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The Democratic Deficit of Dobbs

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Overturning the fifty-year-old constitutional right to abortion, Dobbs v. Jackson Women's Health Organization *wrapped itself in the mantle of the rule of law. The* Dobbs *Court claimed that* Roe v. Wade *and* Planned Parenthood of Southeastern Pennsylvania v. Casey *had lawlessly departed from the Court's established history and tradition test for determining whether an unenumerated right is fundamental and protected by the Constitution. The actual history and tradition test, the Court said, only protects a claimed right as fundamental if positive law had affirmatively protected it when the Fourteenth Amendment was ratified. Seeing only abortion restrictions in that narrow time period, the Court concluded that the right to abortion is not a fundamental right.*

Rule of law values, however, condemn rather than justify Dobbs*'s method and holding.* Dobbs *is an act of judicial discretion, no less so for being unacknowledged. Since the 1960s, the Court has relied upon at least three versions of the history and tradition test for identifying fundamental rights.* Dobbs *created a fourth, overtly originalist test with roots in the 2010 Second Amendment incorporation case,* McDonald v. City of Chicago. *The first and most established version from* Griswold v. Connecticut*, however, is not originalist. It is doubly dynamic. First, under* Griswold*'s version of the history and tradition test, recent precedents count as much or more than longer-standing legal traditions. Second, the* Griswold *Court expected that the declaration of a new fundamental right would pave the way for future fundamental rights claims.*

Stripped of its rule of law veneer, Dobbs *can only justify its originalist methods and result by reference to the originalist, normative justification of popular sovereignty. But* Dobbs *also fails on that ground.* Dobbs*'s originalist history and tradition approach is fundamentally undemocratic and at war with the ideal of popular sovereignty. This Article demonstrates that the history surrounding women and abortion in the nineteenth century makes any popular sovereignty justification for* Dobbs*'s originalism impossible—*

* Professor, University of San Diego Law School. Many thanks to David McGowan, Mila Sohoni, and Mike Ramsey. They are the best colleagues one could wish for. Larry Solum generously provided invaluable comments. Any mistakes are mine, not theirs.

as well as anachronistic and incoherent. The positive law protections for abortion or contraception that Dobbs *demands would never have existed in the nineteenth century for reasons having nothing to do with "the people's" views on abortion. Robust social norms about gender and sexuality guaranteed both women and men's silence in the face of a mid-nineteenth-century wave of abortion restrictions. In fact, without legal penalty, "the people" obtained abortions and used contraceptives throughout the nineteenth century.*

Dobbs*'s originalist error cannot remain confined to abortion if its methods are applied consistently. Yet the Court claimed that* Dobbs *does not portend a reversal of other fundamental rights cases. If true, that condemns* Dobbs *as a selective application of its supposed premise—that is, a political act of judicial hypocrisy. Consistently applied,* Dobbs*'s methods put contraceptive access on the chopping block.*

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INTRODUCTION

"*Roe* was egregiously wrong from the start," declared Justice Alito in *Dobbs v. Jackson Women's Health Organization*, a scathing opinion that extinguished the fifty-year-old constitutional right of women to access abortion.[1] A right to abortion, he wrote, had no basis in the Court's substantive due process jurisprudence, either as a matter of "history and tradition" or under the Court's prior precedents protecting the right to privacy in matters relating to the decision whether to bear or beget children.[2] In the wake of *Dobbs*, states and the federal government can now regulate abortion as they see fit.[3]

Dobbs adopts a new, narrow, originalist history and tradition test. This new test shakes the foundation upon which rest the rights of married and unmarried persons to use and purchase contraception,[4] the right of same-sex partners to engage in intimate sexual conduct in the home,[5] and the right to same-sex marriage.[6] None of these were "protected rights" in

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

2. *See id.* at 2260 ("We have held that the 'established method of substantive-due-process analysis' requires that an unenumerated right be 'deeply rooted in this Nation's history and tradition' before it can be recognized as a component of the 'liberty' protected in the Due Process Clause." (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

3. As a result of *Dobbs*, "A law regulating abortion . . . is entitled to a 'strong presumption of validity' . . . [and] must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id.* at 2284 (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)). Adding, "These legitimate interests include respect for . . . prenatal life . . . the protection of maternal health . . . the elimination of [ ] gruesome or barbaric medical procedures; . . . integrity of the medical profession; the mitigation of fetal pain; and . . . prevent[ing] discrimination . . . ." *Id.* (citing Gonzales v. Carhart 550 U.S. 124, 157–58 (2007)).

4. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (right of married persons to obtain contraception); Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (right of unmarried persons to obtain contraception).

5. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

6. *See* Obergefell v. Hodges, 576 U.S. 644 (2015). *Dobbs* does not endanger the right of individuals to marry persons of a different race. When the Fourteenth Amendment was ratified, many

1868. States and the federal government had free rein to regulate or ban these acts, and many did so.[7] The federal Comstock Act and state equivalents limited access to contraceptives and contraceptive information.[8] States banned sodomy (and unmarried sex) of all kinds.[9] No state permitted same-sex marriage.[10]

Dobbs, Justice Alito reassured, does not call these rights into question. "Abortion is a unique act," he wrote, because abortion extinguishes potential life.[11] The right to marry a person of the same sex, to use or buy contraceptives, or to have sex with a consenting adult pose no like dangers.[12]

True, they pose no like dangers, but, under this narrow, originalist version of the history and tradition test, that fact is completely beside the

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states did in fact ban interracial marriages. *Loving v. Virginia* struck down such laws both because they violated the due process clause and because they violated the equal protection clause. 388 U.S. 1, 12 (1967) (striking down Virginia's anti-miscegenation law because denying the "fundamental freedom" of marriage on the "unsupportable . . . basis" of "racial classifications . . . is surely to deprive all the State's citizens of liberty without due process of law"). *Dobbs*'s originalist approach to fundamental rights leaves *Loving*'s equal protection reasoning unscathed. *Id.* at 11–12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause" because it is "designed to maintain White Supremacy").

7. For more on this, see *infra* notes 506–25 and accompanying text (discussing federal acts and subsequent state laws).

8. Comstock Act, ch. 258, § 2, 17 Stat. 598, 598–600 (1873) (previously titled An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use) (prohibiting the mailing of "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion"); *see also* MARY WARE DENNETT, BIRTH CONTROL LAWS: SHALL WE KEEP THEM, CHANGE THEM, OR ABOLISH THEM 10–12, 14 (1926) (detailing state law prohibitions on the selling of, advertising of, possession of, or giving of information about contraceptives, against bringing them into the state or even discussing them privately).

9. See *Lawrence*, 539 U.S. at 569, recognizing this fact but discounting its importance because states did not enforce these laws rigorously.

10. *See Obergefell*, 576 U.S. at 737 (Alito, J., dissenting) (opposed on the grounds that there was no history and tradition of protecting same-sex marriage because "no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court" created that right "in 2003," and noting that the right to same-sex marriage was not "deeply rooted in the traditions of other nations" either as not one extended that right until 2000); *see also id.* at 738 ("[Objecting that the companionate] understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. [Which] [f]or millennia, . . . was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.").

11. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280 (2022) ("[T]he right to abortion . . . uniquely involves what *Roe* and *Casey* termed 'potential life.'" (first citing Roe v. Wade, 410 U.S. 113, 150 (1973); and then Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992))); *see also id.* at 2261 (opining the dissent "evinces [little] . . . regard for a State's interest in protecting prenatal life.").

12. *Id.* (chiding the dissent for failing to recognize this distinction).

point. If positive law circa 1868 did not actively protect these rights, then consistent with *Dobbs*, the Court should uphold restrictions on them so long as a state has a "rational basis" for doing so. The originalist history and tradition test entails that legislative restrictions on such rights must be sustained as long as they are "rationally related to a legitimate state interest"—whether public health, safety, or even morality.[13]

The *Dobbs* Court claims that the rule of law justifies both its originalist method and results.[14] *Dobbs* starts with the premise that the declaration of new fundamental rights is presumptively illegitimate.[15] *Dobbs* "carefully" articulates the claimed right at the most specific level at which *some* relevant history and tradition can be found.[16] It then asks whether American law actively protected that right around the time the Fourteenth Amendment was framed and ratified.[17] Under *Dobbs*, a right is fundamental only if a history and tradition of affirmatively protecting such a right exists.

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13. *Id.* at 2283 ("States may regulate abortion for legitimate reasons . . . ."); *id.* at 2284 ("[U]nder the Constitution, courts cannot 'substitute their social . . . beliefs for the judgment of legislative bodies.' [Deference is required] even when the laws at issue concern matters of great social significance and *moral* substance." (emphasis added) (citing Ferguson v. Skrupa, 372 U.S. 726, 729–30 (1963))); *id.* (with approval as upholding Congress's legitimate moral interest in eliminating a "particularly gruesome or barbaric medical procedure[]"); Washington v. Glucksberg, 521 U.S. 702, 731 (1997) (employing the rational basis test and sustaining Washington's ban on physician assisted suicide because it furthers the state's legitimate "interest in protecting the integrity and ethics of the medical profession"); *see also* Gonzales v. Carhart, 550 U.S. 127, 146 (2007) (concluding that Congress's ban on D&E abortions "furthers *the legitimate interest* of the Government in protecting the life of the fetus that may become a child," the life of which the Court acknowledges would be terminated by another type of late-term abortion (emphasis added)); *Gonzales*, 550 U.S. at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."); *Gonzales*, 550 U.S. at 157 (holding that the government has a legitimate "interest in protecting the integrity and ethics of the medical profession" (quoting *Glucksberg*, 521 U.S. at 731). *Cf.* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (holding that consistent with the First Amendment states could ban nude dancing as public indecency under their "traditional police power[s]" because such a ban "furthers a substantial government interest in protecting order and morality").

14. *Dobbs*, 142 S. Ct. at 2243 ("It is time to . . . return the issue of abortion to the people's elected representatives. . . . [t]hat is what the Constitution and the rule of law demand.").

15. *Id.* at 2245 ("The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text."); *id.* at 2247–48 ("[T]he Court . . . 'must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court'" (quoting *Glucksberg*, 521 U.S. at 720)).

16. *Id.* at 2258 (rejecting *Casey*'s casting the right abortion as implicating the "broader right to autonomy" because defining rights at such a "high level of generality[] could license fundamental rights to illicit drug use, prostitution, and the like").

17. *Id.* at 2267 ("[T]he most important historical fact [is] how the States regulated abortion when the Fourteenth Amendment was adopted . . . .").

The rule of law, the *Dobbs* Court also contends, requires jettisoning the fifty years of precedent concerning the right to abortion.[18] The fundamental flaw with *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[19] Justice Alito wrote, was that any supposed right to abortion was not based on our "history and tradition" of fundamental rights.[20] In Justice Alito's view, *Roe* and *Casey* were lawless because they put decision-making authority in the hands of judges, not in the hands of the people and their elected representatives.[21]

Under closer scrutiny, however, the history and tradition rationale—the lynchpin of *Dobbs*—disintegrates. Since the mid-twentieth century, history and tradition has been the test for discerning unenumerated rights and liberties.[22] The Court, however, has applied a variety of looser and stricter versions of this test. The version the Court uses often determines its decision.

History and Tradition 1.0 (H&T 1.0) was first articulated by Justice Harlan in *Griswold v. Connecticut*.[23] It was at once historically grounded and dynamic. It framed the claimed right broadly, and twentieth-century precedent—not just long-standing common law or statutory rights—demonstrated historical protection. Justice Harlan's approach was also dynamic in another way. A newly protected right would "cut a channel for what is to come";[24] that is, it would provide a basis for future claims to new unenumerated fundamental rights.

History and Tradition 2.0 (H&T 2.0) was set forth by *Washington v. Glucksberg* over thirty years later.[25] H&T 2.0 drastically restricted H&T 1.0 by framing the claimed right narrowly and specifically.[26]

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18. *Id.* at 2243.

19. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

20. *Dobbs*, 142 S. Ct. at 2242–43.

21. *Id.* at 2243.

22. *See infra* Part I (discussing variations of the history and tradition test used by the Court over the past sixty years).

23. As a clarification, my references to Justice Harlan's test in *Griswold* should be understood as incorporating his reasoning in *Poe v. Ullman*, 367 U.S. 497 (1961), as Harlan's *Griswold* concurrence incorporates his *Poe* dissent. *See* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) ("[T]he proper [ ] inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment . . . . For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, I believe that it does." (citing *Poe*, 367 U.S. at 539–45) (Harlan, J., dissenting)).

24. *Poe*, 367 U.S. at 544 (quoting Irvine v. People of State of California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).

25. Washington v. Glucksberg, 521 U.S. 702 (1997).

26. *Id.* at 723 ("[T]he question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing

Under H&T 2.0, a new right also faced a heavy presumption against protection.[27]

History and Tradition 3.0 (H&T 3.0) dates to 2003's *Lawrence v. Texas*.[28] The *Lawrence* Court rejected H&T 2.0 and purported to apply H&T 1.0. As had H&T 1.0, H&T 3.0 frames a claimed right broadly and relies on precedent and construes their holdings broadly. Whether states had historically and actively *prohibited* a claimed right is the question, not whether states had traditionally protected it. A state's failure to prohibit a specific activity relinquishes its authority to do so. To justify this more expansive and libertarian approach, H&T 3.0 draws upon on equal protection principles.[29] H&T 3.0 also produced *Obergefell v. Hodges*'s holding that same-sex couples had the right to marry.[30]

Dobbs mints History and Tradition 4.0 (H&T 4.0). H&T 4.0 is narrow unlike H&T 1.0 but like *Glucksberg*'s H&T 2.0. It is also originalist, unlike H&T 1.0, 2.0, and 3.0. H&T 4.0 only deems fundamental those rights protected by positive law around the mid-1860s when the Fourteenth Amendment was framed and ratified.[31] Ironically, this turn to originalism is new. It dates only to the 2010 Second Amendment

so."). *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847–48 (contrasting *Glucksberg*'s requirement that a right be framed narrowly with Justice Harlan's broader framing); *Casey*, 505 U.S. at 848 (referencing Justice Harlan saying that liberties protected by due process are "not a series of isolated points pricked out" (quoting *Poe*, 367 U.S. at 543)).

27. *Glucksberg*, 521 U.S. at 720 (expressing a "reluctan[ce] to expand the concept of substantive due process" and the necessity of "exercis[ing] the utmost care when[] . . . asked" to declare a new fundamental right).

28. Lawrence v. Texas, 539 U.S. 558 (2003).

29. *Id.* at 574–75 (describing how Texas's ban on same sex sodomy violated the equal protection clause but that even a neutral ban on sodomy ban would impermissibly stigmatize gay men); *see* Miranda Oshige McGowan, *Lifting The Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 423–24, 427 (2012) (arguing that equal protection principles animate *Lawrence v. Texas* because the Court recognized that Texas had made same sex between men illegal precisely because gay men were a "structural" group).

30. Obergefell v. Hodges, 576 U.S. 644, 672 (2015) ("[The] right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws.").

31. This narrow, originalist version first appeared in *McDonald v. City of Chicago*, the case that held that the individual right to bear arms was incorporated through the Fourteenth Amendment to apply to the states. 561 U.S. 742, 791 (2010).

incorporation case,[32] *McDonald v. City of Chicago*.[33] *Dobbs* purports to rely on H&T 3.0, but H&T 3.0 lacks *Dobbs*'s originalist DNA.

This Article is the first to identify these four different "history and tradition" tests. By itself, this taxonomy makes a significant contribution to the literature of fundamental rights analysis. This scholarly literature has tended to collapse the fundamental rights debate into a debate between originalism and living constitutionalism.[34] The Justices' disagreements over fundamental rights also often reduce to this conflict.[35] The failure to acknowledge the multiplicity of history and tradition tests has meant that fundamental rights cases neither acknowledge nor justify an outcome-determinative choice.[36]

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32. Incorporation doctrine is different than, though related to, unenumerated fundamental rights doctrine. The question whether the Fourteenth Amendment incorporates one of the rights contained in the Bill of Rights does not require the Court to frame the claimed right. *See, e.g.*, *id.* at 767 ("[W]e now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process."). How broadly or narrowly a right is framed often determines the outcome of a case. *See* Sections I.A, I.B, and I.C (discussing how the framing of a claimed right affects whether the Court will determine it to be protected).

33. *McDonald*, 561 U.S. at 767. Justice Alito writes, "[W]e must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition.'" *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

34. Reva Siegel has recently leveled a devastating attack against *Dobbs* on this score. *See generally* Reva Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023).

35. The Justices have also sparred over how broadly or generally to define a claimed right. *Compare, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."), *and Glucksberg*, 521 U.S. at 721 (requiring a "careful description" of a claimed right (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)), *with Casey*, 505 U.S. at 847–48 (holding that it "would be inconsistent with our law" to define a right "at the most specific level" at which it was "protected against government interference by other rules of law when the Fourteenth Amendment was ratified"); *and Casey*, 505 U.S. at 848 ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."). Generally speaking, the broader the right is framed, the more likely a history and tradition of protecting a right will be found (or at least some aspects of that right); the converse is true, as well: the narrower the framing the less likely a history and tradition of protecting that right will turn up. *Obergefell* turned on this issue—whether the right was "same-sex marriage" or "marriage." *Obergefell*, 576 U.S. at 671. *See also Casey*, 505 U.S. at 847–48 (noting that the Court had defined the right at issue in *Loving v. Virginia* as the right to marriage, not the right to interracial marriage, which many states had prohibited when the Fourteenth Amendment was ratified); *Casey*, 505 U.S. at 851 (defining the right claimed to be infringed by Pennsylvania's restrictions on abortion as implicating "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" and finding that right protected by the due process clause).

36. There are a couple of notable exceptions to this. *See, e.g.*, *Michael H.*, 491 U.S. at 110, 126–27, n.6 (plurality opinion) (Justice Scalia describing his methodology as defining the claimed fundamental right very specifically as the right of "natural fathers" to have parental rights); *id.* at 139 (Brennan, J., dissenting) (arguing that precedents have framed issues like the one in *Michael*

Dobbs perfectly illustrates this problem. The majority had discretion to choose which version to apply, but it simply asserts that its narrow, originalist version of "history and tradition" is "the" test.[37] This veiled exercise of discretion refutes *Dobbs*'s claim to minimize judicial discretion and promote the rule of law.

An opinion overturning a fifty-year-old constitutional right is a bitter pill to swallow for those who disagree with its substantive results and even for observers who condone the result but believe in stare decisis. Because "history and tradition" can be assessed in different ways, *Dobbs*'s result cannot be justified either by abstract invocations of those terms or of general rule of law principles. Instead, this originalist and outcome-determinative choice requires other some normative justification.

Popular sovereignty is one normative justification that originalists have often proffered.[38] Interpreting a constitutional provision according to its original, ordinary public meaning enforces what "the people" at least implicitly agreed to when the Constitution was written or amended.[39] On this view, *Dobbs*'s narrow history and tradition test

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H. more generally as involving the rights of parents). *See also, e.g.*, *infra* notes 205–07 and accompanying text (describing the sparring over fundamental rights methodology between Justices Scalia and Stevens in *McDonald v. City of Chicago*).

37. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) ("[T]he Due Process Clause of the Fourteenth Amendment . . . has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" (quoting *Glucksberg*, 521 U.S. at 721)); *id.* at 2247 (referencing the originalist approach in *McDonald*, and stating, "[I]t would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution").

38. *See, e.g.*, *McDonald*, 561 U.S. at 806 (Scalia, J., concurring) (justifying an originalist fundamental rights methodology normatively on the grounds that it, and only it, honors popular sovereignty, the fundamental basis for our republic); *id.* at 805 ("[T]he rights [the originalist approach] acknowledge[s] are those established by a constitutional history formed by democratic decisions . . . ."); *see also* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (contending that the original public meaning of the Second Amendment "is the very *product* of an interest balancing by the people—which [the dissent] would now conduct for them anew"). Justice Alito advanced a different justification from democracy—that *Dobbs* returns the decision to the people to decide through the democratic, majoritarian process. Part II of this Article, *infra*, however, will explain that the history and tradition test might do so in this instance, but it will not invariably do so. The incorporation of the Second Amendment through the due process clause is a counter example. There, an originalist view of fundamental rights wrenched decision-making power over gun regulations from the people and gave it to federal judges.

39. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 155 (1999) (explaining that the original public meaning "draws upon the constitutional foundations of popular sovereignty—that the people alone determined the higher law"); Lawrence B. Solum, *We are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 43 (2011) ("The connection between democratic legitimacy and original public meaning is so close and the argument for that

would similarly honor the ideal of popular sovereignty by recognizing just those fundamental rights protected by positive law around the time of the Fourteenth Amendment's ratification.[40]

Popular sovereignty runs aground on the undemocratic structure of voting in 1787 and 1868, when most Americans could not vote.[41] Popular sovereignty is even weaker with respect to issues that disproportionately affect a class of persons excluded from voting, such as women in 1868.[42] By insisting on affirmative positive law protections of a claimed right when the Fourteenth Amendment was ratified,[43] this originalist history and tradition test unavoidably excludes the views and values of the majority of adult Americans who could not then vote; serve as the representatives who wrote the Fourteenth Amendment; sit as judges who laid down common law principles; or even bring suit to argue that their own rights were being violated.[44] *Dobbs*'s originalist history and tradition analysis ratifies that exclusion, and embeds in twenty-first-century constitutional interpretation the nineteenth-century law that made women fundamentally unequal.

This Article will proceed as follows. Part I explains the four different versions of the history and tradition test for fundamental rights. This Part reveals the discretion at the heart of *Dobbs*: the *Dobbs* majority creates its test by borrowing from an originalist incorporation case from 2010.[45] *Dobbs* claims its originalist test vindicates rule of law values, yet it conceals, not justifies this choice. By burying its discretion, *Dobbs* flouts the rule of law. If *Dobbs* and its originalist history and tradition test for fundamental rights can be legitimated, it must be because originalism serves some other normative value.

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connection so obvious that very little needs to be said about it."); Kurt T. Lash, *Originalism, Popular Sovereignty, & Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) ("[T]he most common and influential justification for originalism [is] popular sovereignty and the judicially enforced will of the people."); *see generally infra* Section III.A.1.

40. *McDonald*, 561 U.S. at 806 (Scalia, J., concurring); *see also* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CON. COMM. 371, 374 (2007) ("[J]udges [should] interpret the [Constitution] based only on its original meaning because those at the time of the enactment used only that meaning in deciding whether to adopt the Constitution.").

41. On the restricted and limited nature of the United States democratic system in 1787 and 1868, see *infra* notes 214–33 and accompanying text.

42. For a discussion on the various classes of people barred from the voting process, see *infra* notes 217–40 and accompanying text.

43. For a discussion of how the Fourteenth Amendment's guarantees did not fully apply to women, see *infra* notes 233–41 and accompanying text.

44. For a discussion on the extensive array of civil and political rights that women still did not have after the ratification of the Fourteenth Amendment, see *infra* notes 235–39.

45. *See McDonald*, 561 U.S. at 742 (adopting originalist history and tradition test).

Part II describes the leading normative justification for originalism—popular sovereignty. As this Part explains, most originalists concede that originalism cannot be justified solely on the ground that it limits judicial discretion. Most agree that originalism must also rest on a normative justification; and that the best one is that originalism honors the ratifying people's original exercise of sovereignty. This Part shows that popular sovereignty cannot justify *Dobbs*'s originalist history and tradition test because the majority of adult Americans could not exercise political rights or most civil rights during the time period that *Dobbs* deems relevant. *Dobbs*'s originalist history and tradition approach is therefore fundamentally undemocratic and at war with the ideal of popular sovereignty that it purports to embrace.

Part III turns to *Dobbs*'s empirical claim that there is no history and tradition of protecting the right to abortion. *Dobbs* sees the lack of opposition to the wave of abortion restrictions in the middle of the nineteenth century as proof that abortion was not then a fundamental right. To be sure, many have attacked *Dobbs*'s conclusion that abortion rights were not protected as being overstated at best and false at worst.[46] This Article attacks a more fundamental problem. The particular history surrounding women and abortion in the nineteenth century makes any popular sovereignty justification for *Dobbs* impossible and renders *Dobbs*'s originalist resort to history and tradition anachronistic and incoherent. The fact is, the kind of positive law *protections* for abortion or contraception that *Dobbs* demands could never have existed in the nineteenth century. That is so for at least four reasons. First, positive rights were unnecessary because until the mid-nineteenth century, women's access to abortion had been unchallenged.[47] Second, women were denied both political and civil rights that would have enabled them to advocate for the right to

46. *See* Brief for Amici Curiae Am. Hist. Ass'n & Org. of Am. Historians in Support of Respondents at 8–9, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), (stating that American common law did not consider the termination of a pregnancy before quickening to be abortion because of "the legal belief that a fetus was not considered a cognizable life for purposes of the law until quickening"); *id.* at 7–11 (explaining the common law doctrine, generally, in the United States and providing examples of state common law); *id.* at 6 ("Only the pregnant woman could definitively determine whether terminating a pregnancy at a given time was permissible or prohibited, because only she could detect whether this 'stirring'—also known as 'quickening'—had occurred." (citing ALFRED SWAINE TAYLOR ET AL., A MANUAL OF MEDICAL JURISPRUDENCE 421 (6th ed. 1866))); *id.* at 11–14 ("Contrary to the assertion of an amicus for the State [of Mississippi], medieval and colonial cases do not support the view that the common law criminalized all abortion throughout pregnancy.").

47. For a discussion of the availability of abortions both practically and legally in the mid-nineteenth century, see *infra* Section III.A.

abortion.[48] Third, powerful social norms discouraged women from participating in politics, even political discussion.[49] The Victorian taboo against discussing sex, especially non-procreative sex, made it impossible for either women or men who cared about their (or their family's) reputation to oppose abortion restrictions. Fourth, the doctors who spearheaded the anti-abortion campaign exploited these gender norms and couched their arguments in rhetoric that guaranteed the public's silence.[50]

Part III extends on the popular sovereignty discussion begun in Part II. To suggest, as *Dobbs* does, that a lack of opposition to these nineteenth-century bans signifies "the people's" approval of them ratifies women's exclusion from the legal and political process that produced those bans. It embeds the past injustice of women's exclusion into our law today.

Part IV looks ahead to consider the potential consequences of the originalist test to which *Dobbs* has now committed the Court. A consistent application of the *Dobbs* history and tradition test would require overruling *Griswold* and *Eisenstadt*'s protection of access to contraception, *Lawrence*'s protection of intimate sexual conduct, and *Obergefell*'s recognition of same-sex marriage. Whatever pablum assurances *Dobbs* offers, these rights do not survive the originalist history and tradition test as *Dobbs* articulates and applies it.[51]

I. THE HISTORY OF THE HISTORY AND TRADITION TEST FOR DISCOVERING UNENUMERATED, FUNDAMENTAL RIGHTS

Over the last sixty years, the Court has deployed at least three versions of the history and tradition test. *Dobbs* relies on a fourth, originalist version that draws on the methodology of the 2010 Second Amendment incorporation case, *McDonald v. City of Chicago*.[52] This Part explains the three more established versions of the history and tradition test. It closes

48. For more on how the history of gender discrimination in politics prevented women from advocating for abortion rights, see *infra* Section III.B.

49. For a discussion on social norm roadblocks, see *infra* Section III.B.1.

50. For a discussion on how doctors crafted their rhetorical strategy to silence opposition to abortion bans, see *infra* Section III.C.

51. *Dobbs* does not dispute the lack of historical basis for these rights but asserts that the victimless nature of the use of contraception, intimate sexual conduct within the home, and same sex marriage distinguishes them from abortion. Dobbs v. Jackson Women's Health Org, 142 S. Ct. 2228, 2280 (2022) (discussing the differences between abortion and other rights). *Dobbs* also implies that it would uphold these precedents under stare decisis as they have proven less unworkable and engendered more reliance than *Roe* and *Casey* had. *Id.* at 2281.

52. McDonald v. City of Chicago, 561 U.S. 742 (2010) (discussing how the rigid originalism test was used to rule on a Second Amendment issue).

by explaining how *McDonald* and *Dobbs* transformed that test into a new, rigid, originalism-focused inquiry.

A. History and Tradition 1.0: Griswold

Griswold v. Connecticut held that Connecticut's ban on contraception use violated the fundamental rights of married couples.[53] Justice Douglas wrote the opinion for the court, but later fundamental rights cases largely ignored Justice Douglas's "penumbras and emanations" approach.[54] Instead, the test articulated by Justice Harlan became the template for future unenumerated, fundamental rights cases.[55]

In concluding that married couples have a fundamental right to use contraceptives, Justice Harlan reasoned,

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . *The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.* That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[56]

Those traditions showed that Connecticut's contraceptive ban "violates basic values 'implicit in the concept of ordered liberty.'"[57] History

53. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

54. *Id.* at 484 ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

55. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849–50 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (referring to Justice Harlan's method and noting the importance of "careful 'respect for the teachings of history'" (quoting *Griswold*, 381 U.S. at 486 (Harlan, J., concurring))). *See also* DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE SILENT NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 80–81 (2007) ("The classic explanation of [fundamental rights] doctrine was given by Justice John Harlan in a predecessor to the 1965 *Griswold* ruling on contraceptives.").

56. *Casey*, 505 U.S. at 849–50 (Harlan, J., dissenting) (emphasis added) (quoting *Poe*, 367 U.S. at 542). Justice Harlan articulated this history and tradition test in two opinions. The first was in his dissent from the denial of a grant of certiorari in *Poe*, an earlier challenge to Connecticut's ban, and the second in his *Griswold* concurrence. *Id.* This discussion weaves them together as subsequent caselaw has done, and thus references to his test in *Griswold* should be understood to incorporate his reasoning in *Poe*.

57. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

and basic constitutional principles undergirded this fundamental right, not judicial will. Future unenumerated, fundamental rights cases would be guided by judicial restraint and the "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[58]

Justice Harlan was not writing on a blank slate. He drew his history-based method from the Court's incorporation cases, including Justice Frankfurter's opinion in *Rochin v. California* and Justice Cardozo's in *Palko v. State of Connecticut*.[59] Both of these cases held due process of law to contain those substantive, "personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', or are 'implicit in the concept of ordered liberty.'"[60]

H&T 1.0 may sound like *Dobbs*'s "deeply rooted in this Nation's history and tradition" test.[61] Like H&T 1.0, *Dobbs* linked our history and tradition to those rights "implicit in the concept of ordered liberty."[62] Yet *Dobbs*'s resemblance to H&T 1.0 stops there. Justice Harlan did not focus narrowly on whether states had historically protected married couples' access to contraception. Neither original meaning nor intent marked the metes and bounds of fundamental rights. Justice Harlan referred to the original meaning of the Fourteenth Amendment only to chide Justice Black and Justice Stewart for their historically indefensible position that its purpose was to incorporate wholesale the first eight amendments but no unenumerated rights.[63] The history of the Fourteenth Amendment did not restrict judges from recognizing new unenumerated rights. The requirements of due process, Justice Harlan wrote, had never been "limited to what is explicitly provided in the Constitution, divorced from the

58. *Id.* at 501; *accord* Adamson v. California, 332 U.S. 46, 59, 67 (1947) (Frankfurter, J., concurring).

59. Rochin v. California, 342 U.S. 165, 169 (1952) (discussing how the due process clause provides constitutional protections for personal rights); *Palko*, 302 U.S. at 325 (stating the Fourteenth Amendment protects rights "implicit in the concept of ordered liberty").

60. *Rochin*, 342 U.S. at 169 (first quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); and then quoting *Palko*, 302 U.S. at 325).

61. Dobbs v. Jackson Women's Health Org, 142 S. Ct. 2228, 2242 (2022).

62. *Id.* ("[T]he Due Process Clause . . . . has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" (quoting Washington v. Glucksberg 521 U.S. 702, 721 (1997)).

63. Poe v. Ullman, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting); *see also id.* at 541 (criticizing the idea that the Fourteenth Amendment's protections are limited to the first eight amendments).

rational purposes, historical roots, and subsequent developments of the relevant provisions."[64]

H&T 1.0 framed the issue more broadly than the question whether our legal tradition protected the specific "right to use contraception."[65] Framed narrowly, our tradition did not. Most states and the federal government had banned contraception from the mid-nineteenth century and into the twentieth.[66] Under *Dobbs*, these prohibitions would conclusively prove that the use of contraceptives was not a fundamental right.[67]

Justice Harlan framed the historical inquiry more broadly: whether we had a tradition of protecting *other* rights related to a married couple's use of contraception.[68] We did and do. These more general protections counted more than specific contraceptive bans. Beginning with marriage, Justice Harlan observed that American law had, "always and in every age . . . fostered and protected . . . ." the "institution of marriage."[69] American law gave married couples both legal protections and privileges not extended to others.[70] Legal protections of the marital relationship necessarily encompassed "the intimacy of husband and wife" (that is, their sex life).[71] Marriage's legal protections and privileges "form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."[72]

Enforcing a ban on the use of contraception would destroy marriage by bringing "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy."[73] This was unimaginable. Married people have a privilege of confidential

64. *Id.* at 549; *see also id.* at 541 (establishing that the Court has never held that the due process clause of the Fourteenth Amendment only guaranteed those rights listed in the Bill of Rights).

65. Griswold v. Connecticut, 381 U.S. 479, 503 (1965) (Harlan, J., concurring) ("[Forbidding] all married persons the right to use birth control devices, regardless of whether their use is dictated by considerations of family planning.").

66. *Poe*, 367 U.S. at 546 (Harlan, J., dissenting) (rationalizing that despite the authorities provided by the Appellants seemingly supporting the use of contraceptives, "not too long ago the . . . opinion was quite the opposite, and that even today the issue is not free of controversy." (footnote omitted)).

67. *See infra* notes 147–64 and accompanying text (explaining how *Dobbs* uses originalist methods to apply a modern history and tradition test to the issue of abortion).

68. *Poe*, 367 U.S. at 545–46 (Harlan, J., dissenting) (describing the private and consensual behavior of married couples).

69. *Id.* at 553.

70. *Id.*

71. *Id.* (asserting these intimacies are "an essential and accepted feature" of marriage).

72. *Id.* at 546.

73. *Id.* at 553.

communications and a spousal testimonial privilege in criminal cases.[74] These privileges are weighty; they elevate the privacy of married couples above a state's interest in seeking truth in legal proceedings. That private communication between spouses was beyond the state suggested that their private, intimate interactions should be, too.[75]

Justice Harlan then turned to rights protecting the home. Regulating the use of contraception would also invade "what, by common understanding throughout the English-speaking world . . . [is] a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense."[76] The state might not literally invade a married couple's home, but it did metaphorically by intruding "on the [family] life which characteristically has its place in the home."[77]

H&T 1.0 is doubly dynamic. First, history and tradition are not stuck in 1868. Twentieth-century Supreme Court precedents count heavily in this fundamental rights calculus.[78] *Meyer v. Nebraska* and *Pierce v. Society of Sisters* supported parents' autonomy and privacy rights to make child-rearing decisions without governmental interference.[79] *Skinner v. Oklahoma* held that individuals had the right to procreate.[80] A married couple's legally protected autonomy, combined with the fundamental rights to create a home without undue intrusion, to rear children as parents see fit, and to procreate implies a fundamental right of married couples to use contraception.[81]

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74. *See* 81 AM. JUR. 2D WITNESSES §§ 289, 291 (2023) (explaining that the marital privilege extends to *all* civil and criminal cases, except for narrow circumstances provided by statute).

75. *Poe*, 367 U.S. at 548 (Harlan, J., dissenting) ("Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations . . . .").

76. *Id.* (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)); *see also id.* at 550 (stating that the Fourth and Fourteenth Amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." (quoting Boyd v. United States, 116 U.S. 616, 630 (1886))).

77. *Id.* at 551; *see also id.* ("The home derives its pre-eminence as the seat of family life.").

78. *See id.* at 542–43, 548, 552 (analyzing twentieth century Supreme Court precedent).

79. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to have children receive foreign language instruction); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (right to send children to religious private school); *see also Poe*, 367 U.S. at 552 (Harlan, J., dissenting) (clarifying how autonomy and privacy rights extend to a married couple's intimate relations).

80. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (claiming procreation as "one of the basic civil rights of man"); *see also Poe*, 367 U.S. at 555 (Harlan, J., dissenting) ("'There are limits to the extent to which a legislatively represented majority may conduct experiments at the expense of the dignity and personality' of the individual." (ellipses omitted) (quoting *Skinner*, 316 U.S. at 546) (Jackson, J., concurring)).

81. *See Poe*, 367 U.S. at 548, 552 (Harlan, J., dissenting) (discussing the constitutional protections and safeguards for a married couple's private intimacy).

Second, H&T 1.0 was dynamic because it anticipated that a new fundamental right would become a precedent for future fundamental rights claims. The declaration of a new fundamental right, Justice Harlan wrote, not only took "its place in relation to what went before" but also "further cut a channel for what is to come."[82] In other words, it was appropriate for the right of married persons to use contraceptives to be the basis for future rights claims.

The right to contraception has been just that. For example, relying on Justice Harlan's historical method, the Court in *Moore v. City of East Cleveland*, held that extended family members had a fundamental right to live with one another.[83] The Court started with the proposition that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[84] To determine whether this history and tradition included living with extended family members, the Court quoted Justice Harlan's concurrence in *Griswold*, "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society.'"[85]

Based on historical evidence about the American family, the Court concluded that the American tradition is not "limited to respect for the bonds uniting the members of the nuclear family."[86] Instead, our country's "equally venerable" historical "tradition of uncles, aunts, cousins, and . . . grandparents sharing a household" merited "constitutional recognition."[87] Millions of Americans had lived in and grown up in households of extended families.[88]

H&T 1.0 became the standard test for identifying fundamental rights, and it governed fundamental rights analysis for decades.[89] Its historical inquiry framed the right at issue broadly, considering whether the law had

82. *Id.* at 544 (alterations omitted) (quoting Irvine v. California, 37 U.S. 128, 147 (1954)).

83. Moore v. City of East Cleveland, 431 U.S. 494, 494–95 (1977).

84. *Id.* at 503.

85. *Id.* (alteration in original) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

86. *Id.* at 504.

87. *Id.*

88. *Id.* at 504–05 ("Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it.").

89. FARBER, *supra* note 55, at 80–81 ("The classic explanation of this doctrine was given by Justice John Harlan in a predecessor to the 1965 *Griswold* ruling on contraceptives."); *id.* at 81 ("Harlan's theory of the meaning of constitutional liberty proved to have a great influence on Rehnquist Court Justices such as Kennedy, Souter, and O'Connor.").

historically protected rights related to the claimed right.[90] It was dynamic, not originalist.[91] Specific historical legal prohibitions of the claimed right did not prove that it was unprotected if our legal traditions had protected related rights.[92] More recent precedents counted at least as much as did long-standing legal traditions.[93] A new right, in turn, became a precedent for future fundamental rights claims.[94]

B. History and Tradition 2.0: Glucksberg

In 1997, *Washington v. Glucksberg* held that there was no fundamental right to a physician's assistance in committing suicide.[95] Its method narrowed H&T 1.0 and represents what I call History and Tradition 2.0 (H&T 2.0). H&T 2.0 elevated the values of federalism to protect state and local government's authority, of democratic, majority rule, and limiting the discretion of unelected, unaccountable, federal courts.[96] To protect these values, H&T 2.0 imposed a presumption against declaring new unenumerated rights.[97] It also required "a careful description" of the claimed right at the narrowest level of generality at which evidence of a

90. *See Moore*, 431 U.S. at 504–05 (1977) (describing the historical aspects of households containing extended family members).

91. *See* FARBER, *supra* note 55, at 81–82 (contrasting Justice Scalia's "static" approach to identifying unenumerated but protected liberties with Justice Harlan's "expansive" approach that "recogniz[ed] that traditions grow and change" over time).

92. *See id.* at 81 (stating that Harlan's approach saw "constitutional liberty [as] 'a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints,' as well as a requirement for special justification when certain critical interests are invaded by the state" (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

93. *See, e.g.*, *Moore*, 431 U.S. at 494–95 (1977) (recognizing the right of individuals to live with extended family based on established Court precedents elaborating unenumerated fundamental rights); Zablocki v. Redhail, 434 U.S. 374, 384–85 (1978) (holding that prisoners had the fundamental right to marry based on *Griswold v. Connecticut* and *Loving v. Virginia* and "[c]ases subsequent" to those decisions that "routinely categorized the decision to marry as among the personal decisions protected by the right of privacy"); *cf.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269–74 (1990) (relying on the common law principle of informed consent and twentieth-century state court cases recognizing the right of a competent person to refuse unwanted medical treatment to hold that the Fourteenth Amendment protects such a right, as well).

94. *See* Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (stating the recognition of a new fundamental right "further [cut] a channel for what is to come" (alteration in original) (quoting Irvine v. California, 347 U.S. 128, 147 (1954)).

95. Washington v. Glucksberg, 521 U.S. 702, 706 (1997).

96. *Id.* at 720 (describing the Court's desire to preserve democratic decision-making and "legislative action" and to avoid "the Due Process Clause" becoming the mere "policy preferences of the Members of this Court").

97. *Id.* (expressing a "reluctan[ce] to expand the concept of substantive due process" and the necessity of "exercis[ing] the utmost care whenever we are asked to" declare a new fundamental right (first quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992); and then quoting *Moore*, 431 U.S. at 502)).

concrete history and tradition respecting that particular right can be found.[98] The Court, for example, criticized characterizations of *Cruzan v. Director* as recognizing the "right to die."[99] Instead, *Glucksberg* described *Cruzan* as holding that "competent persons" had a "constitutionally protected right to refuse lifesaving hydration and nutrition."[100]

Glucksberg illustrates how framing a question may determine the answer. It framed the claimed right specifically and narrowly—a right to physician-assisted suicide. It rejected the broader framing offered by both the challengers[101] (the right to die with dignity) and the Ninth Circuit (to "determin[e] the time and manner of one's death").[102] To establish a right as fundamental, the challengers had to muster evidence that the positive law actively protected that specific right.[103] The protection of rights related to "physician-assisted suicide," such as the right to refuse medical treatment, were not relevant. What was relevant was that nearly all states banned physician-assisted suicide, and both committing suicide and helping someone commit suicide had always been banned by states and the common law.[104]

Glucksberg made no mention of the Fourteenth Amendment's original meaning,[105] much less inquired into it; apparently that meaning was

98. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)); *see also id.* at 722–23 (stating that a broad characterization of *Cruzan* as recognizing the "right to die" was inaccurate, and that the Court instead recognized "a 'constitutionally protected right to refuse lifesaving hydration and nutrition'" (first citing Compassion in Dying v. Washington, 79 F.3d 790, 799 (9th Cir. 1996), *rev'd sub nom*. Washington v. Glucksberg, 521 U.S. 702 (1997); and then quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 267–68 (1990))); *id.* at 722 (stating that fundamental rights analysis has always required a showing of "concrete examples involving fundamental rights found to be deeply rooted in our legal tradition").

99. *See Cruzan*, 497 U.S. at 277 ("This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a 'right to die.'"); *see also Glucksberg*, 521 U.S. at 722–23 ("[A]lthough *Cruzan* is often described as a 'right to die' case, [it] recognized 'the more specific interest in making decisions about how to confront an imminent death.'" (quoting *id.* at 745 (Stevens, J., concurring)).

100. *Glucksberg*, 521 U.S. at 723 (quoting *Cruzan*, 497 U.S. at 279).

101. *Id.* at 722–23 ("[T]hus, the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.").

102. Compassion in Dying v. Washington, 79 F.3d 790, 800 (9th Cir. 1996), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

103. *Glucksberg*, 521 U.S. at 723–24 (rejecting analogies to other rights of personal autonomy as misplaced).

104. *Id.* at 728 ("The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."); *id.* at 710–18 (detailing the history of legal restrictions on assisted suicide in the United States).

105. *See* J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), https://www.city-journal.org/article/an-originalist-victory [https://perma.cc/LA7S-4YJU] ("*Glucksberg*'s test" unlike *Dobbs*' "is not based on the original meaning of any particular constitutional provision").

irrelevant. Instead, the Court focused on common law and statutory protections (or the lack thereof) whatever the vintage.[106] It canvassed over seven hundred years of common and statutory law concerning both suicide and physician-assisted suicide on up to the present, finding that physician-assisted suicide had never been permitted.[107]

The opinion closest to *Glucksberg*'s wide-ranging approach is *McDonald v. City of Chicago*.[108] *McDonald*, however, is overtly originalist.[109] *Glucksberg* is not, and relies at least as much on precedent as on history.[110]

C. History and Tradition 3.0: Lawrence

Justice Kennedy's 2003 opinion in *Lawrence v. Texas* introduced History and Tradition 3.0 and relied on it to strike same-sex sodomy bans.[111] Those bans would have been constitutional under H&T 1.0 and H&T 2.0. Justice Harlan, in fact, had characterized sodomy and homosexuality as examples of activities that clearly lacked any historical, legal protections and would not be fundamental rights under H&T 1.0.[112] Although American law had traditionally criminalized non-procreative sex of all kinds,[113] Justice Kennedy found it significant that those bans had applied

106. *See Glucksberg*, 521 U.S. at 710–18 (examining the "history, legal traditions, and practices" as it relates to assisted suicide).

107. *Id.* (detailing legal history regarding assisted suicide from the thirteenth century to the present).

108. *Compare Glucksberg*, 521 U.S. at 735 (holding that physician-assisted suicide is not a fundamental right and Washington's ban did not violate the Fourteenth Amendment), *with* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (holding that "the Due Process Clause in the Fourteenth Amendment incorporates the Second Amendment right" to keep and bear arms).

109. For more on *McDonald*'s approach, see *infra* notes 157–60 and accompanying text.

110. Reva Siegel astutely observes that *Glucksberg* goes to great pains to distinguish *Casey* from the state of Washington's ban on physician-assisted suicide, which clearly indicates that *Glucksberg* treated the non-originalist *Casey* as good law. Siegel, *supra* note 34, at 1182, n.213; *Glucksberg*, 521 U.S. at 722 ("[T]he development of this Court's substantive-due-process jurisprudence . . . has been a process whereby the outlines of the 'liberty' specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.").

111. Lawrence v. Texas, 539 U.S. 558 (2003) (determining whether a Texas law criminalizing consensual, sexual conduct between individuals of the same sex violated the due process clause of the Fourteenth Amendment).

112. *See* Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting from denial of certiorari) ("Adultery, homosexuality, and the like" lack any historical or legal protections because they "are sexual intimacies which the State forbids altogether.").

113. *See Lawrence*, 539 U.S. at 568 (observing that "early American sodomy laws . . . prohibit[ed] nonprocreative sexual activity more generally").

regardless of the marital status or sexual orientation of the couple.[114] Those criminal bans had also rarely, if ever, been used to prosecute people for sexual acts committed in private. Neither of these facts would be helpful under H&T 1.0. That test required a history of positive legal protection of rights related to a claimed right; an unenforced ban on a general class of activities would not substitute.

H&T 3.0 shares some of H&T 1.0's features. Both tests frame the claimed right broadly. Recall that H&T 1.0 defined the claimed right as "the intimacy of husband and wife" in the home.[115] *Lawrence* described same-sex sodomy bans as infringing on the right of adults to have "intimate sexual conduct" within the home.[116] Neither is originalist.[117] Both are dynamic and rely on recent precedents as evidence of history and tradition.[118]

Precedent lies at the core of H&T 3.0's history and tradition inquiry, much as it did in H&T 1.0. Like H&T 1.0, H&T 3.0 describes the holdings of precedents very generally.[119] *Lawrence* described *Griswold* and *Eisenstadt* as protecting the right to intimate sexual conduct between consenting adults, not the specific right to use or buy contraception.[120]

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114. Brief of Professors of Hist. George Chauncey et al., as Amici Curiae in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152350, at *5–7 (describing English common law, and American colonial and statutory law banning sodomy and non-procreative sex); *see also Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) ("*Sodomy* was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights." (quoting Bowers v. Hardwick 478 U.S. 186, 192 (1986)).

115. *Poe*, 367 U.S. at 553 (Harlan, J., dissenting).

116. *Lawrence*, 539 U.S. at 562.

117. *See supra* text accompanying notes 78–110 (explaining that neither H&T 1.0 set forth by *Griswold* nor H&T 2.0 set forth by *Glucksberg* were originalist); *see also Lawrence*, 539 U.S. at 571–72 (noting that H&T cannot be an exhaustive analysis of substantive due process issues).

118. *See Poe*, 367 U.S. at 502 (citing Nashville, C. & St. L. Ry. Co. v. Browning, 310 U.S. 362, 369 (1940)) (noting that traditional ways of carrying out policy can often have more of an impact than the written law).

119. *See Lawrence*, 539 U.S. at 593 (broadly referencing the Nation's history and traditions); *see also* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (broadly explaining holdings as suggesting penumbras and zones of privacy in the Bill of Rights).

120. *Griswold*, 381 U.S. 479 (determining whether the Constitution protected a right for married couples to buy and use contraception without government interference). Indeed, to reach the conclusion that married people had the right to use contraception, Justice Harlan relied on cases that, if construed generally, could encompass such a right but which did not directly protect such a right. For example, *Skinner*'s right to choose *to* procreate and *Meyer* and *Pierce*'s rights to make choices regarding the rearing of a person's children generally supported finding a right to protect a married couple's right to choose *not* to procreate. *See Poe*, 367 U.S. at 548 (Harlan, J., dissenting from denial of certiorari) ("[T]he State is asserting the right to enforce its moral judgement by intruding upon the most intimate details of the marital relation with the full power of the criminal law."); *see also id.* at 552 (Harlan, J., dissenting from denial of certiorari) ("[I]t is difficult to imagine what is more private and more intimate that a husband and wife's martial relations."); *see*

Lawrence inferred from *Griswold* and *Eisenstadt* that a state could not criminalize the intimate sexual conduct of straight adults within the home.[121] *Griswold*'s holding that legal restraints on a couple's sexual activities in the home would either be purposeless or impermissibly raid the privacy of married couples made it clear that the state could not. *Obergefell v. Hodges*, which used H&T 3.0 to recognize the right of same-sex couples to marry, also broadly characterized precedents. *Loving v. Virginia* protected the "right to personal choice regarding marriage," not merely the right to interracial marriage.[122]

When considering future unenumerated rights, H&T 3.0 is even more dynamic than H&T 1.0. "[H]istory and tradition," writes Justice Kennedy in *Lawrence,* "are the starting point but not in all cases the ending point of the substantive due process inquiry."[123] As the Court elaborated in *Obergefell*, "If rights were defined by who exercised them in the past then received practices could serve as their own continued justification and *new groups* could not invoke rights once denied."[124]

H&T 3.0 is also more strongly libertarian than H&T 1.0. *Lawrence* brushed aside American legal prohibitions of sodomy as largely irrelevant.[125] Instead, the relevant question was whether states historically had explicitly and actively *prohibited* same-sex sodomy.[126] This inquiry is strongly libertarian. Rights and liberties presumptively belong to individuals, and if the government has not traditionally restricted a particular liberty, its prerogative to do so atrophies.

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also Eisenstadt v. Baird, 405 U.S. 438 (1972) (determining whether unmarried people had a Constitutional right to obtain contraceptives without government restriction).

121. *Lawrence*, 539 U.S. at 565 ("After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship"); *id.* at 567 ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

122. Obergefell v. Hodges, 576 U.S. 644, 665 (2015) ("This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause." (citing Loving v. Virginia 388 U.S. 1, 12 (1967)).

123. *Lawrence*, 539 U.S. at 572.

124. *Obergefell*, 576 U.S. at 671 (emphasis added).

125. *See Lawrence*, 539 U.S. at 571–72 (noting that "Judeo-Christian moral and ethical standards" were the impetus for the condemnation of homosexual conduct); *see also Obergefell*, 576 U.S. at 681 (holding that the right to marry is a fundamental right under the due process and equal protection clauses of the Fourteenth Amendment, and same-sex couples may not be deprived of that right).

126. *Lawrence*, 539 U.S. at 571 ("The issue is whether the majority may use the power of the State to enforce these views on the whole of society through operation of the criminal law.").

A doctrinal sting accompanies H&T 3.0's dynamism and libertarianism.[127] *Lawrence* does not conclude that the right to have sex with a same-sex partner is "fundamental."[128] Under H&T 3.0, state laws that invade an activity traditionally left to individual choices do not trigger strict scrutiny. But neither can states justify their regulations under regular rational basis scrutiny.[129] Instead, when regulating "protected liberties," a state must establish that it has an interest in avoiding harm to the persons or property of third persons.[130] A state interest in preventing moral offense will not sustain a law. Regulations based solely on moral offense, in fact, may evince impermissible animus toward a politically unpopular group.[131]

An unstated but subtly discernible principle limits when H&T 3.0's dynamic and libertarian test applies—whether the claimed liberty implicates the equality of particular social groups.[132] The Court references this equal protection brake on dynamic due process in several cases that use H&T 3.0. In *Casey*, the plurality upheld the right of women to terminate pregnancies partly because "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[133] The spousal

127. Reva Siegel also observes that the history and tradition test in these cases is dynamic. Siegel, *supra* note 34, at 1181–82.

128. *Roe* is an exception to this rule, but abortion's "fundamental" rights status did not survive *Casey*. Roe v. Wade, 410 U.S. 113, 169–70 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., dissenting) ("*Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to 'strict scrutiny' and could be justified only in the light of 'compelling state interests.' The joint opinion rejects that view.").

129. *See* Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 383–85 (2012) (describing how *Lawrence v. Texas* did not apply rational basis scrutiny); *id.* at 398 (explaining that *Lawrence v. Texas* held that Texas's moral objections to sex between same-sex partners proved that the state harbored unconstitutional animus toward gay men).

130. *See Obergefell*, 576 U.S. at 679 ("Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties."); *see also Lawrence*, 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.").

131. *See, e.g.*, *Lawrence*, 539 U.S. at 575, 578 (holding that moral reasons standing alone cannot justify bans on sex between same sex partners and that such bans "demean . . . homosexual persons" and deprive them of equal dignity); *cf. id.* at 582 (O'Connor, J., concurring) ("Moral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.").

132. *See* McGowan, *supra* note 129, at 399 (arguing that *Lawrence* and *Romer* used a rigorous form of rational basis scrutiny that is triggered when a state restricts the right of some relevant social group and describing the criteria for identifying such groups).

133. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

notification requirement was unconstitutional because it resurrected the "repugnant" and long-abandoned common law concept of coverture that subordinated women's legal existence to their husbands.[134] The *Lawrence* Court acknowledged that Texas' ban on same-sex sodomy violated the equal protection clause.[135] Due process, however, ultimately justified striking down *all* state sodomy bans, including those not targeting same-sex partners.[136] Any criminal ban on sodomy would inevitably stigmatize gay men and lesbians by creating "an invitation to . . . discriminat[e] [against them] both in the public and in the private spheres."[137]

Obergefell identified a clear connection between due process dynamism and equal protection:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[138]

Narrowly framing the claimed right as the right to "same-sex marriage" would have ratified discrimination against same-sex couples[139] as much as framing the right in *Loving* as "interracial marriage" would have ratified racial prejudice.[140]

Equal protection demanded that the Court frame the due process issue as "the right to marry in its comprehensive sense," and ask if states had

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134. *Id.* at 897–98 ("Women do not lose their constitutionally protected liberty when they marry [even if a law such as a notification requirement exists to] benefit . . . a member of the individual's family.").

135. *See Lawrence*, 539 U.S. at 574–75 (describing the argument that the Texas law violated the equal protection clause as "tenable").

136. *Id.* at 577–78 ("[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

137. *Id.* at 602.

138. Obergefell v. Hodges, 570 U.S. 644, 672 (2015).

139. *Id.* at 671 ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.").

140. *Id.* at 673 ("The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.").

"sufficient justification for *excluding the relevant class* from the right."[141] Forbidding same-sex couples from marrying put state imprimatur on an "exclusion that [ ] demeans or stigmatizes" them.[142] On H&T 3.0's dynamism, the *Obergefell* Court was forthright. The "interrelation" of equal protection and substantive due process "furthers our understanding of what freedom is and *must become*."[143]

Several substantive due process cases, thus, have blended equal protection concepts with due process history and tradition methods to justify two significant analytic moves that reject H&T 2.0's narrow framing of claimed rights. First, equal protection principles justify framing a claimed right or liberty rather generally and construing the holdings of prior fundamental rights cases broadly. The Court does so in order to ensure that the history and tradition test does not use a history (or persistence) of legal discrimination against the rights of certain social groups to justify continued discrimination.[144] Second, when a state criminalizes some claimed liberty, the Court asks whether our history and tradition has *prohibited* that liberty, not whether it *protected* that liberty.[145]

While reaching results that ratified the desires of national majorities as revealed by public opinion polls, cases that relied on H&T 3.0 were thin on traditional legal analysis. Justice Kennedy's opinions in these cases eschewed quotidian legal matters like standards of review and legal methodology in favor of broad pronouncements of rights coupled with granular, fact specific analysis. This absence invited criticism that *Obergefell*, *Lawrence*, and both abortion opinions were lawless.[146] H&T 3.0 appears

141. *Id.* at 671 (emphasis added).

142. *Id.* at 672.

143. *Id.* (emphasis added).

144. *See Obergefell*, 570 U.S. at 671 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."); *Lawrence*, 539 U.S. at 578–79 ("[T]hose who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

145. *See Lawrence*, 539 U.S. at 568–70 (emphasis added) (describing the lack of statutory or common law prohibitions of sodomy between same-sex partners until the middle of the twentieth century); Roe v. Wade, 410 U.S. 113, 130 (1973) ("[T]he restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage."); *id.* at 129–40 (discussing whether abortion has been prohibited from ancient Rome until 1973).

146. *See Obergefell*, 570 U.S. at 687 (Roberts, C.J., dissenting) ("The majority's decision is an act of will, not legal judgment[,] [and] [t]he right it announces has no basis in the Constitution or this Court's precedent."); *Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting) (criticizing the majority opinion's analysis as "results-oriented" and "expedient"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 953, 964 (1992) (Rehnquist, C.J., dissenting) (criticizing the plurality opinion for

to leave an opening for *Dobbs*'s narrow, originalist history and tradition test to waltz through as a (purportedly) principled substitute.

D. History and Tradition 4.0: McDonald *and* Dobbs

Dobbs represents History and Tradition 4.0. Originalism drives *Dobbs*'s holding that access to abortion is not a fundamental right.[147] Whether a right is fundamental, *Dobbs* holds, depends on "what the *Fourteenth Amendment* means by the term 'liberty.'"[148] The answer to that question must be "[g]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty. . . ."[149] In other words, the meaning of a constitutional provision is fixed when it was adopted.[150] The best evidence of that meaning is provided by those substantive, but unenumerated, rights protected by positive law (either statutory or common law) when the Fourteenth Amendment was ratified.[151]

Consequently, "the most important historical fact," according to *Dobbs*, is "how the States regulated abortion *when the Fourteenth Amendment was adopted*."[152] Consequently, *Roe* erred by brushing aside the many state bans that existed in 1868.[153] The simple fact is, *Dobbs* holds, those bans prove no such right to abortion existed.[154]

H&T 4.0 relies heavily on *McDonald v. City of Chicago*. That case held that the Fourteenth Amendment "incorporated" the Second

upholding *Roe*'s "constitutionally imposed abortion code" and creating a new "undue burden" standard "largely out of whole cloth").

147. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (interpreting the text of the Constitution through the Framers original intent).

148. *Id.* at 2248.

149. *Id.* at 2235.

150. Originalists agree on what Larry Solum has called the "fixation" thesis: "that the linguistic meaning of each constitutional provision was fixed at the time that provision was adopted." Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12 (Grant Huscrof & Bradley W. Miller eds., 2011). Larry Solum, to be clear, argues that *Dobbs* is not an originalist opinion. *See infra* text accompanying notes 165–66, for more detail on his and Randy Barnett's argument.

151. *Dobbs*, 142 S. Ct. at 2253–54 ("The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions" as there is no support that the law protected such a right prior to "the latter part of the 20th Century").

152. *Id.* at 2267 (emphasis added).

153. *Id.* at 2254 (noting neither party disputed "the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy").

154. *Id.* at 2253–54 (reasoning that *Roe*'s own recognition of the criminalization of abortion until 1973 contrarily proves that abortion is not a right deeply rooted in the Nation's history and traditions).

Amendment's individual right to bear arms against states.[155] Justice Alito authored the Court's opinion in *McDonald*, an opinion that is nothing if not originalist. *McDonald* held that the Fourteenth Amendment incorporated the Second Amendment because "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[156]

Dobbs likens its method to *McDonald*'s, and it describes *McDonald*'s originalist methods. *McDonald*, *Dobbs* says, focused on "the origins of the Second Amendment, the debates in Congress about the adoption of the Fourteenth Amendment, the state constitutions in effect when that Amendment was ratified, . . . federal laws enacted during the same period, and other relevant historical evidence."[157]

McDonald zeroed in on the time period surrounding the Fourteenth Amendment's adoption, in particular, the specific debates and discussions surrounding the Freedman's Bureau Act, the Civil Rights Act of 1866, and the Fourteenth Amendment itself. These debates emphasized that the right to bear arms would let African Americans protect themselves against the depredations of white vigilantes.[158] "[T]he right to keep and bear arms was" also "highly valued for purposes of self-defense" and most state constitutions protected the right to bear arms "when the Fourteenth Amendment was ratified."[159] *McDonald* concluded that "it is clear that the *Framers and ratifiers* of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[160]

Applying these originalist methods, *Dobbs* required the plaintiffs to show similar historical evidence that established "a constitutional right to abortion . . . when the Fourteenth Amendment was adopted," such as state constitutional provisions or statutes, judicial decisions, or learned

155. McDonald v. City of Chicago, 561 U.S. 742, 742 (2010) ("The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States.").

156. *Id.* at 778.

157. *Dobbs*, 142 S. Ct. at 2247 (citing *McDonald*, 561 U.S. at 767–77).

158. U.S. CONST. amend. XIV; *see, e.g.*, *McDonald*, 561 U.S. at 776 (quoting Rep. Thaddeus Stevens with approval, "Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty. The fourteenth amendment, now so happily adopted, settles the whole question."); *see* An Act to Establish a Bureau for the Relief of Freedmen and Refugees of 1865 (Freedmen's Bureau Act), Pub. L. No. 38-90, 13 Stat. 507, 507, *and* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (1991).

159. *McDonald*, 561 U.S. at 770, 777.

160. *Id.* at 778 (emphasis added).

treatises.[161] *Dobbs* contends that there was none.[162] Quite the opposite—by the late 1860s most states had banned abortion. Even before these state bans, *Dobbs* claims that, under some circumstances, the common law criminalized abortion.[163] "There was," therefore, "no support in American law for a constitutional right to obtain an abortion."[164]

Originalists themselves disagree whether *Dobbs* is originalist. Professors Larry Solum and Randy Barnett, for example, argue that it is not.[165] *Dobbs*, they say, does not grapple with original public meaning of the due process clause, and original public meaning originalism requires *textual* interpretation.[166] The word "liberty" originally meant freedom from restraint, and "due process" meant procedural, not substantive, protections.[167] The original meaning of the Fourteenth Amendment would protect substantive rights but through the privileges or immunities clause, not the due process clause.[168] "Privileges or immunities of citizens" had a well-understood meaning in 1868 that include civil rights, the right to choose one's occupation, and the right to one's own body, subject "to such restraints as the government may justly prescribe for the general

161. *Dobbs*, 142 S. Ct. at 2254 (criticizing the respondents for failing to produce evidence of an abortion right that existed before "the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise").

162. *Id.* (opining that historical support for the respondents' argument does not exist).

163. *Id.* ("[G]reat common-law authorities like Bracton, Coke, Hale, and Blackstone all wrote that a post-quickening abortion was a crime—and a serious one at that. . . . [E]ven a pre-quickening abortion was 'unlawful' . . . . [A]n abortionist was guilty of murder if the woman died from the attempt.").

164. *Id.* at 2235.

165. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 458–59 (2023) ("Justice Alito's plurality opinion in *McDonald*, which he followed in *Dobbs*, is equivocal about whether its reasoning concords with the original meaning of the text. . . . [his] reasoning . . . is a hybrid of originalist and nonoriginalist analysis."). Some critics of originalism also think *Dobbs* is not originalist. *See* Siegel, *supra* note 34, at 1175 ("Dobbs is a 'living constitutionalist' decision because it refashions substantive due process doctrine to achieve changes that movement-identified originalists have sought since the days of the Reagan Administration.").

166. Barnett & Solum, *supra* note 165, at 446 ("[A]n originalist approach to constitutional interpretation requires us to identify the communicative content of the constitutional text.").

167. *Cf. Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("[T]he Due Process Clause at most guarantees process [but] does not, as the Court's substantive due process cases suppose, forbid the government to infringe certain fundamental liberty interests at all, no matter what process is provided.").

168. U.S. CONST.art. IV, § 2; *id.* amend. XIV, § 1. *See* Barnett & Solum, *supra* note 165, at 467 n.146; *see also* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 647 (2000) ("[T]here was substantial consensus among members of the Thirty-Ninth Congress who crafted the Fourteenth Amendment that the Privileges or Immunities Clause . . . (and *not* the Due Process Clause, as is commonly assumed today) would serve as the primary vehicle for protecting individual rights against state infringement.").

good of the whole."[169] *The Slaughter-House Cases*, of course, wrote the privileges or immunities clause out of the Fourteenth Amendment.[170] According to Professors Solum and Barnett, that fact does not justify deviating from the meaning of the due process clause. If *Dobbs* can overrule *Roe* and *Casey* for being obviously wrong, it could also overrule *The Slaughter-House Cases*.

Other prominent originalists, such as Professors Joel Alicea and Lee Strang, trumpet *Dobbs* as an originalist victory.[171] Professor Michael Stokes Paulsen describes *Dobbs* as "a triumph for restoring faithful constitutionalism."[172] Though *Dobbs* may "not be the constitutional purist's pristine picture of perfection," Professor Paulsen writes, it "comes darned close or is at least very, very good—as good as it gets in the real world."[173] On this account, *Dobbs*'s reliance on the non-originalist substantive due process doctrine does not undercut its originalist bona fides. Most originalists agree that originalism permits stare decisis even to incorrect precedents.[174] Some argue that the original public meaning of the judicial power requires stare decisis.[175] To these originalists, after

169. Corfield v. Coryell, 6 F. Cas. 546, 551–52 (Washington, Circuit Justice, C.C.E.D. Pa. 1823).

170. *See* Saenz v. Roe, 526 U.S. 489, 527 (1999) (Thomas, J., dissenting) ("[T]he *Slaughter–House Cases* sapped the [Privileges or Immunities] Clause of any meaning." (citing The Slaughter-House Cases, 83 U.S. 36 (1873)); *see also* Newsom, *supra* note 168, at 646 ("*Slaughter-House* stands for one simple truth: that the Privileges or Immunities Clause is utterly incapable of performing any real work in the protection of individual rights against state interference . . . .").

171. J. Joel Alicea, *An Originalist Victory*, CITY J., MANHATTAN INST. POL'Y RSCH. (June 24, 2022), https://www.city-journal.org/article/an-originalist-victory [https://perma.cc/GV4B-HN7T] ("To acknowledge this achievement is to acknowledge the constitutional theory around which the coalition that brought it about rallied for a half-century: originalism."); Lee Strang, *A Three-Step Program for Originalism*, PUB. DISCOURSE (June 12, 2022), https://www.thepublicdiscourse.com/2022/06/82703/ [https://perma.cc/YT5R-C79N] (arguing that *Dobbs* is originalist in the sense that "originalism exerts a gravitational effect that pulls errant doctrine," i.e., *Roe*, "back toward the original meaning"); *id.* ("Justice Alito's draft *Dobbs* opinion is reasonably characterized as an originalist decision" as it "giv[es] originalist facets of our practice priority, and marginaliz[es] nonoriginalist facets"); Michael Stokes Paulsen, *Three Very Enthusiastic Cheers for the* Dobbs *Draft*, NAT'L REV. (May 6, 2022, 4:50 PM), https://www.nationalreview.com/bench-memos/three-very-enthusiastic-cheers-for-the-dobbs-draft/ [https://perma.cc/2GL9-XAWA] ("[The *Dobbs* draft opinion] is brilliant — a masterpiece of judicial craft, clarity of analysis, precision of expression, and fidelity to the Constitution.").

172. Michael Stokes Paulsen, *The Magnificence of* Dobbs, PUB. DISCOURSE (June 26, 2022), https://www.thepublicdiscourse.com/2022/06/83022/ [https://perma.cc/C3BS-65KQ].

173. *Id.*

174. Alicea, *supra* note 171. It bears noting that Paulsen thinks precedent should play no role in originalist methodology. Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005).

175. Strang, *supra* note 171 ("[T]he best conception of originalism, one it appears most originalists today follow, includes a robust place for stare decisis.").

more than a century, substantive due process is deeply embedded in constitutional doctrine and merits stare decisis.[176] *Dobbs*'s approach of limiting the scope of "liberty" to just those substantive rights protected in 1868 cabins the meaning of the due process clause to the original understanding of only those rights protected when it was ratified.

Professor Paulsen cuts to the heart of the question of *Dobbs*'s originalism. Originalism as practiced by academics is one thing, where purity can be a goal.[177] Originalism as practiced by judges, however, requires satisficing—sacrificing some purity of methodology at the granular level to satisfy broader originalist aims and methods.[178] In this vein, Professors Barnett and Solum concede that originalism at least exerts a "gravitational force" on Justice Alito's opinion in *Dobbs*.[179] In this sense, originalism "leads a justice to adopt a highly restricted version of the [substantive due process] doctrine that reduces, but does not eliminate, the perceived departure from the original public meaning of the clause."[180]

It bears repeating that *McDonald* and *Dobbs* claim to be *originalist* and to use an originalist history and tradition test to determine whether an unenumerated right is fundamental and encompassed by the Fourteenth Amendment's liberty protections.[181] Originalist evidence of such rights

176. Alicea, *supra* note 171.

177. Purity may even be a stretch for originalist academics, as they disagree on what exactly originalist methodology requires. Steven Calabresi and Todd Shaw describe four main points of disagreement among originalists, and there may be others. First, "most originalists" hew to a text's original public meaning "at ratification," but some cling to drafters' intent. Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 529 (2019). Second, the debate over constitutional "interpretation" (discovery of the text's meaning) and construction ("[Determining] what legal effect to give to the text in the absence of a determinate meaning."). *Id.* at 529–30 (internal quotations omitted). Third, within the interpretation/construction debate, some believe that originalist "construction" is possible, while others argue it is invariably normative. *Id.* at 530. Finally, originalists disagree whether non-originalist precedent is binding. *Id.*

178. Strang, *supra* note 171 (arguing that originalism as practiced by the Courts today cannot be measured against an ideal yardstick because originalism is not yet fully ascendant as a judicial methodology). *See also* Joseph Fishkin (@joeyfishkin), TWITTER (May 13, 2022, 1:27 AM), https://twitter.com/joeyfishkin/status/1524999871006052352 [https://perma.cc/RSM4-NVMT] ("There is a ton of evidence—good evidence according to OPM methodology—that the ordinary meaning of the word 'originalism' today is not academic originalism. Instead, basically, 'originalism' means conservative traditionalism. It means exactly what Alito is doing in Dobbs.").

179. Barnett & Solum, *supra* note 165, at 449 (citing Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 420 (2013)). *But see Id.* at 476 (arguing that *Dobbs* is best understood as a "constitutional pluralist" opinion in which "the gravitational force of originalism played a role in the background").

180. Barnett & Solum, *supra* note 165, at 449.

181. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022) (holding that whether abortion access is a fundamental right depends on "what the *Fourteenth Amendment* means

can take the form of explicit positive law protections for the claimed right around the time of the Fourteenth Amendment or evidence that Congress considered a claimed right to be fundamental when it passed the Fourteenth Amendment. In contrast, common law or legislative regulations of a claimed right prove that it is not fundamental and may be freely regulated today.

E. Conclusion: Unprecedented History and Tradition

There is no single history and tradition test for identifying fundamental rights. Neither *Dobbs* nor *McDonald* acknowledge this fact. Worse yet, *Dobbs* invents a new one; *Dobbs* then pretends that its new test is *the* test, and that by following *this* test, it upholds the rule of law. This assertion is false.[182] *Dobbs* exercised judicial discretion in its choice of history and tradition methods, but it neither acknowledged nor justified that exercise of discretion. Burying its choice, *Dobbs* belies allegiance to the rule of law.

Any real justification for *Dobbs*'s crabbed, originalist history and tradition test must rest on grounds sufficient to justify its unacknowledged exercise of discretion. Aside from rule of law values, the most common justification for originalism is that it honors the meaning fixed by the sovereign people when they ratified the Constitution or an amendment. Part II probes how originalists have contended that originalism honors the ratifying people's exercise of sovereignty and explains why popular sovereignty cannot serve as a satisfactory normative justification for *Dobbs*'s test.

II. THE CONTRADICTIONS OF HISTORICAL POPULAR SOVEREIGNTY

What justifies originalism? Why should today's Court care about the original meaning of the Constitution? A formalist justification—the original meaning of the Constitution is binding because the people fixed that meaning when they ratified the Constitution—begs the question that the

by the term 'liberty'"); McDonald v. City of Chicago, 561 U.S. 742, 767–77 (2010) (focusing on the understanding of the right to bear arms during the time period surrounding the Fourteenth Amendment's adoption).

182. *See* Siegel, *supra* note 34, at 1182 n.213 (arguing that "Justice Alito's fabricated '*Glucksberg*' was not even faithful to *Glucksberg* itself[]" but was fabricated "to kill *Casey* and *Roe*.").

meaning was fixed when it was ratified.[183] Even originalists admit the circularity of formalist justifications.[184]

Resolving that circularity requires looking beyond formalism. Originalist scholars agree that any real justification of originalism must provide normative reasons why we ought to be legally, and perhaps morally, bound by original meaning. As the leading exponent of originalism, Larry Solum, puts it, "Constitutional theory" is at root "a normative enterprise."[185] Originalist Kurt Lash agrees that "[a] fully developed originalist theory" includes both a theory of what the Constitution means *and* "a theory of the binding legal and moral force of originalism."[186]

Justice Alito advances one possible normative justification for *Dobbs*'s originalist history and tradition approach. Originalism promotes democratic values by handing decision-making authority over abortion back to "the people's elected representatives."[187] Whether and when women should be able to get abortions, Justice Alito explains, should "be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[188]

This normative justification for originalism falls short for two reasons. First, neither originalism nor an originalist history and tradition test invariably hands decision-making authority to the democratic process. The extent to which originalism gives the people's representatives power to decide an issue depends entirely on the original meaning of the text. *McDonald*, the Second Amendment incorporation case, uses originalism to wrench decision-making authority from the people and to strike down a law enacted by the people's representatives.[189] Its reason for doing so is that the original meaning of the Fourteenth Amendment guarantees the

183. Solum, *supra* note 39, at 11 ("Critics of originalism long contended that many of the arguments for originalism seemed to beg the question" because originalists had not provided a basis for "political morality that answer the question, Why should I regard the original meaning as binding?").

184. For example, originalists Michael Stokes Paulsen and Vasan Kesavan acknowledge that the originalist claim that the Constitution is authoritative because its text proclaims it to be "a little bit circular." Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127 (2003).

185. Solum, *supra* note 39, at 11.

186. *Id.* at 12; *see also* Lash, *supra* note 39, at 1440 ("Because originalism is an interpretive method and not a normative constitutional theory, different originalists advance different normative grounds for their interpretive approach.").

187. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

188. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part)).

189. McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (striking Chicago city ordinance banning possession of most handguns).

individual right to bear arms.[190] Likewise, in *Kennedy v. Bremerton School District*, the Court used an originalist interpretation of the Free Exercise Clause to hold that a school district cannot forbid a teacher from praying at a high school football game.[191] Originalism, therefore, does not inevitably preserve democratic decision-making.

Second, whether the people's representatives have the power to decide whether access to abortion is legal depends entirely on whether abortion—or any other right—is or is not a fundamental right. If it is, then the Constitution reserves that power. Increasing democratic decision-making, therefore, cannot provide an independent normative basis for the decision.

For normative justification, *Dobbs* and originalism must look elsewhere. This next section turns to the most popular and influential normative account of originalism—popular sovereignty.

A. The Normative Case for Original Meaning's Authority: Democracy and Popular Sovereignty

"Popular sovereignty and the judicially enforced will of the people" are "the most common and influential" normative justifications originalists have proposed.[192] According to Professor Solum, the "connection between democratic legitimacy and original public meaning is so close and the argument for that connection so obvious that very little needs to be said about it."[193] The argument goes that "the sovereign people" ratified the Constitution and its amendments in democratic state constitutional conventions; interpreting a constitutional provision according to its original public meaning ratifies that sovereign act.[194] The original public

190. *Id.*; *see also* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022) (striking New York State statute that required applicants to show need for license to carry concealed weapons).

191. Kennedy v. Bremerton School District 142 S. Ct. 2407, 2416 (2022).

192. Lash, *supra* note 39, at 1440.

193. Solum, *supra* note 39, at 43; *see also* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (arguing that originalism is often justified as "manifest[ing] the will of the sovereign citizens of the United States" who "assembled in the conventions and legislatures that ratified the Constitution and its amendments"). Although Brest discussed popular sovereignty in the context of original intent originalism, his observation applies with just as much (if not more) force in the context of original public meaning of originalism. *But see* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1835–36 (1997) (arguing that social contract theory cannot ground any theory of Constitutional legitimacy, and, instead, "that any plausible argument for the Constitution's authority . . . at least to some extent . . . depend[s] on the Constitution's substance").

194. WHITTINGTON, *supra* note 39, at 135 (the original public meaning "draws upon the constitutional foundations of popular sovereignty—that the people alone determined the higher law"). Paul Brest, a prominent but fair critic of originalism, put it this way: "The Constitution manifests

meaning of the Constitution is binding because, as Professor Keith Whittington explains, by "ratifying the document, the people appropriated it, giving its text the meaning that was publicly understood."[195]

Popular sovereignty "emphasizes the democratic foundation of the Constitution and provides a mechanism for understanding what is required by consensual government in the context of a durable constitutional text."[196] It both justifies "constitutional authority" while also prescribing originalism as "a method for interpreting the document."[197] Under this view, popular sovereignty can even resolve the "counter-majoritarian" difficulty,[198] because judges construe the Constitution according to the original public meaning as ratified by the people.[199]

In his scholarly writings, Justice Antonin Scalia also justified originalism based on popular sovereignty.[200] "The Constitution," Justice Scalia wrote, is "a democratically adopted text," and its meaning should be fixed, not evolve over time.[201] "The purpose of constitutional guarantees" is to enshrine the "original values" of "the society" that "adopt[ed]

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the will of the sovereign citizens of the United States—'we the people' assembled in the conventions and legislatures that ratified the Constitution and its amendments. The interpreter's task is to ascertain their will." Brest, *supra* note 193, at 204. The current iteration of originalism—original public meaning—would amend Brest's explanation slightly to say that the interpreter's task is to ascertain the original public meaning of the words the people ratified.

195. WHITTINGTON, *supra* note 39, at 60.

196. *Id.* at 159.

197. *Id.*

198. Lash, *supra* note 39, at 1446 ("Popular sovereignty theory resolves the [counter majoritarian] difficulty by grounding judicial review in the more deeply democratic law of the people.").

199. WHITTINGTON, *supra* note 39, at 111 (stating that when judges construe the Constitution according to its original public meaning judicial review "is not simply an anti-democratic feature of American politics but is an instrument of the people in preserving the highest promise of democracy").

200. Justice Scalia referred to original meaning originalism in various ways, often referring to it as "textualism." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS & THE LAW 23 (Gordon S. Wood et al. eds., 1997). Keith Whittington explains that Justice Scalia's references to "textualism" are "somewhat misleading." Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 379 (2013). "By textualism," Whittington explains "Scalia has in mind the 'objectified intent' of the legislature—what 'a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.'" *Id.* (quoting Scalia, *supra*, at 17). Not all originalists concur that popular sovereignty provides the normative justification for originalism. Professors John McGinnis and Michael Rappaport, for example, argue that "originalism advances the welfare of the present-day citizens of the United States because it promotes constitutional interpretations that are likely to have better consequences today than those of nonoriginalist theories." JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 2 (2013).

201. Scalia, *supra* note 200, at 40.

the Constitution."[202] Non-originalist interpretations undermine popular sovereignty because they "deprive[e] the people of th[e] power" to define the Constitution's meaning.[203] The "whole purpose" of a democratically adopted Constitution, Justice Scalia wrote, "is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."[204]

Justice Scalia made similar arguments in his opinions. In *McDonald*, he justified freezing the scope of unenumerated rights to just those explicitly protected when the Fourteenth Amendment was ratified: "[This] approach intrudes less upon the democratic process because the rights it acknowledges are those established by *a constitutional history formed by democratic decisions*."[205] At the same time, "the rights [the original meaning] fails to acknowledge are left to be democratically adopted or rejected by the people, with the assurance that their decision is not subject to judicial revision."[206] Justice Scalia castigated Justice Stevens's *McDonald* dissent for having updated the meaning of the Constitution. In his view, Justice Stevens would replace a democracy "in which 'majorities or powerful interest groups always get their way'" "with a system in which unelected and life-tenured judges always get *their* way."[207]

To Justice Scalia, then, a fundamental rights test that recognizes only rights protected when the relevant Constitutional provision was ratified honors the ratifying people's exercise of popular sovereignty. Non-originalist judges wrest power from the ratifying people to define fundamental values and to fix their choices in law. Originalism preserves the power of the sovereign people.

The popular sovereignty account of originalism has been criticized for reducing to the "dead hand" of the past exerting power over present generations who had no say in the Constitution's meaning.[208] Professor

202. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

203. McDonald v. City of Chicago, 561 U.S. 742, 805 (2010).

204. Scalia, *supra* note 200, at 40; *see also id.* at 47 (arguing that if judges interpret the Constitution in a flexible way to evolve with the times, the Constitution will cease to offer any protections at all).

205. McDonald v. City of Chicago, 561 U.S. 742, 805 (2010) (Scalia, J., concurring).

206. *Id.*

207. *Id.* (quoting *Id.* at 911 (Stevens, J., dissenting)).

208. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 636 (1999) (arguing that the appeal to popular sovereignty reduces to an argument that we are ruled by a "Dead Hand"); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2–3 (1987) (stating that the original Constitution does not deserve veneration because it created a framework that treated enslaved African Americans and women unjustly); Brest, *supra* note 193, at 225 ("Even if the adopters freely consented to the Constitution,

Whittington responds that honoring prior exercises of popular sovereignty preserves our power to exercise sovereignty today and in the future.[209] We, the people, always have the power to "assert [our] sovereign will by amending the Constitution."[210] Courts that enforce the original public meaning of prior ratifiers provide the necessary condition for our own and future generations' exercise of sovereignty.[211] Put slightly differently, we can preserve our own authority as sovereigns to amend our Constitution "only if we are willing to recognize the reality of" the founders' prior acts of sovereignty.[212] Applying something other than the original public meaning effectively "strip[s] [the founders] of their right to constitute a government . . . [and] likewise strips us of our own."[213] The popular sovereignty justification ultimately depends on comparative analysis. First, are we better off honoring the exercise of prior sovereigns' power in order to preserve our own sovereign power? Second, are popular votes in the past more democratic than current judicial declarations? The next section discusses the baseline for such a comparison—the extent to which the original exercise of popular sovereignty was actually democratic. Future work will discuss how a non-originalist, dynamic approach to fundamental rights is more consonant with democratic principles. I turn now to originalism's fundamentally undemocratic nature.

B. Originalist History and Tradition and America's Original Sin

To the extent the history and tradition test rests on the ideal of popular sovereignty, it must explain why the ratifying people's exercise of popular sovereignty deserves respect. Originalists are not so misty-eyed about the Constitution's origins to deny that the 1789 ratification process was, as Professor Larry Solum puts it, "imperfect, even by the standards of the day."[214]

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however, this is not an adequate basis for continuing fidelity to the founding document" because "[*w*]*e* did not adopt the Constitution, and those who did are dead and gone." (emphasis added)).

209. WHITTINGTON, *supra* note 39, at 44.

210. Leslie F. Goldstein, *Original Meaning, Precedent, and Popular Sovereignty:* Whittington et al. v. Lincoln et al., 82 FORDHAM L. REV. 783, 787 (2013) (citing WHITTINGTON, *supra* note 39, at 110–59).

211. *Id.* ("The judicial obligation to stick to original understanding makes meaningful any new assertion, because *only* then can people be confident that their new assertion will be legally meaningful." (citing WHITTINGTON, *supra* note 39, at 50–59)); *see also* Solum, *supra* note 39, at 44 (observing that should we, or future generations, amend our Constitution, originalism will preserve our power to "fix[] the original public meaning" of that amendment).

212. WHITTINGTON, *supra* note 39, at 133.

213. *Id.*

214. Solum, *supra* note 39, at 43.

Viewed through modern eyes, Professor Solum says, the Constitution's "ratification process was woefully inadequate" because it excluded all women, enslaved persons, most free Black men, and white men who did not own enough property.[215] Measured against what was politically possible at the time, Professor Solum contends that the ratification "must count as one of the most profoundly democratic moments in human history" up to that point.[216] Even if true, the question remains whether this "imperfect" or "woefully inadequate" exercise of popular sovereignty makes a compelling case for the normative legitimacy and authority of the original meaning of the Constitution.

To answer that question, it is worth considering how profoundly undemocratic the original Constitution's ratification process was. Only adult males who met property qualifications could vote for ratification, roughly 15 percent of the population.[217] No women, regardless of race or property,[218] no enslaved persons, and, in three states, no free Black men could vote.[219] Participation among eligible men was low even by our modern expectations of low voter turnout. Perhaps "only twenty to twenty-five percent of those eligible actually participated" in the ratification process.[220] And "[o]f the roughly 160,000 adult males who voted on

215. *Id.*

216. *Id.*

217. In 1790, only three of thirteen states barred Black men from voting because of their race. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 354 tbl.A.5 (2000). In 1790, ten of the thirteen states maintained property requirements to vote. *Id.* at 340 tbl.A.1; Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CAL. L. REV. 1482, 1498 n.44 (1985) ("It has been estimated that eighteen to nineteen percent of the population at that time were adult males, and that only eighty to eighty-five percent of this population was eligible to participate in ratification elections.") (citing ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" 69 (1956)).

218. New Jersey women's brief right to vote between 1776 and 1807 slightly qualifies this blanket statement. Under the 1776 state constitution, which used gender neutral language, single and widowed New Jersey women had the right to vote if they were "worth fifty pounds'" and "resided in the state for one year." Judith Apter Klinghoffer & Lois Elkis, *"The Petticoat Electors": Women's Suffrage in New Jersey, 1776–1807*, 12 J. EARLY REPUB. 159, 159–60 (1992). Women's votes probably did not tip the needle in favor of ratification, *id.* at 171, and before 1787, few women appear on poll lists. Jan Ellen Lewis, *Women's Suffrage in New Jersey, 1776-1807*, 63 RUTGERS L. REV. 1017, 1024 (2011). No other state until 1890 extended the franchise to women, when Wyoming did so. Karen M. Morin, *Political Culture and Suffrage in an Anglo-American Women's West*, 19 WOMEN'S RTS. L. REP. 17, 21 tbl.1 (1997).

219. Non race-based property requirements, however, would have barred many from voting. *Cf.* KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 197 (2021) (noting that New York's property requirement of $250 "disenfranchised all but the wealthiest Black men in the state").

220. Simon, *supra* note 217, at 1498 n.44 (citing LOUIS M. HACKER, THE SHAPING OF THE AMERICAN TRADITION 238 (1947)).

ratification, not more than 100,000" of the American population "voted in favor of it."[221] In total, about 10 percent of the adult population voted for ratification.[222] Furthermore, the propertied white males who did vote "had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales."[223]

The popular sovereignty argument for the original meaning of the Fourteenth Amendment fares little better, except that by then nearly all white men had the right to vote.[224] The voting rights of Black men, however, sharply *contracted* in the years between the ratification of the original Constitution and the Fourteenth Amendment.[225] From 1790 to 1860, the number of states in which Black men could vote on the same terms as whites shrank from ten out of thirteen states to five out of thirty-three.[226] Theoretically, New York was a sixth state that permitted Black men to vote, but New York imposed a high property requirement on Black men, but not white men, that denied nearly all Black men the right to vote.[227] Black men's voting rights did not measurably expand until the Fifteenth Amendment's ratification in 1870. Between 1863 and 1870, "more than

221. *Id.* (first citing CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 250 (1935); and then citing FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 14 n.11 (1958)).

222. I arrived at my 10 percent estimate as follows. The population of the United States was about four million, but that would include minors who today cannot vote. *See* 1790 CENSUS: RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 4 (1793), https://www2.census.gov/library/publications/decennial/1790/number_of_persons/1790a-02.pdf [https://perma.cc/F2A4-73S2]. In 1790, our population was relatively youthful, the census does not give enough information to say just how youthful. Census tables do show that there were almost as many white males under fifteen as white males sixteen and older. *Id.* No age breakouts for white women are provided, but one would expect that there would be about the same proportion of women under fifteen. In total, enslaved persons made up around eighteen percent of the population. Simon, *supra* note 217, at 1498–99 n.44.

223. Simon, *supra* note 217, at 1498–99 n.44; *see also* Brest, *supra* note 193, at 230 ("Similarly, the assumption that the contract clause reflected widely held norms of eighteenth century America is weakened to the extent that creditors were well-represented and debtors underrepresented in the Philadelphia and state ratifying conventions.").

224. By 1856, all states had abolished property requirements for white men, and by the Civil War, only five states retained taxpayer requirements. Stanley L. Engerman & Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, 65 J. ECON. HIST. 891, 898 tbl.1 (2005).

225. MASUR, *supra* note 219, at 209–10 (describing that in the nineteenth century, "advocates of Black men's right to vote were working against a strong tide of disenfranchisement").

226. KEYSSAR, *supra* note 217, at 87–88 ("At the outset of the war, only five states, all in New England, permitted blacks to vote on the same basis as whites . . . .").

227. *Id.* (New York required Black men to possess at least $250 in property to vote).

fifteen northern states" resoundingly rejected "proposals to enfranchise" Black men.[228]

Women, regardless of their color, could not vote to ratify either the original Constitution or the Fourteenth Amendment.[229] The Fourteenth Amendment dimmed the lights on women's rights by inserting, for the first time, the word "male" into the Constitution.[230] That inclusion made it clear that denying women the right to vote was perfectly constitutional.[231] The Fifteenth Amendment iced women's exclusion by making unconstitutional the abridgment of the right to vote on the basis of color, but not sex.[232] Susan B. Anthony and Elizabeth Cady Stanton believed that the exclusion of sex from the Fifteenth Amendment was just "another in a long train of 'humiliations'" for women.[233]

For the originalist history and tradition test, women's exclusion from the Fourteenth Amendment bites particularly hard. After all, it is their right to abortion (and, as we will see, contraception) that the Court aims to construe.[234] As originally understood, the Fourteenth Amendment[235]

228. Only Iowa, Minnesota, and the District of Columbia extended the right to vote to Black men during this period, and Minnesota voters may not have understood what they were voting for. *Id.* at 89.

229. Once again, only propertied single and widowed women could vote in New Jersey. *See* Lewis, *supra* note 218, at 1018.

230. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 215 (1984); WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 22–25 (2019).

231. FONER, *supra* note 230, at 255. U.S. CONST. amend. XIV. § 2, cl. 2 (reducing a state's representation if it did not permit all *males* to vote).

232. Elizabeth Cady Stanton is notorious for her racist criticism of the Fifteenth Amendment's failure to guarantee women the right to vote. FONER, *supra* note 230, at 216.

233. *Id.* at 356.

234. *See* Siegel, *supra* note 34, at 1199 ("Originalist interpretation abolished abortion rights, has threatened a host of other rights, and has left women's liberties in 2022 tied to a body of law enacted in the Civil War era in which women had no vote or say."); *id.* at 1193 ("The *Dobbs* majority signed on to an opinion in which decisions and laws written by men were presented as America's history and traditions, without a single woman's voice represented, and which claimed those traditions were sufficient to justify stripping women today of a half-century of constitutional rights."); *cf.* Dobbs v. Jackson's Women Health Org., 142 S. Ct. 2228, 2329 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[T]hose living in 1868 would not have recognized [women's] claim [to fundamental liberties] because they would not have seen [women] as a full-fledged member of the community.").

235. Whether the Nineteenth Amendment largely cured the defects of the original ratification and the ratification of the Fourteenth Amendment, the Nineteenth Amendment cannot have cured the *original meaning* of the Fourteenth Amendment. That original meaning is what the *Dobbs* history and tradition tests incorporates. *Cf.* MCGINNIS & RAPPAPORT, *supra* note 200, at 111 (arguing the original meaning of the Fourteenth Amendment was to promote racial equality and thus, the *Brown v. Board of Education* decision was consistent with the original meaning).

permitted states to deprive women of civil rights,[236] the guarantees of privileges and immunities,[237] equal protection,[238] and the right to vote.[239] Giving women the right to vote in 1920 retroactively cured the flaws of

236. Had the Civil Rights Act of 1866 applied to women, it would have wiped coverture off the books, yet coverture persisted. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–82 (1991) ("All persons within . . . the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."). Linda Speth, *The Married Women's Property Acts 1839–1865*, *in* WOMEN AND THE LAW 69, 69 (D. Kelly Weisberg ed., 1982). In discussing the common law doctrine of coverture, Speth writes, "marriage for all practical purposes ensured a woman's 'civil death.'" She lacked the right to sue or be sued or the right to contract. Husbands owned all their wives' personal property and had the legal right to manage her real property. Her wages were his. Husbands, not wives, could appoint guardians for children. Speth, *supra*, at 69. *See also* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 13–14 (1998) (quoting 1846 legal treatise as saying, "the husband, by marriage, acquires an absolute title to all the personal property of the wife" and further commenting that "[h]usbands also gained extensive power over her and her real estate"); *id.* at 14 ("A wife could not normally make contracts in her own name."). Professor and legal historian Norma Basch notes that when the Civil Rights Act of 1866 was passed, "twenty-nine states had passed some form married women's property law" which gave women some property rights but left other aspects of coverture intact—the remaining seven states retained coverture. Married women's property acts were "piecemeal"; women did not gain full civil rights well into the twentieth century. NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY AMERICA 28 (1982). To limit their reach, state courts narrowly construed married women's property acts. *E.g.*, WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 98 (1999) (courts continued to use the common law to uphold "traditional family values" against incursions by married women's property acts); *id.* at 108 (same and arguing that these statutes were weak in any case). *See* Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 355–56 (1979) (stating that married women's property acts "did not deliver the death blow to the old Blackstone code for married women").

237. Bradwell v. Illinois, 83 U.S. 130, 139 (1873) (holding that the right to practice law is not a privilege or immunity as understood by the Fourteenth Amendment); *see also id.* at 140–41 (Bradley, J., concurring) (stating that it cannot be claimed that the right to practice law "has ever been established as one of the fundamental privileges and immunities of the sex," that is, women).

238. Justice Scalia once admitted that from an originalist perspective, sex discrimination would not be a protected category under the equal protection clause because "[n]obody thought it was directed against sex discrimination." Adam Cohen, *Justice Scalia Mouths Off on Sex Discrimination*, TIME (Sept. 22, 2010), https://content.time.com/time/nation/article/0,8599,2020667,00.html. [https://perma.cc/29ZQ-URJS]. *See, e.g.*, Goesart v. Cleary, 335 U.S. 464, 465–66 (1948) (holding that consistent with the equal protection clause, "Michigan could, beyond question, forbid all women from working behind a bar," even in their *own* bars because "[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic"). Deep into the twentieth century, women did not have equal rights to serve on juries, a right at least theoretically guaranteed to all men under the Fourteenth Amendment by *Strauder v. West Virginia*, 100 U.S. 303 (1880). KERBER, *supra* note 236, at 136 (detailing how no state even "*permitted* women to serve" until Utah in 1898); *id.* (the right of a "*defendant* to a jury drawn from a list" that equally included women "was not firmly established until 1975").

239. U.S. CONST. amend. XIV, § 2, cl. 2.

the original ratifying process no more than a backdated check paid the bill on time.

According to Professor Whittington, the popular sovereignty justification for originalism does not hinge solely on the legitimacy of the ratification processes.[240] Original meaning is also binding because it honors prior exercises of sovereign will; adherence to original meaning preserves our and future generations' sovereign power to amend the Constitution.[241]

But the potential for amendment does not cure a flawed document. Our amendment process puts a heavy burden of change on those who would ameliorate any deficiencies of the original meaning of the Fourteenth Amendment. Burdens of proof are often decisive, more so when supermajority support is necessary.

Any fundamental rights analysis that relies on the state of the law circa 1789 or 1868 imports the injustice of women's exclusion into the present. The normative appeal of popular sovereignty derives from a commitment to human dignity; that is, persons bound to obey laws must have had a voice in their adoption. This general point is particularly acute when a law imposes disproportionate burdens on members of an excluded group, as is the case with laws against abortion. The profound deficiencies in the process of adopting the Fourteenth Amendment negate any claim that the Amendment's original meaning—or any history and tradition test that draws on that meaning—is democratically legitimate.

Part III will show that the particular history surrounding women and abortion in the nineteenth century makes any popular sovereignty justification for *Dobbs* impossible. *Dobbs*'s originalist resort to history and tradition is anachronistic and fundamentally incoherent.

III. THE HISTORY, TRADITION, AND HOLE AT THE HEART OF *DOBBS*

The narrow, originalist history and tradition test in *Dobbs v. Jackson Women's Health Organization* requires proof that American law affirmatively protected some claimed fundamental right when the Fourteenth Amendment was ratified. The majority opinion deems it significant that between the 1840s and the 1880s, many states adopted stringent restrictions on abortion, all without significant debate or opposition.[242] The success of these bans, the majority claims, shows that abortion was not a protected right when the Fourteenth Amendment was adopted. The

240. WHITTINGTON, *supra* note 39, at 135.

241. *Id.*

242. *See* Dobbs v. Jackson's Women Health Org., 142 S. Ct. 2228, 2285–300 (2022) (listing various state statutes in the appendix).

historical evidence, however, does not show that the public widely favored abortion restrictions or that access to abortion was practically restricted. In the context of abortion, this Part explains that, *Dobbs*'s demand for evidence of actual protections for abortion rights is anachronistic.

Section III.A will discuss how women had access to abortion in the nineteenth century without fear of prosecution. True, no law or common law doctrine, statute, or state constitution proclaimed a woman's "right" to have an abortion, but the law did make it practically impossible to prosecute those who performed or facilitated abortion. Judges resisted efforts to overturn the common law doctrine of quickening, which permitted abortion into the fourth month of pregnancy. Both of these factors insulated women and abortion providers from legal consequences.

Section III.B will argue that the kind of positive law *protections* for abortion or contraception that *Dobbs* demands could never have existed in the nineteenth century. First, positive rights were unnecessary because women's access to abortion had been unchallenged through most of the nineteenth century, removing any need to codify them. Second, this Section particularizes the critique of popular sovereignty to the context of abortion: when states began to ban abortion, women had no political or legal power to oppose the bans. It is nonsense to argue that originalism upholds the *people*'s supposed exercise of "popular sovereignty." Indeed, to suggest, as *Dobbs* does, that women's silence in the face of these bans establishes their approval of them ratifies their exclusion from this process and carries that injustice into today.

Section III.C will demonstrate that the public's failure to oppose abortion bans does not prove the public supported them. In fact, just the opposite is true. Women and men actively flouted these bans for decades. Furthermore, men and women remained silent in the face of these bans for several legal, cultural, and political reasons. Those reasons included gender norms about what it meant to be a proper woman, mother, or husband and Victorian reticence about sexual matters. The rhetoric of abortion opponents exploited both of these norms, guaranteeing the public's silence. An originalist history and tradition analysis cannot claim legitimacy from a supposed exercise of popular sovereignty.

A. Throughout the Nineteenth Century, Abortion Providers Could Provide Services without Legal Consequences

In an era that lacked reliable birth control, Americans privately accepted abortion as necessary to preserve women's health and to ensure

that families could adequately provide for their children.[243] No one celebrated abortion, but often women who needed abortions could obtain them. Historians agree on this point,[244] and evidence supports it.[245] The

243. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 21–22 (1997) (explaining that "many American women and their friends and family accepted abortions" and had them for health reasons and because they had material constraints); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 19–20 (1984) (explaining that women frequently had abortions and that Americans generally believed that "abortion before quickening was morally blameless, only slightly different from preventing a conception in the first place"); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 94 (1979) ("American women of all economic classes practiced abortion"); *id.* at 115–16 ("American men and women wanted to express their sexuality and mutual affections . . . and to [also] limit their fertility," and abortion "neither desirable nor undesirable in itself" was a way to "reconcil[e] and realiz[e] those two priorities"); *id.* at 117 ("American couples" had abortions "to postpone family responsibilities until they . . . were better prepared to raise children").

244. MOHR, *supra* note 243, at 71 ("Virtually all of the nation's experts on forensic medicine in the years from 1840 through 1880 concurred" in the opinion that "abortion rates in the United States soared during the middle of the nineteenth century"); *id.* at 50 (pointing to the "increased visibility" of abortion as indicating its prevalence mid-nineteenth century); *id.* 53–58 (describing evidence of a "flourishing business in abortifacient medicines" and citing that as indicating abortion's prevalence); *id.* at 61–63, 66–67 (documenting "accelerated proliferation of materials that allowed American women an ever widening access to possible methods of aborting themselves"); *id.* at 70–71 (noting "private female clinics" were springing "up all around the country" during the middle decades of the nineteenth century); *id.* at 75–82 (describing many studies by doctors in "medical journals or medical monographs" published for physicians which presented evidence or studies proving high rates of abortion); *id.* at 75 ("Medical writers throughout the period unanimously supported the conclusion, already manifest in the other types of evidence examined, that the incidence of abortion rose dramatically around 1840."). JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 225–31 (1994) (detailing many different abortifacients and emmenagogues and surgical abortions available in the mid-nineteenth century, all advertised in periodicals and sold in great numbers); Lauren McIvor Thompson, *Women Have Always Had Abortions*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/interactive/2019/12/13/opinion/sunday/abortion-history-women.html [https://perma.cc/Z89F-JLRL]; Tamara Dean, *Safer Than Childbirth*, AM. SCHOLAR (March 4, 2023) https://theamericanscholar.org/safer-than-childbirth/ [https://perma.cc/SK7F-N7VL] ("[A]bortion was a common means of birth control, a way for women of every race and social class to limit family size, manage resources, and protect their health [in the mid-nineteenth century].").

245. Many doctors prominent in the anti-abortion campaign did studies and surveys about the frequency of abortion. *See infra* notes 317–22 and accompanying text. *See also* Brief of Feminists for Life of America, Pro. Women's Network, as Amici Curiae in Support of Petitioners at *22 n.10, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (No. 90-985) ("Medical literature of the period also documented an increase in abortion" and citing medical sources from the 1850 to the early 1870s with approval). One legal scholar, Joseph Dellapenna, argues that abortions were not as frequent as some doctors then claimed or historians studying the issue now claim. JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 304 (2006). His argument turns mostly on the fact that he believes that most abortifacients were quack medicine. DELLAPENNA, *supra*, at 305. He points to a dearth of cases of sepsis as evidence that few women were having surgical abortions in the earlier parts of the nineteenth century. DELLAPENNA, *supra*, at 340–41. He backtracks from this position, however, and allows that "by the middle of the 19th century, abortion was becoming more common and was becoming an increasingly open phenomenon," despite the fact that states had tightened legal restrictions during the 1850s to the 1870s.

doctors who spearheaded the campaign against abortion certainly believed abortion was widely available, and they continued to lament its widespread availability through the end of the nineteenth century.[246] Large numbers of women tried to "restore their menses" or terminate their pregnancies and faced no legal penalties.[247] The doctors who inveighed against abortion believed this to be the case.

Under the common law, abortions before "quickening"[248] were largely unpunishable.[249] True, state common law did not specifically *protect* a woman's *right* to terminate her pregnancy pre- or post-quickening, but that fact is irrelevant.[250] No law *would* protect a woman's "right" to abortion because, prior to the 1840s, states largely did not try to use either the common law or to pass statutes to regulate women's pregnancies before

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DELLAPENNA, *supra*, at 327. Of course it is hard to say with any precision how many women had abortions the days before rigorous medical record keeping and public opinion polling, but doctors at the time believed that abortion was growing more common, see *infra* notes 317–23, 424–33, 489–496 and accompanying text. In some ways, Professor Dellapenna's objections are beside the point I make here. Abortifacients and surgical abortions were widely advertised which implies that many bought or sought them, see *infra* note 500 and accompanying text. Few who sold such drugs or provided abortions were prosecuted and fewer convicted. *See infra* notes 262–78, 282–312 and accompanying text. Furthermore, some preparations available in the nineteenth century could in fact induce abortions, although they also made a woman terribly, and sometimes fatally ill. *See* JENNIFER WRIGHT, MADAME RESTELL: THE LIFE, DEATH, AND RESURRECTION OF OLD NEW YORK'S MOST FABULOUS, FEARLESS, AND INFAMOUS ABORTIONIST 24 (2023) (describing various abortifacient compounds and citing nineteenth century medical journals that explained their efficacy).

246. *See infra* notes 318–21 (stating anti-abortion doctors claimed one in four pregnancies ended in abortions in the, more conservative estimates claim that one in five pregnancies ended in abortions, similar to the rate today).

247. LORETTA J. ROSS AND RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 24 (Rickie Solinger et al. eds., 2017).

248. "Quickening" meant the point in pregnancy at which a woman first feels the fetus move, generally toward the end of the fourth or the beginning of the fifth month of pregnancy. MOHR *supra* note 243, at 3.

249. State v. Murphy, 27 N.J.L. 112, 114 (N.J.1858) (stating that under the "common law, the procuring of an abortion, or the attempt to procure an abortion, by the mother herself, or by another with her consent, was not indictable, unless the woman were quick with child" and if a woman consented, the "act was purged of its criminality"). *See also* Siegel, *supra* note 34, at 1184 (noting that *Dobbs* largely ignores that "[a]t the Founding and during the early republic, the common law criminalized abortion only *after* quickening—as late as weeks 16 to 25 in pregnancy").

250. Historian Laura Briggs has argued that the failure of the original Constitution and eighteenth and early nineteenth-century legislatures to ban abortion indicates approval of the quickening doctrine. Laura Briggs, *Originalists are Misreading the Constitution's Silence on Abortion*, WASH. POST (May 3, 2022), https://www.washingtonpost.com/outlook/2022/05/03/originalists-misreading-constitution-silence-abortion/ [https://perma.cc/V8XK-AXTH]. Constitution framer James Wilson argued that abortion was "not the business of courts or lawmakers." *Id.* Briggs emphasizes that the common law did not view life in a legal sense to exist before quickening and left medical judgments to doctors. *Id.*

"quickening."[251] "Quickening" persisted in the common law well into the latter half of the nineteenth century,[252] such that without state statutes to the contrary, the common law permitted abortion.[253] In 1860, Dr. Horatio Storer, who led the American Medical Association's (AMA) anti-abortion lobbying campaign, bemoaned the common law's tolerance of abortions. "[I]n the sight of the common law, and, in most cases of the statutory law," he complained, "the crime of abortion, properly considered, does not exist."[254] Public opinion, he charged, "both in theory and in practice[]" also "fails to recognize the crime."[255]

Dobbs gets the basic facts right about statutory abortion restrictions in the nineteenth century. A few states passed abortion laws in the 1820s and 1830s, and the real wave of statutes began in the 1840s and continued through the end of the nineteenth century.[256] The new laws tended to ban abortion outright, except when necessary to save a woman's life, and

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251. GEOFFREY R. STONE, SEX AND THE CONSTITUTION 180 (2017) ("In the eighteenth and early nineteenth centuries, there were no laws prohibiting either contraception or abortion before quickening.").

252. *Compare* Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884), *with* Angelini v. OMD Corp., 575 N.E.2d 41 (Mass. 1991) (holding that a defendant could not be held civilly liable for the death of a fetus when the woman's pregnancy was not yet quick and observing that a contrary finding would be at odds with the lack of criminal liability for such an act).

253. In 1858, the New Jersey Supreme Court reviewed a conviction under its 1849 statute. The Court observed:

> At the common law, the procuring of an abortion, or the attempt to procure an abortion, by the mother herself, or by another with her consent, was not indictable, unless the woman were quick with child. The act was purged of its criminality, so far as it affected the mother, by her consent. It was an offence only against the life of the child.

State v. Murphy, 27 N.J.L. 112, 114 (1858). *See also, e.g.*, State v. Cooper, 22 N.J.L 52, 58 (1849) ("We are of opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law, and consequently that the mere attempt to commit the act is not indictable."); *Cooper*, 22 N.J.L at 58 ("It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period" because under the "law life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it"). Commonwealth v. Parker, 50 Mass. 263, 265–66 (1845) ("[A]t common law, no indictment will lie, for attempts to procure abortion with the consent of the mother, until she is quick with child" because the law does not consider it "a person in being"). Neither the *Parker* court nor the *Cooper* court could find *any* English or American common law authority to support an indictment for an abortion before quickening.

254. HORATIO R. STORER, M.D., ON CRIMINAL ABORTION IN AMERICA 9 (1860) [hereinafter STORER, CRIMINAL ABORTION].

255. *Id.*

256. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285–86 (2022).

some required at least one doctor to attest to its medical necessity.[257] By 1880, nearly every state in the union banned abortion at any stage.[258]

Dobbs elides ambiguities in the statutes that show quickening's imprint on what appear to be blanket statutory bans. In particular, New York's 1828 statute made it manslaughter to use or provide drugs to a woman pregnant with a quick child with the intent of destroying that child; and a misdemeanor to do the same on "any pregnant woman . . . with intent thereby to procure the miscarriage."[259] The statute's language is curious—the law calls it a *child* after quickening, yet before quickening, it says it is unlawful to induce a *miscarriage*.[260] Quickening, thus, marks a shift in the status of the fetus. Missouri's 1825 statute bans causing or procuring the "miscarriage of any woman then being with child."[261] This looks like a blanket ban applying to all stages of pregnancy, but this is not the only possible reading. Quickening may mark when people believed that pregnancy truly began. If a woman was only "with child" when the fetus was "quick," then Missouri law only banned giving poison to a woman "quick with child." *Dobbs*'s discussion of these early bans sweeps these ambiguities under the rug.

State courts that construed state statutes often limited their reach to abortions after quickening.[262] In 1869, for example, New York toughened its abortion statute to remove the quickening distinction. It became a crime to give or attempt to give a woman drugs or a surgical abortion resulting in "the death of [the] child."[263] But, in 1872, New York's highest court held that quickening must still be proved to convict under the statute.[264] The court held that "[i]t is not the destruction of the fœtus, the interruption of that process by which the human race is propagated and continued, that is punished by the statute as manslaughter, but it is the

257. *Id.* app. A, at 2287 (referencing Mich. Rev. Stat., Tit. 30, ch. 153, §§ 33–34 (1846)) (in Michigan, two physicians can attest that an abortion is necessary to save a woman's life); *id.* (referencing N.H. Laws 708 (1849)); *id.* app. A, at 2289 (referencing Cal. Stat. 233 (1850)) (providing "that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life").

258. *Id.* app. A, at 2296 (showing that Kentucky was an outlier, not banning abortion by statute until 1910).

259. *Id.* app. A, at 2285 (emphasis omitted) (quoting N.Y. REV. STAT. pt. 4, ch. 1, tit. 6, § 21 (1828) (codified as amended at 1829 N.Y. LAWS 19)).

260. *Id.*

261. *Id.* app. A, at 2285 (emphasis omitted) (quoting 1825 MO. LAWS 283).

262. *See* BRODIE, *supra* note 244, at 254 ("[B]etween 1840 and 1860 the new statutory restrictions on abortion were challenged in nine state supreme courts, seven of which had upheld the common law tradition and ruled that an abortion before quickening was not a criminal offense.").

263. DELLAPENNA, *supra* note 245, at 327 (quoting N.Y. LAWS ch. 631, § 1, at 1502(1869)).

264. Evans v. People, 49 N.Y. 86, 90–91 (1872).

causing the death of a living child."[265] "There must," therefore, "be a living child before its death can be produced."[266] A fetus, the court reasoned, is only "living" once it is quick.[267] Consequently, the defendant could not have been charged under the statute unless there was "evidence of life," that is, that the fetus "had become 'quick' in the womb."[268] As late as 1888, anti-abortion physician Hugh S. Pomeroy found "considerable confusion" in his study of state abortion laws "over whether 'destruction of the infant' before quickening was a common law offense."[269]

Abortion bans were hard to enforce. Whatever a statute said, jurors put stock in quickening,[270] and prosecutors had a hard time persuading jurors to convict.[271] The public may not have thought that abortions before quickening were even "abortions." A pregnancy that ended before quickening "'slipp[ed] away,' or the menses had been 'restored.'"[272] Some mid-nineteenth-century advertisements for abortifacients reflect this belief. "Cherokee pills," pitched as "a 'female regulator'" warned that "if the pills were used during the first three months of pregnancy, 'the unfailing nature of their action would infallibly *prevent* pregnancy.'"[273] Another menses restorer, "'Dr. Duponco's French Periodical Golden Pills,' promised" to "*prevent* pregnancy to those ladies whose health will not permit an increase in family."[274]

Well into the statutory movement to ban abortion, doctors complained that people put stock in quickening. In 1870, one doctor railed against the ignorance of women who put moral stock in quickening. Quickening "is more effective in causing the commission of the crime than all things else combined."[275] He decried the "almost universally erroneous belief that the fœtus is not viable until the fourth or fourth and half-month of its

265. *Id.* at 90.

266. *Id.*

267. *Id.* at 91.

268. *Id. See also* DELLAPENNA, *supra* note 245, at 433 (noting that abortion, and even the fact of pregnancy, was "virtually impossible to prove" by medical examination in the nineteenth century, as "there simply was no reliable clinical test for pregnancy until 1927"); *id.* at 437 ("So long as proof of quickening was required for conviction, courts also had to deal with women who were unable or unwilling to testify whether the fetus had quickened.").

269. BRODIE, *supra* note 244, at 254–55.

270. *Id.* at 254 ("Juries continued to treat the prequickening distinction as significant . . . .").

271. *Id.*; *see also* DELLAPENNA, *supra* note 245, at 431 (noting that "acquittals or dismissals do predominate among reported cases").

272. REAGAN, *supra* note 243, at 8.

273. PETER ENGELMAN, A HISTORY OF THE BIRTH CONTROL MOVEMENT IN AMERICA 11 (2011) (emphasis added).

274. *Id.* at 10–11 (emphasis added).

275. ANDREW NEBINGER, CRIMINAL ABORTION: ITS EXTENT AND PREVENTION 19 (1870).

development, the usual period of '*quickening*,' improperly . . . so called."[276] In 1857, the Suffolk County Medical Society in Massachusetts despaired that "the present morale of the community condones abortion."[277] That same year, an American Medical Society report complained that the police ignored and polite society welcomed abortion providers.[278]

Quickening sounds laughable to modern ears; equally laughable is that "unblocking the menses" is anything but an abortion. We live in an age of fast, accurate, cheap, grocery-store, home-pregnancy tests, sensitive stethoscopes, and ultrasounds. Well into the nineteenth century, however, at least until she was showing, a woman's perceptions of quickening and her word to that effect were the only proof she was pregnant. Practical considerations of proof aside, scientists had not even confirmed that pregnancy developed continuously from fertilization to birth until the early nineteenth-century.[279] Doctors and scientists had to be persuaded of that fact, and so too the public. However implausible it sounds, the "concepts [of] blocked menses and quickening" were real to people in the nineteenth century.[280] They were not "excuse[s] made by women who knew they were pregnant."[281]

Abortion cases were hard to prosecute.[282] Prosecutors found it hard to convict defendants charged with abortion, especially if there was any doubt about whether quickening had occurred;[283] or if "common law traditions covering evidence and criminal defendants' rights appeared to

276. *Id.*

277. R. Sauer, *Attitudes to Abortion in America, 1800–1973*, 28 POPULATION STUD. 53, 56 (1974) (quoting SUFFOLK DIST. MED. SOC'Y, COMMITTEE ON CRIMINAL ABORTION 4 (1857)).

278. *Id.* (citing D. Meredith Reese, *Report on Infant Mortality in Large Cities*, 12 TRANS. AM. MED. ASSOC. 93, 98 (1857)).

279. Nineteenth-century "philosophical and biological developments regarding the creation and evolution of pre-natal life" affected beliefs about quickening, at first, mostly among doctors. *Id.* at 58–59. Over the course of that century, "thought on how prenatal life developed drifted away from the previously widely accepted belief that human life is dormant like an unsprouted seed, until the mother could first sense the foetal [sic] stirrings and moved towards the belief that a separate entity was alive and active from the earliest indications of pregnancy." *Id.* at 58.

280. REAGAN, *supra* note 243, at 9.

281. *Id.*

282. MOHR, *supra* note 243, at 72–73 ("Abortion remained essentially impossible to prove at law on the basis of the knowledge and technology available to medical examiners in the nineteenth century."). Joseph Dellapenna, who has argued stridently that abortion was in no way legally protected in the nineteenth century, agrees that prosecutions of abortions were hard to win. DELLAPENNA, *supra* note 245, at 430–33.

283. An 1866 treatise on evidence law said, "No evidence but that of the female can satisfactorily establish the fact of quickening." ALFRED SWAINE TAYLOR ET AL., A MANUAL OF MEDICAL JURISPRUDENCE 421 (6th ed. 1866); *see also* BRODIE, *supra* note 244, at 254 (noting that abortion was difficult to prosecute if there was "any doubt whether quickening . . . had occurred").

have been violated by the prosecution or the police."[284] Juries thought quickening was significant, and prosecutors struggled to prove that quickening had occurred.[285]

State courts enforced common law doctrines that insulated *both* pre- and post-quick abortions from prosecution well into the 1870s.[286] Massachusetts common law doctrine was so unfavorable to abortion restrictions that authorities failed to "convict a single person of criminal abortion between the end of the Civil War and 1877."[287]

Court-imposed roadblocks included proof of intent to end a pregnancy. That meant that the prosecution had to prove that a woman was pregnant. Such evidence was tough to come by in an era before pregnancy tests,[288] which would not be invented until 1927.[289] Consequently, intent requirements made it hard to convict,[290] and state court judges steeped in the doctrine of quickening cut prosecutors little slack.[291] In one 1851 case, the Maine Supreme Court overturned a conviction for performing an abortion[292] despite evidence that "a woman had died" after the defendant had "forc[ed] and thrust[] [a] wire[] into her womb and body."[293] The prosecution failed because it lacked proof that the defendant intended to destroy the fetus or to cause a miscarriage.[294]

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284. BRODIE, *supra* note 244, at 254.

285. *Id.*

286. MOHR, *supra* note 243, at 230 (stating that state legislation did not result in convictions because "American state and local courts" tolerated abortion, making "convictions in cases of abortion difficult to obtain through the early 1870s").

287. MOHR, *supra* note 243, at 230.

288. "While prosecutors [in the 1870s] could point to a limited number of anti-abortion rulings that dated from the 1850s, judges continued to decide many technical points of law and virtually all of the crucial medical questions that arose in abortion cases in favor of the accused." *Id.* at 231 (relating that defense counsel in an 1863 New York prosecution of Edmund Browne for abortion convinced the trial court that several physical signs of pregnancy, including an enlarged uterus and a detached placenta, were insufficient to establish the woman's pregnancy).

289. *See, e.g.*, *The Thin Blue Line: The History of the Pregnancy Test*, NAT'L INST. OF HEALTH (Sept. 10, 2020), https://history.nih.gov/display/history/Pregnancy+Test+Timeline [https://perma.cc/3A4E-TM6U] (noting that a reliable pregnancy test was not available until the 1970s, and the first home pregnancy test became available in 1977).

290. MOHR, *supra* note 243, at 26.

291. *Id.* at 41 (noting that "[t]he largest loophole in" early abortion laws "was the necessity to prove intent, which was simply impossible to do, given the tolerant attitude of American courts toward abortion" before quickening).

292. Smith v. State, 33 Me. 48, 61 (1851).

293. *Id.* at 54.

294. *Id.* at 58–60. Significantly, the Maine Supreme Court acknowledged that the Maine statute prohibited all abortions, and not just post-quick abortions. *Id.* at 57 ("It is now equally criminal to produce abortion before and after quickening."). The Court's reasoning for overturning the defendant's conviction, however, made it nearly impossible to prove that an abortion provider had intended to cause a miscarriage or intended to destroy a fetus. *See id.* at 60 (overturning conviction

State courts also required "direct" evidence of an abortion. If a woman had died (which was usually why someone was being prosecuted), that left the testimony of the person who performed the alleged abortion unless others witnessed the procedure. In 1863, New York prosecutors failed to convict Edward Browne for performing an abortion on a woman who had died.[295] The late woman's boyfriend testified that he had arranged the abortion with Browne, and the police found a large set of abortion instruments in Browne's office.[296] Nevertheless, the trial court "ruled that all of this evidence was circumstantial."[297] There was no direct evidence that the woman had been pregnant, that Browne had performed an abortion, or that an abortion had killed her.[298] Finally, women escaped any legal consequences because it was generally not illegal to *have* an abortion.[299] Doctor Storer of the AMA deplored this anomaly—women were "a party to the action . . . an accessory or the principal."[300]

These evidentiary requirements bit hard. Take the problems that New York prosecutors faced in convicting Ann Lohman for abortion. Infamously known as "Madame Restell," her services were in high demand morning to night.[301] She became fabulously wealthy by performing surgical abortions and selling contraceptives and abortifacients.[302] In 1840, Mrs. Maria Purdy, ill with tuberculosis and fearing she was too weak to have another child, sought an abortion from Madame Restell.[303] Two years later, Mrs. Purdy died of some undefined illness, possibly tuberculosis. On her deathbed, she claimed that the abortion Madame Restell had performed was killing her.[304] New York prosecutors charged Madame Restell with causing Mrs. Purdy's death by giving "certain noxious medicine" and performing an abortion "by the use of instruments."[305]

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for performing an abortion because "a design to cause its miscarriage is not the same thing as a design to destroy the child," and an intent "'to bring forth the said child,' does not imply even a premature birth").

295. MOHR, *supra* note 243, at 231.

296. *Id.* at 231–32.

297. *Id.* at 233.

298. *Id.* at 231–33.

299. STORER, CRIMINAL ABORTION, *supra* note 254, at 8.

300. *Id.*

301. *Id.* (Madame Restell's office was "open daily from 9 a.m. to 10 p.m., was always full," and sometimes "a line of women [were] waiting when she opened her doors").

302. WRIGHT, *supra* note 245, at xiv (Madame Restell's skill at compounding effective abortifacients and performing surgical abortions "allow[ed] her to amass a fortune").

303. Karen Abbott, *Madame Restell: The Abortionist of Fifth Avenue*, SMITHSONIAN MAG. (Nov. 27, 2012), https://www.smithsonianmag.com/history/madame-restell-the-abortionist-of-fifth-avenue-145109198/ [https://perma.cc/9WCU-NVRW].

304. WRIGHT, *supra* note 245, at 58.

305. Abbott, *supra* note 303.

The press vilified Madame Restell as a "monster in human shape" who had committed "one of the most hellish acts as ever perpetrated in a Christian land."[306] A jury convicted her, but a New York appellate court ruled Mrs. Purdy's deathbed conviction inadmissible and overturned Madame Restell's conviction.[307] Retried without the deathbed confession, Madame Restell was acquitted.[308] Seven years later, she was charged and convicted for the misdemeanor of procuring an abortion (rather than the felony manslaughter conviction that the prosecutor sought), and served just one year in jail.[309] She openly sold abortifacient pills for another thirty years, and she continued performing surgical abortions, too—both without legal consequences.[310] Then in 1878, Anthony Comstock entrapped her for violating the law that bore his name.[311] Fearing the gig was up, she committed suicide.[312]

The most relevant fact for "history and tradition," is that for decades people widely flouted the abortion bans adopted during the 1850s through the 1870s.[313] Legislatures seem to have taken a dim view of "quickening," but through the late nineteenth century, however, women *and* men generally expected that women could have abortions before it occurred.[314] Abortion was a method of family planning and for protecting

306. *Id.*

307. *Id.*

308. *Id.*

309. WRIGHT, *supra* note 245, at 130.

310. *Id.* at 153 ("Madame Restell was no sooner free from Blackwell's [Island prison] than she resumed her normal operations" performing surgical abortions); *id.* at 156–58 (describing surgical abortions Madame Restell performed after leaving prison); *id.* at 158–59 (describing complaint brought and then dropped by woman who had received three abortions from Madame Restell); *id.* at xi–xii (writing that Restell had offered to perform a surgical abortion for Anthony Comstock's supposed girlfriend); *but see* Abbott, *supra* note 303 ("Upon her release" from prison, Madame Restell "claimed she would no longer offer surgical abortions but would still provide pills . . . .").

311. WRIGHT, *supra* note 245, at xi–xii (describing how Comstock approached her for abortion services, and she offered him abortifacient powders with the assurance that if they did not work, he should bring "his lady friend . . . for an appointment that would cost him $200" in 1878).

312. *Id.* at 269–70 (relating how Restell desperately, repeatedly contacted her attorney and was despondent and panicked that she would be convicted; the next morning her maid found her dead in the bathtub with her throat slit).

313. Sauer, *supra* note 277, at 59 (noting the absence of open opposition to abortion restrictions). Some doctors did oppose abortion restrictions on the grounds that these restrictions imperiled women's health. Edwin Hale was not opposed to abortion and believed that "early abortions" were justified "to preclude the possibility, as distinguished from the certainty, of a dangerous delivery." MOHR, *supra* note 243, at 77.

314. *See* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 230–38 (1980) (discussing women's resort to abortion and husbands' support); *see also* MOHR, *supra* note 243, at 114–17 (discussing how abortion was a choice couples would make together, considering their priorities when it came to family planning).

a woman's health from the dire risks of pregnancy and childbirth.[315] Abortion may even have been safer than childbirth.[316] The sheer number of women having abortions midcentury speaks to women's belief that abortion was permissible before quickening.[317] Several physicians who

315. Judith Walzer Leavitt, *"Science" Enters the Birthing Room: Obstetrics in America Since the Eighteenth Century*, *in* CONTROLLING REPRODUCTION: AN AMERICAN HISTORY 33, 34–35 (Andrea Tone ed., 1997) (discussing the dangers of childbirth); *id.* at 35 (describing how fear of death, disability, and pain led women to search "for safer and less painful childbirths" as new options, like male midwives or obstetricians, "became available"); *id.* at 38–41 (discussing how, in the nineteenth century, obstetricians increasingly delivered babies, sometimes introducing new risks into the birthing process, including bloodletting and a too-ready resort to forceps, the latter sometimes causing perineal tearing and injuring babies' heads); *id.* at 44 ("There are . . . indications that physicians' techniques created new problems for birthing women and actually increased the dangers of childbirth" with "[i]nappropriate forceps use" and "careless administration of ether and chloroform" and by carrying "puerperal fever," which could kill a woman after childbirth).

316. ENGELMAN, *supra* note 273, at 10; *see* CLIFFORD BROWDER, THE WICKEDEST WOMAN IN NEW YORK: MADAME RESTELL, THE ABORTIONIST 13 (1988) ("Abortion . . . was not . . . considered—many M.D.'s' assertions to the contrary—as any more dangerous than childbirth."); *see also* MOHR, *supra* note 243, at 77 (stating that an anti-abortion doctor, Edwin M. Hale, "believe[d] that abortions were remarkably safe, not horribly dangerous," and quoting him as saying if "skillfully performed, the fatal results need not exceed one in a thousand"). Abortion's relative safety may say more about childbirth's dangerousness. Laurel Thatcher Ulrich, *"The Living Mother of a Living Child": Midwifery and Mortality in Post-Revolutionary New England*, 46 WM. & MARY Q. 27, 27 (1989) (noting that "puerperal fever, the dreaded infection that killed so many women in the nineteenth century, 'is probably the classic example of [a] disease caused by medical treatment itself'" (quoting RICHARD W. WERTZ & DOROTHY WERTZ, LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA xi, x, 128 (1977))). *See also* BROWDER, *supra*, at 13 (noting that in an age before antiseptics and germ theory, doctors "and quacks alike attended their patients with hands unwashed and instruments unsterilized" causing frequent infections among women giving birth). The maternal death rate in 1900 was 850 women per 100,000 births, or 0.85 percent. Max Roser & Hannah Ritchie, *Maternal Mortality*, OUR WORLD IN DATA (2013), https://ourworldindata.org/maternal-mortality [https://perma.cc/8WHE-AABP]. The maternal mortality rate was probably somewhat higher mid-nineteenth century, as life expectancy for women was between six-to-ten years lower. Michael Haines, *Fertility and Mortality in the United States*, EH.NET (Mar. 19, 2008), https://eh.net/encyclopedia/fertility-and-mortality-in-the-united-states/ [https://perma.cc/U7PW-5GM7].

317. DEGLER, *supra* note 314, at 228–29 (explaining that doctors noticed a significant increase in abortions in the 1830s and 1840s, which appeared to increase even further in the 1850s and 1860s); *id.* at 231 (citing American Medical Association studies that concluded that "[i]n state after state . . . abortions were rising in number" during the 1870s); *see also* MARY ZIEGLER, REPRODUCTION AND THE CONSTITUTION OF THE UNITED STATES 17 (2022) ("In the late nineteenth century, some observers estimated that doctors performed over 2 million abortions a year—many more than women received in the late 1990s.").

opposed abortion estimated that between 20 percent[318] and 25 percent[319] of pregnancies ended by abortion. Perhaps more objective studies show that about 20 percent of pregnancies ended in abortion,[320] which makes the mid-nineteenth-century abortion rate roughly the same as today's.[321] After legislatures passed bans, women appeared to have at least as many abortions as they had when abortion was legal.[322] As is true today, people had complex feelings about the morality of abortion—something that might be regrettable but necessary. However complex Victorians' feelings were, they sought abortions.

Thus, *Dobbs* ignores that for well over a decade after the Fourteenth Amendment was ratified, people could perform, and women could seek abortions before quickening with few or no legal consequences. Deep into the late nineteenth century, what we would today call an "early-term" abortion was factually, morally, and legally ambiguous. Ordinary people and the law treated quickening "as a defining moment in human development."[323] Juries (which were all male, of course) often refused to convict those charged with performing an abortion.[324] Common law doctrines blocked most prosecutions anyway, insulating most early-term abortions from legal consequence. While abortion providers did not claim that a

318. Dr. Edwin M. Hale presented a paper in 1860 in which he estimated that "one in every five pregnancies ended in abortion," which "he based . . . upon his own experience and his own practice in the Chicago area." MOHR, *supra* note 243, at 77. In 1866, Hale conducted another study in Massachusetts that led him to conclude that abortion drove the high stillbirth rate of one in three deliveries. *Id.* "Based on health statistics compiled by the best public health statistician of the time, Dr. Horatio Storer and his co-author, attorney Franklin Fiske Heard, concluded that 20 percent of all pregnancies in New York were being aborted." *Id.* at 79. Storer and Heard believed that this rate was "not at all out of line with the available figures for other localities in the United States." *Id.* at 79. Doctors in other cities and regions in the United States reported similarly high or even higher rates in the 1860s and 1870s. *Id.* at 79–81.

319. DEGLER, *supra* note 314, at 231 (quoting Dr. G. Maxwell Christine who, based on "25 years' practice," estimated in 1889 "that more than one-half of the human family dies before it is born, and that probably three-fourths of these premature deaths are the direct or indirect result of abortion by intent."). MOHR, *supra* note 243, at 50 (estimating that by the 1850s and 1860s, there was one abortion for "every five or six live births," which represented a huge increase from the proportion terminated between 1800 and 1830, which he estimated as being between "one abortion for every twenty-five or thirty live births").

320. MOHR, *supra* note 243, at 50.

321. The Guttmacher Institute estimates that eighteen percent of pregnancies in 2017 were terminated by abortion. *Induced Abortion in the United States*, *Fact Sheet*, GUTTMACHER INST. (Sept. 2019), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states# [https://perma.cc/VYK6-HSND].

322. *See* DEGLER, *supra* note 314, at 231 (discussing evidence that suggests that about 20 to 25 percent of pregnancies ended in abortion from the middle of the 19th century through the 1920s).

323. REAGAN, *supra* note 243, at 9.

324. BRODIE, *supra* note 244, at 254.

woman's "right" to an abortion prevented their prosecution, the lack of legal consequences meant that they did not need to.

Against this backdrop, *Dobbs*'s demand for affirmative, positive law protection for abortion "rights" makes no sense. This next Section explains an additional reason positive law protections could not have existed. Formal legal barriers and informal social norms blocked women from opposing abortion bans or fighting for positive rights.

B. Women's Exclusion from Politics Made Opposing Abortion Restrictions Impossible

Dobbs contends that the success of nineteenth-century state abortion bans and the lack of opposition to them shows that abortion was not a protected right. Formally this is true, but the conclusion is anachronistic. One crucial reason that abortion was not a "right" in the nineteenth century is that women were almost entirely excluded—both de jure and de facto—from discussion and debate about how the law should treat it.[325] Most obviously, women could not vote. Married women had no legal existence before states enacted married women's property laws between the 1840s and 1880s; even then women did not have full civil rights.[326] Married women also could not sue on their own behalf to influence whether the common law ensured their access to abortion.[327] Nor, to state the obvious, were women the judges who created the common law or the lawyers who chose what cases to prosecute or defend.[328]

These next Sections demonstrate that several cultural and political forces also prevented people who privately favored a woman's right to have an abortion from publicly opposing state abortion restrictions. Rigid gender roles kept women from even informally influencing debates on abortion. Victorians were squeamish about sex and believed that the only

325. *See* Siegel, *supra* note 34, at 1186 (arguing that in *Dobbs* "Justice Alito excused himself from considering how prevailing beliefs about gender shaped the campaign to ban abortion, which occurred at a time when law so regularly enforced these gender-role divisions that the Supreme Court itself authorized states to bar women from voting and to deny women the right to practice law").

326. For a further discussion on the legal rights of women in America, see *supra* notes 236–39 and accompanying text.

327. Norma Basch, *Marriage and Domestic Relations*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789-1920) 245, 250 (Michael Grossberg & Christopher Tomlins eds., 2008) (stating "the wife's legal disabilities" under common law "were formidable," denying her the right to sue or be sued).

328. Bradwell v. Illinois, 83 U.S. 130, 139 (1872) (holding that the right to practice law is not a privilege or immunity as understood under the Fourteenth Amendment); *see also id.* at 140–41 (Bradley, J., concurring) (stating that it cannot be claimed that the right to practice law "has ever been established as one of the fundamental privileges and immunities of the sex," that is, women).

moral function of sex was reproduction. Women and men who advocated for birth control—even abstinence—faced withering criticism.

1. Social norms effectively censored white, middle- and upper-class women and men from overtly discussing sexuality

Separate spheres of ideology ruled the lives of middle- and upper-class men and women during the era when states considered and adopted abortion restrictions.[329] Women's special reproductive capacities "dictated"[330] their "traditional role" of wife and mother.[331] Compared to men, women were "higher, more sensitive, [and] more spiritual creature[s]."[332] Women's "superior moral[ity]" made them solely responsible for ensuring "the maintenance and progress of civilization."[333]

Sex was for procreation, not pleasure.[334] Men's sex drives were dangerously strong, and Victorians believed that taming those destructive urges required men to have sex only with their wives.[335] These attitudes mean that ordinary people in the antebellum period did not talk about abortion (or even birth control) publicly, and it was a singular taboo for women. The few women who did were exceptions and were excoriated for even counseling abstinence or a woman's prerogative to refuse her husband's sexual demands.[336]

Against these norms surrounding sex and motherhood, no average woman would take a public stance in favor of non-procreative sex, birth control, or abortion. "[E]ven in the bedchamber or in the most private conversation," talking about sex or birth control was so "immodest[]" that

329. *See* CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 183 (1985) ("Woman, Victorian society dictated, was to be chaste, delicate, and loving.").

330. *Id.*

331. *Id.* at 185.

332. *Id.* at 195–96.

333. JAMES REED, THE BIRTH CONTROL MOVEMENT AND AMERICAN SOCIETY: FROM PRIVATE VICE TO PUBLIC VIRTUE 40 (1984).

334. Charles Rosenberg, *Sexuality, Class, and Role in 19th-Century America*, 25 AM. Q. 131, 148 (1973) ("Procreation was the purpose of sexual intercourse; once the child had been conceived, every energy should be spent toward nurturing the young life."); *see also* Estelle B. Freedman, *Sexuality in Nineteenth-Century America: Behavior, Ideology, and Politics*, 10 REVS. AM. HIST. 196, 203–04 (1982) (arguing that until the end of the nineteenth century, "for most nineteenth-century Americans, to speak of sex was to speak of procreation").

335. *See* Rosenberg, *supra* note 334, at 139 (describing the nineteenth-century view that men were aggressive and driven by sexual desire, and respectable "Christian gentlemen" must exercise self-control).

336. *See, e.g.*, BRODIE, *supra* note 244, at 128, 257 (describing how Mary Gove Nichols, a prominent lecturer on "sexuality, marriage, and reproductive control" who counseled abstinence to limit family size, was denounced by Elizabeth Blackwell as "spreading the detestable doctrines of abortion and prostitution").

it alarmed and startled women.[337] Section III.C will show that abortion opponents exploited these gender norms to suppress opposition to bans.[338]

2. Separate spheres ideology barred respectable, middle- and upper-class white women from politics

Some women were politically active during the nineteenth century, especially in the abolitionist and woman suffrage movement and other causes that particularly affected women and children. In the 1830s and 1840s, women led "Moral Reform" campaigns to rid the scourge of prostitution, which they argued threatened their marriages, families, and their own health.[339] Others pushed for married women's property laws.[340] Women tried, usually unsuccessfully, to claim that their very womanhood justified their participation in these causes. Harriet Beecher Stowe, for example, argued that securing women's rights to property and child custody would "enhance [a] woman's duties as wife and mother."[341]

The women who actively participated in political movements were extraordinary exceptions to the general rule against women's participation in politics. One contrast illustrates this point. Susan B. Anthony led the American Loyalty League's petition drive in favor of emancipation during the 1860s.[342] An impressive 300,000 women signed the petition. Only 5,000 joined the League itself.[343]

During the antebellum period, political participation and public debate were simply out of bounds for respectable middle-class women. As historian Linda Kerber writes, "the concept of separate spheres" could not

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337. *Id.* at 131 (quoting Frances Dana Gage, noted nineteenth-century abolitionist and suffragist).

338. *See* HORATIO STORER, WHY NOT? A BOOK FOR EVERY WOMAN 79 (1866) [hereinafter STORER, WHY NOT?] ("Of the mother, by consent or by her own hand" violates "all law, human and divine, of all instinct, all reason, all pity, all mercy, [and] all love"); *see id.* at 15 (characterizing abortion as a crime against a woman's nature); *see id.* at 34–35 (equating abortion to infanticide, for "[w]herein among all these criminals does there in reality exist any difference in guilt?").

339. *See* LORI D. GINZBERG, WOMEN IN ANTEBELLUM REFORM 39–44 (2000) (describing women's leadership of moral reform efforts).

340. *See generally* Holly J. McCammon et al., *A Radical Demand Effect: Early US Feminists and the Married Women's Property Acts*, 38 SOC. SCI. HIST. 221 (2014) (describing women's activism for civil and property rights during the 1840s, and on).

341. WENDY HAMAND VENET, NEITHER BALLOTS NOR BULLETS: WOMEN ABOLITIONISTS AND THE CIVIL WAR 160 (1991).

342. *Id.* at 156.

343. *Id.* at 136. Some of the strictures on women's participation in politics loosened late in the nineteenth century, but during the period with which we are concerned, they were particularly strict. *Id.* at 161 (antebellum, women activists faced "ridicule" and "overwhelming public hostility," while women activists in the 1870s faced less opposition).

accommodate women's political participation.[344] Politics was inherently masculine—typified by "wild," "vulgar," "vigorous . . . public debate."[345] "Friends, family, and academic institutions actively discouraged women who wanted to speak publicly and shunned those who actually dared to address the public from the podium."[346] Apart from fear of disapproval, "political feminism" repelled most women who were devoted to the "female world of love" and the ideology of domesticity.[347] The "public sphere" was so inappropriate that women who entered it were likened to "prostitutes."[348]

The treatment of women abolitionists reveals the serious social barriers to women's political participation more generally. Abolitionist women carefully swaddled their activism in the ideology of separate spheres.[349] They contended that women's divine gifts of "piety, purity, domesticity" and their role as the "moral and religious teachers of the family" licensed their public opposition to enslavement.[350] Women claimed they were

344. Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 12 (1988).

345. CAROLINE FIELD LEVANDER, VOICES OF THE NATION: WOMEN AND PUBLIC SPEECH IN NINETEENTH-CENTURY AMERICAN LITERATURE AND CULTURE 2–3 (1998).

346. *Id.* at 3; *see also* ALISON M. PARKER, ARTICULATING RIGHTS: NINETEENTH-CENTURY AMERICAN WOMEN ON RACE, REFORM, AND THE STATE 67–68 (2010) (relating Catharine Beecher's criticism of abolitionist and woman's rights activist Fanny Wright, "who can look without disgust and abhorrence upon such an one [sic] as Fanny Wright, with her great masculine person . . . feeling no need of protection, mingling with men in stormy debate, and standing up with bare-faced impudence, to lecture to a public assembly").

347. Kerber, *supra* note 344, at 25.

348. Kathy Peiss, *Going Public: Women in Nineteenth-Century Cultural History*, 3 AM. LIT. HIST. 817, 819 (1991); *id.* at 822; *see also* Pastoral Letter of the General Association of Massachusetts, June 28, 1837, https://users.wfu.edu/zulick/340/pastoralletter.html [https://perma.cc/X89M-9WTP] [hereinafter Pastoral Letter] (decrying women's speaking in front of "promiscuous" audiences); *see also* Lori D. Ginzberg, *Pernicious Heresies: Female Citizenship and Sexual Respectability in the Nineteenth Century*, *in* WOMEN AND THE UNSTABLE STATE IN NINETEENTH-CENTURY AMERICA 139, 141 (Alison M. Parker & Stephanie Cole eds., 2000) ("[F]emale independence itself suggested prostitution, a lack of restraint, or loss of male control [and] negative association of women's independence with sexual freedom" meant that they had to frame "their claims to full citizenship" carefully).

349. *See* Franny Nudelman, *Harriet Jacobs and the Sentimental Politics of Female Suffering*, 59 ELH 939, 941 (1992) (describing how women abolitionists couched their condemnation of slavery as furthering the "sexual and domestic values they were entrusted to protect").

350. VENET, *supra* note 341, at 3; *see also id.* at 132–35 (describing how Elizabeth Cady Stanton justified women's participation in the abolitionist movement as reflecting the values of "true womanhood"); *cf. id.* at 82 (describing how Harriet Beecher Stowe subscribed to the basic tenets of separate spheres, making an exception only for the "moral" crusade of emancipation, and retiring to home and family once convinced that President Lincoln was dedicated to the cause); PARKER, *supra* note 346, at 83 (discussing the Grimké sisters' strategy of retiring to their domestic roles in order to "prove that granting American women expanded political roles and rights . . . would not subvert their traditional domestic roles").

fighting to protect enslaved women from enslavers who predated their "sexual purity" and weaponized their motherhood by selling their children away from them.[351] Women who decried the "sexual abuse" inherent in the institution of enslavement trod on dangerous ground and had to resort to "euphemism and innuendo."[352]

Women abolitionists nevertheless "alienated" the general public.[353] Their meetings enraged people and sparked mob violence and riots.[354] "[O]pponents reviled" them "as 'unsexed' or 'amazons.'"[355] Women abolitionists who worked with free Black persons were accused of favoring "amalgamation"[356] and "licentiousness."[357] The American Anti-Slavery Society splintered over whether to let women to vote or hold office.[358]

Abolitionist women were accused of "sexual improprieties" even when they said nothing about sex.[359] The press called them "harlots, miscegenationists," and "spinsters shopping for husbands."[360] An 1837 Massachusetts "Pastoral Letter" chastised women public speakers for exposing themselves to "promiscuous' audiences."[361] Public speaking brought upon women shame, "degeneracy and ruin." Women

351. Nudelman, *supra* note 349, at 939–41, 943 (arguing that the sexual exploitation and "maternal suffering" of enslaved women "authorize[d]" the work and "voice of white female activists"); *see also* VENET, *supra* note 341, at 24 (arguing that Black abolitionist Harriet Jacobs framed her autobiography in terms of the "cult of true womanhood," and emphasizing that enslavement violated women's basic instincts of "purity, domesticity, and maternity").

352. Nudelman, *supra* note 349, at 952.

353. VENET, *supra* note 341, at 135–36; *see also* PARKER, *supra* note 346, at 71 (noting that conservatives "outside" of the abolitionist movement criticized women's petition drive to Congress to drop its "gag" rule on anti-slavery petitions as violating "men's proper domain" of politics and behaving in an "unladylike manner"); PARKER, *supra*, at 71 (noting Catharine Beecher's argument that "women could best influence society . . . through their moral teachings to their" husbands, sons, fathers, and brothers rather than by public speaking or petitioning).

354. NANCY ISENBERG, SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA 46–48 (1998); *see also* Joyce A. Lochhead, *Turning the World Upside Down*, 27–29 (2014) (M.A. dissertation, Northwest Missouri State University) https://www.nwmissouri.edu/library/theses/2014/LochheadJoyceA.pdf [https://perma.cc/PV8D-U3ZF].

355. ANNE M. BOYLAN, THE ORIGINS OF WOMEN'S ACTIVISM: NEW YORK AND BOSTON, 1797–1840 36 (2002).

356. *Id.*; *see also* Lochhead, *supra* note 354, at 28 ("The [men and young boys] yelled and called the women 'amalgamationists' because the white women and men abolitionists walked together with free blacks.").

357. ISENBERG, *supra* note 354, at 46.

358. VENET, *supra* note 341, at 14–15 (describing how the American Anti-Slavery Society split when "Abby Kelly was appointed to the business committee"); Lochhead, *supra* note 354, at 32.

359. Ginzberg, *supra* note 348, at 147 (emphasis added).

360. ISENBERG, *supra* note 354, at 46.

361. Pastoral Letter, *supra* note 348.

surrendered their entitlement to both men's "care and protection" and God's, too.[362]

Women risked their social and moral standing even when participating in causes that dovetailed with "separate spheres" ideology. The "Moral Reform" movement sought to make men legally responsible for frequenting sex workers, yet women leaders of this movement "elicited outraged condemnation."[363] Fighting for more unwomanly causes brought worse criticism.[364]

In sum, political advocacy—even to protect sexual purity, family, and motherhood—put women at risk of being criticized as unwomanly and morally and sexually disreputable. Against this backdrop, this next Section will show that public endorsement of abortion or birth control was unthinkable to a respectable Victorian woman.

3. Suffragists advocating abstinence were condemned as immoral

Strangely to modern eyes, nineteenth-century feminists did not promote, and sometimes opposed, the use of contraceptives.[365] Birth control and contraceptives were highly controversial, and the law reflected that fact. Most states and the federal government banned the sale, advertisement, or distribution of contraceptive devices or information as obscene.[366] Well into the twentieth century, they remained a taboo subject. In 1915, Margaret Sanger tried to get "fifty prominent women to publicly voice support for birth control" but "was told to wait until we got the

362. *Id.*

363. Anne M. Boylan, *Women and Politics in the Era Before* Seneca Falls, 10 J. EARLY REPUBLIC 363, 382 (1990).

364. *See id.* ("The tradition of mobilized womanhood . . . elicited outraged condemnation because it involved women directly in politics in pursuit of unpopular causes.").

365. DEGLER, *supra* note 314, at 203 ("[M]ost feminist leaders and the feminist movement as a whole in the 19th never supported contraception . . . ."); Thompson, *supra* note 244 ("Most women's rights activists in the 1800s did not openly embrace contraceptives or abortion as part of their national platform[,] [because] [t]hey knew that doing so would have increased men's sexual access to women, while allowing them to escape responsibility for any consequences.").

366. *See infra* Part IV (alluding to a precedent set by *Dobbs* that might lead to elimination of other fundamental rights in the future).

vote."[367] Abortion was an even more controversial, and feminists generally steered clear of it.[368]

Mainstream feminists focused on securing women's rights to vote, own property, and make contracts.[369] Victory in these causes was never a foregone conclusion.[370] For more than fifty years after the Fifteenth

367. Olga Khazan, *The Suffragists Who Opposed Birth Control*, ATL. MONTHLY (July 16, 2019), https://www.theatlantic.com/health/archive/2019/07/did-suffragists-support-birth-control/593896/ [https://perma.cc/AT84-BUKD]. Similarly, Mary Dennett stepped down from her leadership role in the National American Woman Suffrage Association in 1914 to form the National Birth Control League. *Id.* When she "lobbied women's-rights groups, [like] the League of Women Voters, to add birth control to their political agenda" they refused, concerned about undermining their fight for the vote. *Id.*

368. Mary Ziegler notes the division of opinion about whether feminist leaders affirmatively objected to abortion, but finds it significant that "few feminists endorsed laws criminalizing abortion." ZIEGLER, *supra* note 317, at 16. Historian Lauren McIvor Thompson, replying to an editorial in which Colleen Kelly Spellecy and Eric Anthony, board members at the Susan B. Anthony Birthplace Museum, claimed that both Susan B. Anthony and Elizabeth Cady Stanton opposed abortion, wrote "Neither suffragist left any 'extensive' writings on abortion. Neither took a public stand on the issue because they and other suffragists wanted to keep discussions about sex far away from the conversation about suffrage." *See* Spellecy & Anthony, *Yes, Susan B. Anthony Was Pro-Life*, WALL ST. J. (June 14, 2022), https://www.wsj.com/articles/susan-b-anthony-was-pro-life-elizabeth-cady-stanton-roe-abortion-dobbs-decision-11655151459 [https://perma.cc/3VF4-QCDF], *with* Lauren McIvor Thompson, Letter to the Editor, *How Leading Suffragists Approached Abortion*, WALL ST. J. (July 1, 2022), https://www.nytimes.com/interactive/2019/12/13/opinion/Sunday/abortion-history-women.html [https://perma.cc/8FDM-VAB6]. This exchange represents a long-standing debate among pro-life and pro-choice historians about whether Elizabeth Cady Stanton and Susan B. Anthony were against abortion, or took any public stance against abortion. Susan B. Anthony's newspaper, *The Revolution*, published an article that referred to abortion as "child murder." Pro-choice historians and historians at the Susan B. Anthony house claim that she did not write this article. Thompson, *supra*; *see also* Harper D. Ward, *Misrepresenting Susan B. Anthony on Abortion*, SUSAN B. ANTHONY HOUSE (2018), https://susanbanthonyhouse.org/blog/misrepresenting-susan-b-anthony-on-abortion/ [https://perma.cc/AYB7-NM8F]. Pro-life historians claim the opposite. *See*, *e.g.*, Cat Clark, *The Truth About Susan B. Anthony*, FEMINISTS FOR LIFE, https://www.feministsforlife.org/the-truth-about-susan-b-anthony/ [https://perma.cc/8JFN-E8ZF]. For a time, pro-life historians claimed that Stanton once wrote disparagingly about women disposing of their children as property. Tracy A. Thomas, *Misappropriating Women's History in the Law and Politics of Abortion*, 36 SEATTLE L. REV. 1, 36 (2012). No one can find that quote, and pro-life historians have now withdrawn their claim that she ever said this. Thomas, *supra*, at 37. Stanton did express opposition to infanticide, but she does not appear to have characterized abortion as infanticide. Thomas, *supra*, at 41–42. Reva Siegel argues that the anti-abortion stance some in the feminist movement took was more complicated than it appears. Some in the Voluntary Motherhood movement, she argues, tacitly condoned abortion "in cases of 'enforced childbearing.'" Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 307 n.184 (1992) (quoting E.B. DUFFEY, WHAT WOMEN SHOULD KNOW: A WOMAN'S BOOK ABOUT WOMEN 124–25, 130–33 (1873)).

369. *See, e.g.*, Thomas, *supra* note 368, at 5 ("Beyond the vote, Stanton demanded for women within the family, advocating for equal marital partnerships, no-fault divorce (especially for victims of domestic violence), marital rights to property, and maternal custody of children.").

370. Reva Siegel argues that the success of the women's movement in gaining greater property rights for women may have been linked to the passage of abortion bans. Siegel, *supra* note 368, at

Amendment, suffragists toiled for women's right to vote. Even so, the Nineteenth Amendment came within a hairsbreadth of failing.[371]

Advocating for contraceptives could only hurt the suffragist cause, never mind abortion. Women's suffrage challenged women's very essence—their motherhood. Critics claimed it stoked women's "desire for fewer children and consequently a greater need for abortion."[372] The few women's rights activists who did promote contraceptives were excoriated. Their outspokenness threatened to tar the women's rights and suffragist movement with the brush of immorality and sexual impropriety.[373]

It makes perfect sense that feminists and suffragists would oppose or say nothing about contraceptives or abortion.[374] To combat "overwhelming public hostility" to women's right to vote, suffragists staked their claim for the vote on women's essential differences.[375] They argued that "motherhood" and women's superior moral sensibilities "required [women] to take political responsibility for social change."[376] Politics needed women's "purifying influence."[377] Severing sex from

320 ("During the very period in which states were enacting the abortion legislation doctors sought, they were simultaneously reforming the common law of marital status in response to feminist demands.").

371. *See* ELAINE WEISS, THE WOMAN'S HOUR: THE GREAT FIGHT TO WIN THE VOTE 305–08 (2018) (describing Tennessee State Senator Harry Burn's turmoil over becoming the decisive vote in favor of Tennessee's ratification of the Nineteenth Amendment and noting that ratification passed 50-to-48).

372. Sauer, *supra* note 277, at 56. An 1869 article in the *Catholic World* charged that suffrage would make the "fearfully prevalent," "horrible crime of infanticide before birth" even "more prevalent." *Id.* (quoting Orestes A. Brownson, *The Woman Question*, CATH. WORLD 151 (May 1869)).

373. *See, e.g.*, Heather Munro Prescott & Lauren MacIvor Thompson, *A Right to Ourselves: Women's Suffrage and the Birth Control Movement*, 19 J. GILDED AGE & PROGRESSIVE ERA 542, 543–45 (2020). In the late 1820s and 1830s, Fanny Wright agitated for women to have greater knowledge about birth control and contraception, but "[r]eligious leaders and political conservatives denounced these views calling Wright the 'Red Harlot of Infidelity.'" *Id.* Similarly, Mary Gove Nichols' advocacy of a wife's right to refuse sex with her husband was harshly criticized in the 1850s and 1860s by the popular press which "created a problem for women's rights activists" more generally. *Id.*

374. Ginzberg, *supra* note 348, at 139, 150 (expanding women's legal and political rights would be palatable if "politicians and woman suffrage activists could articulate a notion of female citizenship that did not openly sever women's interests from those of their husbands").

375. VENET, *supra* note 341, at 161 (noting that in comparison to the antebellum obloquy they faced, women in the 1870s met with fewer obstacles and less opposition).

376. PARKER, *supra* note 346, at 85 (quoting abolitionist and suffragist Sarah Grimké); *see also* Ginzberg, *supra* note 348, at 155–56 (noting that women appeal "to the state" or seek "to represent voters 'as mothers,'" for future generations); Linda Gordon, *The Struggle for Reproductive Freedom*, *in* CONTROLLING REPRODUCTION: AN AMERICAN HISTORY 147, 149 (Andrea Tone ed., 1997) (stating that suffragists argued that "[m]otherhood" was why "women needed more power").

377. PARKER, *supra* note 346, at 85 ("Instead, women's capacity as mothers, along with their greater morality, required them to take political responsibility for social change.").

reproduction undermined suffragists' message.[378] Biology was destiny, and women's biology made them mothers.[379]

In the 1870s, however, many women's rights advocates also began to argue that women had a right to personhood and autonomy within marriage,[380] which gave them the right to refuse sex with their husbands.[381] They advocated for "Voluntary Motherhood." Opponents branded these activists as sex "radical[s]"[382] who opposed marriage and motherhood.[383] To counsel abstinence was to speak of sex. Women who spoke publicly about sex, even euphemistically, were "the exception, not the rule."[384]

Some feminists also opposed artificial birth control for ideological reasons. One of the premises of "voluntary motherhood" was that a woman owned her own body.[385] Self-ownership was important because pregnancy and childbirth could be deadly; women's sexual pleasure was decried not celebrated; and abortion was dangerous, too. Any method of birth control besides abstinence could fail, and ready access to contraceptives gave women fewer reasons to refuse sex.

In sum, fighting against abortion bans was impossible. When the Fourteenth Amendment was ratified, women could not vote, and married women could not sue to enforce their rights. Women who participated in politics were attacked as unwomanly or worse. Women who advocated for abstinence courted controversy at best and, at worst, were vilified as

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378. Gordon, *supra* note 376, at 149 ("[Suffragists] shared the general religious and moral view that sex should be only for reproduction and only within marriage.").

379. SMITH-ROSENBERG, *supra* note 329, at 183, 185, 196 (discussing the biology of women and how "medical and biological arguments helped . . . to rationalize woman's tradition role").

380. Prescott & Thompson, *supra* note 373, at 543.

381. *Id.* at 544.

382. DEGLER, *supra* note 314, at 204. Stanton, a leader in the voluntary motherhood movement recognized the radicalism of her position: Voluntary motherhood put "radical thought[s] . . . into [women's] heads" that "permanently lodged there!" *Id.*

383. *Id.* (noting that activists denounced the "custom for making 'obligatory the rendering of marital rights and compulsory maternity'" (quoting Pauline Davis Wright)).

384. BRODIE, *supra* note 244, at 130 (noting that when women spoke of abstinence and limiting the frequency of sex, but that even a small amount of leeway had been won by the women's rights movement of the 1860s and 1870s). Brodie notes that Elizabeth Cady Stanton went on a "Marriage and Maternity" lecture tour in 1869 that promoted "the gospel of fewer children and a healthy, happy maternity" through abstinence. *Id.* at 131. Her claim that women had the right to refuse sex "alarmed many of her female listeners" as too explicit. *Id.* at 130–31.

385. Elizabeth Cady Stanton, for example, protested, "[d]id [men] ever take in the idea that to the mother of the race, and to her alone, belonged the right to say when a new being should be brought into the world?" Thomas, *supra* note 368, at 32 (quoting Letter from Elizabeth Cady Stanton to Gerrit Smith (Dec. 21, 1855)). In a published, open letter to noted abolitionist Garrit Smith, she said, that "the right of a woman to control her own person was the foundational right, the starting point for social equality, 'the battle-ground where our independence must be fought and won.'" *Id.*

immoral. "[M]arginalization and isolation" awaited "women or men [who] spoke out on behalf of any challenge to traditional sexual behavior . . . especially birth control."[386] Abortion connoted sexual license. Sexual license meant eternal damnation.[387]

The next Section explains how the AMA's lobbying campaign for abortion bans staved off public opposition by exploiting Victorian social norms about sex and separate spheres.

C. The American Medical Association Exploited These Social Norms to Squelch Opposition to Their Anti-Abortion Campaign

Physicians and the AMA carefully crafted their rhetoric to silence opposition to abortion bans. Doctors led the charge for abortion bans;[388] as part of their efforts, they actively lobbied state lawmakers much as modern lobbyists do today—sending lawmakers detailed policy briefs,[389] and even model legislation.[390] Their rhetoric effectively branded anyone, even men, who opposed abortion as immoral and apostates from reputable society.[391] Doctors insisted any woman who publicly endorsed abortion was immoral because she was endorsing sex divorced from procreation. A *mother* who ended a pregnancy by abortion subverted the very

386. Ginzberg, *supra* note 348, at 156.

387. *Id.*

388. MOHR, *supra* note 243, at 147–70 (describing concerted, organized effort by the American Medical Association to persuade state legislatures to pass laws criminalizing abortion at all stages of pregnancy); *see also id.* at 200 ("Between 1860 and 1880, the regular physicians' campaign against abortion in the United States produced the most important burst of anti-abortion legislation in the nation's history."); *see also id.* (stating that "most of the legislation . . . explicitly accepted the [doctors'] assertions that" abortion should be illegal at all points during a pregnancy). Not all doctors were anti-abortion. For example, in the 1839 edition of his book on contraception, *The Fruits of Philosophy*, Dr. Charles Knowlton included a chapter, *Of the Nature or Life of the Foetus: Has It Any Rights?*. *See also* BRODIE, *supra* note 244, at 99. His conclusion was that "a fetus, because it was attached to a woman's body, had no more rights than any other extremity." *Id.* "The laws in this country against abortion were never made by physiologists, and I should hardly think by men of humane feelings." *Id.* (quoting CHARLES KNOWLTON, FRUITS OF PHILOSOPHY 75 (Peter Pauper Press ed., 1937) (1839)).

389. *See, e.g.*, MOHR, *supra* note 243, at 157–58 (describing how American Medical Association's (AMA) sent Storer's AMA address against abortion to "each governor and to every state legislature in the country"); *id.* at 206–10 (describing how the Ohio medical society pressed the legislature to stiffen Ohio's abortion restrictions, providing them with policy briefs, a report on abortion in Ohio, and proposed the legislation, and describing how this concerted lobbying effort swayed Ohio's legislature); *id.* at 210–21 (describing similar successful lobbying campaigns in other states).

390. *Id.* at 206 (relating that the Ohio state medical society "submitted a proposal [to the state legislature] to stiffen the state's existing abortion law").

391. For a discussion on condemning advocates, see *supra* notes 365–77 and accompanying text.

purpose of her existence.[392] Doctors silenced men by blaming them for demanding excessive sex from their wives. Such husbands effectively made prostitutes of their wives, which drove them to have abortions.[393]

Anti-abortion physicians painted the ideal woman as a domestic "angel[]" and a paragon of moral virtue.[394] "[I]n their normal condition" women are "more craving of a spiritual sympathy; more angelic than ourselves, we may truly call them," said Dr. Horatio Storer, the head of the AMA's anti-abortion campaign.[395] A woman is more physically delicate, but "in moral vigor, in religious aspiration, and faith, and in all purely emotional attributes, she far excels" a man.[396] No wonder that women represented the "ideal of angels and saints in heaven."[397] Virtuous women could not possibly favor abortion, much less have one.

Doctors argued that a woman's reproductive capacity at once dictated her maternal role, endangered her health, and imposed mental and physical incapacities on her.[398] Doctors professed superior, scientific knowledge about how women's reproductive organs affected women's strengths and weaknesses.[399] Their expertise made them "guardians of women and their offspring."[400] Dr. Storer contended that her "womb alone" made a woman what she is.[401] Her powerful sexuality was dangerous and had to be channeled into reproduction.[402]

Physicians' beliefs about "women's physiology and sexuality . . . reinforce[d] a conservative view of women's social and domestic roles."[403]

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392. NEBINGER, *supra* note 275, at 18 ("[E]ven mothers in many instances shrink not from the commission of this crime, but will voluntarily destroy their own progeny, in violation of every natural sentiment, and in opposition to the laws of God and man.").

393. Siegel, *supra* note 368, at 308–09 (quoting several doctors from the anti-abortion movement as expressing that sentiment).

394. HORATIO R. STORER, IS IT I? 101 (1867) [hereinafter STORER, IS IT I?] .

395. *Id.* at 81.

396. *Id.* at 101.

397. *Id.*

398. SMITH-ROSENBERG, *supra* note 329, at 183–85 (discussing how doctors believed that women's reproductive organs governed women's health and social roles).

399. *Id.*

400. STORER, CRIMINAL ABORTION, *supra* note 254, at 7. *See also* SMITH-ROSENBERG, *supra* note 329, at 183–84 ("[T]he physician's would be scientific views reflected and helped shape social definitions of the appropriate bounds and development of [a] woman's role and identity."); *cf.* ZIEGLER, *supra* note 317, at 15 ("[I]n [Dr.] Storer's view, only regular physicians had the moral compass to understand that abortion was wrong . . . .").

401. JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 146 (2nd ed. 1997) (quoting Dr. Horatio Storer).

402. SMITH-ROSENBERG, *supra* note 329, at 23 (noting that women were described as "naturally lusty and capable of multiple orgasms" and their "only sexual desire . . . was reproductive").

403. *Id.*

Physicians actively joined political movements to promote norms that limited appropriate sexuality to reproduction.[404] Doctors pushed a feminine ideal that put motherhood at its center.[405] Any "demands for [women's] education or for employment outside the home, or the practice of fertility control" provoked "furious jeremiads from the [medical] profession."[406]

As the "sentinel[s]" of women's "purity," doctors had to fight for abortion bans because abortion, "daily and hourly[,] assail[s]" women's purity.[407] Doctors had to "rectify public opinion" and persuade Americans that abortion was "infanticide."[408] If women only understood the scientific fact that abortion snuffed out a life, they would never commit this crime against both nature and *her* nature.[409] Doctors had to teach them.

Sex and abortion equally endangered a woman's physical well-being. Abortion made it easy to have too much sex; too much sex, in turn, caused "gynecological lesions, . . . 'reflex irritation[,]' loss of memory, insanity, heart disease, and even 'the most repulsive nymphomania.'"[410] Heaven forbid a *mother* might have sex during pregnancy—the "unnatural, excited, and exhaustive state" that intercourse caused[411] would give the unborn child epilepsy.[412]

Doctors insisted they possessed superior insight about the evils and immorality of abortion.[413] Doctors "knew" that from the moment of

404. D'EMILIO & FREEDMAN, *supra* note 401, at 146.

405. *See id.* at 147 (explaining that certain medical constraints on women showed that doctors exercised their authority at women's expense).

406. SMITH-ROSENBERG, *supra* note 329, at 23.

407. NEBINGER, *supra* note 275, at 13.

408. STORER, WHY NOT?, *supra* note 338, at 82 (quoting Professor Hugh Lenox Hodge, *Introductory Lecture at University of Pennsylvania*, p. 19 (1854)).

409. NEBINGER, *supra* note 275, at 12 ("Heaven forbid, that woman, whose goodness, purity, chastity, and religion have so often and so deservedly been the theme of poets and the subject of panegyrists, should . . . [know] of the nature of the crime which she commits . . . when she kills . . . her unborn babe.").

410. Charles Rosenberg & Carroll Smith-Rosenberg, *The Female Animal: Medical and Biological Views of Woman and Her Role in Nineteenth-Century America*, 60 J. AM. HIST. 332, 349 (1973) (quoting LOUIS FRANÇOIS ÉTIENNE BERGERET, THE PREVENTIVE OBSTACLE: OR CONJUGAL ONANISM (1870) and other nineteenth-century medical sources). Other diseases caused by too much sex included "menorrhagia, dysmenorrhoea, leucorrhoea, amenorrhoea, abortions, prolapsus, chronic inflammations and ulcerations of the womb," and a "great[ ] variety of sympathetic nervous disorders." J.R. BLACK, M.D., THE TEN LAWS OF HEALTH; OR, HOW DISEASES ARE PRODUCED AND PREVENTED, AND FAMILY GUIDE: TO PROTECTION AGAINST EPIDEMIC DISEASES AND OTHER DANGEROUS INFECTIONS 241 (1885).

411. BLACK, *supra* note 410, at 243.

412. *Id.* at 241.

413. *Id.* at 249 (lamenting that, despite physicians' superior knowledge, "the public are not disposed to acknowledge physicians as authoritative promulgators of what is morally right or wrong").

conception a fetus was as alive as a newborn and an independent being.[414] A fetus was, in fact, no more a part of a woman's body than of its father's. A woman "merely" gave it "nutrition and shelter."[415] Quickening was utterly meaningless. Women could not feel a fetus move before a certain point in pregnancy because it was just too small.[416] Doctors, however, could detect fetal movement well before a woman felt it, and some doctors had even *seen* premature, early-term fetuses move.[417] These medical facts proved that abortion should "always [be] a crime."[418]

Selfishness and ignorance drove women to abortion, doctors said.[419] If women knew "the immoral enormity of [their] conduct,"[420] maternal "instinct" would kick in, and they would willingly "perish to preserve [the] child."[421] Armed with superior, scientific knowledge doctors had to lead the moral charge against the pernicious myth of quickening.[422] Once disabused, women would cease having abortions.[423]

Doctors deplored that married women were having most of the abortions.[424] Married women had "absolutely" no excuse[425] for treating "the noblest purposes of their being as" if it were "a disaster and a

414. STORER, CRIMINAL ABORTION, *supra* note 254, at 10–11, 13 (arguing that physicians knew of the signs of life and purposely misled the public to believe that abortions were not wrong).

415. *Id.* at 10–11.

416. *Id.* at 12 (stating it was easier to feel quickening with boys rather than girls due to their "relative difference in size").

417. *Id.* (claiming fetal movement "is sometimes reduced to a matter of ocular demonstration").

418. *Id.* at 13.

419. NEBINGER, *supra* note 275, at 14 (describing women's motivations for having abortions as including "the labor and expense of rearing children, and the interference with pleasurable pursuits"); *id.* at 17 (quoting a physician who believed that married women had abortions "simply from the inconvenience of an increase in family!"); *see, e.g.*, H.S. POMEROY, THE ETHICS OF MARRIAGE 58–69 (1888) (describing "a school of instruction in the art of avoiding parenthood" that teaches young Americans to "learn to look upon parenthood as a responsibility and a burden which they may properly avoid if possible," cultivate married lives dedicated to pleasure and incompatible with children and have abortions to maintain their lives of pleasure).

420. NEBINGER, *supra* note 275, at 14; *see also id.* at 19 (stating that he is "convinced" that the belief in quickening and "ignorance of the great vital and physiological laws of the conception of development of the foetus" [sic] are "more effective in causing the commission of the crime than all things else combined").

421. STORER, CRIMINAL ABORTION, *supra* note 254, at 11.

422. *Id.* at 9 (describing women who had sought abortions believing that the fetus was not a being before quickening).

423. *Id.* at 19.

424. *Id.* at 31 (emphasizing that those getting "criminal abortions" were "married and respectable women"); *see also* NEBINGER, *supra* note 275, at 16–17 (expressing his own opinion and quoting other doctors).

425. Sauer, *supra* note 277, at 59 (citing J.H. Carstens, *Education as a Factor in the Prevention of Criminal Abortion and Illegitimacy*, 47 J. AM. MED. ASSOC. 1889, 1889 (1906)).

disgrace."[426] Married women selfishly put "fashion," "expenditures, . . . dress, [and] . . . success in society" above motherhood.[427] So endemic was the wicked practice that "[l]adies boast[ed]" to each other about having abortions and egged each other on.[428]

Women were misinformed that they needed abortions to protect their health. "[T]here is hardly a conceivable case" where the risks of pregnancy "could not be relieved," and abortion would only aggravate any danger.[429] "Fear of childbed" was overblown.[430] Abortion was fifteen times—no, "a hundredfold" more dangerous "than . . . delivery at full" term.[431] So were fears of excruciating pain during labor. With anesthesia, doctors transformed labor from a "primal curse . . . to a state frequently of positive pleasure."[432] Doctors conceded that having too many children too close together for too long would wear out a woman's health, but that did not justify abortion.[433] Women could just nurse longer as a natural contraceptive, "fashion" be damned.[434] Married couples should simply have less sex.[435]

Indeed, properly spaced pregnancies promoted women's health, while abortion and birth control ruined "a woman's mental, moral, and physical well-being."[436] This made sense, according to Doctor Storer, because

426. STORER, IS IT I?, *supra* note 394, at 112.

427. STORER, WHY NOT?, *supra* note 338, at 81–82 (quoting STORER, CRIMINAL ABORTION, *supra* note 254, at 55).

428. *Id.*

429. *Id.* at 71.

430. *Id.*

431. BLACK, *supra* note 410, at 256. Dr. Mary Dixon-Jones elaborated,

> As soon as conception takes place the vital forces are summoned to new energies and new activities dormant powers are aroused, and wonderful processes commence. . . . To interrupt these processes is a shock—a shock to the whole being, the nutritive, nervous, and mental systems; it does violence to the procreative organs, and renders them incapable of ever as efficiently performing their special functions.

Mary A. Dixon-Jones, *Criminal Abortion: Its Evils and Its Sad Consequences*, 46 MED. REC. 9, 9 (1894).

432. STORER, WHY NOT?, *supra* note 338, at 72. Leavitt, *supra* note 315, at 41–42 (describing one woman who described anesthesia as having transformed childbirth). Doctors were "uncertain[] about the safety of" anesthesia, however. *Id.* at 42. One study in the mid-nineteenth century found that doctors often "held back on using the drugs" unless a woman insisted upon them. *Id.* Doctors administered anesthesia, on average, about 50 percent of the time in the second half of the nineteenth century. *Id.* at 43. Ether and chloroform carried the potential for overdose, *id.*, or could cause breathing disorders if not administered correctly. *Id.* at 44.

433. STORER, WHY NOT?, *supra* note 338, at 73 ("This error is one which would justify abortion as a necessary for the mother's own good; a selfish plea.").

434. *Id.* (warning women may "forego the duty and privilege of nursing" for "fashion's sake").

435. *Id.* (arguing couples should regulate their frequency of intercourse or face the consequences).

436. *Id.* at 76.

pregnancy "is the end for which [women] are physiologically constituted and for which they are destined by nature."[437] He prescribed that women have a child every "two to two and a half or three years."[438]

What if a woman wanted to give the children she already had a healthier and better life? A Spartan existence hardens children, replied Dr. Storer.[439] Besides, parents could just exercise "greater frugality of living, and greater self-denial, and self-control" in the first place.[440] Even if poverty did enfeeble some children, we should feel grateful for them because these children "oftenest, perhaps, represent [our country's] intellect and its genius."[441]

Doctors, in short, simply distrusted women,[442] and they believed they had good cause for their distrust. A pregnant "[w]oman's mind is prone to depression, and . . . temporary actual derangement."[443] "[P]ersonal considerations, and those of the moment" also "warped" a woman's judgment.[444] Was there ever any excuse for abortion? Doctors "are compelled to answer, None," concluded Dr. Storer.[445] In rare cases, pregnancy might endanger a woman's life, but only a doctor could judge if that were so.[446]

The crime of abortion, one doctor argued, is "often capital."[447] Women who had abortions "soon break[] down in health, and die[] early," just like prostitutes.[448] The "terrible" increase in abortion was causing more insanity among women.[449] A woman who believed she had safely had an abortion deluded herself. Abortion could cause "an insidious and terrible disease . . . in the generative organs" that, at about age

437. *Id.* at 75–76.

438. STORER, IS IT I?, *supra* note 394, at 115–16.

439. STORER, WHY NOT?, *supra* note 338, at 73–74 (explaining that weak Spartan babies that could not endure hardening by exposure and diet would die early from natural causes).

440. *Id.* at 76.

441. *Id.* at 74.

442. *Cf.* Siegel, *supra* note 368, at 302 ("Doctors scarcely acknowledged that wives had meaningful reasons for aborting a pregnancy . . . .").

443. STORER, WHY NOT?, *supra* note 338, at 74–75; *see also* HORATIO ROBINSON STORER, THE CAUSATION, COURSE, AND TREATMENT OF REFLEX INSANITY IN WOMEN 128 (1871) (describing how the "physical changes" from pregnancy increased the number, distribution, and excitation of nerves, causing "an increase of nervous irritability, which, affecting both mind and body," could lead a woman to decide to abort her pregnancy).

444. STORER, WHY NOT?, *supra* note 338, at 74.

445. *Id.* at 74.

446. *Id.* at 79–80 (positing abortion had to be deemed "an absolute necessity by two competent medical men").

447. BLACK, *supra* note 410, at 248.

448. STORER, IS IT I?, *supra* note 394, at 113.

449. *Id.* at 97.

forty, "burst forth into torturing and incurable activity." Abortion caused cancer in middle-aged women, it seems.[450]

Men were not spared the doctors' lash either. Men did not realize that sex was different for women. Women wanted sex to make babies, not for pleasure.[451] A man who failed to curb his animal impulses "abuse[d] his marital privileges."[452] He made his wife "a mere plaything," quickly worn out."[453] Men were "brute[s]"[454] who made prostitutes of their wives.[455] Their uncontrolled sexual urges "turn[ed] a woman's purity into an offense" and nailed "licentiousness to the wings of angels."[456]

Men bore responsibility for this "terrible fashion now so prevalent, of slaughtering the innocents while still in nature's lap."[457] Legislators were the worst: "Senators, Congressmen and all sorts of the politicians," one anti-abortion doctor crowed "bring some of the first women in the land here."[458] Men shouldered the "blame" for women's "wrong and wickedness."[459]

In sum, a woman's reproductive biology shaped her nature as a moral being. Motherhood was her destiny and her blessing. Abortion perverted her essence. Only selfish, ignorant, wanton women wanted one. Men who lacked self-control misused their wives' bodies, prostituting women to their selfish, sexual desires.[460] They impregnated their wives too often, driving them to abort their babies.

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450. BLACK, *supra* note 410, at 251. Even today some state health agencies and anti-abortion propaganda promote this myth. *See* Michelle Ye Hee Lee, *Texas State Booklet Misleads Women on Abortions and Their Risk of Breast Cancer*, WASH. POST (Dec. 14, 2016, 3:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2016/12/14/texas-state-booklet-misleads-women-on-abortions-and-their-risk-of-breast-cancer/ [https://perma.cc/VN4K-RBYL] (reporting that Texas's mandated informed consent booklet for abortion tells women that abortion increases the risk of breast cancer despite overwhelming scientific evidence to the contrary).

451. STORER, IS IT I?, *supra* note 394, at 102 (claiming a woman's emotion of maternal love is a stronger motivator than her need for "simple" intercourse).

452. *Id.* at 77.

453. *Id.*

454. *Id.* at 107.

455. *Id.* at 146 (quoting Ductor [sic] Dubitantium as saying "he is an ill husband that uses his wife as a man treats a harlot"). *See also* STORER, WHY NOT?, *supra* note 338, at 83 (endorsing the view of Professor Hodge who said that a couple that resorted to abortion rendered their marriage "nothing less than legalized prostitution").

456. STORER, IS IT I?, *supra* note 394, at 135.

457. *Id.*

458. Sauer, *supra* note 277, at 55.

459. STORER, IS IT I?, *supra* note 394, at 128 (discussing the need for male accountability in the circumstances surrounding abortion).

460. STORER, IS IT I?, *supra* note 394, at 97 (quoting Dr. John P. Grey as saying that the "horrid . . . secret crime" of abortion turned "the 'holy estate of matrimony,' into the basest species of prostitution").

Little wonder, then, that almost no one spoke out against abortion bans.[461] Silence was the only rational response. What ammunition could women possibly muster against science, much less against their God-given role as mothers? What man would proclaim himself a slave to his sexual passions, so selfish as to sacrifice his wife or children's well-being for his momentary pleasure, or the pimp to his prostitute?[462] Acceptable family planning required abstinence and men's self-restraint.[463] Those in favor of abortion make "public confession of cowardly, selfish and sinful lust."[464] Marriage, "where the parties shrink from its highest responsibilities, is nothing less than legalized prostitution."[465]

The preceding section explained the myriad forces silencing women from opposing abortion restrictions. Women could not vote, and married women could not sue to enforce their own rights. Separate spheres ideology kept most women out of politics. The few who did enter the fray often had their womanhood and their virtue disparaged, even if they advocated for causes that had nothing to do with sex. Feminists who called for birth control through abstinence were denounced for their immorality. Norms that "conditioned [women] not to take part in political decisions" silenced them "from publicly voicing their opinions."[466] Any woman who "privately questioned restrictive abortion laws . . . likely . . . felt powerless to do anything to change them."[467] "Victorian reticence in speaking on sexual matters"[468] and Victorian morality about controlling

461. Sauer, *supra* note 277, at 59 ("Despite reports that abortion was increasingly utilized in the nineteenth century, there is no evidence that anyone spoke out against the restrictive laws.").

462. STORER, CRIMINAL ABORTION, *supra* note 254, at 101 (describing marriages involving such men as "nothing less than legalized prostitution").

463. *Id.* (describing what was then considered acceptable family planning).

464. *Id.*

465. *Id.*

466. Sauer, *supra* note 277, at 59 (noting the societal attitudes towards women in the nineteenth century contributed to the lack of political participation and power).

467. *Id.* at 59–60.

468. *Id.* at 60. *See also* Rosenberg, *supra* note 334, at 134 (discussing the "tone of increasing repressiveness" prevalent in nineteenth-century medical and biological literature on sexuality); BRODIE, *supra* note 244, at 6 (describing how "prudery" shaped and limited discussion of sexual topics and required resorting to euphemisms to describe anatomy, sexual intercourse, and reproductive control); *id.* at 131 (according to one advocate of birth control, "most women 'even in the bedchamber or in the most private conversation start back in alarm that cannot be controlled from the immodesty of the thing'"); D'EMILIO & FREEDMAN, *supra* note 401, at xi ("[T]he Victorians, so uncomfortable with the erotic that they hid the nakedness of classical statuary beneath fig leaves . . . .").

one's sexual passions[469] put the final nails in the coffin for any public opposition to abortion restrictions.

The public's silence signifies nothing, however, because opposing abortion bans was legally impossible for women and socially impossible for women *and* men. We cannot, as *Dobbs* does, read the public's silence as ratifying abortion bans. We can, however, infer their attitude toward abortion from what they *did.* Women, with men's approval, did in fact have abortions to control their fertility and to protect their health.[470] They used contraception and birth control to avoid pregnancy.[471] Their actions trumpet women and men's opposition to abortion restrictions louder than any words.

D. Women and Men Ignored Legal Restrictions, Used Birth Control and Contraceptives, and Got Abortions

Victorians held deeply contradictory attitudes about sex and whether and how to avoid pregnancy. The "middle-class family valued sexual privacy [but] called for public reticence."[472] What Victorians said in public about sex, birth control, and abortion bore little relation to what they said and did in private. As historian Michael Grossberg puts it, the topics of childbearing, birth control, and abortion "unearth[] a fundamental ambiguity of nineteenth-century America: the coexistence of public opposition to family limitation along with a widespread resort to family planning."[473] Abortion and other types of birth control, however, "entered the mainstream of American family life during the first half of the nineteenth century."[474]

The way Victorians talked about birth control and contraceptives sounds odd to modern ears. "Birth control" could be any method to avoid childbearing. It could include abortion, abstinence, the rhythm method, withdrawal, artificial contraceptives like condoms, cervical barriers, or douching, or even purposefully causing a miscarriage by, say, jumping

469. Rosenberg, *supra* note 334, at 137 (contending that American in the Victorian era believed that the failure to control sexual passion "was to destroy any hope of creating a truly Christian personality").

470. MOHR, *supra* note 243, at 113–18 (noting both men and women wanted to "limit their fertility"); DEGLER, *supra* note 314, at 230–38 (discussing women's resort to abortion and husbands' support). Men's support may sometimes have spilled over into pressure. Feminists worried that this was possibility, which explains part of their opposition to abortion. MOHR, *supra* note 243, at 113–14.

471. MOHR, *supra* note 243, at 117.

472. D'EMILIO & FREEDMAN, *supra* note 401, at 130.

473. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 155 (1988).

474. *Id.* at 169.

from a high place. A Victorian might advocate birth control or "voluntary motherhood" through abstinence while opposing abortion or artificial contraceptives like cervical barriers and douching.[475]

Social censure discouraged most from publicly endorsing birth control of any kind, including abortion.[476] "The typical directive of [Victorian] prudery," writes historian Linda Gordon, "was to hide sex."[477] "Birth control was . . . unmentionable[]."[478] "[T]he veil of privacy over reproductive decisions" was so opaque, discussion so "awkward[]," and "hypocrisy" so great that people in the nineteenth century often had no idea if or how anyone else "controlled fertility."[479] One hundred sixty years later, their reticence and prudishness makes almost impossible to pin that down today.[480]

There is, however, no doubt that Victorians did have abortions and use some form of birth control.[481] The collapsing birth rate among those born in America proves that much. In 1800, a woman bore on average of about seven children.[482] By 1860, the average dropped to just over five, and by

475. DEGLER, *supra* note 314, at 203 (noting that a leader of the "Voluntary Motherhood movement" did not advocate for contraception, but argued for women having the right to limit how many children they have); *see also* BRODIE, *supra* note 244, at 59 (explaining various contraceptive practices used in the nineteenth century).

476. *See* GROSSBERG, *supra* note 473, at 170 (stating that those in favor of family limitation and abortion "spoke not in pamphlets and speeches but in silent practice").

477. LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 9 (2002).

478. *Id.*

479. TRENT MACNAMARA, BIRTH CONTROL & AMERICAN MODERNITY: A HISTORY OF POPULAR IDEAS 9 (2018).

480. *See* DEGLER, *supra* note 314, at 210, 219 (1980) (noting the absence of much private correspondence on birth control).

481. BRODIE, *supra* note 244, at 59 (noting that "coitus interruptus . . . . appears to have been widely practiced" in the nineteenth century "well into the twentieth century"). In 1839 rubber vulcanization enabled "the domestic manufacture of condoms, intrauterine devices, douching syringes, womb veils," (diaphragms and cervical caps), and "male caps" (condoms that "covered only the tip of the penis"). ANDREA TONE, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA 14 (2001). In *Gum-Elastic and Its Varieties*, published in 1853, Goodyear touted some of these goods as some of "the many uses of his discovery." *Id.* By "the early 1870s, condoms, douching syringes and solutions, vaginal sponges, diaphragms, and cervical caps could be purchased from mail-order houses, wholesale drug-supply house, pharmacies, and dry-goods and rubber vendors." *Id.*

482. REED, *supra* note 333, at 4; *see also* D'EMILIO & FREEDMAN, *supra* note 401, at 58.

1900, to about 3.5.[483] Books about birth control sold like hotcakes,[484] and their authors' medical practices boomed.[485]

Strong evidence also suggests that abortion rates increased in the first few decades of the nineteenth century.[486] Married women appeared to be having the bulk of them.[487] The steepest drop in birth rates "occurred between 1840 and 1850, exactly when abortion . . . came out into the open."[488] Doctors certainly thought abortions were becoming shockingly more common. They anecdotally reported an alarming increase of white, Protestant, married women coming to them for abortions, but few "single women in trouble."[489] Dr. Storer archly commented:

> There is no reason to suppose . . . that the rapid and constant decrease of births I have shown to exist can be attributable to any progressive lack of fecundity on the part of women, or of generative power on that

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483. D'EMILIO & FREEDMAN, *supra* note 401, at 58 (reporting a drop in the average number of children a married couple had from more than seven in 1800 to 5.42 in 1850, and 4.25 in 1880).

484. REED, *supra* note 333, at 9–11 (noting the 7,000 copies sold of author Charles Knowlton's birth control book between 1832 and 1837). Of particular popularity were Robert Dale Owen's 1831 book, *Moral Physiology; or, A Brief and Plain Treatise on the Population Question*, and Charles Knowlton's 1832 book, *Fruits of Philosophy; or, The Private Companion of Young Married People*. *Id.* at 7. Both advocated birth control for married couples. *id.* Owen advocated coitus interruptus. *id.* Knowlton advocated douching and his book described how to do it. *id.* at 8.

485. *Id.* at 9 (noting that after the publication of *Fruits of Philosophy*, Charles Knowlton's medical practice prospered despite his very public obscenity convictions).

486. *See supra* notes 244–47 and accompanying text; *infra* notes 491–94.

487. MOHR, *supra* note 243, at 89, 93 (stating that although some immigrant German women sought abortions, "contemporary evidence" points to native born women making up the "overwhelming proportion of the women seeking and obtaining abortions in the United States between 1840 and 1880").

488. *Id.* at 82–83. The fertility rate data reported here is for white women. Lauren McIvor Thompson and Kelly O'Donnell report, "Free Black women in the urban North had even lower birth rates, while enslaved women before the Civil War extended breastfeeding and used herbs to avoid pregnancy as strategies of resistance against a system that exploited their reproduction for profit." Lauren MacIvor Thompson & Kelly O'Donnell, *Contemporary Comstockery: Legal Restrictions on Medication Abortion*, 37 J. GEN. INTERN. MED. 2564, 2565 (2022). Other sources confirm their assertion that the fertility among free African American women in the nineteenth century was very low in both the North and the South during the nineteenth century. Stanley L. Engerman, *Black Fertility and Family Structure in the U.S., 1880–1940*, 2 J. FAM. HIST. 117, 118 n.5 (1977). That rate declined between 1820 and 1860 among African American women, both enslaved and free, suggesting that African American women had methods of some sort to control their fertility. *Id.* White women's fertility rates declined more sharply than African American women's between 1820 and 1840. *Id.* Enslaved African American women obviously lacked any bodily autonomy, and enslavers considered an enslaved woman's reproduction to be part of their property interest. *Id.* There is some evidence that enslaved African Americans, nevertheless, used herbs for abortifacients and contraception; white, Southern doctors certainly worried that they did. Sarah Handley-Cousins, *Abortion in the 19th Century*, NAT'L MUSEUM CIV. WAR MED. (Feb. 9, 2016), https://www.civilwarmed.org/abortion1/#_ftn4 [https://perma.cc/849T-JXPE].

489. MOHR, *supra* note 243, at 86 (explaining that physicians observed married women seeking abortions more frequently than single women).

> of men; nor is there reason to think that the passions of the race burn less freely than formerly, or that they are more generally under control.[490]

Abortion was the culprit.

Doctor Storer reported in 1860 that fifteen "married and respectable women"[491] "approached him for abortions within one six-month period."[492] His experience was not unusual.[493] In 1870, a poll of fifty-nine Philadelphia doctors uncovered an "epidemic" of abortions.[494] The "crime" of abortion among married women was, in short, "frequent and bold."[495]

The explosion of advertisements for abortion and birth control from the 1840s on confirms that both had become common.[496] Abortion advertisements cluttered newspapers and periodicals. They touted abortifacients and instrumental procedures touted as cures for "menstrual

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490. Horatio Robinson Storer, *On the Decrease of the Rate of Increase of Population Now Obtaining in Europe & America* 8 (1858) *reprinted in* 43 AM. J. SCI & ARTS 19 (Mar. 1867). *See also* STORER, WHY NOT?, *supra* note 338, at 62 ("No one supposes that men or women have, as a whole, so deteriorated in procreative ability as this might otherwise seem to imply.").

491. STORER, CRIMINAL ABORTION, *supra* note 254, at 31.

492. Sauer, *supra* note 277, at 54.

493. STORER, WHY NOT?, *supra* note 338, at 66 ("[O]ne of the many frightful characteristics of induced abortion [is] that the act is proportionately much more common in the married than in the unmarried . . . ."). Some evidence apart from anecdotes supports that these beliefs were true. *See* MOHR, *supra* note 243, at 241–42, 312–13 nn.53–54 (referring to hand compiled data, New York Times case surveys, and some studies performed in the late nineteenth century); MOHR, *supra*, at 86; Sauer, *supra* note 277, at 55 ("Abortion in the nineteenth century appears to have been concentrated in the middle and upper classes, and even with the stigma of illegitimacy, many writers felt that abortion was more common among the married than the unmarried.").

494. Sauer, *supra* note 277, at 55.

495. STORER, CRIMINAL ABORTION, *supra* note 254, at 30 (quoting Dr. Blatchford, of New York, discussing his experience with the frequency women sought out abortions from his practice).

496. MOHR, *supra* note 243, at 46–47 (explaining that abortion became commonly advertised beginning in the 1840s, and stating that "[T]o document fully the pervasiveness of those open and obvious advertisements would probably require the citation of a substantial portion of the mass audience publications circulated in the United States around midcentury"). Lauren McIvor Thompson, *Mother's Friend: Birth Control in Nineteenth-Century America*, NAT'L MUSEUM CIV. WAR MED. (Feb. 5, 2017), https://www.civilwarmed.org/birth-control/ [https://perma.cc/FX5F-2LLZ] (explaining that sellers of contraception advertised "both openly" (often violating state and local laws) and in "coded language, using phrases like 'feminine hygiene,' 'female wash,' 'female tonic,' 'female remedies,' 'female pills,' 'prevention powders,' 'regulators,' 'disinfectant,' and . . . 'Mother's friend'"); *see also* Kathleen L. Endres, *'Strictly Confidential': Birth-Control Advertising in a 19th-Century City*, 63 JOURNALISM Q. 748, 748 (1986) (describing increased commercialization and advertisement of birth control in the United States after 1850); ENGELMAN, *supra* note 273, at 10–11 (describing ubiquity of both coded and explicit newspaper advertisements for abortion and contraception).

blockage" and other such female maladies.[497] Abortion and birth control were "advertised in every newspaper," with "professors of the art in abundance . . . in every city."[498] Abortion providers gave out handbills on street corners. The advertisements minced no words. "There is no secret as to the various means resorted to for carrying out these unnatural resolutions" (that is, contraception and abortion).[499] Something once quietly available and privately practiced was now out in the open—advertised in every newspaper and magazine, available in drugstores, through the mail, and from practitioners who starkly stated their business. Some abortion providers, such as the notorious New York abortionist Madame Restell, became celebrities.[500]

E. Conclusion: Dobbs*'s Fundamental Nonsense*

Under H&T 4.0, the new and originalist fundamental rights test that *Dobbs* creates and applies, a right is not fundamental unless positive law protected it at about the time the Fourteenth Amendment was ratified.[501] This Section showed that such a test cannot be sensibly applied to women's right to abortion.

When the Fourteenth Amendment was ratified, abortions were widely available and rarely punished. People knew that. They did not need to mount political campaigns against ineffective laws, any more than twentieth-century Americans needed to rewrite the Comstock Act—a dead letter regarded as a historical curiosity.[502] *Dobbs*'s H&T 4.0 consulted only

497. Thompson, *supra* note 496 ("The most common means included the women's ingestion of abortifacient drugs, as well as abortions performed with surgical instruments by trained practitioners (who weren't always physicians).").

498. ENGELMAN, *supra* note 273, at 11 (quoting English clergyman Barham Zinke who toured the U.S. in the late 1860s).

499. *Id.*

500. BROWDER, *supra* note 316, at 22 (describing Madame Restell as "[i]mmediately and supremely successful, well-to-do, and living like a lady" the late 1830s); *id.* at 57 (describing her "sustained notoriety" in the 1840s). *See also* Brief of Feminists for Life, *supra* note 245, at *22 n.10 ("Lohman's," a.k.a., Madame Restell's, "practice became so wide-spread and notorious that the term 'Restellism' was commonly used to derogate the practice of abortionists").

501. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246–49 (2022); *see also supra* Section I.D (explaining the history and tradition of unenumerated, fundamental rights).

502. Luke Vander Ploeg & Pam Belluck, *What to Know About the Comstock Act*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/us/comstock-act-1978-abortion-pill.html [https://perma.cc/BV82-M2DL] (explaining that "by the time [*Griswold v. Connecticut*] established a constitutional right to the use of contraception in 1965 and [*Roe v. Wade*] established a national right to abortion in 1973, the act was seen as a relic"); *see also* Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C., slip op. at 1–2 (Dec. 23, 2022) (discussing how the Comstock Act's prohibition on contraceptive and abortifacient devices and drugs has been rendered a nullity by federal court decisions, application by the United States Postal Service (USPS), and congressional ratification of those interpretations

legal texts, but those texts are an unreliable and misleading guide to real life during that time. As H&T 4.0 requires, *Dobbs* overlooks how ordinary people resisted these laws in private and how judges and juries resisted implementing them. Had nineteenth-century courts and prosecutors taken abortion bans as seriously as *Dobbs* does, those laws might well have been changed. Either way, *Dobbs*'s H&T 4.0 cannot generate sound conclusions about social or legal history.

Dobbs cannot fall back on rule of law values to justify either its application of H&T 4.0 or its conclusion that access to abortion is not fundamental. *Dobbs* overruled nearly fifty years of precedent that protected women's right to abortion access while concealing, not justifying, the act of discretion upon which that decision turned.[503] The *Dobbs* Court could have chosen among several history and tradition tests, however, it chose the most recent and least established one, first devised in the 2010 incorporation case, *McDonald v. City of Chicago*. Worse yet, *McDonald* simply abandoned H&T 1.0, the most established, dynamic history and tradition test of *Griswold v. Connecticut*.[504]

Without recourse to the rule of law, *Dobbs* must find some other normative justification for H&T 4.0. The most common one originalists rely upon, aside from the rule of law, is that originalism alone honors the ratifying people's exercise of popular sovereignty. Yet popular sovereignty is bankrupt when applied to women's rights in the nineteenth century. Laws forbade women from formally participating in the political process, and women had limited practical ability to influence politics informally.

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when it amended the Act several times in the twentieth century); *Abortions*, slip op. at 5–11 (explaining federal court interpretations of the Comstock Act rendering it inapplicable to contraceptives and abortifacients); *Abortions*, slip op. at 11–15 (explaining that Congress ratified these courts' interpretations of the Comstock Act by removing references to contraceptives in the Act, and in doing so tacitly accepted courts' narrowing constructions); *Abortions*, slip op. at 15–16 (describing how the USPS, which enforces the Comstock Act, accepted the courts' narrowing constructions and has not and will not apply it to contraceptives or abortifacients). *But see* Vander Ploeg & Belluck, *supra* (describing how the Comstock Act could overturn Federal Drug Administration (FDA) approval of mifepristone, effectively banning the use of this abortion drug). A federal district court has recently revived the Comstock Act's application to overturn the FDA's approval of the abortion drug mifepristone. *See* Order Granting App. for Stay, All. for Hippocratic Med. v. U.S. Food & Drug Admin., 143 S. Ct. 1075 (U.S. Apr. 21, 2023) (No. 22A902) (staying the order of the U.S. District Court for the Northern District of Texas, No. 2:22-CV-223 (N.D. Tex. Apr. 7, 2023)), *petition for cert. filed*, 2023 WL 5979790 (U.S. Sept. 8, 2023) (No. 23-235), *and petition for cert. filed*, 2023 WL 5979792 (U.S. Sept. 8, 2023) (No. 23-236).

503. *See Dobbs*, 142 S. Ct. at 2242–243 (explaining the holding of the case and the decisions it overruled).

504. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); *see also* Poe v. Ullman, 367 U.S. 497, 522–39 (1961) (Harlan, J., dissenting) (describing the history and tradition approach he would rely on to find that a married couple had a fundamental right to use contraception).

This next Part will conclude by showing that the damage *Dobbs* has done to abortion rights will have repercussions for a fundamental right that Americans have taken for granted for sixty years—contraception access.

IV. THE DOMINOES THAT COULD FALL AFTER *DOBBS*

Under the new, originalist history and tradition test, abortion could be only the first domino to fall in a cascade of rulings overturning the right to contraception, sexual intimacy in the home, and same-sex marriage. None of these rights were protected when the Fourteenth Amendment was ratified.[505] If applied consistently, H&T 4.0 commits the Court to overruling all of these cases.

This Part will show that *Dobbs*'s conclusion that the original meaning of the Fourteenth Amendment excludes the right to access abortion applies with equal force to the right to access contraception. Bans on contraceptive methods that prevent pregnancy after conception could be upheld as an extension of *Dobbs* on the ground that a state has a legitimate interest in preserving "potential life." But all methods of contraception are vulnerable under *Dobbs*'s originalist fundamental rights approach. A detailed legal analysis of the history of nineteenth-century laws and common law doctrines regulating obscenity generally and contraception more particularly is beyond the scope of this Article; future work will elaborate the sketch I make here.

As the ink on the Fourteenth Amendment was drying, a new "social purity" movement mounted an attack on contraception.[506] In 1873, Congress passed the Comstock Act.[507] The Comstock Act built on prior federal law and some early state bans on obscenity.[508] These state laws were

505. For more on the history and significance of the Fourteenth Amendment's exclusion of women, see *supra* Part I.

506. BRODIE, *supra* note 244, at 258 ("Behind the obscenity laws were 'social purity' reformers and their organizers."); *id.* at 263 (noting the "social purity" movements origins in New York in the mid-1860s); *see also* TONE, *supra* note 481, at 4–5 (describing the Comstock Act's origins in disgust with a booming trade in pornography that had taken off during the Civil War among soldiers who though "[d]ivided in their politics . . . shared common ground in making mail-order pornography a vibrant part of camp life").

507. Comstock Act, ch. 258, 17 Stat. 598 (1873).

508. Ohio, for one, enacted "a mini-Comstock law" in 1867. Siegel, *supra* note 368, at 315–16. It was intended to "prevent the publication, sale or gratuitous distribution of drugs, medicines and nostrums intended to prevent conception, or procure abortion." Act of Apr. 16, 1867, 1867 Ohio Laws 202–03 (quoted in MOHR, *supra* note 243, at 209).

sometimes used to prosecute doctors and others who counseled the use of contraception.[509]

The Comstock Act made it a felony to use the mail to sell or advertise contraception:

> [N]o obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, . . . nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made . . . shall be carried in the mail . . . .[510]

It imposed heavy sentences and fines, ranging from "not less than one hundred dollars" to "five thousand dollars," imprisonment "at hard labor" for "not less than one year nor more than ten years."[511] Judges could impose punishment for each offense and both fines and sentences.[512] Anthony Comstock began a campaign of entrapment and prosecution of purveyors of contraceptives and contraceptive information.[513] The Comstock Act "led to the censorship of information on all forms of fertility control."[514] The Act contained no exception for doctors, which chilled them from educating patients about how to avoid pregnancy.[515]

In the Comstock Act's wake, twenty-four states passed statutes by 1885 that banned contraceptive devices or information as obscene.[516] Some states explicitly modeled their laws on the Comstock Act. Others stiffened it.[517] For example, fourteen states made "even private

509. For example, Massachusetts common law prohibited obscenity. In the 1830s, state prosecutors hounded Dr. Charles Knowlton for his book *Fruits of Philosophy*, in which he described and provided instructions for various contraceptive methods. Amy Sohn, *Charles Knowlton, the Father of American Birth Control*, JSTOR DAILY (Mar. 21, 2018), https://daily.jstor.org/charles-knowlton-the-father-of-american-birth-control/ [https://perma.cc/W5LW-AFR9]; *see also* Robert E. Riegel, *The American Father of Birth Control*, 6 N.E. Q. 470, 486 (1933) (discussing the negative reception of Knowlton's book, *Fruits of Philosophy*).

510. Comstock Act, ch. 258, 17 Stat. 598 (1873).

511. *Id.*

512. *Id.*

513. ENGELMAN, *supra* note 273, at 16–17 (describing how Comstock "used a decoy letter" to obtain a "10-cent pamphlet" circulated by Dr. Edward Bliss Foote "that advocated certain contraceptive techniques," prosecuted him, and secured a $3,000 fine against him).

514. *Id.*

515. *Id.* at 17.

516. BRODIE, *supra* note 244, at 257 (stating that, among others, Colorado, Indiana, Iowa, Massachusetts, New York, Pennsylvania, Washington, and Wyoming did so).

517. *Id.*; *see also* DENNETT, *supra* note 8, at 14 ("[W]e have 24 States in which there is a specific prohibition of the circulation of contraceptive information or means.").

conversations illegal by prohibiting the verbal transmission of information about contraception or abortion."[518] Nearly a dozen made possessing contraceptive information a crime.[519] Another twenty-two banned obscenity more generally, and those statutes applied to contraception.[520] Hand in hand with the federal Act, these state laws "forced contraceptive advocates and commercial" sellers "underground."[521]

Statutes banning contraceptives and contraceptive opponents sometimes conflated contraception with abortion.[522] The propaganda campaign that accompanied the Comstock Act, for example, "deliberately confound[ed] contraception with abortion and brand[ed] as murder and licentiousness the whole project of birth control," according to historian Linda Gordon.[523] Mary Ware Dennett, an early twentieth-century birth control advocate, observed that state Comstock Acts also conflated contraception with abortion.[524] Some opponents argued that contraceptive use was immoral because it somehow made abortion *more* likely.[525]

Section III.B.3 also revealed that nineteenth-century feminist leaders, strangely to modern eyes, generally opposed contraceptive use.[526] Mainstream feminists did not embrace contraceptives until the 1930s after the Nineteenth Amendment was ratified and doctors began promoting them.[527] Instead, nineteenth-century feminists promoted a woman's right

518. BRODIE, *supra* note 244, at 257.

519. *Id.* at 257.

520. DENNETT, *supra* note 8, at 14. Dennett argued that states were free to prosecute contraceptive information under these statutes under then existing legal precedents. *Id.*

521. ENGELMAN, *supra* note 273, at 17.

522. *See, e.g.*, POMEROY, *supra* note 419, at 60 ("The *prevention* or destruction of unborn human life is, in America," is "verily the 'terror that walketh in the darkness and the destruction that wasteth at noonday.'" (emphasis added)); *see also* BRODIE, *supra* note 244, at 87 (describing the 1866 work of Dr. William Andrus Alcott, in which he described contraceptives as "destroy[ing]" life).

523. Gordon, *supra* note 376, at 149.

524. DENNETT, *supra* note 8, at 12 (pointing to California's state Comstock Act that titled its statute "Advertising to produce miscarriage," that is, abortion, despite the fact that the statute banned advertisements for contraceptives as well). As Dennett put it, "Abortion may be birth control, but birth control is not abortion." *Id.*

525. POMEROY, *supra* note 419, at 58–66 (arguing that the use of contraception instilled a selfishness and love of pleasure in couples inconsistent with the responsibilities of parenthood making them more likely to resort to abortion). *Id.* at 65–66 (warning that "[d]uring the earliest period of [ ] pre-natal life, when the hearts and minds of [ ] parents should be filled with loving thoughts and wise plans for the little one already dependent upon them," those parents "are refusing to recognize it, or even seeking its destruction").

526. GORDON, *supra* note 477, at 117; *see also*, Khazan, *supra* note 367 (stating that suffragists "knew a sexually conservative message was more likely to get them the vote").

527. Khazan, *supra* note 367 (describing Margaret Sanger failed in 1915 to get prominent women's rights advocates to publicly support birth control because they wanted to get the vote first); *id.* (describing similar failed efforts by Mary Dennett to get suffragists to support access to

to "voluntary motherhood," which emphasized a woman's right to refuse sex with her husband.[528] Contraceptives, they feared, would undermine a woman's ability to refuse sex because it obviated a reason for avoiding sex that husbands might share.[529] In an era when grounds for divorce included refusing sex with one's husband and marital rape was not a crime, it was critical that a woman's husband agreed to abstain from sex.[530]

Nineteenth-century prohibitions on teaching about or advertising or selling contraceptives bear a striking resemblance to laws prohibiting abortion. From the early nineteenth century, some states banned information about contraceptives as obscene. No positive law, either common or statutory, protected communications about them or their use, advertisement, or sale. In the years immediately following the Fourteenth Amendment's ratification, the criminalization of the dissemination of contraceptives and information about them took off. These criminal laws spread to nearly every state in the union by the 1880s.[531]

Dobbs and H&T 4.0, in short, put the right to contraceptive access on the chopping block, right next to *Roe*'s remains. *Dobbs* denies this. Abortion, *Dobbs* asserts, "uniquely involves what *Roe* and *Casey* termed 'potential life,'" while contraceptives do not.[532] In the context of fundamental rights, this is a distinction without a difference.

First, the question whether some unenumerated right is fundamental or not does not turn on the presence or absence of "third-party" interests,

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contraceptives). *Id.* (arguing that birth control only shed its "radical image" when Margaret Sanger "aligned herself with doctors, who by the 1930s had begun to tentatively support birth control"); *id.* (arguing that the unfortunate consequence of that alliance was Sanger's embrace of eugenics).

528. Thomas, *supra* note 368, at 29–30 ("Both conservative and radical factions of the women's rights movement agreed on the topic of voluntary motherhood.").

529. *Cf.* Daniel Scott Smith, *Family Limitation, Sexual Control, and Domestic Feminism in Victorian America*, *in* CONTROLLING REPRODUCTION 77, 86 (Andrea Tone ed., 1997) (noting that a woman's desire "for a smaller family may have been so successful precisely because it was not contrary to the rational calculations of her husband" that a smaller family was easier to support).

530. GORDON, *supra* note 477, at 3; D. KELLY WEISBERG, DOMESTIC VIOLENCE LAW § 4.3(d), § 10.5 (2019) (explaining that "American legislatures and courts" incorporated the English common law principle that marital rape was a legal impossibility and did not begin to make marital rape a crime until the 1970s); *id.* at § 10.5 (noting that "the early feminist movement" of the nineteenth century "met with little success in their attempts to reform the law of marital rape").

531. Martha J. Bailey, *"Momma's Got the Pill": How Anthony Comstock and* Griswold v. Connecticut *Shaped U.S. Childbearing*, 100 AM. ECON. REV. 98, 104 (2010) (following the enactment of the Comstock Act in 1873, "42 states had enacted or amended antiobscenity statutes" by 1900 that "directly regulated trade" in information about and devices for "the prevention of conception").

532. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280–81 (2022) (first quoting Roe v. Wade, 410 U.S. 113, 150 (1973); and then quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992)).

such as "potential life." Indeed, the Court held in *McDonald* that the right to bear arms was fundamental *despite* the fact that "bearing arms" endangers the safety of third parties.[533] Those dangers, in fact, are precisely why some people want to "bear arms."[534] Under *McDonald* and *Dobbs*, the status of an unenumerated right as fundamental turns only on whether positive law protected such a right when the Fourteenth Amendment was ratified. The law did not protect access to contraception. Quite the opposite—federal and state laws criminalized the sale of contraceptive devices and information.

Second, the presence or absence of a fundamental right triggers the level of scrutiny under which a state restriction will be examined. Only then does a state's interest become relevant. If a right is not fundamental, *Dobbs* holds that the Court should uphold state laws if it is rationally related to the achievement of a legitimate state interest.[535] Morality *is* a legitimate state interest.[536] Whether a law serves a moral purpose or not is not a provable fact but a judgment—one that *Dobbs* puts in the hands of a state.[537] Under rational basis review, therefore, restrictions on *any* form of contraception could plausibly be sustained under *Dobbs*.

At the very least, *Dobbs* undermines a woman's right to use certain types of contraception, such as intrauterine devices (IUDs), which just happen to be the most effective form of contraception.[538] The question of when life begins is not a provable or unprovable fact. *Dobbs* leaves it

533. McDonald v. City of Chicago, 561 U.S. 742, 912 (2010) (Breyer, J., dissenting) ("Unlike other forms of substantive liberty, the carrying of arms for that purpose often puts others' lives at risk.").

534. *Id.*

535. *Dobbs*, 142 S. Ct. at 2283–84 (holding that abortion is not a fundamental right and abortion bans will be upheld "if there is a rational basis on which the legislature could have thought that it would serve legitimate state interest"). *Id.* at 2284 (holding that abortion bans would be justified by myriad legitimate state interests including "respect[ing] [] and preserv[ing] [] prenatal life at all stages of development," protecting "maternal health and safety," eliminating "particularly gruesome or barbaric medical procedures," preserving "the integrity of the medical profession," mitigating "fetal pain," and preventing "discrimination on the basis of race, sex, or disability").

536. For cases discussing this point, see *supra* note 13. Remember that when the Court held that the right to same sex intimacy was not a protected right, it sustained state bans because they promoted the state's valid governmental interest in morality. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that "majority sentiments about the morality of homosexuality" are adequate to sustain Georgia's ban on same sex "sodomy"), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

537. *Dobbs*, 142 S. Ct. at 2284.

538. *Myths and Facts About the Intra-Uterine Device (IUD)*, INT'L PLANNED PARENTHOOD FED'N (Mar. 19, 2023), https://www.ippf.org/blogs/myths-and-facts-about-intra-uterine-devices [https://perma.cc/YH4H-85M4] (stating that IUDs are 99% effective, ranking them "among the most effective reversible methods, with pregnancy rates similar to those for female sterilization").

to states to judge such questions.[539] Fertilization is *a* point at which life—or potential life—can be said to exist. Kentucky, for one, so defines life,[540] as do other states, such as Missouri,[541] Arizona,[542] and Oklahoma.[543] In some cases, IUDs prevent a fertilized egg from implanting in a woman's uterus.[544] Whether this ends a "life" is a moral, not a factual, question, the resolution of which *Dobbs* would leave to the states.[545]

Dobbs will not remain confined to abortion if the Court applies its originalist methods consistently. The Court claimed that *Dobbs* does not portend a reversal of the right to access contraceptives or other fundamental rights cases. If true, that fact condemns the opinion as a selective application of its supposed premise—which is to say an act of judicial will and hypocrisy. The fact is, *Dobbs*'s methods put the right to contraceptive access right on the chopping block.

CONCLUSION

Rule of law values offer *Dobbs* only a simulacrum of authority for what was, at its core, a breathtaking exercise of judicial discretion. As

539. *Dobbs*, 142 S. Ct. at 2257 ("Voters in [some] States may wish to impose tight restrictions based on their belief that abortion destroys an 'unborn human being,'" and "[o]ur Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.").

540. KY. REV. STAT. ANN. § 311.720(6) (West, Westlaw through 2023) ("Fetus' means a human being from fertilization until birth.").

541. Missouri, for example, prohibits abortion as the intentional destruction of "the life of [an] embryo or fetus in his or her mother's womb" or "[t]he intentional termination of the pregnancy." MO. REV. STAT. § 188.015(1) (West, Westlaw through 2d Reg. & 1st Extra. Sess. of the 101st Gen. Assemb. 2022). An "unborn child" is defined as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development." *Id.* § 188.015(10). "Conception," in turn, is defined as "the fertilization of the ovum of a female by sperm of a male." *Id.* § 188.015(3). *See also id.* § 1.205(3) (defining "unborn child" and "unborn children" as including "all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development").

542. ARIZ. REV. STAT. § 1-219 (West, Westlaw through 2d Reg. Sess. of the 55th Leg. (2022)) (providing that "an unborn child at every stage of development," possesses "all rights, privileges and immunities available to other persons, citizens and residents of this state"), *enjoined by* Isaacson v. Brnovich, 610 F. Supp. 3d 1243 (2022).

543. OKLA. STAT. ANN. tit. 63 § 1-745.51. (West, Westlaw through ch.1 of 1st Reg. Sess. of 59th Leg.) (defining "abortion" as the termination of the pregnancy with the knowledge that it will cause the death of an unborn child; defining "unborn child" as "a human fetus or embryo in any stage of gestation from fertilization until birth," and "fertilization" as "the fusion of a human spermatozoon with a human ovum"). Oklahoma's statute also specifically exempts "the use, prescription, administration, procuring, or selling of Plan B, morning-after pills, or any other type of contraception or emergency contraception." *Id.*

544. INT'L PLANNED PARENTHOOD FED'N, *supra* note 538 (stating that in "very rare cases" IUDs prevent implantation of a fertilized egg).

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

this Article has shown, the Court has used multiple versions of the history and tradition test for identifying fundamental rights over the last sixty years. Until *Dobbs*, the tests used by the Court to discern fundamental rights were non-originalist, dynamic, and broadly framed. From *Griswold* to *Glucksberg* to *Lawrence* and *Obergefell*, the history and tradition test enunciated in and applied by the Court's fundamental rights jurisprudence appropriately avoided relying on rigid assertions concerning the Fourteenth Amendment's "meaning."

In *Dobbs*, the Court made a sharp break with this precedent by creating a new history and tradition test that is narrow, originalist, and static. Most importantly, the *Dobbs* test pivots entirely on the Court's view of the original meaning of the Fourteenth Amendment. For access to abortion to be regarded as a fundamental right, historical evidence would have to demonstrate that "a constitutional right to abortion was established when the Fourteenth Amendment was adopted."[546]

As this Article has shown, *Dobbs* neither acknowledges nor justifies its choice to abandon the jurisprudence concerning fundamental rights and to create a new one from whole cloth. *Dobbs*, therefore, cannot be justified on rule of law grounds. Rather, if *Dobbs*, or for that matter originalism as a whole, can be justified, it is on the grounds that it honors the original exercise of popular sovereignty. That justification is also hollow, as this Article has shown. In the end, the logic of *Dobbs* simply extends our Constitution's fundamental injustice of excluding a majority of the adult population from participating in our democracy and subordinating them to the will of white men.

546. *Id.* at 2254.