Dobbs and Civilization
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While the Dobbs decision was a welcome one for many, it was not so for others, dealing as it does with abortion, one of the most contentious issues of an increasingly divided America. This article considers the Dobbs decision in the light of other divisive legal decisions in this nation’s history. From a legal perspective, the Dobbs decision has some great benefits: it now forces those who wish to defend or expand abortion in this country to have to do so via the legal process (which will be harder for them to do), and should also strengthen respect for the rule of law and the Constitution in our country overall. All of this is contingent on people choosing to maintain civility while moving forward in a post-Dobbs America, of course, which is by no means guaranteed.

Civilization is fragile. We were reminded of this uncomfortable reality in Dobbs v. Jackson Women’s Health Organization, which overturned the constitutional protection of abortion first asserted in Roe v. Wade in 1972. The decision, anticipated for well over a month due to a leaked draft of Justice Samuel Alito’s opinion, was welcome news to those who have been fighting for the end of abortion for nearly five decades, but many progressives and libertarians were furious at what they saw as the Court’s war on women’s reproductive rights. Dobbs provided America with the occasion to be mindful of just how divided it is on a fundamental question of the first order. Can a civilized nation like America, conceived in liberty and dedicated to the idea that all humans are created equal, survive when a significant percentage of its population are unwilling to extend the most basic protections to prenatal life? What can be more barbaric than killing babies?

One cannot help fearing Yeats was correct when he wrote:

Things fall apart; the center cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

For now, the center may be holding. Anarchy remains held at bay. We hope and pray this continues to be the case. We can take some comfort...
in the fact that our judiciary no longer considers the killing of unborn persons a fundamental constitutional right. But although it will no longer receive constitutional protection, the thing itself will continue to exist in many states around the country. Barbarity is always knocking at the door. Civilization is always under threat. How do you maintain civility? It must be anchored in something solid, something real. When civility becomes mere politeness for politeness’ sake, it is difficult to see why it is worth maintaining. Civility only makes sense when it is connected to a civitas; politeness only makes sense when it is connected to a polity. Why remain civil, or polite, when your political community is crumbling? It is at such times that “the best lack all conviction, while the worst are full of passion—ate intensity.”

Abraham Lincoln understood the fragility of civilization. Consider his famous Lyceum Address. The danger of mob violence, he argued, goes beyond the fact that mobs may harm the innocent. The bigger problem is that they ignore the rule of law. Driven by outrage and a desire to bring about justice, mobs act out of passion rather than cold, calculating reason. Law, however, is an ordinance of reason, and following it requires (for all but philosophers) habituation. Our natural inclination is to act swiftly when we see injustice, but law demands a slow, deliberative process. As Lincoln observed, civilization depends upon law to elevate reason above passion.

But giving pride of place to reason is no easy task. Allowing criminals the benefit of a trial elevates reason above passion, and this is difficult. Providing criminals with lawyers to help them make their strongest defense elevates reason above passion, and this is difficult. Accepting the outcome of elections, legislative sessions, trials, and judicial decisions elevates reason above passion, and this can be very difficult. The difficulty is not simply that we must discipline our sense of justice to be patient. That is hard, yes, but more difficult still is not allowing anger to get the best of us when the law does not reflect what is right. Lincoln feared the center would not hold if good citizens became discouraged by a legal system that could not protect them. They might be willing to entrust their liberties to a demagogue, even one willing to knock down the established order. Mobs cannot be tolerated, he believed, and a love for the Constitution and its laws must be instilled in the hearts of every citizen. This was Lincoln’s answer: Passion must come to the aid of reason. But rather than a passion for justice, Lincoln would have us nurture a passion for patriotism that elevates obedience to the law.

Lincoln also recognized that the civility he advocated needed to be rooted in a political community worth loving. And the greatest threat to patrio-
tism in his day was not really mob violence, but the legal practice of chattel slavery. Abolitionists had become vocal in their disrespect for a frame of government that protected such an evil disregard of human dignity. William Lloyd Garrison called it an “agreement with death and covenant with Hell” as he lit a copy of the Constitution afire.\(^4\) The response to the abolitionists showed no more respect for the Constitution and the rule of law, as Elijah Lovejoy learned when his abolitionary printing presses were destroyed. Lovejoy and others lost their lives fighting over the issue of slavery—neither side cared much for their nation. Civilization really is a fragile thing.

Nothing underscores this reality more vividly than the divisive issues that cut to the marrow of our political bones. Sometimes the difficulty is finding grounds for a compromise that all contesting sides can accept while affirming their membership in the community and assuring one another of their devotion to peace and stability. But the most difficult problems are the ones which do not admit of compromise. In these cases, political efforts to forge agreement can backfire.

In the first half of the nineteenth century, Americans disagreed sharply on slavery, and political efforts to find compromise ultimately failed. Initial hopes of states heavily regulating and eventually prohibiting slavery faded the further south one traveled, and the fear that Congress would either abolish slavery or force it upon western states led to agreements, such as the Missouri Compromise, which were abandoned as soon as the political winds shifted. Eventually the Supreme Court stepped in, hoping the *Dred Scott* decision would settle things so that Americans, North and South, could go about their business without threatening to leave the Union.\(^5\) It was an attempt to preserve civilization, but it only made things worse.\(^6\)

In the second half of the twentieth and the first quarter of the twenty-first centuries, the issue that has tested the resolve of Americans’ commitment to civilization most severely has been abortion. Though not traditionally an area over which there has been much controversy, the sexual revolution of the 1960s and a concerted effort at about the same time to improve equality of opportunities for women led many to hold the position that such things as contraception and abortion should be treated as individual rights over which the government could practice little or no regulatory control. Without these rights, it has been argued, women will not be able to compete on an equal playing field with men at work. They must be able to plan their pregnancies so that they may plan their careers and, more broadly, their lives. From the standpoint of this argument, abortion is both a matter of autonomy (or individual liberty to rule oneself, or more simply, to choose) and equality (in this case, closing the disparities of economic inequality between men and women).
Most Americans have little quarrel with the goals associated with women’s equality. But using abortion as a means and giving it the same status as other constitutionally protected rights is rightly recognized by the Pro-Life movement as absolutizing the means and making it the end. How can terminating the life of an unborn human ever be justifiable? Is there no other way to support women in their professional careers? These and comparable questions are typical of those who oppose abortion.

The Supreme Court of 1973 made the same move it had made in 1857 with *Dred Scott*. In both instances, the Justices saw an intractable political debate about a moral issue, and they decided to act with the hope of preserving peace and national stability. The Taney Court hoped to settle the slavery question. The Burger Court hoped to settle the abortion question. The Taney Court used the Due Process Clause of the Fifth Amendment to create an individual right to own the body of a slave and to do with it as you want, a right that the United States Congress could not prohibit. The Burger Court used the Due Process Clause of the Fourteenth Amendment to create an individual right to own your own body and to do with it what you want, a right that state governments could not prohibit. Substantive Due Process plagues both cases.

In *Roe*, the Court did recognize that there are two human bodies involved in an abortion and thus admitted that states have an interest in preserving the life of unborn child. But because allowing the contending sides to find the means of their own compromise seemed fleeting, particularly because many on both sides did not think a compromise possible, Justice Harry Blackmun, writing for the Court, laid out a trimester framework for a compromise. Even those who would have been perfectly comfortable with the Court establishing a right to abortion were confused and dismayed by the legislative nature of Blackmun’s opinion. The basic idea was that as the embryo comes closer to viability, the state’s interest in protecting its life gains strength in the eyes of the law. This assumed that that prenatal life somehow becomes more human over the duration of the pregnancy, a nonsensical metaphysical claim into which the Court unwittingly stumbled in its effort to take abortion off the political table.

In *Casey v. Planned Parenthood*, the co-authored plurality opinion admitted that the trimester schema exceeded judicial authority, but upheld viability as the threshold for state prohibitions on abortion. *Casey* is basically *Roe II*. If there were a *Dred Scott II* that paralleled *Casey*, its argument would look something like the following: striking down the Missouri Compromise went too far, but the fundamental right to hold another human being in bondage is indeed the law, and the government can only regulate it under certain unspecified conditions that we the Court will
have to settle going forward. *Casey* made this move, and in doing so the Court committed the federal judiciary to being involved in each and every state law concerning abortion, because only the Court was capable of determining whether such a law was constitutional. If the Civil War had not erupted, the Court would have been doing the same thing every time Congress passed a measure relating to slavery. The result would have been what it was in the case of abortion, the elevation of a moral issue to the level of constitutional politics that favors extreme positions and makes efforts on the parts of citizens to persuade each other through reasonable argumentation nearly impossible.

When pro-lifers argued that abortion is immoral, their opponents were able to say that it is a constitutionally protected right. When pro-lifers offered reasonable ideas to limit abortions, their opponents were able to say that it is a constitutionally protected right. When pro-lifers sought to provide women with information about alternatives to abortion, they were told that they were messing with a constitutionally protected right. Constitutional rights are conversation killers in the realm of public policy. *Dobbs*, we hope, will force those who favor abortion to defend it in state legislatures with arguments rather than short cuts. And pro-lifers will have an easier time making moral arguments in legislative assemblies rather than in courts. Judges are trained to focus on legal rather than moral questions, but legislatures are not inhibited from more full-throated moral arguments. Generally, pro-lifers have a certain advantage in legislative chambers and pro-choicers tend to be at an advantage in court rooms, or at least they were when the Court insisted that there was a legal right to an abortion. In the aftermath of *Dobbs*, pro-choicers will be pushed to defend abortion on moral grounds—which is a more difficult task than relying on the constitutional-right trump card.

But more important than the renewal of argumentation, the greatest good of *Dobbs* is that it should lead to a renewed appreciation for the rule of law and the Constitution among Americans. This should be particularly true of American Catholics. Many Catholics still have a healthy patriotism in America, but a lack of respect for the law of our land has clearly grown, particularly among more traditional Catholics in recent years. Books by lawyers like Adrian Vermule, political scientists like Patrick Deneen, and even theologians like Scott Hahn have argued that America’s Constitution is a product of liberal thought and that liberal thought is opposed to the true teachings of Christ’s Church. Oddly enough, American Catholics were not making these arguments against the Constitution prior to the 1970s. They began, as best I can tell, at about the time of *Roe v. Wade*, have slowly gained momentum, and today are becoming somewhat popu-
lar. Constitutional protection for same-sex relationships and other things that the Church teaches are wrong have only served to add fuel to the fire.

These traditional Catholics have become abolitionists of our day. They have taken up Garrison’s cry that the Constitution was a deal with the devil. As with the abolitionists, the anti-liberal Catholic position is understandable. They are outraged by injustice. They are angry at the disregard for human life that has enjoyed protection under the Constitution. The abolitionists, however, could point at the Constitution itself as accommodating slavery. Anti-liberal Catholics have blamed the Constitution, but they would have been better blaming the Court for misusing its constitutional authority in cases like Roe.

*Dobbs* shows that the Constitution allows political institutions to correct themselves. This should give us hope. But it is also just the beginning. After all, from the standpoint of constitutional jurisprudence, the problem with *Roe* and *Casey* was not simply that they allowed the evil of abortion. They were also bad constitutional arguments. And a slew of other individual rights, many of them controversial, rest upon almost identical reasoning: The Due Process Clause of the Fourteenth Amendment is used to require states to protect fundamental liberties, including privacy, which is not mentioned by name in the Constitution. What counts as a fundamental privacy right and what does not will be left to nine Justices in black robes. The Court would do well to step away from Substantive Due Process as much as possible and to walk back as many Substantive Due Process rights as possible. This will likely be unpopular in the short term, but it will lead to greater long-term respect for the Court and, likewise, the Constitution.

The argument for doing so is not difficult to make. The Justices do a respectable job of it in *Dobbs*, and it goes something like this: Abortion is a difficult moral question over which Americans are deeply divided. Unless it is exceedingly clear that the right to an abortion is rooted in the Constitution, the Court has no business trying to settle what is really a controversial policy debate that cuts to the moral marrow of our political bones. The people themselves must settle the issue through reasoned debate. The capacity to do so is necessary to civilization.

Yes, civilization is fragile. And when the Court thinks it must intervene to preserve it, we should take quick stock of ourselves because we are probably in bad shape. In *Dobbs*, the opposite is happening: The Court is giving the people the responsibility of figuring things out, of entering civil discussion and working our way to justice—or so we hope and pray. We must remember that our Constitution depends upon civilization, not the other way around. It was written and ratified for a civilized people. In the words of Benjamin Franklin, we have a republic, if we can keep it.
Notes

1. Dobbs v. Jackson Women’s Health Organization, 597 U.S. ______ (2022). The case was decided June 24, 2022. Roe v. Wade, 410 U. S. 113 (1973). Earlier versions of this paper were presented at the American Political Science Association’s and the Society for Catholic Social Scientists’ annual meetings. Many thanks to fellow panelists and members of the audiences whose comments, questions, and suggestions improved this essay reflection on the case.


