separate concurring opinions of Justice Kavanaugh and Justice Thomas in *Dobbs*. Both Kavanaugh and Thomas have long recognized the incompatibility of *Glucksberg* and *Casey*. As then-Judge Kavanaugh noted in a lecture delivered a year before his nomination to the Supreme

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19. 521 U.S. 702.

20. 539 U.S. 558.

21. 517 U.S. 620.

22. 576 U.S. 644.

23. See *Dobbs*, 142 S.Ct. at 2277–78 (majority opinion) ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

Court, “even a first-year law student could tell you that the *Glucksberg* approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe v. Wade* in 1973—as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood v. Casey*.”<sup>24</sup> Justice Kavanaugh did not suggest that *Glucksberg* was wrong. According to Justice Thomas’s originalist outlook, however, *Glucksberg* itself is incompatible with the law of the Constitution.<sup>25</sup> That is why Thomas in his solo concurrence called for a complete reconsideration in the future of all the Court’s substantive due process precedents.<sup>26</sup>

By contrast with Justice Thomas’s call for ending substantive due process entirely in the future, an explicit purpose of Justice Kavanaugh’s concurrence was to underscore this doctrine’s continuance: “I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of [*Griswold, Eisenstadt, Loving, or Obergefell*], and does *not* threaten or cast doubt on those precedents.”<sup>27</sup> This assertion by Kavanaugh underlined the statement made twice in Justice Alito’s opinion for the Court that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”<sup>28</sup>

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24. Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William H. Rehnquist*, American Enterprise Institute, 2017 Water Berns Constitution Day Lecture, available at <https://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf/>.

25. See *Dobbs*, 142 S.Ct. at 2300–01 (Thomas, J., concurring) (summarizing originalist analyses from earlier concurrences by Justice Thomas and concluding that “the Due Process Clause at most guarantees *process*. It does not, as the Court’s substantive due process cases suppose, forbid the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided.”).

26. See *id.* at 2301 (suggesting that “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold, Lawrence, and Obergefell*”).

27. *Id.* at 2309 (Kavanaugh, J., concurring).

28. *Id.* at 2277–78 (majority opinion); *id.* at 2280.

II. PRUDENTIAL ORIGINALISM IN THE MAINTENANCE OF  
*GLUCKSBERG*

If Justice Thomas is right that all substantive due process doctrine is incompatible with the original law of the Fourteenth Amendment, then does it follow that Alito's opinion for the Court in *Dobbs* is not originalist? *Dobbs* further entrenches *Glucksberg*, after all, and *Glucksberg* is a way of implementing substantive due process. The answer to this question depends on what one means by "originalist." In my view, the most perspicacious distinction pertinent here is the one drawn by Professor Stephen Sachs in *Originalism: Standard and Procedure*.<sup>29</sup> According to Sachs, originalism is best understood as a standard of correctness rather than a procedure for making decisions.<sup>30</sup> Sachs's deployment of this distinction is a helpful way of developing a distinction earlier drawn by Professor Christopher Green between "originalism [as] an ontological thesis about what makes constitutional claims true," and originalism as an epistemological approach toward ascertaining true constitutional claims.<sup>31</sup>

With this distinction in view, a decision like *Dobbs* is originalist if it is oriented toward bringing constitutional doctrine more closely in line with original law plus any lawful changes to original law. Justice Alito's opinion in *Dobbs* is clearly an originalist decision in its treatment of original law as a constitutional truthmaker.<sup>32</sup> Justice Alito opens his analysis by invoking Chief Justice John Marshall's 1824 opinion for the Court in *Gibbons v. Ogden* and Justice Joseph Story's 1833 *Commentaries on the Constitution of the United States* for the propositions that "[c]onstitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for

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29. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022).

30. *Id.* at 778–81.

31. See *id.* at 789 & n.83 (discussing Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 511–12 (2018)).

32. Green, *supra* note 31, at 499, 506.



ascertaining what our founding document means.”<sup>33</sup> As noted by the joint dissent, moreover, Alito’s opinion for the Court also states that “the most important historical fact [is] how the States regulated abortion when the Fourteenth Amendment was adopted.”<sup>34</sup> This history did not change between *Roe* and *Dobbs*; the Justices’ appreciation for its significance did. Alito’s opinion underscores this shift in two lengthy appendices that document the history of state-law (and territorial-law) prohibitions of abortion.<sup>35</sup>

Although the *Dobbs* dissenters are right about originalism’s importance to Alito’s opinion, they overstate its outcome-determining effect when they depict the decision as resting entirely on constitutional originalism. According to the *Dobbs* dissent, Alito’s opinion for the Court turns on a “single question: Did the reproductive right recognized in *Roe* and *Casey* exist in ‘1868, the year when the Fourteenth Amendment was ratified?’”<sup>36</sup> Contrary to the dissent’s single-minded anti-originalism, though, there is much more to Alito’s opinion in *Dobbs* than an inquiry into the state of the law in 1868. In keeping with the *Glucksberg* framework, the opinion for the Court also emphasizes the absence of any historical support for a

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33. 142 S.Ct. at 2244–45.

34. *Id.* at 2324 (joint dissent) (quoting 142 S.Ct. at 2267). Notably, the *Dobbs* dissenters agreed with their colleagues in the majority about the absence of a constitutional right to abortion in 1868. *See id.* at 2323 (“The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.”). This datapoint from *Dobbs* suggests that critics of constitutional originalism like Harvard’s Adrian Vermeule have overstated originalism’s vulnerability to hijacking by “impishly subversive” theories of “living originalism” like that advanced by Yale’s Jack Balkin. *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 98 (2022) (asserting that the “‘convergence’ of living constitutionalism and originalism, rightly identified as such by Balkin and others, is like the convergence of a predator and its prey”). Neither was Balkin’s originalist argument for abortion taken seriously enough by any of the Justices in dissent to merit a mention.

35. Appendix A contains “statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868.” 142 S.Ct. at 2285–96. Appendix B adds “statutes criminalizing abortion at all stages in each of the Territories that became States and in the District of Columbia.” *Id.* at 2296–300.

36. *Id.* at 2323 (joint dissent), quoting *id.* at 2252–53 (majority opinion).

constitutional right to abortion over the full first century of the Fourteenth Amendment's operation—right up until the year before *Roe* when Justice Brennan planted the seed in *Eisenstadt v. Baird*.<sup>37</sup>

*Glucksberg* is certainly *more* consistent with the original law of the Fourteenth Amendment than *Roe* and *Casey*. But even on the reasonable assumption that constitutional originalism sometimes authorizes a Justice to rely on *stare decisis* in continuing to apply erroneous precedents, constitutional originalism lacks the resources on its own to dictate just how closely toward the original law to return the doctrine when reversing erroneous precedent. Understood as a criterion of correctness rather than a procedure for decisionmaking, originalism itself cannot generate a rule for deciding among various incorrect options. Rather, the Court's reversal of *Roe* and *Casey* in favor of the *Glucksberg* framework reflected prudential judgment in adjusting a variety of sources of constitutional law by reference

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37. 142 S.Ct. at 2248 & n.23. Alito's summary of this history is worth considering in full for what it reveals both about the true state of the history and about the falsity of the dissent's characterization:

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

*Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight.

*Id.* at 2248–49.

to constitutional tradition.<sup>38</sup> The need for this kind of judgment is one way in which *Dobbs* exemplifies the “distinction between the activities of (i) ascertaining the best understanding of the Constitution as law, and (ii) rendering judgment in a case according to all applicable law.”<sup>39</sup>

Unless original-law originalism requires maximal displacement of doctrine every time the Court confronts disharmony between existing doctrine and the best understanding of the law of the Constitution, judicial implementations of substantive constitutional law as understood by reference to original-law originalism will always be informed by prudential considerations of a similar sort as those seen in *Dobbs*. This raises the question of how to evaluate that kind of judicial selectivity. In my view, this kind of evaluation of judicial opinions issued by members of the Supreme Court of the United States can profitably be undertaken by reference to the virtues of justice and prudence. Having already considered certain aspects of justice, I now turn to consideration of the various opinions in *Dobbs* by reference to prudence.

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38. See Marc O. DeGirolami, *Traditionalism Rising*, 23 J. CONTEMP. LEGAL ISSUES (forthcoming 2023) (identifying Justice Alito’s opinion for the Court in *Dobbs* as evidence that “[c]onstitutional traditionalism is rising”). For additional examples of Alito’s constitutional traditionalism, see *Town of Greece v. Galloway*, 572 U.S. 565, 599–603 (2014) (Alito, J., concurring) (engaging in traditionalist interpretation); *United States v. Alvarez*, 567 U.S. 709, 741–42 (2012) (Alito, J., dissenting) (same); *Pleasant Grove City v. Summum*, 555 U.S. 460, 471–72 (2009) (same).

39. Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule’s New Theory*, 98 NOTRE DAME L. REV. 403, 455 (2022). Because *Dobbs* also involved the more particular question of whether to overrule erroneous precedents, the decision “provides a textbook illustration of the difference between (i) answering a question of what the Constitution, correctly understood, provides; and (ii) deciding how to rule in the face of an inconsistency between a correct understanding of the Constitution, on the one hand, and decades-old decisions interpreting the Constitution incorrectly, on the other.” The majority’s understanding of the answer to question (i) informed but did not itself determine its answer to question (ii).

III. THE PRUDENTIAL OPTION FOR REALITY OVER RESTRAINT IN  
*DOBBS*

The perspective supplied by a focus on the virtue of prudence is helpful for assessing Supreme Court opinions like *Dobbs*. Questions presented to the Court are filtered in a way that tends to yield for Supreme Court resolution only those federal-law questions that are both significant and unsettled. Served up in petitions for certiorari, the parties and the Court isolate and extract specific questions out of the cases in which they are embedded—cases shaped by justiciability, procedural, and remedial doctrines.<sup>40</sup> This setting calls the particularity of prudential judgment into action. Prudence is about right reason in action. It is the intellectual and moral virtue that “applies universal principles to the particular conclusions of practical matters.”<sup>41</sup> “[I]t belongs to the ruling of prudence to decide in what manner and by what means man shall obtain the mean of reason in his deeds.”<sup>42</sup> The virtue of “prudence, or practical wisdom, [is] the bridge between the moral and intellectual virtues, which brings the power of moral reasoning to its full and proper development.”<sup>43</sup> Prudence is concerned with the concrete and contingent, particular decisions and actions, means rather than ends.<sup>44</sup> “It is exclusively the business of prudence ‘to form a right judgment concerning individual acts, exactly as they are done here and now.’”<sup>45</sup>

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40. See, e.g., Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 J. CONST. L. 1, 16–19 (2016) (describing agenda-setting mechanisms available to the Supreme Court).

41. AQUINAS, *supra* note 18, at II-II, Q. 47 art. 6.

42. *Id.* at Q. 47 art. 7.

43. J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS’S VIRTUE ETHICS 43 (2017).

44. See JOSEF PIEPER, FOUR CARDINAL VIRTUES 32–33 (1990) (“It is not the purpose or the business of the virtue of prudence to discover the goals, or rather the goal, of life, and to determine the fundamental inclinations of the human being. Rather, the purpose of prudence is to determine the proper roads to that goal and the suitable outlet in the here and now for those fundamental inclinations.”).

45. *Id.* at 28.

It is a common misunderstanding to equate prudence with caution or incrementalism.<sup>46</sup> Caution in relation to which dangers? Incrementalism with respect toward movements in which direction? As previously noted, whether one opinion is narrower or more restrained than another depends on what is being compared. Measured by the distance in which *Dobbs* moved substantive due process doctrine from the Court's substantive due process precedents going in, for instance, Alito's opinion for the Court is broader than Roberts's and the dissenters'. The same opinion, though, is narrower when measured against the original law of the Fourteenth Amendment as understood by Justice Thomas.

In contrast with Roberts's appeal to restraint, we can identify reality-based decisiveness as the defining feature of Alito's judicial prudence in *Dobbs*. For those who viewed *Roe* as a landmark, *Dobbs*'s demolition charge was a blockbuster.<sup>47</sup> Alito did not allow restraint to divert the razing of *Roe* and *Casey* in *Dobbs*. Responding to Roberts's reliance on restraint, Alito called on the Chief Justice "to face up to the real issue without further delay."<sup>48</sup> Roberts stood alone in trying to straddle the divide between the majority and dissenting positions by saving more definitive doctrinal determinations for another day. But the lawyers for the parties on both sides urged the Court "either to reaffirm or overrule *Roe* and *Casey*."<sup>49</sup>

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46. Cf. JEAN-PIERRE TORRELL, O.P., *AQUINAS'S SUMMA: BACKGROUND, STRUCTURE, & RECEPTION*, trans. Benedict M. Guevin, O.S.B., 44 (Catholic University of America Press 2005) ("Current usage considers prudence to be a timorous attitude and rather negative. But in the *Summa*, prudence is the virtue of choice and decision, of personal responsibility, of risks consciously taken. It belongs to prudence to bring to conclusion a course of action in a specific, unique, and unrepeatable situation. There is no room for hesitation here").

47. See Marc O. DeGirolami & Kevin C. Walsh, *A Less Corrupt Term: 2016-2017 Supreme Court Roundup*, *FIRST THINGS* 39 (October 2017), <https://www.firstthings.com/article/2017/10/a-less-corrupt-term> [<https://perma.cc/92CA-BN3U>] ("[A] blockbuster is not just a TV and film sensation. It is also—and originally—a bomb powerful enough to destroy a neighborhood block. Blockbusters wipe out the existing habitations of civilization so that new structures can replace them.").

48. 142 S.Ct. at 2283.

49. *Id.* at 2281; see also *id.* at 2242–43.

And the dissenting Justices agreed in insisting on a choice between these options, repeating some version of the word “reaffirm” several times in their joint opinion.<sup>50</sup>

Although his call for restraint attracted none but himself, Roberts nevertheless persisted down that path, restrained neither by the perceptions of his colleagues nor the arguments of the parties. Alito, by contrast, maintained a majority for overruling. Addressing Roberts’s “reasonable opportunity to choose [abortion]” on the substance, Alito noted that the lawyers for the law’s challengers termed Roberts’s proposed approach “completely unworkable,” and “less principled and less workable than viability.”<sup>51</sup> He added that Roberts’s concurrence had “not identified any of the more than 130 *amicus* briefs filed in this case that advocated its approach. Roberts’s concurrence, Alito concluded, would thus do exactly what it criticizes *Roe* for doing: pulling ‘out of thin air’ a test that ‘[n]o party or *amicus* asked the Court to adopt.’”<sup>52</sup>

The law of a particular jurisdiction, such as the law of the United States, has a certain internal organization and unity of its own. Justice Alito understood in *Dobbs* that he could administer justice only through fidelity both to his role as a federal judge on a multimember appellate court, and also to his best understanding of the demands of federal law as shaped by his predecessors and shapeable by his past, present, and future judicial colleagues. This role fidelity beckoned him to submerge his outlook as an individual Justice into a shared understanding that allowed him and his colleagues to form a majority and to coalesce around an opinion for the Court. In answering to those aspects of his practical reasoning and grasp of governing law that would open the way to a working majority in *Dobbs*, Justice Alito also came more fully into his own as a prudent jurist.

In St. Thomas Aquinas’s account of the virtues, “[t]he integral parts of a principal thing really are its components—they are the

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50. See, e.g., *id.* at 2317, 2321, 2322, 2327, 2333, and 2347 (joint dissent).

51. *Id.* at 2281 (majority opinion).

52. *Id.*, quoting 142 S.Ct. at 2311 (Roberts, C.J., concurring).

distinct elements that must concur for its perfection or completion. In this sense the wall, roof, and foundations are parts of a house.”<sup>53</sup> St. Thomas identifies eight integral parts of prudence: memory (*memoria*); understanding or intelligence (*intelligentia*); docility or teachableness (*docilitas*); shrewdness (*solertia*); reason (*ratio*); foresight (*providentia*); circumspection (*circumspectio*); and caution (*cautio*).<sup>54</sup> These integral parts of prudence provide criteria by which we can assess Justices’ use of the relevant legal materials.

All eight integral parts of prudence work together in deliberation about what is to be done, but a particular contribution that *memoria*, *docilitas*, and *solertia* all make is in their assessment of “what is ‘already’ real, upon things past and present, things and situations which are ‘just so and no different,’ and which in their actuality bear the seal of a certain necessariness.”<sup>55</sup> This is to say that these integral parts of prudence are both present-oriented and backward looking for a judge in just the right way; they inform judicial assessment not only of the present facts but also of the past precedents that must be considered in evaluating the situation.<sup>56</sup>

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53. BUDZISZEWSKI, *supra* note 43, at 6.

54. AQUINAS, *supra* note 18, at II-II Q. 49 arts.1–8.

55. PIEPER, *supra* note 44, at 17.

56. The remaining five integral parts, understanding (*intelligentia*), reason (*ratio*), foresight (*providentia*), circumspection (*circumspectio*), and caution (*cautio*) are more present-oriented while making use of insights from past impressions, present considerations, and probabilistic considerations about the future. Informed jurists can make their own comparative assessments of the Alito and Roberts opinions by reference to these parts of prudence. Given the posture of the case and our corrupted constitutional culture, it is understandable that the majority did not address the most important legal reality whose recognition is required for just laws regulating abortion: the Fourteenth Amendment personhood of the unborn. The Court’s overruling of *Roe* and *Casey* countered significant constitutional corruption. Yet the constitutional corpus juris is still distended. Across the board of Fourteenth Amendment case law more generally, one might reasonably believe that constitutional law is even more corrupt in 2022 (*Dobbs*) than in 1992 (*Casey*) or 1973 (*Roe*). In a less corrupt constitutional culture, the hallmark of a just and prudent Supreme Court opinion in a future case about abortion law should be reality-based deference rather than reality-based decisiveness. In legal reality, prenatal human persons are persons under the Fourteenth Amendment. In an appropriate

For St. Thomas, “true-to-being memory” is “the first prerequisite for the perfection of prudence; and indeed this factor is the most imperiled of all.”<sup>57</sup> Imperiled memory can be a peculiar problem at the Supreme Court of the United States because judicial supremacy can operate to falsify the law of the Constitution. A specific danger for *memoria* is that “at the deepest root of the spiritual-ethical process, . . . the truth of real things will be falsified by the assent or negation of the will.”<sup>58</sup> Insofar as a precedential interpretation of the Constitution is the product of simple judicial will—what Justice White called in his *Roe* dissent an “exercise of raw judicial power”<sup>59</sup>—then taking it as a representation of the reality of the law of the Constitution is a danger to *memoria* in the exercise of judicial prudence.

Chief Justice Roberts appears to have succumbed to this danger during the pendency of the *Dobbs* decision or some time before. The litigation over Texas’s Heartbeat Act, which prohibited abortion after approximately six weeks’ gestational age, may have been a turning point. While *Dobbs* was pending, the Supreme Court’s consideration of jurisdictional, procedural, and remedial questions related to this Act resulted in two argued cases, *United States v. Texas* (later dismissed as improvidently granted) and *Whole Woman’s Health v. Jackson* (a fractured decision that left Texas’s Heartbeat Act

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future case calling for the evaluation of a state or federal law that protects prenatal persons as persons, the just and prudent stance of the Supreme Court (or any other court evaluating such a law under the Fourteenth Amendment) should be to defer to the enacting government’s recognition of the reality of Fourteenth Amendment personhood. For arguments and evidence relating to prenatal Fourteenth Amendment personhood, see, e.g., John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J. L. & PUB. POL’Y 927 (2022); Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J. L. & PUB. POL’Y 539 (2017); Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 14 (2012).

57. PIEPER, *supra* note 44, at 15 (, citing AQUINAS, *supra* note 18, at II-II Q. 49 art. 1).

58. *Id.*

59. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).



untouched).<sup>60</sup> In his solo opinion in *Whole Woman's Health*, Roberts asserted that "[t]he clear purpose and actual effect of S.B. 8 [i.e., Texas's Heartbeat Act] has been to nullify this Court's rulings."<sup>61</sup> Issued on December 10, 2021, this opinion came down just nine days after the Court heard oral argument in *Dobbs*. Given that Roberts believed that "the role of the Supreme Court in our constitutional system is at stake" if a state like Texas could escape judicial censure of a law at odds with then-governing precedent,<sup>62</sup> it is easy to understand why Roberts searched for some ground in *Dobbs* of keeping up appearances. For Alito and the other Justices in the later *Dobbs* majority, by contrast, the outward appearances of *Roe* and *Casey* were already on their way to being brought back closer to the reality of the Fourteenth Amendment's requirements.<sup>63</sup>

The Chief Justice's perception that a state legislature's enactment of a law inconsistent with existing Supreme Court doctrine amounts to nullification of that doctrine presupposes a conventional form of judicial supremacy. This conventional judicial supremacy is "the idea that the Constitution means *for everybody* what the Supreme Court says it means in deciding a case."<sup>64</sup> Although conventional, judicial supremacy of this sort should be more controversial. I have previously contrasted this conventional understanding with judicial departmentalism, a form of bounded judicial supremacy in which "the Constitution means *in the judicial*

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60. *United States v. Texas*, 142 S.Ct. 14 (Mem.) (2021); *Whole Woman's Health v. Jackson*, 142 S.Ct. 522 (2021).

61. *Whole Woman's Health*, 142 S.Ct. at 545 (Roberts, C.J., dissenting).

62. *Id.*

63. It is very likely that these Justices had already voted in conference to overrule *Roe* and *Casey* completely. Press accounts informed by leaks later reported this, but I will not cite those nor otherwise refer to the shamefully leaked draft opinion for the Court that accompanied these press reports. There is no reason to abet an already sad state of affairs in which *curiositas* can kill the Court.

64. See Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WILLIAM & MARY L. REV. 1713, 1715 (2017) (describing "judicial supremacy" as "the conventional designation for the idea that the Constitution means *for everybody* what the Supreme Court says it means in deciding a case").

*department* what the Supreme Court says it means in deciding a case.”<sup>65</sup> On this understanding, state and federal officials can act on different understandings of the Constitution than the Supreme Court’s without infidelity to the Constitution itself. These officials are subject to being brought into federal court, though, where the law of judgments, the law of remedies, and the law of precedent all operate to stabilize certain judicial resolutions.

From a judicial departmentalist point of view, entrenched opposition to *Roe v. Wade* extending over almost half a century need not be understood as attempted nullification. CLE by the *sensus fidelium* is more like it. In a system of constitutionalism based on popular sovereignty, the sustained efforts of citizens to provoke continued court confrontations can sometimes be best understood as representing the outlook of the constitutionally faithful that the Court can eventually be brought to see the error of its ways and change course.

Chief Justice Roberts’s judicial supremacy prevented him from seeing things this way. The *Dobbs* dissenters, too. The joint dissent asserted that “[t]he Court reverses course today for one reason and one reason only: because the composition of this Court has changed.”<sup>66</sup> A better alternative, of course, would have been for one or more of the Justices to have changed his or her mind while on the Court.<sup>67</sup>

The back-and-forth of judicial deliberation over cases within a Term, and the serial progression of cases over many Terms, can inform the habitual disposition of *docilitas* or teachableness. But *docilitas* does not run deep at One First Street, NE. For this kind of teachableness to be activated, there must be a kind of open-mindedness, an “ability to take advice, sprung not from any vague ‘modesty,’

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65. *Id.*

66. 142 S.Ct. at 2320 (joint dissent).

67. *Cf. e.g., Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985) (Justice Blackmun authoring an opinion for the Court overruling an opinion he had joined nine years prior). An example of multiple judges changing course while on the Court can be seen in the shift from *Minersville Sch. Dist. v. Gobotis*, 310 U.S. 586 (1940), to *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

but simply from the desire for real understanding (which, however, necessarily includes genuine humility)."<sup>68</sup> When the members of the Supreme Court are epistemically closed off to the influence of the *sensus fidelium* by judicial supremacy, however, the only way that the Court can change its collective mind is through personnel change.

Even when there has been personnel change, individual Justices may for a variety of reasons balk at rapid doctrinal change. Chief Justice Roberts gestured in this direction when he contended that "[t]he Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases."<sup>69</sup> Considering how to respond to the invocation of bringing about a "serious jolt" is where *solertia* can come in. *Solertia*, or shrewdness, is the "virtue of 'objectivity in unexpected situations,'" a virtue that allows one confronted with a sudden event to "swiftly, but with open eyes and clear-sighted vision, decide for the good, avoiding the pitfalls of injustice, cowardice, and intemperance."<sup>70</sup>

The temporal dimension of *solertia* is swifter than that of *docilitas*, but both are integral parts of prudence. The Court granted certiorari in *Dobbs* after an extended period of deliberation and limited the grant to a single question. The internal agenda-setting considerations that guided these actions, though, were upended by the emergence of Texas's Heartbeat Act and its insertion into the Court's agenda. By decision time in *Dobbs*, there was no prudent way to put off for another day direct confrontation with the full extent of the errors of the *Roe/Casey* regime. To their credit, the *Dobbs* majority and the *Dobbs* dissenters both recognized this and acted accordingly. The Chief Justice's overreliance on tactical shrewdness left him alone and outflanked on both sides.

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68. PIEPER, *supra* note 44, at 16.

69. 142 S.Ct. at 2316 (Roberts, C.J., concurring).

70. PIEPER, *supra* note 44, at 16.

## CONCLUSION

In overruling *Roe* and *Casey*, Justice Alito's opinion for the Court in *Dobbs* overcame the greatest error of his predecessor, Associate Justice Harry Blackmun. He did so by answering the arguments of Chief Justice John Roberts with doctrine declared by Roberts's predecessor, Chief Justice William Rehnquist. Like Blackmun, Alito operated for a time in the shadow of the Chief Justice. Blackmun was dubbed Chief Justice Burger's "Minnesota Twin" during his appointment process.<sup>71</sup> Just as those Minnesota Twins began by voting more closely together and eventually grew more distant, Alito and Roberts also began by voting together more often before eventually growing more distant.<sup>72</sup> Blackmun called himself "Old Number Three" because he was the President's third nominee for the seat he occupied on the Court.<sup>73</sup> Alito, too, was the President's third nominee for the seat he occupied.<sup>74</sup> But the parallels end there. Blackmun's opinion in *Roe* was the product of an Associate Justice new to the Court and still under the influence of a Chief Justice he had been closely linked with through his appointment and in his early years on the bench. The decision was imprudent and led to great evils. Alito's opinion in *Dobbs*, by contrast, is the product of an Associate Justice with a juridical outlook matured by years of experience in the role and standing apart from the influence of a Chief Justice with whom he had been linked earlier on. It is a prudent decision. Whether it leads to more good depends less now on

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71. See Laura Kalman, "Becoming Justice Blackmun": Deconstructing Harry, N.Y. TIMES, May 8, 2005, <https://www.nytimes.com/2005/05/08/books/review/becoming-justice-blackmun-deconstructing-harry.html> [https://perma.cc/2DKP-7JQB].

72. See Adam Liptak, *Once Allies, Roberts and Alito Have Taken Divergent Paths*, N.Y. TIMES, May 4, 2022, <https://www.nytimes.com/2022/05/04/us/politics/roberts-alito-abortion-roe-v-wade.html> [https://perma.cc/STC2-UP5C].

73. Kalman, *supra* note 71.

74. The first two were John Roberts, who was initially nominated for the vacancy created by Justice O'Connor's resignation before being nominated for Chief Justice, and Harriet Miers.

the federal judiciary than on the use made of the lawmaking authority it returns to those who may rightfully exercise it.