Advance Sheet

DOBBS-SMACKED

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Analysis of the existence (or not) of judicial power ought not to depend in the first instance on whose ox is gored. During the 1960s and 1970s, so-called conservatives condemned the Supreme Court for supposedly overstepping its legitimate bounds and "making" law, instead of merely applying it, with political effects far beyond the appropriate limits of judicial authority. *Roe v. Wade* was itself held out as a prime example of the alleged phenomenon. Liberals demurred then but today decry *in haec verba* the supposedly illegitimate exercise of judicial power by a more conservative Court, moving in a very different direction. On this ground, among others, they have condemned *Dobbs v. Jackson Women's Health Organization* as an overextension of judicial power in overturning *Roe*. Meanwhile, those defending the Court now insist that it is just righting the balance upset by *Roe*, without apparently seeing the problem in using judicial power to undo what they perceive to be an excessive use of judicial power. Or, more to the point, upsetting a way of doing things that has existed for nearly half a century in the wake of *Roe*, thereby injecting the Court into both politics and social relations in a salient way. *Dobbs* has thus added to the perception, even if begun in an earlier day, of the impermanence of principle in the face of nothing but a Supreme Court political game.

To be sure, it is a legitimate question to ask anew where the Court got any such power to add or subtract rights and whether it comes by it fairly. The founders are famous for having referred to the judiciary as the "least dangerous branch," which will serve now as only cold comfort for 2022 liberals as much as it did earlier for 1970s conservatives. Judicial power did, however, conform for a time to this original billing. The founders' great progenitor, John Locke, thought so little of the importance of the courts that he did not even describe them as a fundamental governmental activity. He relegated them in his separation-of-powers scheme to a purely subsidiary role within the executive department, assisting the latter in carrying out what the legislature had prescribed by law. Although the draftsmen of the Constitution elevated the courts to a more significant role, they still listed it third among the constitutional departments and seem to have believed they'd kept its activities narrow in scope.

Famously, the founders omitted any mention in that document of judicial review for the Supreme Court, the ultimate source of much of the Court's power to affect the legal and political landscape. *Marbury v. Madison* changed all that, of course, though not necessarily once and for all. Even Chief Justice Marshall did not go to the far limit of appointing the Supreme Court as the ultimate arbiter of all constitutional questions. As has been frequently pointed out, the substance of his decision and his backwards way of deciding it (considering jurisdiction last) could be construed as limiting it in effect to a case in which the stated constitutional scope of judicial power was being changed by a congressional enactment. In short, judicial review and supreme judicial power might have been deemed to exist only amidst the Constitution's checks and balances, where necessary to protect

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the Supreme Court's constitutional turf from encroachment by Congress.

Marshall's stirring edict that it is "emphatically the province and duty of the judicial department to say what the law is" unquestionably implied a far wider scope for the doctrine, and judicial power, than merely that. At the same time, it is hardly irrelevant that judicial review was never used a second time during his more than 30-year tenure. Or thereafter either, until it showed up again 54 years after *Marbury* in *Dred Scott v. Sanford*. There, Chief Justice Taney used Marshall's same principle and assumed power not just to strike down the Missouri Compromise but to offer up various supposedly authoritative but execrable ruminations regarding the nature and status of African Americans.

The long previous silence, together with the demonstrated double-edged character of judicial review, at least makes one wonder how persuasive, necessary, or beneficial the doctrine, with its sweeping constitutional power for the courts, really is. No less a constitutional exegete than Abraham Lincoln, who never stinted in his praise of his forebears, had nary a kind word for Marshall. Perhaps he recognized better than most that judicial review, and judicial power more generally, might be as much a force for evil as for good. Indeed, his analysis seems to have been that the Civil War was the deadly consequence of the misuse of a presumed judicial authority that, in Lincoln's mind, did not meet the test of constitutional sufficiency.

Neither the cautionary tale suggested by *Dred Scott* nor the later misuses by the early New Deal Court prevented a further increase in the scope and authority of judicial power in our own time. It received a significant additional boost in the 20th century during the Warren Court. At the same time, any scruples about increasingly powerful courts may have been diminished for a while by the expectation that the courts would, or at least should, be "nonpolitical" in the exercise of their powers. In the 19th century, the idea would

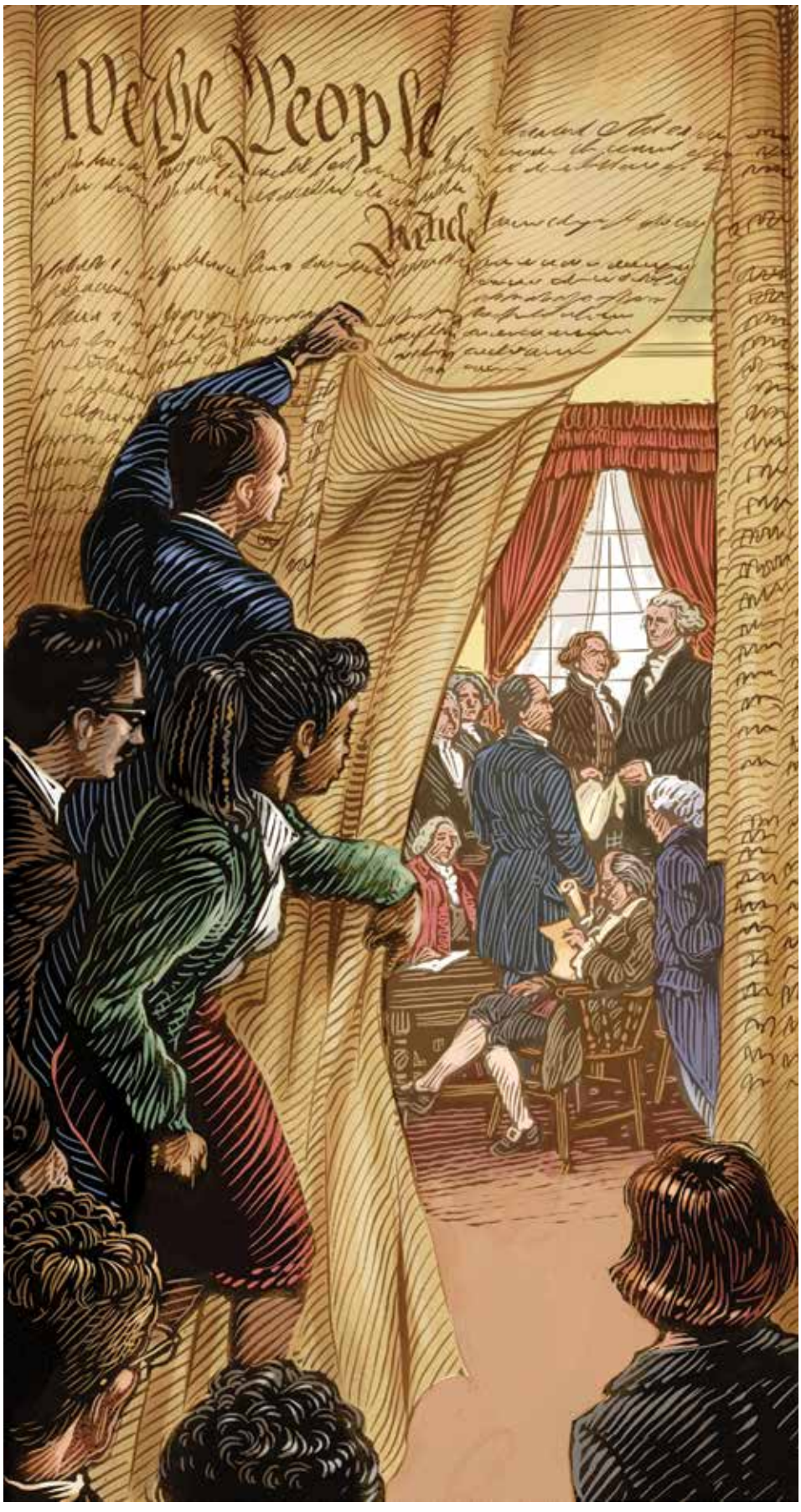

Illustration by Tim Foley

have seemed risible, as the courts tended and were understood to be as "partisan" as the other departments. It gained force in more modern times even as the courts gained more power. But as the 20th century has rolled into the 21st, the nonpartisan ideal has slowly lost its credibility, not to mention its efficacy, resulting in what could be viewed as the worst of all possible constitutional worlds: powerful courts acting upon openly political motives. In this respect, *Dobbs* seems only the most recent in a long line of cases in the last 75 years in which the courts have taken for themselves, or at least accepted, a decisive role in some of our most fraught political controversies. Power does as power can.

Judicial Power and Politics

With judicial power now a fact of political life, for better or for worse, this history might at least serve as an admonition to the high court in particular to act with the highest possible prudence in exercising judicial power. *Dobbs* seems a poor example of that. Regardless of the merits of its theoretical argument about abortion rights, the Supreme Court boldly injected itself into a troubled political environment that the Court had itself in some sense created. And while there is some merit to righting wrongs, if that's what the Court believed it was doing, there should also be some notion, particularly in a "conservative" Court, of restraint before taking any such action. It is not the least of the ironies in *Dobbs* that Justice Alito himself remarks at the start that the point of precedent and stare decisis is in part to curb judicial hubris. To conclude that one should attempt, on the basis of one's individual theory of things, to try to put toothpaste back in the tube, acting as if the prior half century of political activity, legislative initiative, and court decision-making presented no objection to redoing the analysis from scratch, hardly seems to cohere with any notion of judicial conservatism or moderation.

Nor, for that reason, does *Dobbs* qualify as a true abnegation of power, as the majority sometimes seems to try to make it. Just as not to decide is to decide, so too to decide *not* is a decision. In the end, however, the real question is how judicial power is applied, what end it seeks. Justice Alito in *Dobbs* opted to use the Court's power to reconsider whether the right to obtain an abortion is a "constitutional" right. But however much persuaded he was by his own conclusions, and convinced of his prudence, his analysis presents several serious problems, not least in underestimating the true complexity of the problem.

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Fundamental Rights and the Constitution

Justice Alito began his analysis inauspiciously, to say the least: "We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion." It is difficult not to be gobsmacked by this, by a formulation of the problem rather at odds in fact with what might be expected from an asserted "originalist." It can easily be shown that the original Constitution, the one signed by the drafters at Philadelphia, was never intended or designed to "confer" rights at all. In fact, it had in it only one mention of "rights." This was not in connection with free speech or the right to bear arms or due process. It referred to copyrights.

The reason for this silence about other, more fundamental rights is that, as was said in the Declaration of Independence, people are not given rights by the Constitution but "endowed" with them by nature. The purpose of government, and therefore the Constitution, was not to confer by law what was given by nature, a contradiction if there ever was one, but to "secure" rights, i.e., to prevent them from being interfered with by society or others. If one goes in the first instance to the original Constitution to find what rights are being "conferred," one is certain to come up mostly empty-handed.

Of course, there was the Bill of Rights, the first 10 amendments to the Constitution. They did not "confer" rights either. James Madison, who drafted the original Virginia plan that became the Constitution and wrote the Bill of Rights too, in fact resisted the effort to amend the Constitution in this way, believing that a statement of rights had no place in that document. He relented only as a tactical concession to ensure that the people of Massachusetts, and others, would vote to adopt the Constitution, upon a promise that a bill of rights would later be added. Even then, when he drafted the amendments, he included the Ninth Amendment, which made clear that what was being done was attempting to articulate only some of the rights that *previously* existed, by nature or otherwise, and not to confer rights that could be viewed as derived from the Constitution itself. Strangely, in *Dobbs*, Justice Alito misdescribes, and in fact seems to misunderstand, these considerations applying to the Ninth Amendment.

To be sure, allowances need to be made for the Fourteenth Amendment, not to mention the tradition that has grown up around it and its neighbors as a conferring of rights rather than a protection for them. These, among other things, have

led to the loose expression "constitutional rights" when speaking of what is derived from nature, not the Constitution. To not lose sight of the principle, however, one ought to consider the negative styling of the Fourteenth Amendment when considering whether what it does is affirmatively grant rights, rather than acknowledging them, while defensively preventing those natural rights from being taken away.

Do Rights Exist by Nature?

Justice Alito does seem to come around finally to the idea that rights at least could exist by nature, when he acknowledged that such rights might exist if "deeply rooted in [our] history and tradition . . . and essential to our Nation's scheme of ordered liberty." Unfortunately, this hardly rescued the analysis, which still betrayed two fundamental and interrelated mistakes. First, it appears that, in his view, rights either exist as a result of or under the Constitution, or they don't. If they do, they are in a sense absolute, presumably because the Constitution cannot both give and take away at the same time, unless a principle and exception are so specified. Everything then becomes a matter of textual interpretation. If all or the most important rights are essentially natural, however, and the Constitution exists to protect or secure them, then, on the one hand, rights would seem to have a broader scope and, on the other, the question becomes to what extent the rights can and need to be regulated or curtailed to provide for common security.

This is exactly what was happening with the "right" to obtain an abortion in the wake of *Roe*, where a half century of jurisprudence had been spent determining whether and to what extent the asserted right should be limited. As he has in the case of gun rights, where a similarly absolutist approach has prevailed, Justice Alito seems to take instead an all-or-nothing stance. If the right exists, it cannot be abridged. If it can be abridged, it is not a right. Strikingly, he seems not to have noticed that he has modeled his view of rights on the same extreme approach to rights that he would otherwise deride in the case of the First Amendment.

Second, and in a similar vein, when he turned to "ordered liberty," where a natural rights discussion would most seem called for, he instead considered what statutory restrictions existed at the time of the founding, elevating these statutes to the role of determining what the rights are, rather than to what limitations were permissible. They are relevant but not definitive with respect to the former. They should play a much larger and direct role in the latter. The proper approach to these statutes would seem to be to inquire whether they imply that a right to obtain an abortion might fall within the purview of a natural right, while still being capable of some limitation in the public interest. Strikingly, as the "quickening" laws show, the people of the founding era seem to have made that decision in favor of only some restrictions, suggesting they viewed an abortion as a matter of public concern only after a certain time in a pregnancy, otherwise *allowing* women to decide for themselves.

Privacy and the Constitution

In the end, the question of what is or is not a right, natural or "constitutional," and to what extent it can be limited, is a far more complicated one than Justice Alito seems to have understood. It requires a far more sophisticated understanding of the structure of our regime. A few elements are critical to the analysis. There can be little question that the founders' natural rights or, if you will, concept of "ordered liberty" included a "right" of privacy. To say otherwise is in some sense to misunderstand the Constitution radically. To a very great extent, the Constitution is all about privacy, an implementation of the Declaration's forceful invocation of private and personal rights, i.e., one's private interest in life, liberty, and pursuit of personal happiness, to be protected by governmental strictures deriving from the consent of the governed. There is a private sphere and a public one—the latter restricted by the first importance of the former—which also affect the procedures (laid out in the Constitution) that are consistent with them.

In decisive respect, human beings in the founders' analysis are, by nature, free to do what they want in their private lives. Government protects them in this private pursuit of their happiness, by limiting it only through its "just" powers and only to the extent necessary to achieve the public goals (stated generally in the Constitution's preamble), which include ensuring no interference with others' similar pursuit of their self-interest. Of course, not every private interest is a "right," but those that are will always be found within or deriving from the private sphere. To know whether what we are talking about—the right to obtain an abortion—is a natural right, one might, indeed should, ponder what the founders meant by the identified rights of life (in particular the right to self-preservation), liberty, and the pursuit of happiness. Justice Alito purports to be answering this question but, as suggested, does so on the wrong principles.

In deciding these questions now, we are not confined to the founders' scientific understanding of the matter, no matter how original. The progress of science, and our understanding of the entire experience, may require us to analyze the issue of pregnancy and abortion differently, which may call upon us to answer the question and assess the balance differently. Nothing about "originalism" or the analysis of rights requires that we proceed on mistaken facts or untruth, even if genuinely believed by the founders. ▪