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Dobbs Is Not a Religion Case

I was unhappy, but not surprised, to see *Canopy Forum* including *Dobbs v. Jackson Women's Health Organization*, the case that overruled *Roe v. Wade*, in a call for submissions under the rubric, "Law and Religion in Pressing Supreme Court Cases." I was not surprised because, for years, many critics have labeled pro-life opposition to *Roe* a purely religious viewpoint. This labelling continued after *Dobbs* was decided. Eddie Tabash, the Board Chair of the secular Center for Inquiry, described the *Dobbs* decision, in a widely disseminated email, as an imposition of "religious dogma on the entire nation."

But there is nothing inherently religious about qualms concerning abortion, nor is there anything specifically religious in the *Dobbs* majority opinion. Abortion is, as Justice Samuel Alito wrote for the majority, a "profound moral issue." But, it is not a purely religious one.

The idea that there can be no secular anti-abortion position ignores the Pro-Life position of people like Nat Hentoff, columnist for *The Village Voice* from 1958-2009, who called himself a proud "[Jewish Atheist](#)." It also stunts the moral vision of secularism and exacerbates the religious/non-religious division in America.

The argument that any outcome other than *Roe* would have imposed a religious position upon society was first articulated by the constitutional scholar Larry Tribe in an influential 1973 [article](#) for the Harvard Law review.

The heart of Tribe's argument was that in light of the absence of any "general agreement" as to when "the fetus should be regarded as a human being with independent moral claims," and considering that conception does not occur in a moment but is a "complex and continuing process," "the question when human life truly begins asks not for a discovery of the point at which the fetus possesses an agreed-upon set of characteristics which make it human, but rather for a decision as to what characteristics should be regarded as defining a human being."

That latter question is religious in nature. Answering it does not call for "an inference or demonstration from generally shared premises, whether factual or moral, but a statement of religious faith upon which people will invariably differ widely."

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According to Tribe, for the Court to have endorsed any particular view of when life begins would thus have constituted an unconstitutional establishment of religion.

Indeed, Tribe went further, arguing that when "organized religious groups" "play a pervasive role" in an area that is inherently religious, "all substantive governmental controls within the 'entangled zone' could quite plausibly be deemed tainted." So, any government regulation of abortion in the early stages of pregnancy would constitute a forbidden entanglement of Church and State.

In contrast, viability, the standard the Court used in *Roe* to permit abortion regulation, could be justified by the state's secular interest in preventing murder. Everyone agrees that the killing of a viable fetus delivered prematurely would constitute murder. There is no reasonable way to distinguish that act of killing from an abortion committed moments before birth. Therefore, viability marks the outer limit of permissible state regulation on abortion, precisely as *Roe* held.

What Tribe could not see is that his argument justifying post-viability abortion regulation did not support, or even connect with, his argument about the religious nature of any earlier regulation.

To see this, consider the slavery debate in 1850s America. At some level, that debate was similarly concerned with whether the beings held in slavery "should be regarded as...human being[s] with independent moral claims." Although Americans could not agree on "what characteristics should be regarded as defining a human being" and had recourse to religious arguments on both sides, this debate was not a purely religious one. Instead, the slavery debate drew upon all of the normative and factual resources of Western Civilization.

But Tribe's error went beyond misunderstanding the nature of religious argument. His more fundamental mistake was in concluding that the presence of intractable debate means that a matter is beyond determination. As the philosopher Hilary Putnam wrote in *The Many Faces of Realism*, "No sane person should believe that something is subjective merely because it cannot be settled beyond controversy." After all, Americans today cannot even agree whether it is getting warmer.

The slavery debate was judged a stalemate, yet it was ultimately settled, the climate question is on the way to being settled, and the nature of early human life will one day also be settled, or at least will have advanced toward agreement.

Having set aside these false premises regarding the inherently religious nature of anti-abortion positions premised on the humanity of an unborn child, it is now possible to consider the *Dobbs* opinion itself. Is *Dobbs* a decision premised on religious claims and assumptions?

Dobbs is a long opinion, but its essential movement is simple. The first step was to show that abortion is not a right in the Constitution. The right to choose an abortion was grounded in *Planned Parenthood of Southeastern Pa. v. Casey*, the case that reaffirmed *Roe* in 1992, in substantive due process — a substantive reading of the protection of "liberty" in the Due Process Clause of the Fourteenth Amendment. Under this approach, the Supreme Court has recognized rights as fundamental that are not mentioned in the Constitution. Although not in every case, the Court has limited this category to those rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Access to abortion was traditionally highly regulated, and even widely prohibited, and does not qualify under this historical standard.

The right to abortion fails as an independent constitutional right because it is not grounded in history and tradition.

The second step was to distinguish the right to abortion from the right of privacy that the Court had previously recognized. This right involves the autonomy of the citizen to make certain

intimate and personal choices free from government coercion. But in the case of abortion, all a court can do is balance the interests of the pregnant woman against the interests of what the *Roe* and *Casey* opinions called “potential life.” The people of each State might balance those interests differently.

The final piece of the argument was to distinguish the right to abortion from other precedents involving personal autonomy. Here the *Dobbs* opinion stated its essential position: abortion is different because it destroys what the abortion caselaw considers “potential life” and what the Mississippi 15-week ban on abortion upheld in *Dobbs* refers to as an “unborn human being.”

That is why the *Dobbs* opinion could conclude that overruling *Roe* does not undermine other cases in the autonomy/privacy line. Only the decision to have an abortion involves that unique consequence.

Undoubtedly, those who criticize *Dobbs* as a case based on religion would say that this last point makes the very mistake that Tribe warned against: deciding that human life begins at conception. For Tribe, that could only be a religious conclusion.

But the *Dobbs* opinion does not decide when human life begins. The right to abortion fails as an independent constitutional right because it is not grounded in history and tradition. Because of that failure, all the Court needed to demonstrate in distinguishing other cases is that these precedents involved less weighty moral claims. No one disputes that life in the womb is something uniquely important. That is all the *Dobbs* opinion needed to make its point.

I am not suggesting that this reasoning is inevitable or persuasive. I only mean to suggest that the *Dobbs* opinion is part of the general reliance on history to define rights that the originalist bloc on the Court utilizes in many fields. The general goal of this originalist movement, which has been going on in constitutional jurisprudence for years, is to lessen reliance on the independent moral judgment of judges out of a fear that such judgments will inevitably be subjective and idiosyncratic. This historical approach was not dominant at the time *Roe* and *Casey* were decided, but it is now.

There is nothing religious about this reliance on history. In fact, in its skepticism about moral reasoning, originalism’s emphasis on history is quite secular, even relativistic and nihilistic.

Roe and *Casey* refused to decide when human life begins, as did Tribe. The *Dobbs* opinion was similarly agnostic. Ultimately, the only difference among them is that *Roe*, *Casey* and Tribe left the decision of this question to the pregnant woman, while the *Dobbs* Court, relying on history, left it with democratic decision-making.

The *Dobbs* decision also dismissed *stare decisis* arguments for retaining *Roe* and *Casey*. Critics have seized on this, but it is unclear why. It took 58 years for *Brown v. Board Of Education* to overrule *Plessy v. Ferguson*’s separate but equal approach to racial segregation and *Plessy* was applied numerous times over that period. Who cares how long it takes to overrule a case if that case was wrongly decided?

For that matter, when the Court finally overruled *Bowers v. Hardwick*, the 1986 decision that permitted the criminalization of same-sex relations, in *Lawrence v. Texas*, the Court gave little weight to the searching stare decisis inquiry *Casey* required in refusing to overrule *Roe*. *Bowers* was overruled essentially because the Court changed its mind. And a good thing, too.

But perhaps what the critics who consider *Dobbs* to be a religious decision really mean is not that anything the Court actually said or did was specifically religious, but that the whole edifice — the whole 50-year struggle, the whole raft of political organization and manipulation of the confirmation process to finally achieve a majority that would overturn *Roe* — has been really religious in its motivation from the start.

That would explain the [media's](#) emphasis on the fact that the five Justices who joined the majority opinion — Samuel Alito, Amy Coney Barrett, Neil Gorsuch, Brett Kavanaugh and Clarence Thomas — were all raised Catholic.

Furthermore, they are all said to be, in the words of Steven Millies, Professor of Public Theology at the Catholic Theological Union in Chicago, "[particular kinds of Catholics, traveling in particular Catholic circles.](#)" They are a product of Catholicism's conservative side.

The problem with this approach to *Dobbs*, however, is the implicit assumption that only a conservative religious orientation could account for opposition to, or even discomfort with, abortion.

So, naturally, they would overturn abortion rights.

There is undoubtedly something to this view. Moral formation probably accounts for a lot of decisions that judges make. One of the worst aspects of originalism's historical emphasis is that it seeks to deny and obscure this. One of the most fatuous aspects of the confirmation process is that it allows judicial nominees to avoid serious questioning about their worldviews.

The problem with this approach to *Dobbs*, however, is the implicit assumption that only a conservative religious orientation could account for opposition to, or even discomfort with, abortion. That is why this criticism of *Dobbs* as being religious contributes to the moral stunting of secularism.

If it were not for the issue of abortion, the idea that a human life begins at conception would not even be controversial. For when else could it begin? And even if, as Tribe argued, conception is not a moment, but a process, it still does come to an end. When that end does come, the result is the beginning of a new human life. That is so, even though many of the resulting developing human beings will never be born because of one mishap or another.

This conclusion is only rejected because of a fear that, if accepted, the inevitable result would be a total ban on abortion, maybe even constitutional protection for life in the womb.

But those outcomes do not necessarily follow. Tribe was right that the decision as to when "the fetus should be regarded as a human being *with independent moral claims*" is contested. Thus,

the issue is not when a human life begins, but how much of a moral claim that human life should be regarded as making at a very early stage of development. In answering that question there is a lot to consider, including, obviously, the societal sexism that overwhelmingly imposes the burdens of childrearing on women.

In other words, even if human life does begin at conception, society might decide to permit abortions, especially in the early stages of pregnancy.

America will be better off when that debate goes forward openly, without the use of the word “religious” as invective. In fact, *Dobbs* may finally push us to have that debate. This time, including secularists. ♦



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