CONSTITUTIONAL NORMAL SCIENCE AND THE *DOBBS* DECISION

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The decision in Dobbs v. Jackson Women's Health *resonated with the citizenry in the United States—either as a horrible stripping away of fundamental bodily autonomy or as a resurgence of protecting life at its most vulnerable stage. Though its holding is clear enough, the method by which the majority arrived there is both obscure and far-reaching. This Note sets forth the substantive due process analysis in* Dobbs*, critiques that analysis, and analyzes it through the lens of constitutional normal science. It then contrasts this lens with the doctrine of stare decisis. At a minimum, the* Dobbs *decision represents an analytical fissure within the reproductive rights doctrine. At a maximum, that fissure spreads across the entire spectrum of substantive due process rights. It is best described as a kind of constitutional abnormal science that attempts to overrule* Obergefell *and its methodology for only a subset of the unenumerated—but still fundamental—rights protected by Fourteenth Amendment substantive due process: namely, abortion rights. The Court's justifications, that abortion is doctrinally unique and that* Roe *was "egregiously wrong" when decided, are unpersuasive in the face of both stare decisis and the more doctrinally consistent arguments for or against the abortion precedent before* Dobbs*. The paradigm slippage* Dobbs *manifests is serious and only tenable if one takes at face value these flawed arguments about the 49 years of case law it tossed aside.*

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INTRODUCTION

The decision in *Dobbs v. Jackson Women's Health Organization*[1] resonated with the citizenry of the United States—either as a horrible stripping away of fundamental bodily autonomy or as a resurgence of protecting life at its most vulnerable stage. Though its holding is clear enough, the method by which the majority arrived there is both obscure and far-reaching. This Note sets forth the substantive due process analysis in the *Dobbs* majority opinion, critiques that analysis, and analyzes the opinion using the lens of constitutional normal science.[2] It then contrasts this lens with the doctrine of stare decisis.[3]

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284–85 (2022).

2. Analysis of constitutional law through a normal science lens is not a brand-new tactic. Toni M. Massaro, *Constitutional Law as "Normal Science,"* 21 CONST. COMMENT. 547, 548 (2004). Massaro follows Farber in appealing to the idea of normal science as an appropriate lens for evaluating constitutional doctrine and its evolution. *Id.* The aim of this Note is to develop this into a sharper and more applicable lens for evaluating judicial decisions in the realm of constitutional law.

3. The majority in *Dobbs* concludes that the five factors of stare decisis, namely the nature of their error, the quality of their reasoning, the workability of the rules, the disruptive effect on other areas of the law, and the presence or absence of concrete reliance,

Part I sets forth a summary of the holding and reasoning in *Dobbs* and a criticism of its major struts. Part II discusses stare decisis as a constraint on judicial decisions and analyzes the flaws in the majority's application of stare decisis principles. Part III defines and refines what has been called "constitutional normal science" and applies its tenets to the majority opinion. Part IV contrasts constitutional normal science with stare decisis principles and explains why the *Dobbs* majority opinion straddles multiple inconsistent paradigms of judicial doctrine, exhibiting what could best be described as a kind of constitutional "abnormal science." Rather than a true paradigm shift or standard normal science in action, the opinion is best described as a paradigm *slip*. The opinion falls short of a true commitment to the textualist and originalist methods it purportedly employs. Rather, it produces a serious—indeed, an analytically fatal—tension between the abolition of abortion rights and other Supreme Court precedents that provide substantive due process protections for a panoply of unenumerated—but still fundamental—rights.

Put another way, *Dobbs* did not convert us from constitutional law Newtonians to Einsteinians. Briefly, Newtonian physics calculates against a backdrop of absolute space and absolute time, which posits those entities exist uniformly throughout the universe and wholly independent from the physical phenomena occurring in the local area, whereas modern physics—after Einstein—demands an inertial frame of reference and accounts for the physical oddities produced by the tenets of general relativity.[4] The two theories are deeply incoherent with one another at a fundamental level: according to Newton, gravity acts immediately at a distance, but there is no such independent force as gravity in the scheme of general relativity.[5] *Dobbs*, in contrast, does the doctrinal equivalent of splicing a part of Newtonian physics into Einsteinian relativity while ignoring the incompatibility of the two regimes when applied to real world situations.

At a minimum, the result is an analytical fissure within the reproductive rights doctrine. At a maximum, that fissure runs across the entire spectrum of substantive due process rights. In fact, *Dobbs* may be inconsistent with a wide swath of constitutional law cases that do not rely on Justice Alito's version of "history plus tradition" methodology.[6] Waving away the problems, as Justice Alito does in

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all weigh in favor of overruling the precedent set by the line of abortion cases already decided. *Dobbs*, 142 S. Ct. at 2237–38.

4. *Space and Time: Inertial Frames*, *in* STANFORD ENCYCLOPEDIA OF PHIL. (Apr. 15, 2020), https://plato.stanford.edu/entries/spacetime-iframes/ [https://perma.cc/H8G4-42NF].

5. *See infra* Section III.A.

6. This is most clear in cases involving technology that did not exist historically and has no traditional or historical treatment under the law. *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 806 (2011) (Alito, J., concurring) (Justice Alito's concurrence in this case goes to pains to point out that the Court should "proceed with caution" when dealing with new and evolving technologies, which ironically runs at odds with the dogmatic history plus tradition approach in *Dobbs*). The doctrinal development in the First Amendment's free speech arena can be tough to interpret and apply, even when the Court is attempting to follow the history and tradition laid out by its precedent. In a recent case Justice Thomas dissented

Dobbs,[7] should reassure very few critics of *Dobbs* and embolden all who think Justice Thomas's concurring opinion calling for overruling *Obergefell v. Hodges*[8] and even *Griswold v. Connecticut*[9] is the better path.[10] Such a fundamental shift in basic doctrine requires far more compelling justifications than Justice Alito's claims that abortion is doctrinally unique[11] and that *Roe v. Wade*[12] was "egregiously wrong" when decided despite later reinforcement from *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[13] This Note explains why neither claim is persuasive and why *Dobbs* violated Justice Alito's own terms on doctrine unworthy of stare decisis deference.[14] The paradigm slippage is serious and only tenable if one takes at face value these flawed arguments about the 49 years of case law it tossed aside.

I. THE *DOBBS* DECISION

Initially, the central question in the *Dobbs* case was whether all abortions that occur pre-viability are constitutionally protected from any prohibitions.[15] The majority analyzes the case in three parts: first, it dissects and explains the standard used to determine whether the liberty referred to in the Fourteenth Amendment protects some particular right; second, it determines whether the right to abortion is deeply rooted in the history and tradition of the United States and whether it is an essential component of ordered liberty; and third, it examines whether the right to abortion is part and parcel of some other broader protected right that is "entrenched" in the sense required by the second prong of its analysis.[16] Next, the majority dismisses the notion that the *Roe* and *Casey* holdings are compelled by stare

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and complained that the majority had misinterpreted an earlier "clear rule for content-based restrictions" and replaced it with "an incoherent and malleable standard." City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 86 (2022) (Thomas, J., dissenting). But most clear of all are the cases that expanded rights in the past under the substantive due process protections granted by the Fourteenth Amendment. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down a law banning interracial marriage); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 542–43 (1942) (striking down a law allowing for the forced sterilization of prisoners); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (striking down a law forbidding the use of contraceptives for its intruding on the privacy of married couples); Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (prohibiting the banning of distribution of contraceptives by unmarried people). Additionally, the landmark case overturning the "separate but equal doctrine" would not fit into the history and tradition analysis and will be discussed below. *See infra* Subsection IV.C.2 (discussing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

7. *Dobbs*, 142 S. Ct. at 2257–58.

8. Obergefell v. Hodges, 576 U.S. 644, 680–81 (2015).

9. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

10. Justice Thomas has consistently decried the expansion of substantive due process protections and insisted the correct constitutional source is the Privileges and Immunities Clause of the Fourteenth Amendment. *Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring).

11. *Id.* at 2258–59 (majority opinion).

12. Roe v. Wade, 410 U.S. 113, 164–67 (1973).

13. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 901 (1992); *Dobbs*, 142 S. Ct. at 2265.

14. *See infra* Part II.

15. *Dobbs*, 142 S. Ct. at 2244.

16. *Id.*

decisis—reasoning those holdings, especially *Roe*, were "egregiously wrong from the start" and failed to bring about a "national settlement of the abortion issue" as a whole.[17]

A. What Rights Are Implied by "Liberty" Under the Fourteenth Amendment?

The textualist grounding of the majority opinion is clear, and the idea that the words written in the Constitution provide us with a fixed standard for its meaning is a prominent justification in the majority opinion.[18] But the justification does ring ironic when, only paragraphs later, the majority criticizes the "capacious" nature of the term "liberty" and references that historians have cataloged "more than 200 different senses" in which the word has been used.[19] To maintain methodological fidelity, the majority had to determine which "liberty" the drafters of the Fourteenth Amendment intended to use—the result was outcome-determinative as to which unenumerated fundamental rights are protected by the Constitution.

To explain why the Fourteenth Amendment does not provide overly broad protections of liberty, the Court relies on the standard from *Washington v. Glucksberg*[20] that any right protected under the Due Process Clause must be both (i) deeply rooted in the history and tradition of the United States and (ii) implicit in the concept of ordered liberty.[21] There is also a telling reference to the idea that the right to abortion is "fundamentally different" from rights to "intimate sexual relations, contraception, and marriage" because abortion destroys "an unborn human being."[22] Such a reference is telling because, while arguably factual, it does not speak to how the analysis of substantive due process should proceed because it does not bear on whether the right is either deeply rooted in history or implicit in the concept of ordered liberty.[23]

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17. *Id.* at 2243.

18. *Id.* at 2244–45.

19. *Id.* at 2247. The irony stems from the fact that the words of the Constitution are meant to provide a fixed standard, but there is not even a fixed meaning we can attach to those words. The textualist enterprise seems doomed, if not to failure, then at least to faltering from the outset.

20. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

21. *Dobbs*, 142 S. Ct. at 2246–49.

22. *Id.* at 2243.

23. *See* Cass R. Sunstein, Dobbs *and the Travails of Due Process Traditionalism* 4–5 (Harvard Pub. L. Working Paper No. 22-14, 2022), https://ssrn.com/abstract=4145922 [https://perma.cc/LG5U-5H22]. Sunstein summarizes the dialectical subterfuge succinctly:

> [T]he Court does not attempt to show that prior holdings are, in fact, supportable by reference to an inquiry into traditions and ordered liberty. Instead, the Court urges, the relevant cases did not involve "the critical moral question posed by abortion." The reason is that they did not "potential life" or an "unborn human being." This is a gesture in the direction of a minimalist opinion, and of course the claim is true. But why, exactly, is it relevant? The central thrust of the Court's opinion is theoretically ambitious. It is not that the interest in protecting unborn human beings, or the rights of unborn human beings, outweighs, or might reasonably be taken to outweigh, the right to choose; it is that under the

B. How Do History and Tradition Inform Which Rights Are Fundamental?

The majority begins its survey of history with Anglo-American common law tradition, stretching the lens of its jurisprudence back to a time when women not only lacked the right to vote and to be represented in government but were largely considered tantamount to chattel whose purpose was childbearing.[24] The survey covers the history of abortion of both quickened and pre-quickened fetuses,[25] though the majority stresses that just because aborting a pre-quickened fetus was "not itself considered homicide, it does not follow that abortion was permissible at common law—much less that abortion was a legal right."[26] The majority points out that in the United States, even as of the ruling in *Roe*, 30 states continued to restrict abortion access at all stages except where the health of the mother was involved; in the year the Fourteenth Amendment was ratified, 28 of the then 37 states criminalized abortions performed before quickening occurred.[27]

Because of this historical evidence, the majority reached an "inescapable conclusion" that there is no "deeply rooted" right to abortion in the "Nation's history and traditions."[28] Shortly after a brief and blunt description of the decisions in *Roe* and *Casey*,[29] the majority opinion gives its holding as a response to a false dichotomy (that there are no half-measures available to them in this decision) and states that the right to abortion is neither explicitly nor "implicitly protected by any constitutional provision," including the Due Process Clause of the Fourteenth Amendment.[30]

> framework of due process traditionalism, the right to choose does not fall in the category of presumptively protected interests.

Id.

24. *Dobbs*, 142 S. Ct. at 2249–50. Even turning a blind eye to the laws and norms of the thirteenth century, where the majority in *Dobbs* begins their examination of history and tradition regarding abortion laws, women in the Western World lived and experienced a startlingly different reality from the men around them well into the nineteenth century. The fruits of a woman's labor (including her children) belonged to her husband, as noted by Boston jurist Theophilus Parsons in 1873: "Whatever she earns, she earns as his servant, and for him; for in law, her time and her labor, as well as her money, are his property. . . . He is the stronger, she is the weaker; whatever she has is his." *Patriarchy: Comparative History, Early Modern England*, *in* THE OXFORD ENCYCLOPEDIA OF WOMEN IN WORLD HISTORY 422 (Bonnie G. Smith ed., 2008). Rape was a crime understood more as a theft of the woman's virtue rather than a violation of her body, and it was a crime for which her father or husband, rather than the woman herself, could sue for compensation. *Id.* And marriage laws "gave a husband an irrevocable lifelong access to his wife's body; until the late twentieth century, rape within marriage was a legal impossibility." *Id.*

25. Though there is debate surrounding the details, general quickening is the point at which a pregnant person can first feel the movement of the growing fetus within them. Katherine Brind'Amour, *Quickening*, *in* THE EMBRYO PROJECT ENCYCLOPEDIA (Oct. 30, 2007), https://embryo.asu.edu/pages/quickening [https://perma.cc/Y5YF-TV7E].

26. *Dobbs*, 142 S. Ct. at 2250.

27. *Id.* at 2252–53.

28. *Id.* at 2253.

29. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

30. *Dobbs*, 142 S. Ct. at 2242.

C. Application to Abortion Rights and Pushing Back on the Dobbs *Dissent*

It is notable that the majority opinion opens with a line not about the judicial complexity of substantive due process and its intricacies but about the "profound moral issue" posed by abortion.[31] In the second paragraph, the Court states that for "the first 185 years after the adoption of the Constitution, each state was permitted to address [the issue of abortion] in accordance with the views of its citizens," and "though the Constitution makes no mention of abortion, the Court held [in *Roe*] that it confers a broad right to obtain one."[32] But these statements are provided with no comparative context: for the first 76 years after the adoption of the Constitution, for example, many states permitted the ownership of human beings as slaves, but this provides no reason to think it was a good or legitimate practice in light of our current understanding of justice. [33]

And the Constitution makes no mention of the right to marriage between people of different races or people of the same sex. Nor does it discuss the right to educate one's children in a private school or in the language of one's own choosing, the right to engage in private and consensual sexual acts, or even the right against forced sterilization.[34] The fact that these rights are unenumerated—not explicitly present in the text of the Constitution or the Bill of Rights—makes them no less fundamental to the ordered liberty enjoyed by citizens living their lives and exercising their autonomy within those domains. The methodology adopted by the majority in *Dobbs* would, absent the constitutional amendments against slavery and for equal protection, erode or destroy every one of the aforementioned rights if applied ecumenically.

In support of the Mississippi Gestational Age Act,[35] the act at the center of *Dobbs*, the majority notes that the Mississippi legislature did its due diligence by factfinding on the issue of abortion rights worldwide.[36] It points out that the United States, as of 2018, was one of only seven countries allowing elective abortion procedures after the 20th week of gestation.[37] The majority fails, however, to note that the general global trend since 1994 has been away from abortion restrictions and toward more permissive abortion practices.[38] Equally absent is the argument

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31. *Id.* at 2240.
32. *Id.*
33. U.S. CONST. amend. XIII, § 1.
34. Sunstein, *supra* note 23, at 4. The rights listed in Sunstein's paper are more numerous than what is listed in this Note, but neither was intended to be exhaustive of the category of unenumerated rights grounded in the Constitution.
35. MISS. CODE ANN. § 41-41-191 (West 2018).
36. *Dobbs*, 142 S. Ct. at 2243.
37. *Id.*
38. *See The World's Abortion Laws*, CTR. FOR REPROD. RTS. (Oct. 2022), https://reproductiverights.org/maps/worlds-abortion-laws/ [https://perma.cc/EHY8-P67V]. See the information available as one scrolls down the page, which shows 30 years of global changes in abortion law. Perhaps a starker contrast than the one drawn by the Mississippi legislature is the fact that the United States will be one of only four countries—alongside Nicaragua, El Salvador, and Poland—going against the grain of the larger, liberalizing trend by reversing its abortion protections at the federal level; more than 60 countries have liberalized their laws during the 30-year span.

that legal restrictions on abortion do not reduce the number of abortions and instead compel pregnant people to risk their lives in pursuit of unsafe healthcare and nonprofessional abortion services.[39] The majority either engaged in preferential statistics by picking and choosing those that supported its opinion or failed to diligently pursue a complete understanding of the issue.

The majority counters the dissent's claim that without abortion access, people "will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors" by arguing that the Court simply does not have the authority to balance the interests involved.[40] The majority's representation of the dissent's position stops short of the claim that pregnant people will be forced into child labor and delivery, a prospect that is especially dangerous for those in the lower socioeconomic strata.[41] The majority does acknowledge, however, that there are important policy arguments surrounding the increased resources available to pregnant people who seek to bring their fetuses to term and give birth.[42] But these all run as a tangent to a main moral concern at issue: whether the state should force people into giving birth against their will. The failure of the majority to mention this appalling reality, in spite of their continued mention of the moral issue posed by unborn human life and abortions, is exceptional.

The majority also deflects the dissent's appeal to the variety of nonabortion substantive due process rights that have developed over relatively recent history, dismissing these complaints as "designed to stoke unfounded fear that our decision will imperil those other rights."[43] The majority asserts this in spite of the fact that, in his concurrence, Justice Thomas explicitly expresses his desire to erode, or remove completely, precisely that list of rights and delegate discretion to the states.[44] In fact, Thomas specifically calls for reconsidering the substantive due process rights granted in *Griswold* (contraceptives for married couples), *Lawrence v. Texas*[45] (consensual sexual acts), and *Obergefell* (same-sex marriage).[46]

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39. *Id.*

40. *Dobbs*, 142 S. Ct. at 2258–59.

41. The causes responsible for the increased dangers of pregnancy for those with fewer resources is not clear, but at least part of it is likely due to a lack of adequate prenatal care. *See* Min Kyoung Kim, et al., *Socioeconomic Status Can Affect Pregnancy Outcomes and Complications, Even with a Universal Healthcare System*, INT'L J. FOR EQUITY HEALTH 17:2, at 2 (2018), https://doi.org/10.1186/s12939-017-0715-7 [https://perma.cc/8TK9-GV5Y]. Additionally, there are associated long-term and acute health risks for newborn children raised in a poverty-stricken home. *See* Charles Larson, *Poverty During Pregnancy: Its Effects on Child Health Outcomes*, 12 PEDIATRICS & CHILD HEALTH 673, 673 (Oct. 2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2528810/ [https://perma.cc/3CTY-QUV6].

42. *Dobbs*, 142 S. Ct. at 2258–59.

43. *Id.* at 2261.

44. *Id.* at 2301–02 (Thomas, J., concurring). This is further complicated by Justice Thomas's apparent belief that abortion practices and the regulations surrounding them are sourced in a eugenics campaign with a racially discriminatory mission. *See* Box v. Planned Parenthood of Indiana & Kentucky, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

45. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

46. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

After abandoning the (questionable) history lesson on abortion rights, the majority moves on to criticize the "largely limitless reach of the dissenters' standard" as far too general and permissive.[47] Pushing back against the idea that no single moment captures the whole of American constitutional tradition, the majority argues that even if this were true, *Roe* was still wrongly decided because there is no pre-*Roe* precedent supporting abortion rights.[48] The Court's continued reliance on the crucial difference between *Roe* and the precedent on which it relied from *Griswold* and *Eisenstadt*—namely that those cases did not involve the destruction of unborn humans—belies its inability or unwillingness to honestly confront the point the dissent is making. Examining precedent from only up to 50 years after women's suffrage for an honest survey of good policymaking concerning women's rights is a bit like surveying the Southern states 50 years after the Civil War ended for an idea of good policymaking concerning the rights of Black people. There are arguably times when a decade of history can be more poignant, relevant, and powerful than the century that came before it. The majority itself cites *Brown v. Board of Education*[49] and its upending of precedent as an example of how stare decisis can be overturned, but if the Court had applied its logic from *Dobbs* to *Brown*, its outcome would have been drastically different, and certainly not a historical break with judicial precedent made in light of very recent social change.[50]

One final point the majority feels it must address is the idea that "[t]he American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle."; in Justice Alito's words, "[t]here is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial 'watershed' decision," like *Roe*.[51] The majority laments that it "can only do [its] job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly," even as it upends settled law in what could have been a straightforward application of stare decisis and what had until then been a clearheaded view of which unenumerated rights have come to be deeply rooted and essential to ordered liberty in recent years.[52]

Before turning to an examination of just how the majority applies the principles of stare decisis in its analysis, it is worth briefly noting what seems to be a main critique it has of the dissent's position: that the "[a]ttempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of

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47. *Id.* at 2260–61 (majority opinion).

48. *Id.* at 2260.

49. Brown v. Bd. of Educ., 347 U.S. 483, 494–96 (1954).

50. *Dobbs*, 142 S. Ct. at 2261–62. One possible counterargument to this might be that the *Brown* decision was based on equal protection rights rather than substantive due process protection of an unenumerated right. More detail to come on this topic later in the Note. *See infra* Subsection IV.C.2.

51. *Dobbs*, 142 S. Ct. at 2278 (citations omitted).

52. *Id.* at 2279 (citations omitted). *But see* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (recognizing a private right for any non-felon citizen to own firearms which had never explicitly been recognized prior to that ruling). The ruling in *Heller* is notable for the fact that it goes against what at least one of the Founders thought the Second Amendment was meant to protect upon its enactment. *See* THE FEDERALIST NO. 29 (Alexander Hamilton).

existence' prove too much. . . . Those criteria, *at a high level of generality*, could license fundamental rights to illicit drug use, prostitution, and the like."[53] As the dissent notes, this complaint is flatly wrongheaded.[54] And even if one is firmly against the right to illicit drug use or the right to seek employment as a sex worker, each of which is a separate and live debate unto itself,[55] the idea that either is straightforwardly comparable to being forced into actual childbirth is naive at best.

So, the majority denies there is any sense in which abortion access is deeply rooted in the American legal tradition and also rejects the idea that the right to abortion access might stem from a broader right, such as privacy, which has been entrenched in our legal tradition and is fundamental to the concept of ordered liberty.[56] The majority also denies that principles of stare decisis bind it to uphold the decisions made in *Roe*, *Casey*, and the numerous cases citing them as precedents for their own respective holdings.[57]

II. STARE DECISIS IN *DOBBS*

Typically, courts rely on stare decisis to decide cases based on the state of the law in their jurisdiction. The *Dobbs* majority relies on five criteria for examining previous case law and ultimately overruling the precedents established by *Roe*, *Casey*, and their progeny: (a) the nature of the error made in the previous case; (b) the quality of the reasoning used in the previous case; (c) the workability of the rules stemming from the previous case; (d) the disruptive effect those rules have had on other areas of the law; and (e) the presence or absence of concrete reliance on those rules.[58]

A. Nature of the Court's Error

The majority begins its stare decisis analysis by discussing the nature of the Court's errors in *Roe* and *Casey*, stating that "*Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional

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53. *Dobbs*, 142 S. Ct. at 2236 (emphasis added) (citations omitted).

54. *Id.* at 2327 (Breyer, J., dissenting).

55. Some argue that legalizing illicit drugs will lead to more addiction, dependency, and treatment issues. *See* J.Q. Wilson, *Against the Legalization of Drugs*, 6 NARCOFFICER 13 (May 1990), https://www.ojp.gov/ncjrs/virtual-library/abstracts/against-legalization-drugs-1 [https://perma.cc/6739-BN43]. Others argue that legalization would save government resources and provide benefits for public health and safety. *See* S.B. Duke & A.C. Gross, *Legalizing Drugs Would Benefit the United States*, *in* LEGALIZING DRUGS (Karin L. Swisher ed., 1996), https://www.ojp.gov/ncjrs/virtual-library/abstracts/legalizing-drugs-would-benefit-united-states-legalizing-drugs-p-32 [https://perma.cc/9ZH8-TQTA]. Similar arguments are made from both sides regarding the legalization of sex work as a form of employment. *See, e.g.*, Janice G. Raymond, *10 Reasons for Not Legalizing Prostitution*, COAL. AGAINST TRAFFICKING IN WOMEN INT'L (Mar. 25, 2003), https://rapereliefshelter.bc.ca/10-reasons-for-not-legalizing-prostitution/ [https://perma.cc/BG9Q-D8RS]; Annamarie Forestiere, *To Protect Women, Legalize Prostitution*, HARV. C.R.-C.L. L. REV. (Oct. 1, 2019), https://journals.law.harvard.edu/crcl [perma.cc/PQF7-CHMC].

56. *Dobbs*, 142 S. Ct. at 2253–58.

57. *Id.* at 2265.

58. *Id.*

provisions to which it vaguely pointed."[59] The majority describes *Roe* as having "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people" and asserts that this usurpation subsequently sharpened and inflamed the public debate without leaving participants with any way to make their voices effectively heard.[60] This implies that since state legislators were no longer able to pass certain laws regarding abortion, their constituents were no longer able to meaningfully impact the abortion debate.[61] While removing power from the people is an undesirable outcome, it is not clear that this accurately represents the Court's "error" from *Roe*; the error, if there was one, was overextending the doctrine of substantive due process rights into an arena in which it was never meant to intrude. Stripping away the power of the people to lobby their legislators about abortion laws is a consequence of that purported error but does not define its nature. A consequence of taking the wrong turn while driving might be that you get lost heading to your destination, but it would be odd to conclude that the nature of your error was being in the wrong place after driving; the error was taking the wrong turn.

B. Quality of the Court's Reasoning

The quality of reasoning in *Roe*, which the majority states "has an important bearing on whether it should be reconsidered" under its stare decisis analysis, was "more than just wrong" because it "stood on exceptionally weak grounds."[62] The majority attacks the tripartite framework established in *Roe* and abandoned in *Casey* as having been "concocted" by the Court; even more broadly, the majority accuses *Roe* of being unsupported by "text, history, or precedent."[63] The development of the tripartite test and its subsequent dismantling is an excellent working example of how judicial doctrine can look a lot like a normal science enterprise, and in spite of its detractors from both sides, the *Roe–Casey* example laid out a path that attempted to give objective standards for seeking out and obtaining an abortion.[64] In particular, an appeal to viability represents an attempt to objectivize the standard in accordance with what might be considered a "common sense" application of judicial decision-making. In spite of the fact that "[n]either party advocated the trimester framework[,] nor did either party or any amicus argue that 'viability' should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed," the concept is not as hard to understand as the majority makes it seem.[65]

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59. *Id.*

60. *Id.*

61. Because the state legislators presumably act on behalf of their constituents, removing the ability of those legislators to enact laws restricting abortions that they genuinely believe to be aligned with the desires of their constituents also removes the power of those constituents to impact the political process by exerting pressure on their elected officials.

62. *Dobbs*, 142 S. Ct. at 2265–66.

63. *Id.* at 2266.

64. As discussed below, normal science is akin to a puzzle-solving activity, and the *Roe* tripartite scheme is, perhaps charitably, viewable as an effort to find a solution to the puzzle posed by fitting abortion access into the expanding panoply of unenumerated but still fundamental rights protected by substantive due process. *See infra* Section III.B.

65. *Dobbs*, 142 S. Ct. at 2266.

Given that the state's interest in protecting life requires there be life to protect, there must be some standard for evaluating whether life exists. Luckily, nothing quite so complicated as that is required for the purposes of this evaluation because we already know that we are alive. What is needed is a way to decide when a fetus makes the transition to being alive like us. Viability as an answer to this question makes a strong showing on first evaluation because the moment the fetus becomes viable outside the womb certainly marks a point at which it would colloquially be considered alive. But this is beside the point about the quality of reasoning in *Roe* because, again, the reasoning in question should be the application of substantive due process rights to the domain of abortion access. If the reasoning undergirding such an application was valid but the means by which it was carried out were inefficacious or unjustified (such as by a tripartite system or by an analysis of what constitutes an undue burden), then the means should be adjusted without abandoning the end.

The main thrust of the majority's critique here is *Roe*'s reliance on case precedent that does not, as *Casey* and *Dobbs* do, involve what *Roe* termed "potential life."[66] The majority, by this critique, dismisses an appeal by the dissent (and by the opinions in *Roe* and *Casey*) to place the right to abortion access squarely in the domain of the right to personal privacy. This right traces its pedigree to the likes of *Loving v. Virginia*,[67] *Skinner v. Oklahoma*,[68] *Griswold v. Connecticut*,[69] and *Eisenstadt v. Baird*;[70] namely, to the right to interracial marriage, the right not to be forcibly sterilized, the right for married couples to access contraceptives, and the right for unmarried people to access contraceptives. While the right to marry does not directly involve potential life, the others do (contrary to the *Dobbs* majority's claims). And the fact that they do illustrates an issue with the term "potential life," as it is used without any sort of definition to tether its application. "Potential life" could just as much mean the fetus only one month from being born as it could the proverbial twinkle in a parent's eye, which might be months or years from being conceived; there is nothing in the phrase "potential life" to adjudicate between the two cases. In fact, if anything, the latter is truer to the "potential" side of the phrase than the former because it is further from actualization.

Regardless, the right to avoid sterilization and the right to access contraceptives clearly involve potential life in a very direct way. Sterilized people no longer have the potential to create life. Following the Court's decision in *Skinner*, the government rightfully lost its power to forcibly sterilize people. And if a person has no access to contraceptives, their ability to preclude potential life from becoming actual life is directly hindered. So, allowing access to contraceptives is the same as allowing people the ability to prevent potential life from coming to fruition. There

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66. *Id.* at 2268.

67. Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down a law banning interracial marriage).

68. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 542–43 (1942) (striking down a law allowing for the forced sterilization of prisoners).

69. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (striking down a law forbidding the use of contraceptives for its intruding on the privacy of married couples).

70. Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (prohibiting the banning of distribution of contraceptives to unmarried people).

is no debating this point, and indeed, for this reason, contraceptives are often at the center of religious and moral debates as another form of infanticide that merely happens further upstream in the causal chain.[71]

Of course, the connection gets more attenuated the further life is from being ushered into the world, but that is the nature of the term "potential." Ironically, the majority raises this issue when it references Professor Tribe's quip that putting such a premium on viability as a demarcation for the state's interest "mistakes a definition for a syllogism."[72] The majority then goes on to criticize the use of viability as one that is subject to the march of scientific progress (which seems more like a compliment than a criticism), and its vulnerability to a host of philosophical critiques about whether those persons who lack the qualities normally associated with personhood, such as self-awareness and reasoning, should therefore not be considered persons either.[73] This Note avoids engaging in these particular philosophical debates, but the majority places the highest premium on the fact that evaluating viability depends on a host of factors extrinsic to the fetus itself: medical facilities, health of the pregnant person, etc.[74]

All of this is not to defend the concept or application of viability but to show that the reasoning employed in *Roe* did not spring up of its own accord from a vacuum or absent any possible explanatory factors. The majority spends a large amount of space engaged in a practical and moral critique of viability as an applicable test when the concept is not essential to the substantive due process right at stake.[75] Despite the allegedly egregiously wrong decision in *Roe*, the majority admits that *Roe*'s "reach was steadily extended in the years that followed."[76]

The majority then goes on to criticize *Casey* for doing nothing to bolster the constitutional criteria of "text, history, and precedent" in placing the right to abortion access squarely within the confines of the Fourteenth Amendment's Due

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71. The Catholic Church was initially against the use of artificial birth control because such devices "blocked the natural journey of sperm during intercourse" and tampering with sperm was "tantamount to murder." *The Catholic Church and Birth Control*, PUB. BROAD. SERV., https://www.pbs.org/wgbh/americanexperience/features/pill-catholic-church-and-birth-control/ [https://perma.cc/5F7H-UCH2] (last visited Aug. 8, 2023). Suffice it to say that if male sperm on its own is enough to qualify as "potential life" then it is very difficult to find a reasonable place to draw the line: the sorites paradox is perhaps nowhere more viciously embodied than in the process of fertilization, conception, and birth.

72. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2268 (2022) (quoting Laurence Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973) (internal quotation marks omitted)).

73. *Id.* at 2269–70.

74. *Id.*

75. On either end of the spectrum would be laws which prohibited all abortions or allowed all abortions. Aside from those extremes, the law might make use of time (as the *Roe* opinion attempted to do) or the health of the mother. Another point to note is that depending upon external factors is not necessarily a sign of faulty logic. For example, people are generally more hesitant in their insistence upon a full ban of abortions when presented with cases of children who were raped and subsequently became pregnant. The fact that the rape is extrinsic to the fetus is surely not immaterial.

76. *Dobbs*, 142 S. Ct. at 2271.

Process Clause.[77] So, while most of the *Dobbs* majority's analysis of *Roe*'s quality of reasoning is dedicated to the since-jettisoned trimester framework adopted in *Roe*, it does give some space to *Casey*'s undue burden test as a replacement for the tripartite scheme (it criticizes the undue burden test as difficult to apply and *Casey*'s continued reference, even if circuitous, to viability as unexplained by "reason and fairness"); but because *Roe* and its tripartite division were no longer law when *Dobbs* was decided, it is strange for the majority to have spent so much time dissecting it.[78]

C. Workability of Precedent

In analyzing the workability of the previous decision for purposes of stare decisis, the test is "whether [the precedent] can be understood and applied in a consistent and predictable manner."[79] Here, the majority slides back into criticizing *Casey* after spending so much of the previous section attacking (or analyzing the quality of the reasoning of) *Roe*.[80] The majority splits the rule from *Casey* into three subrules based on how subsequent courts applied *Casey*: (i) substantial obstacles are invalid; (ii) undue burdens are unconstitutional; and (iii) unnecessary regulations are invalid if they either place a substantial obstacle or impose an undue burden.[81] These rules are far from clear, and their analysis and application through later opinions are laudable even if problematic in their consistency; but it is hard to claim they are so unworkable as to render unconstitutional the entire right in question. Despite over 20 years of court decisions relying on *Casey*, the majority declares that "*Casey*'s 'undue burden' test has proved to be unworkable."[82]

D. Disruptive Effects on Other Areas of Law

Penultimately, the Court examines the disruption that previous case law has had on other areas of the law.[83] The majority appeals to the fact that Supreme Court justices have "repeatedly lamented that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." This seems more like a disruption in the same area of law than in another because the cases were "involving state regulation of abortion."[84] A more substantive, though less analyzed, discussion comes next, in which the majority asserts that abortion case law has done much to disrupt other areas of law. According to the majority, abortion case law has diluted the strict standard for facial constitutional challenges, ignored third-party standing doctrine, disregarded principles of res judicata, flouted rules about severability of unconstitutional provisions, and distorted First Amendment doctrines.[85]

The majority does not assert so much as state that these disruptions have happened. Even taking the majority at face value, the accusation that "vindicating a

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77. *Id.* at 2272.
78. *Id.* at 2271–73.
79. *Id.* at 2272.
80. *Id.* at 2272–75.
81. *Id.* at 2272–73.
82. *Id.* at 2275.
83. *Id.* at 2275–76.
84. *Id.* at 2275.
85. *Id.* at 2275–76.

doctrinal innovation" by "engineer[ing] exceptions to longstanding background rules" shows that the doctrine has failed to deliver the sort of "principled and intelligible development of the law that *stare decisis* purports to secure" is at least as damning to the majority decision in *Dobbs* and its severance of the steady expansion of substantive due process rights as it is to any of the previous cases in its line.[86] Anyone who is unconvinced and still considers other substantive due process rights safe from the right to abortion's fate in *Dobbs* need only peruse Justice Thomas's concurrence to see what at least one of the five required votes would see done to those rights that remain.[87]

E. Reliance Interests

Finally, the majority examines whether *Roe* and its progeny created reliance interests that might be upset if the Court ignored stare decisis and overruled the precedential case.[88] Amazingly, the majority's analysis of this factor suffers from the same paucity of attention as in the previous section on disruptions to other areas of the law. The majority in *Dobbs* finds the sorts of reliance interests invoked by the majority in *Casey* and the dissent in *Dobbs* to be insubstantial and ephemeral as opposed to the standard sorts of reliance interests meant to be considered under stare decisis: "very concrete reliance interests, like those that develop in cases involving property and contract rights."[89] While the majority recognizes that the "contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women," it also stands by the judicial principle that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies."[90] Ironically, the majority then makes note of the fact that women make up a consistently larger portion of the active voter base in the United States than do men, noting that the November 2020 election cycle saw women making up 55.5% of the Mississippi voters who cast ballots despite comprising 51.5% of the Mississippi population.[91] This analysis is good to highlight, though it might have been especially instructive had the majority considered corresponding data points from the year in which the Fourteenth Amendment was ratified and the years in which *Roe* and *Casey* were decided.

Regardless, the majority dismisses the reliance interests invoked by the dissent in *Dobbs* as not concrete enough. Traditional reliance interests involve "advance planning of great precision" as a "necessity."[92] Needless to say, family planning requires significant planning—the more precise, the better. Interestingly, the *Casey* plurality also agreed that abortion, as a generally unplanned activity that could take "virtually immediate account of any sudden restoration of state authority

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86. *Id.* at 2276 (quoting June Med. Servs. v. Russo, 140 S. Ct. 2103, 2152 (2020)) (Thomas, J., dissenting) (internal quotation marks omitted).
87. *Id.* at 2301–04 (Thomas, J., concurring).
88. *Id.* at 2276–77 (majority opinion).
89. *Id.* at 2276 (citations omitted).
90. *Id.* at 2277 (citations omitted).
91. *Id.*
92. *Id.* at 2276 (citations omitted).

to ban abortions," did not engender traditional reliance interests.[93] Framing abortion as an unplanned activity is a nice way to recast the fact that sexual activity without an intention to procreate can be part of a broader and more multifaceted plan to lead a child-free life—the kind of plan many people stake a huge amount of reliance upon, and rightfully so: raising a child is neither easy nor something that should be forced upon someone who is not interested in doing it.

Even if the reliance interests here are not concrete enough for the Court, the weaknesses in its analyses of the other stare decisis factors make upending decades of case law by overturning *Roe* and its progeny a tough sell. What's more, regardless of the reliance interests at stake, the question here involves a constitutional right to substantive due process. And despite its sometimes-controversial status, we all have a concrete reliance interest in our substantive due process rights. The majority's decision to overturn one of those rights should therefore be concerning.

F. Judicial Legislating and Moral High Ground

The majority also accuses *Roe* of legislating from the bench, and indeed, the tripartite distinction espoused in *Roe* does read like legislative rulemaking in both its appearance and justification.[94] But more importantly than that, *Roe* placed the decision about how to handle the abortion procedure in the hands of the person seeking the procedure and the medical professionals performing it.[95] And because courts should "defer to the judgments of legislatures in areas fraught with medical and scientific uncertainties," and legislatures conduct factfinding in partnership with medical professionals, it seems logical on its face for a rule to require that medical professionals be involved in assessing the appropriateness of a medical procedure.[96]

Both the majority and the dissent make recourse to a moralistic high ground. The majority accuses the dissent of maintaining "that overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects," arguing the dissent is willing to overturn decisions only when popular attitudes have evolved to some sufficient degree.[97] What is interesting about this accusation is its amphiboly, which trades on the word "justified" in two distinct senses: first in the judicial sense and second in the moral sense. There is no doubt that school segregation was morally unjustifiable, but that does not mean the burden

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93. *Id.* (citations omitted). It is far from clear that family planning by individuals can react so quickly, especially when states pass laws that prevent their ability to follow through on their plans. Some states, like Idaho, have even gone so far as to criminalize attempts to aid abortion seekers from travelling out of state to receive medical care. Moira Donegan, *Idaho's Abortion Travel Ban is Incredibly Cruel*, THE GUARDIAN (Mar. 31, 2023), https://www.theguardian.com/commentisfree/2023/mar/31/idaho-abortion-travel-ban-women-girls-social-trust [https://perma.cc/MT6F-BUTD].

94. *Dobbs*, 142 S. Ct. at 2268.

95. Roe v. Wade, 410 U.S. 113, 164–65 (1973) (summarizing the main points of the holding and the fact that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician").

96. *Dobbs*, 142 S. Ct. at 2268 (citations omitted).

97. *Id.* at 2279.

borne by Black schoolchildren could never have been judicially justifiable. Of course, this only lends credence to a stronger relationship between judicial and moral normativity as a positive and legitimate means by which judicial doctrine can chart a course through social dilemmas. It would be wonderful if evaluating when a decision was "egregiously wrong" was an easy decision, but if it were, then (absent some progress in the interregnum) the decision in *Roe* could never have come down as it did in the first place. If the confines of existing judicial doctrine, firmly anchored to the text of the Constitution and the evolution of liberties stemming from that text, are insufficient for responding to changing social norms and mores, the judiciary needs something else to guide it beyond the text of the Constitution.

In fact, the majority raises this issue in describing the dissent as admitting that "a decision *could* 'be overruled just because it is terribly wrong,' though the dissent does not explain when that would be so."[98] The lens of constitutional normal science would provide a way to evaluate, if not a way to decide, when overruling precedent would be necessary and judicially justified.

III. CONSTITUTIONAL NORMAL SCIENCE

The term constitutional normal science is intended to capture the spirit of Kuhnian normal science and the paradigm system he argued for in the fields of scientific enterprise. The Kuhnian paradigm, or at least the word paradigm, has become near-common parlance since the initial publication of *The Structure of Scientific Revolutions*.[99] Though its application there was fitted to the fields of the harder sciences (physics, chemistry, biology, astronomy, etc.), it was more of a retrofitting in the sense that Kuhn took inspiration from the structure of political revolutions in creating the criteria for the terms "paradigm" and "normal science."[100] So, whether these terms can meaningfully and usefully be applied to the evolution of judicial doctrines is at least a prima facie possibility.[101]

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98. *Id.* at 2280 (citations omitted).

99. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 11 (4th ed. 2012).

100. *Id.* at 93–94. Especially worrisome is the idea that sufficient polarization of paradigms causes the systemic failure of political recourse and precipitates violent revolution as the inevitable solution to the growing tension.

101. Others have taken a similar approach as the one this Note will present, such as the line explored by constitutional law professor at the University of Arizona Toni Massaro:

> Constitutional doctrine is and has always been a human creation, not a divine emanation arising from the text or framers' intent. Equal protection and substantive due process doctrine are no exception. The cases depend upon human judgment as informed by human experience, both of which are malleable in ways that defy formalism. For example, the cases that first identified 'suspect classes' or 'fundamental rights' entailed a dynamic and fluid approach to rights, under which the Court accommodated changed perspectives on government power, on affected private interests, and on the delicate balance between them. The Court attached these analytically significant labels only *after* it considered a complex set of factors, including sociopolitical phenomena external to text and doctrine. The so-called 'selective incorporation' of rights into the Fourteenth

A. Traditional Kuhnian Normal Science Doctrine

Scientific paradigms are best grasped by example, so after a brief description of a few well-known ones, the analogy to judicial paradigms will follow. Once paradigms are understood, the task of normal science and the fundamental requirement that it operate within a paradigm will be clear. One of the more well-known paradigm shifts occurred when astronomy moved from a geocentric to a heliocentric conception of the solar system and placed the Sun, rather than the Earth, at the center of our neighborhood in the cosmos. The experiments and observations which followed were made within the Copernican (heliocentric) paradigm, and the resulting empirical data were simply incoherent within the previous paradigm of a geocentric solar system. The assumption about which celestial body is at the center of the solar system informs and justifies which results astronomers should look for to confirm their theories.

Paradigm switches are hardly ever quick or easy, and the outgoing paradigm will inevitably retain adherents who cling to Ptolemaic-like[102] theories to explain how observations continue to fit within their preferred paradigm, but this is expected. Kuhn required that a paradigm be (i) "sufficiently unprecedented to attract an enduring group of adherents away from competing modes of scientific activity" and (ii) "sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve."[103] In order to satisfy the first criterion, the new scientific paradigm must siphon scientists away from the previous one as the newer theoretical framework continues to better explain the empirical work done in the field.[104] And to satisfy the second criterion, the paradigm must leave room for continued empirical work to resolve questions left unanswered by existing theoretical framework.[105] The latter requirement is what leaves room for normal science to operate within a paradigm as a puzzle-solving activity. But the paradigm itself sets the rules of the puzzle-solving process. So, while the heliocentric Copernican paradigm did not by itself resolve questions about the movement of the planets and stars in relation to Earth, it provided a backdrop—that the Sun, and not Earth, is at the center of our solar system—against which such questions could intelligibly be answered.

> Amendment likewise occurred over time and entailed judgment calls not dictated by text. The Court deemed freedom of speech to be incorporated into fourteenth amendment due process in 1925, though the fourteenth amendment nowhere mentions freedom of speech.

Massaro, *supra* note 2, at 574. Massaro follows Farber in her eponymous application of constitutional law as normal science. *Id.* at 548.

102. The Ptolemaic model of the universe was geocentric and featured a complex series of nested spheres upon which turned the celestial bodies. Alexander Raymond Jones, *Ptolemaic System*, ENCYC. BRITANNICA, https://www.britannica.com/science/Ptolemaic-system [https://perma.cc/XF94-LHXP] (last visited Apr. 12, 2023). These nested spheres have become synonymous with overly complicated explanatory devices pursued to an extreme rather than abandoned in favor of reexamining theoretical assumptions.

103. KUHN, *supra* note 99, at 10–11.

104. *Id.*

105. *Id.*

A second example is the move to Einsteinian relativistic spacetime and away from Newtonian absolute space and absolute time. Here, two incompatible views on the fundamental structure of reality competed for adherents. On a Newtonian conception, the force of gravity must act immediately across space, a fact that would violate the universal speed limit set by the speed of light (because not even light can cross a distance immediately). In contrast, the Einsteinian picture under general relativity treats gravity as a feature of the structure of local spacetime.[106] In this view, gravity is not a force that acts over distances but instead a feature of the warped contours of paths through the fabric of spacetime; the contours exist structurally and do not need to travel over any distance to interact causally with mass traveling through them.[107]

For Kuhn, normal science is defined as "research firmly based upon one or more past achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice."[108] Once enough experiments in a given field reveal some flaw in the current paradigm, whether the relative movement of celestial bodies or the paradox of precisely when gravity's force is exerted, the assumptions underpinning the paradigm itself are challenged and competitor paradigms sprout up that purport to better explain the emerging flaws.[109] Eventually, one of the competitor paradigms garners enough support to become dominant, and normal science begins to happen under the new paradigm.[110] Importantly, paradigms are often so distinct as to make intelligible debate over their respective merits a near impossibility:

> [I]ndividuals commit themselves to some concrete proposal for the reconstruction of society in a new institutional framework. At that point the society is divided into competing camps or parties, one seeking to defend the old institutional constellation, the others seeking to institute some new one. And, once that polarization has occurred, *political recourse fails*. Because they differ about the institutional matrix within which political change is to be achieved and evaluated, because they acknowledge no supra-institutional framework for the adjudication of revolutionary difference, the parties to a revolutionary conflict must finally resort to the techniques of mass persuasion, often including force.[111]

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106. *See generally* Nick Huggett et. al., *Absolute and Relational Space and Motion: Post-Newtonian Theories*, *in* STANFORD ENCYCLOPEDIA PHIL. (Edward N. Zalta & Uri Nodelman eds., July 19, 2021), https://plato.stanford.edu/archives/sum2023/entries/spacetime-theories/ [https://perma.cc/X54P-84KP].

107. *Id.*

108. KUHN, *supra* note 99, at 10.

109. *Id.* at 10–12.

110. *Id.*

111. *Id.* at 93–94. As mentioned before, it is interesting that Kuhn bases his works on scientific revolutions on the turmoil typically associated with political revolutions and social progress. This makes his language particularly apt for describing judicial doctrines, which, for all the loftiness of the goal of elevation above and beyond the terrible tendrils of political influence, are nonetheless policies that are themselves part and parcel of the social order of a nation.

As a final example from the scientific fields, electricity serves as a particularly illuminating display of the various ways in which theoretical frameworks can be interpreted to fit the available empirical data. This is useful not only for the current discussion but also as a commentary on the workability of the textualist interpretive doctrine: if hard empirical facts can be interpreted in a multitude of more or less consistent ways, then linguistic-legal entities like "meanings" must be at least as susceptible to multiple realizabilities as the physical entities comprising our observable world. For example, in the first half of the eighteenth century, there were at least three main groups contending for theories that would serve as the theoretical paradigm offering an explanation for the physical phenomenon of electricity.[112] The first group explained (magnetic) attraction and frictional generation as fundamentally electrical phenomena but left repulsion as a secondary effect and postponed all discussion of the novel discovery of electrical conductivity.[113] The second group saw attraction and repulsion as equally fundamental electrical phenomena but had trouble accounting for conductivity and frictional generation; this group viewed electricity as a sort of "fluid" that ran through conductors, but the group had trouble accounting for attraction and repulsion.[114] Kuhn argues that this interaction of multiple groups competing for prevalence based on best fit is typical for paradigms that neither evolved prehistorically (e.g., math) nor from a subdivision of an already matured field (e.g., biochemistry). It makes good sense that judicial paradigms would emerge and compete in a somewhat similar fashion, even if what they hope to interpret is not purely empirical data.[115]

B. Constitutional Law as Normal Science

The main goal here is to sharpen that lens and, by examining *Dobbs* and substantive due process in particular, evaluate whether it can offer analysis that differs from (or agrees with) the practice of stare decisis as applied by the Court in *Dobbs*.[116] Judicial paradigms, borrowing *mutatis mutandis* from the machinery of scientific paradigms, must fulfill two criteria: they must be both sufficiently judicially unprecedented as to attract an enduring group of adherents away from

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112. *Id.* at 14–15.

113. *Id.*

114. *Id.* Eventually, a third theory emerged that accounted for all the observable phenomena (it continued to be stymied by the mutual repulsion of negatively charged bodies—perfection is difficult—but it was clearly a better fit for observable data than any of the other theories), and over time, adherents of the other groups either retired or were converted to the new paradigm. *Id.*

115. *Id.*

116. *See, e.g.*, Ernest A. Young, *State Sovereign Immunity After the Revolution* 2–3 (Duke L. Sch. Pub. L. & Legal Theory Series, Working Paper No. 2023-15, 2023), https://ssrn.com/abstract=4350164 [https://perma.cc/KJY5-74FV]. Young's article "presupposes that one can distinguish between instances in which courts create a new framework—or 'paradigm,' as Kuhn would say—and those in which courts pursue a kind of 'normal science' by applying that framework to particular cases and resolving open questions within the paradigm's governing principles." This Note aims to make clear why such a presupposition is legitimate: in Young's case as a tool to evaluate the doctrine of state sovereign immunity jurisprudence and in this Note's case as a tool to evaluate the federal substantive due process protection of unenumerated but fundamental rights. *See id.*

competing judicial doctrines and sufficiently open-ended to leave problems for the judicial apparatus to resolve.[117] The first criterion informs the fact that a new paradigm in the judicial field will often (or always) fly in the face of stare decisis, at least in some capacity, because precedent will be set against any paradigm shift by definition. The second criterion seems like an inevitable result of a sufficiently complex judicial system because no decision could possibly resolve all questions within a given field of issues. But this depends on how broad or narrow the paradigm is when applied to a particular field as well as how many areas of the judiciary make use of it. Call these qualities the "latitude" (the breadth of issues covered within a certain area of law) and "ubiquity" (the frequency of application across different legal content areas) of a judicial paradigm. An example of how the latitude and ubiquity of a scientific paradigm can determine whether it satisfies Kuhn's two criteria is useful here:

> [R]evolutions . . . need seem revolutionary only to those whose paradigms are affected by them. To outsiders they may, like the Balkan revolutions of the early twentieth century, seem normal parts of the development process. Astronomers, for example, could accept X-rays as a mere addition to knowledge, for their paradigms were unaffected by the existence of the new radiation. But for men like Kelvin, Crookes, and Roentgen, whose research dealt with radiation theory or with cathode ray tubes, the emergence of X-rays necessarily violated one paradigm as it created another. That is why these rays could be discovered only through something's first going wrong with normal research.[118]

In other words, the X-ray paradigm was very narrow in latitude with respect to astronomy despite being ubiquitous enough to be absorbed into both astronomy and radiology. Similarly, the *Dobbs* decision does not have broad latitude for all judicial doctrines—for some, it can merely be added to the list of decisions on the map as a data point to be observed (similar to the non-delegation doctrine or the business judgment doctrine). But, and very importantly, for the doctrine of substantive due process, *Dobbs* had a much broader latitudinal effect—one much more akin to the radiologists' reaction to the discovery of X-rays.

Assuming a judicial paradigm exists and guides case law development within a particular area, we should expect decisions in that area to follow the constraints of normal science. For scientific fields, normal science is constituted by inherently slow and deliberately careful puzzle-solving work that expands upon firmly proven previous results.[119] Importing this to the judicial field should immediately conjure the idea of stare decisis, given its deference to past achievements, which lends legitimacy to and gives a foundation for its future application. Judicial normal science, therefore, should be both firmly based on judicial precedent, and some subset of the judicial community must acknowledge that precedent as supplying a legitimate foundation for further practice. The first piece is backward-looking, asking whether the current decisions being made by the

117. Kuhn, *supra* note 99, at 10–11.
118. *Id.* at 93.
119. *See id.* at 10.

judiciary are aligned with previous decisions. But the second piece is forward-looking and questions the continued use of such precedent as a good foundation for further practice. The degree to which these two normal science criteria are in tension will determine the likelihood of a paradigm shift in response to a belief that operation within the once legitimate foundation no longer provides such legitimacy. When a sufficient subset of the Court (five justices) shares that belief, the judiciary is ripe for a paradigm shift.[120]

A potential objection might be that the constraints of judicial normal science are best analyzed as identical to the constraints of stare decisis. Stare decisis analysis factors include (i) the nature of the Court's error; (ii) the quality of the Court's reasoning; (iii) the workability of the rules imposed on the country; (iv) the disruptive effect of those rules on other areas of the law; and (v) the absence or presence of concrete reliance on the previous ruling.[121] But stare decisis covers less ground than judicial normal science as a whole and is contained mostly within Kuhn's first criterion as a backward-looking mechanism. And when we ask those same stare decisis inspired questions through the lens of judicial normal science, we are allowed to consider not only a wider breadth of issues, including prevalent social issues and moral concepts as they develop[122] but also those issues with eyes to the future and the question of whether continuing to embrace the judicial status quo is a good decision.

C. Has Substantive Due Process Evolved via Constitutional Normal Science?

The state of substantive due process protections before *Dobbs* was a fairly continuous, if relatively slow, expansion of rights brought under the umbrella of the Fourteenth Amendment.[123] Substantive due process as it concerns the right to abortion grew out of earlier cases that bestowed protections against state infringement on autonomy more broadly, as noted by the *Dobbs* dissent: "The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial

120. This is not to say that only the Supreme Court can run fissures through the current judicial paradigm, and it is without doubt that state judiciaries are constantly engaged in this balancing act as well; but this Note focuses on the precedent and paradigms as viewed through the cases the Supreme Court accepts and decides. The degree to which state decisions impact the Supreme Court's choice of cases and their decisions in them would be an excellent, but separate, topic of analysis.

121. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

122. The idea of a "living constitution" is often set in contrast to textualist and originalist methodologies, and a good case might be made that the tenets of constitutional normal science, as described in this Note, provide a set of guard rails for a kind of living constitutionalism to develop without committing to any particular moral justification for its boundaries.

123. Though the idea of justifying protections using substantive due process rather than privileges and immunities is potentially problematic, it was nonetheless the go-to mechanism for the expanding protections provided by the judiciary. *See, e.g.*, Toni M. Massaro, *Substantive Due Process, Black Swans, and Innovation*, 2011 UTAH L. REV. 987, 988–93 (2011).

relationships, and procreation."[124] This claim is evidenced by at least two lines of cases.[125]

A key issue tracing back to the *Griswold* decision is whether a general right to privacy grounded the protections given there regarding marital privacy.[126] On the one hand, self-determination and autonomy seem fundamental to the concept of ordered liberty, but on the other hand, the strict holding required no necessary reference to a broad right to privacy in lieu of a narrower right to privacy in marriage. Still, there is no need for a general right to privacy to support the *Dobbs* dissent's arguments because a right to reproductive self-determination would suffice in place of a right to self-determination writ large.

Renowned constitutional scholar Cass Sunstein's four (non-exhaustive) options for interpreting the Due Process Clause are useful for sharpening the analysis: (i) purely procedural, protecting no substantive rights; (ii) largely procedural but protecting those substantive rights codified in the first eight amendments; (iii) largely procedural but including substantive rights codified in first eight amendments and those taken to be fundamental in the sense that they were fundamental to ordered liberty at the time of ratification; and (iv) substantive as well as procedural, encompassing a concept of liberty that is not frozen at a particular time.[127] The third and fourth options above are what much of the argument between the majority and dissent from *Dobbs* boils down to, and they also serve to frame the current analysis of *Dobbs* as cementing or upending a paradigm within constitutional law as applied to reproductive autonomy. The majority in *Dobbs* argued that the concept of ordered liberty did not include a right to abortion, and therefore, the right to abortion is not a fundamental one.[128] The dissent argued that the concept of ordered liberty, which matters for substantive due process analysis, should not be

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124. *Dobbs*, 142 S. Ct. at 2319 (Breyer, J., dissenting).

125. One line of cases focuses on reproductive autonomy and substantive due process protections against forced sterilization or the prohibition of contraceptives. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541–43 (1942) (finding unconstitutional a statute allowing for the forced sterilization of convicted criminals); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (striking down as unconstitutional prohibitions on single persons obtaining contraceptives but allowing married persons to obtain them); Carey v. Population Servs. Int'l, 431 U.S. 678, 700–02 (1977) (striking down as unconstitutional a New York state statute prohibiting the advertisement of contraceptives). A second line of cases addresses bodily autonomy more generally. *See, e.g.*, Rochin v. California, 342 U.S. 165, 166, 173–74 (1952) (finding a protection against forced stomach pumping); Winston v. Lee, 470 U.S. 753, 766–67 (1985) (finding a protection against forced surgery); Washington v. Harper, 494 U.S. 210, 229, 236 (1990) (finding a protection against being forced to take antipsychotic drugs). These cases are important because they are bound up in the protections expounded upon and expanded in *Griswold*, most particularly the "emanations" and "penumbras," which provide privacy protections via the substantive due process incorporated by the Fourteenth Amendment. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965). That said, the main focus of this Note is the evolution of those substantive due process protections into the main trio of abortion rights cases: *Roe*, *Casey*, and *Dobbs*.

126. *Griswold*, 381 U.S. at 484 (describing the "penumbras" formed by specific guarantees in the Constitution as creating "zones of privacy").

127. Sunstein, *supra* note 23, at 7–8.

128. *Dobbs*, 142 S. Ct. at 2253–54.

interpreted through the lens of American values in 1868.[129] The question is whether the majority's argument (i) conforms to the current paradigm by which the Court interprets substantive due process, (ii) disrupts that paradigm, or (iii) signals a paradigm shift by a massive enough disruption. Part IV will sketch an answer to that question by developing a working theory of abnormal science and paradigm slippage.

IV. ABNORMAL SCIENCE AND PARADIGM SLIPPAGE

The *Dobbs* decision does not fit comfortably into either the doctrine of constitutional normal science or the doctrine of stare decisis. Instead, *Dobbs* requires a new category to fully explain and justify its decision and methodology. The tenets of constitutional normal science, as argued in this Note, require that a given constitutional doctrine must be both firmly based on judicial precedent, and some subset of the judicial community must acknowledge that precedent as supplying a legitimate foundation for further practice grounded in it.[130] On the other hand, a paradigm shift in how constitutional normal science is practiced must be both sufficiently judicially unprecedented to attract an enduring group of adherents away from competing judicial doctrines and sufficiently open-ended to leave problems for the judicial apparatus to resolve.[131]

A. Was Dobbs *an Example of Constitutional Normal Science in Action?*

The idea that the *Dobbs* majority opinion was constitutional normal science in action requires both that it was firmly based on precedent and that the precedent supplied a legitimate foundation for future practice. Here, there is some tension between what constitutional normal science requires and what the tenets of stare decisis require, but that does not mean that the two can never coexist. For example, stare decisis creates situations in which "it is common for courts to accept a precedent or group of precedents as settled while rejecting those precedents' underlying theory and refusing to apply it to undecided questions in the future."[132] Furthermore, Young argues (as have others)[133] that "judges foreclosed by *stare decisis* from overruling precedents with which they disagree might well draw fine distinctions that minimize the precedents' impact . . . [and] those fine distinctions might produce more uncertainty than a clean break from precedent."[134]

Considering the tension between constitutional normal science and stare decisis in the context of the *Dobbs* decision could yield an analysis that views the majority as rejecting the underlying premises from *Roe* and *Casey* regarding the right to abortion and refusing to apply those underlying theories to the facts in *Dobbs*. But that view does more than merely refuse to apply the underlying premises involved in the precedent set by *Roe* and *Casey*—it demolishes the precedent

129. *Id.* at 2319 (Breyer, J., dissenting).
130. *See supra* Section III.B.
131. *See supra* Section III.B.
132. Young, *supra* note 116, at 39.
133. Young is quoting Caleb Nelson in what follows here. *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 64—65 (2001).
134. Young, *supra* note 116, at 40.

entirely.[135] A putative *Dobbs* majority opinion that curtailed the undue burden test from *Casey* or specified further requirements from the Mississippi statute in question without invalidating it in all its forms could have fit into the bucket of constitutional law as normal science at the same time as it followed stare decisis and its demands, given that such a decision would have rejected some of the underlying premises guiding *Roe* and *Casey* while also respecting (and tweaking) the precedent they established.[136] But there is no serious sense in which the decision to remove the right to abortion that *Roe* and *Casey* grounded in the right to privacy and self-determination is firmly based in precedent because it completely erodes that precedent rather than modifying it.

At least with respect to abortion rights, there is no sense in which *Dobbs* was an example of constitutional normal science because the abortion right no longer exists post-*Dobbs*.[137] This leaves open the question of whether it was within the bounds of constitutional normal science regarding the doctrine of substantive due process as a whole. Substantive due process has a much broader latitude than the abortion right it once protected based on the simple fact that there are more substantive due process cases than abortion rights cases.[138] The question is whether cutting the abortion right out of the unenumerated rights protected by substantive due process counts as progressing constitutional normal science. Contrasted against Justice Thomas's desired outcome (the abolition of unenumerated substantive due process protections),[139] it surely seems to be such an example.

Ironically, it is by aligning the criteria of constitutional normal science and stare decisis, rather than contrasting them, that we can conclude such a cutting away of the right to abortion is not an example of normal science operating within constitutional law because it was not firmly based in precedent. Stare decisis clearly did not foreclose the majority in *Dobbs* from overruling precedents it disagreed with, and the decision was far from firmly based in precedent, as required by constitutional normal science. So, if *Dobbs* did not embody the practice of constitutional normal science, then perhaps it embodied a paradigm shift instead.

B. Was Dobbs *a Paradigm Shift in Constitutional Normal Science?*

A brief analogy to the astronomical shift between the geocentric and heliocentric models of the solar system, a quintessential example of a paradigm shift in purely empirical science, could be useful. Before the move to a Sun-centered picture, Ptolemaic astronomers created laughably (to us, at least) complicated models of the solar system involving spheres upon spheres of rotating bodies in

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135. The *Dobbs* decision did not tweak constitutional protections for abortion rights but removed them completely. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253–54 (2022).

136. The concurring opinion from Chief Justice Roberts seems to indicate that something along those lines would have been preferable to what was done by the majority decision. *Dobbs*, 142 S. Ct. at 2310–14 (Roberts, C.J., concurring in judgment).

137. *See supra* note 135.

138. This comes from the simple fact that the abortion rights cases are a subset of the substantive due process cases, as evidenced by any of the cases mentioned that ground their decisions in substantive due process but are not concerned with the right to abortion.

139. *Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring).

order to account for the studied movements of the heavenly bodies within the confines of a geocentric mode of thinking.[140] Two poignant questions emerge. Was *Dobbs* akin to moving from a Ptolemaic-like model, which carved an unnecessary substantive due process "sphere" out for abortion rights, to a simpler model? Or was *Dobbs* a move back toward a Ptolemaic-like model, with no substantive due process "sphere" carved out for abortion rights despite that right exhibiting characteristics quite similar to the other substantive due process rights "spheres" that are accounted for by the model (e.g., marital self-determination and sexual privacy)?

To be considered a paradigm shift, the *Dobbs* decision would need to be unprecedented in the sense that it serves to attract a group of adherents to its new doctrine and away from a previous doctrine. The relevant doctrinal shift would be a severing of abortion rights from other substantive due process rights, which are similarly both unenumerated and (like abortion until recently) protected.[141] There is no rule about paradigm shifts that they must occur in some marching order that tends inevitably toward positive progress, and the majority's claim that abortion rights should be severed from the larger family of unenumerated substantive due process rights might fit into a picture in which the paradigm was shifted first by *Roe*[142] and then shifted back in a much-needed course correction by *Dobbs*.[143]

But this picture requires two different paradigms: one paradigm for unenumerated rights relating to self-determination, autonomy, and the liberty they secure, all protected by substantive due process as incorporated by the Fourteenth Amendment;[144] and a separate paradigm for evaluating the self-determination and autonomy constitutive of liberty regarding the decision of whether to seek an abortion.[145] This represents less of a paradigm shift and more of a paradigm slip because the rest of the unenumerated rights protected by substantive due process are allegedly left untouched by the majority decision in *Dobbs*.[146] Whether this is true will emerge as time passes and legislatures across the nation grapple with the fallout from *Dobbs*.

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140. *See supra* note 102.

141. This would most likely come from accepting the majority's insistence that abortion is unique for its consideration of potential human life. *Dobbs*, 142 S. Ct. at 2258–59. Whether potential human life is more protected than actual human life, or whether life as opposed to personhood is the more salient criterion, would presumably need to be explained under the new paradigm.

142. Roe v. Wade, 410 U.S. 113, 166 (1973) (holding that the Texas abortion statutes must fall "as a unit").

143. *Dobbs*, 142 S. Ct. at 2266–70.

144. *See supra* Section III.C.

145. Again, this is because the majority found that abortion is unique among the substantive due process protections for its consideration of potential human life. *Dobbs*, 142 S. Ct. at 2258–59.

146. Justice Kavanaugh makes explicit his belief that abortion is being treated *sui generis* by the *Dobbs* majority decision and that other protections "such as contraception and marriage" are not threatened. *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring). But Justice Thomas, as mentioned before, argues for (at least) those precedents to be overruled. *Id.* at 2301–04 (Thomas, J., concurring).

Regardless, this means the majority in *Dobbs* relied upon a question of moral fact for its legitimacy insofar as it claimed that the abortion cases are different from other cases involving unenumerated substantive due process rights.[147] This was despite the fact that moral decision-making is generally portrayed as a feature of living constitutionalism rather than the originalist, textualist methodology espoused by the *Dobbs* majority.

C. Dobbs *and the Paradigm Slippage of Abnormal Science*

The fact that *Dobbs* is not sufficiently pinned down by either the normal science lens of constitutional law or a paradigm shift shows that something odd happened in the case. What that oddness amounts to is what this Note refers to as the "paradigm slippage of abnormal science." Returning one final time to the analogy from astronomy, paradigm slippage would be best exemplified by a hypothetical move to a new version of our heliocentric model that made use of the Ptolemaic spheres-on-spheres to explain the movement of some subset of the astronomical bodies we observe in the sky but not others. The implication is that those astronomical bodies, whatever they might be, are not properly subject to the rules that govern all the other celestial objects and instead require their own treatment by separate analysis. The analogy, admittedly somewhat simplified for effect, makes the *Dobbs* majority's treatment of the right to abortion seem like a special carving out of the right to abortion from the body of other rights that are similar in too many respects to deserve different treatment.

1. Defining Paradigm Slippage

The argument that abortion is different because of the presence of fetal life is insufficient to justify it being entirely separated from the list of unenumerated fundamental rights; those rights similarly spring from the tenets of autonomy and self-determination that undergird the concept of ordered liberty that forms the backbone of substantive due process.[148] While that argument could have justified a more conservative (in the judicial sense) version of the *Dobbs* decision, say the one espoused by Chief Justice Roberts,[149] there is too much dog for that tail to wag on its own. Fully overturning the abortion rights precedent without touching the other unenumerated rights that are (or were) likewise protected by substantive due process falls short of being a paradigm shift in constitutional law and simultaneously goes too far for the boundaries of constitutional law as normal science.

Paradigm slippage and abnormal science occur in constitutional law when (albeit, perhaps not only when) there is both insufficient precedent to justify the premises underlying a new decision and the premises underlying the new decision do not require a radical reworking of the legal theories necessarily involved in the relevant precedent. The *Dobbs* majority argues that our nation's legal history and

147. There can be little agreement about when a human life has become a "life," objectively speaking. But there is no definite need to find an adequate answer to that question so long as agreement can be found about when to treat a human being as an organism with "life." And the latter question is unmistakably a moral question.

148. *See supra* Section IV.B.

149. *Dobbs*, 142 S. Ct. at 2310–14 (Roberts, C.J., concurring in judgment).

tradition alleviates the tension put on its decision by the former criterion,[150] but there is a difference between legal precedent in case law and legal tradition in history.[151] And there are no new tools for legal analysis required post-*Dobbs* to make sense of what the majority accomplished in its holding; instead, what is required is accepting that abortion rights are severable from the rest of the unenumerated substantive due process rights.[152]

2. Why Brown v. Board *Was Not Paradigm Slippage (but* Dobbs *Was)*

Despite the fact that an Equal Protection analysis is not the same as a substantive due process analysis, it is worthwhile to examine *Brown v. Board*, especially because the *Dobbs* majority and one of the concurring opinions mention it.[153] The Court in *Brown* refers to the fact that there was no history and tradition, certainly not in 1868, of public education for students of color.[154] The majority goes on to explain that "the status of public education [in 1868]" in the South was such that "the movement toward free common schools, supported by general taxation, had not yet taken hold."[155] What is more, the state of affairs was such that "any education of [students of color] was forbidden by law in some states."[156] Luckily, *Brown* relied on equal protection rather than a "history and tradition" view of substantive due process protection.[157] Regardless, the decision in *Brown* was a significant departure from what stare decisis alone would demand,[158] and the decision is therefore a candidate for either a constitutional law paradigm slip or paradigm shift.

Plessy v. Ferguson upheld the previous paradigm of "separate but equal."[159] Around 50 years later, roughly the same amount of time that passed between *Roe* and *Dobbs*, the Court overturned that paradigm in *Brown* by declaring that "in the field of public education the doctrine of 'separate but equal' has no place."[160] *Brown* only meets one of the two criteria for a paradigm slippage from

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150. Because the majority claims the precedent they overturned in *Dobbs* was egregiously wrong, it would presumably diffuse the tension in the first criterion by arguing there is sufficient precedent that is not egregiously wrong upon which their decision can comfortably rest.

151. Legal precedent is formed through case law, while historical legal tradition is a panoply of statutes, regulations, and case law.

152. This may seem like a new tool for legal analysis, but it is the same old tool (substantive due process protection for an unenumerated right) rendered usable on a more restricted set of objects (i.e., no longer on the abortion right).

153. The majority notes that *Brown* was one of the cases in which stare decisis did not compel keeping to precedent. *Dobbs*, 142 S. Ct. at 2262–63. Justice Kavanaugh also discusses *Brown* in the context of identifying when precedent is "not just wrong, but egregiously wrong." *Id.* at 2307–08 (Kavanaugh, J., concurring).

154. Brown v. Bd. of Educ., 347 U.S. 483, 489–90 (1954).

155. *Id.*

156. *Id.* at 490.

157. *Id.* at 488.

158. *See id.* (noting that a three-judge federal district court denied relief to plaintiffs by following the "separate but equal" doctrine announced by the Court in Plessy v. Ferguson, 163 U.S. 537, 544 (1896)).

159. Plessy v. Ferguson, 163 U.S. 537, 550–52 (1896).

160. *Brown*, 374 U.S. at 495.

above: namely, the lack of sufficient precedent to justify the premises underlying the new decision.[161] It does not meet the other criterion because the premises underlying *Brown* did require a radical reworking of the legal theory involved in the relevant precedent: *Plessy* was far from the first to make use of the separate but equal doctrine.[162] And because that doctrine was jettisoned in *Brown*,[163] it is safe to say the decision radically reworked the theories involved in the precedent and history leading up to and stemming from *Plessy*.

The other criterion for paradigm slippage, which posits there is insufficient precedent for justifying the premise underlying the new decision, was satisfied in *Brown*. But this is because of what was just discussed regarding the satisfaction of the former criterion. It is because *Brown* trod on new doctrinal ground that there was insufficient precedent available to justify, from the standpoint of precedent (and stare decisis) alone, its rationale and conclusion. So, this Note argues *Brown* was an example of a genuine paradigm shift in constitutional law and not a paradigm slip. If this is true, it would also explain away one of the worries Justice Kavanaugh raised in his concurring opinion when he asks us to imagine "that in 1924 this Court had expressly reaffirmed *Plessy v. Ferguson* and upheld the states' authority to segregate people on the basis of race" and then to wonder whether "the Court in *Brown* some 30 years later in 1954 [would] have reaffirmed *Plessy* and upheld racially segregated schools simply because of that intervening 1924 precedent?"[164] If *Brown* really was a paradigm shift, then the imagined reaffirmation of *Plessy* would not make a difference to whether the Court would overturn the precedent such a hypothetical case reaffirmed.

Because *Brown* was not paradigm slippage, it does not make for a particularly strong argument by analogy against the *Dobbs* decision as an inappropriate denial of stare decisis. The factors that contributed to the paradigm shift in *Brown* did not stem from an unenumerated fundamental right protected by substantive due process, but that does not mean the *Dobbs* majority can freely help itself to *Brown* as an example of why *Dobbs* likewise flew in the face of judicial precedent and the tenets of stare decisis. Unlike *Brown*, *Dobbs* did not radically rework the legal theory involved[165]: the *Dobbs* majority reworked a small layer of a complex interweaving of the legal theory involved while preserving the rest of that theory (unenumerated fundamental rights protected by substantive due process) as much as possible.[166] This is a bit like attempting to remove the 10th floor of a 30-story building while preserving the floors above it.

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161. *See supra* Subsection IV.C.1.

162. *Plessy*, 163 U.S. at 544–48.

163. *Brown*, 347 U.S. at 495.

164. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

165. This is not to say the *Dobbs* opinion will not have radical consequences.

166. The decision removed abortion protection from the list of rights granted by substantive due process, and the majority argued that the justifications for doing so would not alter substantive due process itself or how it operates on the other protections it grants. *Dobbs*, 142 S. Ct. at 2257–61.

3. Implications of Paradigm Slippage Following Dobbs

There are two main possibilities following the *Dobbs* decision: either the Court holds true to the majority's promise that abortion rights are special and unique, or it does not. What results from the former is a substantial curtailing of reproductive rights and personal autonomy in the sphere of abortion rights. What results from the latter is a de facto overruling of the methodology from *Obergefell* in favor of the very narrow interpretation of *Glucksberg* favored by Justice Alito's majority decision.[167] Such a view could lead to a rash of reductions and removals of the important protections provided by substantive due process and could be disastrous for the significant precedent securing those liberties in future cases.

CONCLUSION

The logical consequences for substantive due process protections following *Dobbs* cannot be overstated, particularly considering this Court's (or at least a subset of justices') willingness to extend its parsimonious view of the Fourteenth Amendment's incorporation of unenumerated rights beyond the right at issue in *Dobbs*. Part I of this Note outlined how the *Dobbs* majority interpreted the facts of the case; it then proceeded to analyze substantive due process, hearkening to the *Glucksberg* rule and retreating from the progress made by numerous lines of cases in recent history that extended protection to rights other than abortion access back to the much stricter standard found earlier in the Court's history.[168] Part II tracked the majority's justifications for resisting stare decisis as a strong enough doctrine to impede its ultimate decision to overturn precedent in *Dobbs* and examined the dissent's arguments that stare decisis should have given sufficient reason to uphold the precedent found in *Roe* and *Casey*.[169] Part III then put forward a theory of constitutional law as normal science, offered ways to sharpen the tools already provided by others in previous works, and analyzed the *Dobbs* decision through that lens to determine whether its result would best be categorized as further normal science or as a paradigm shift.[170] Finally, Part IV argued that *Dobbs* does not fit neatly into either of the two buckets: what we got from the *Dobbs* majority was not constitutional law operating as normal science, but it was also not a proper paradigm shift in light of the internal inconsistencies it generated between the various unenumerated rights other than the right to abortion access.[171] Instead, Part IV argued the *Dobbs* decision is best categorized as abnormal science because it failed to shift far enough away from previous decisions to constitute a new paradigm, but it simultaneously failed to adhere to the confines of normal science under the current constitutional paradigm established by the substantive due process precedent.[172]

Even if one takes seriously the majority's justifications for abandoning stare decisis in *Dobbs*, there is still room to criticize its decision as failing to fall within the description of constitutional law as an enterprise of normal science. While

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167. *Id.* at 2242–43.
168. *See supra* Part I.
169. *See supra* Part II.
170. *See supra* Part III.
171. *See supra* Sections IV.A–B.
172. *See supra* Section IV.C.

these criticisms are separate and distinctly grounded, both stare decisis and constitutional normal science provide useful lenses for determining the merits of justifications employed in cases that feature murkier constitutional law issues—of which substantive due process protections are an example *par excellence*—and give us a richer trove of resources upon which to rely in analyzing such decisions.