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## The Superficial Application of Originalism in Dobbs: Could a More Comprehensive Approach Protect Abortion Rights?

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# THE SUPERFICIAL APPLICATION OF ORIGINALISM IN *DOBBS*: COULD A MORE COMPREHENSIVE APPROACH PROTECT ABORTION RIGHTS?

By Amanda Trau\*

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### INTRODUCTION

On June 24, 2022, the United States Supreme Court overturned *Roe v. Wade* and, with it, the 49-year precedent that protected the constitutional right to abortion.<sup>1</sup> The impact of the decision has been devastating for women<sup>2</sup> around the country. The practice of abortion has been banned in 13 states and restricted in five.<sup>3</sup> The average time it takes to travel to a clinic has increased from 30 minutes to 100 minutes.<sup>4</sup> In Ohio, the six-week abortion ban forced a ten-year-old rape victim, who was six weeks and three days pregnant, to drive to Indiana to receive the abortion she so desperately needed.<sup>5</sup> Ohio’s law does not include an exception for rape or incest.<sup>6</sup> In Wisconsin,

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1. See generally *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

2. Throughout this Note, I use the word ‘women’ because the issue of abortion, especially in history, often comes down to the regulation of women and their bodies. But under the umbrella term “women,” I include any person with a uterus or ability to become pregnant as well.

3. See Aria Bendix, *Travel Time for Abortions Tripled and Requests for Pills Soared, Investigations Into Effects of Supreme Court Ruling Show*, NBC NEWS (Nov. 1, 2022, 2:58 PM), <https://www.nbcnews.com/health/health-news/abortion-bans-supreme-court-dobbs-decision-health-impacts-rcna54896> [https://perma.cc/Q3KD-TXU4]. Courts in six states blocked abortion bans, some indefinitely and some only temporarily. See Allison McCann et al., *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Dec. 23, 2022, 9:30 AM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/SW7C-Z2DD].

4. See Bendix, *supra* note 3.

5. See David Folkenflik & Sarah McCammon, *A Rape, an Abortion, and a One-Source Story: A Child’s Ordeal Becomes National News*, NPR (July 13, 2022, 10:28 PM), <https://www.npr.org/2022/07/13/1111285143/abortion-10-year-old-raped-ohio> [https://perma.cc/AZY3-P944].

6. See Dana Goldstein & Ava Sasani, *What New Abortion Bans Mean for the Youngest Patients*, N.Y. TIMES (July 25, 2022),

emergency room physicians caused a woman to bleed and suffer for ten days because they refused to remove tissue left in her uterus after an incomplete miscarriage.<sup>7</sup> A Texas doctor forced a woman to carry a dead fetus for two weeks, causing her crippling pain and threatening her ability to have more children in the future.<sup>8</sup> In central Texas, a hospital instructed a doctor that they could not remove an ectopic pregnancy until it ruptured, seriously endangering the woman's life.<sup>9</sup>

People of color are disproportionately affected by anti-abortion legislation.<sup>10</sup> Black women are five times more likely to obtain an abortion than white women for two crucial reasons.<sup>11</sup> First, Black women often live in areas considered “contraceptive deserts.”<sup>12</sup> These areas include pharmacies with early closing times, few female pharmacists, no educational material on the wide range of birth control methods, condoms locked behind glass, and no self-checkout options.<sup>13</sup> Second, Black women are more likely to suffer from dangerous complications and maternal mortality than white women.<sup>14</sup> As of 2019,

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<https://www.nytimes.com/2022/07/16/us/abortion-bans-children.html> [<https://perma.cc/L773-YL9Z>].

7. See Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/> [<https://perma.cc/N5AB-S6H9>].

8. See Sarah Martinez, *Texas Woman Shares Story of Carrying Dead Fetus Due to Anti-Abortion Laws*, MY SAN ANTONIO (July 19, 2022), <https://www.mysanantonio.com/news/local/article/Texas-woman-dead-fetus-anti-abortion-laws-17314394.php> [<https://perma.cc/3B6S-8A24>].

9. See Reese Oxner & María Méndez, *Texas Hospitals Are Putting Pregnant Patients at Risk by Denying Care Out of Fear of Abortion Laws, Medical Group Says*, TEX. TRIB. (July 15, 2022, 2:00 PM), <https://www.texastribune.org/2022/07/15/texas-hospitals-abortion-laws/> [<https://perma.cc/JVV4-PPUP>].

10. See Chelsea Jones & Christine Slaughter, *How Black Women Will be Especially Affected by the Loss of Roe*, WASH. POST (June 25, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/06/25/dobbs-roe-black-racism-disparate-maternal-health/> [<https://perma.cc/QYE7-SN28>].

11. See *id.*

12. See *Contraceptive Deserts*, POWER TO DECIDE, <https://powertodecide.org/what-we-do/access/contraceptive-deserts> [<https://perma.cc/58WF-KCNS>] (last visited Dec. 13, 2022) (“Contraceptive deserts are defined as counties where the number of health centers offering the full range of methods is not enough to meet the needs of the county’s number of women eligible for publicly funded contraception, defined as at least one health center for every 1,000 women in need of publicly funded contraception.”); see also Jones & Slaughter, *supra* note 10.

13. See, e.g., Jones & Slaughter, *supra* note 10; *Tip Sheet: Understanding Contraceptive Deserts*, POWER TO DECIDE, <https://powertodecide.org/sites/default/files/2022-02/Understanding%20Contraceptive%20Deserts.pdf> (last visited March 31, 2023).

14. See *id.*

Black women are three times more likely to die from a “pregnancy-related cause” than white women, largely because of the racism they experience in the medical field.<sup>15</sup> Ectopic pregnancies are more common in Black women, and abortion bans have caused confusion around treating ectopic pregnancies that lead to delays in critical treatment.<sup>16</sup> The *Dobbs* decision has allowed states to implement abortion bans that do not provide any health exceptions and deliberately deprive women of life and liberty.<sup>17</sup>

Not only has *Dobbs* been critiqued for the impact it has on marginalized populations,<sup>18</sup> but legal scholars also critique the methodology of the decision.<sup>19</sup> *Dobbs* is a work of originalism, which is an approach to judicial decision-making that looks to the original public understanding of constitutional text at the time it was ratified to discern its meaning.<sup>20</sup> A central problem with the *Dobbs* majority’s

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15. *See id.*

16. *See id.*; Shefali Luthra, *Abortion Bans Are Barring People From Life-Saving Pregnancy Care, Medical Groups Warn*, 19TH NEWS (Nov. 1, 2022, 6:00 AM), <https://19thnews.org/2022/11/abortion-bans-restrict-critical-pregnancy-care-senate-report/> [<https://perma.cc/33KK-ECPT>].

17. *See Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (“The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother’s life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective . . .”).

18. The *Dobbs* decision has raised concerns around the additional substantive due process precedents, such as the right to contraception, same-sex intimacy, and same-sex marriage. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

19. Throughout this Note, originalism will serve as an analytical tool because it is the current majority’s preferred method of interpretation. *See David Cole, The Supreme Court Embraces Originalism — And All Its Flaws*, WASH. POST (June 30, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-originalism-constitution/> [<https://perma.cc/Z4UK-D27M>]. Therefore, this Note assumes, for the sake of argument, that originalism is valid. But many legal scholars have and will continue to debate the legitimacy of originalism as a tool of constitutional interpretation. *See generally* ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

20. *See* Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation> [<https://perma.cc/6MBE-VW5M>] (last visited Jan. 30, 2023, 10:15 AM). *But see* Reva B. Siegel, *Memory Games: Dobb’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1, 46–47 (forthcoming 2023) (“Several natural law

originalist analysis is that it only credits certain voices, certain sources published in a certain context, and abstractly analyzes these voices and sources instead of engaging them in the context of their daily lives. This analysis is especially egregious given the fact that the Court currently employs “public meaning originalism,”<sup>21</sup> which asserts that “the Constitution should be interpreted based . . . on the original public meaning of the language. The original public meaning is normally thought to be the meaning that a knowledgeable and reasonable interpreter would have placed on the words at the time that the document was written.”<sup>22</sup> The extensive debate around originalism has a long history and expands throughout the legal community.<sup>23</sup> This Note participates in the debate by arguing that if public meaning originalism is a valid tool of interpretation, its application in *Dobbs* fell short.<sup>24</sup>

The *Dobbs* opinion, written by Justice Samuel Alito, highlighted the majority’s fixation on a narrow view of history and tradition in America.<sup>25</sup> It utilizes originalism by focusing on the meaning of liberty during the nineteenth century, especially during the decade surrounding the passage of the Fourteenth Amendment.<sup>26</sup> But there is an essential question that the *Dobbs* majority fails to answer as it attempts to proselytize its view of the history and tradition surrounding abortion: when examining the original meaning of text, which populations’ understanding should be considered? Specifically, when looking at whether abortion was considered a protected right, how did women at the time understand the word liberty? For the Court to answer that question, they would have needed to go beyond historical

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originalists have argued that *Dobbs*’s substantive-due-process history-and-traditions analysis approximated original meaning so far as feasible for a judge who respects precedent, consistent with a judge’s role commitments to stare decisis . . . . This Article understands *Dobbs* as originalist on different grounds. *Dobbs* does not employ the methods of academic originalists; it shows no interest in the original public meaning of the Fourteenth Amendment. But *Dobbs* is the expression of originalism that has developed in the conservative legal movement and the Republican Party over the last forty years.”).

21. See Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1965 (2021). This Note explains the background of originalism in Part II. See *infra* Section II.B.

22. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. L. REV. 1371, 1376 (2019).

23. See, e.g., *supra* note 19.

24. See *infra* Section II.B.

25. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2244 (2022).

26. See *id.* at 2235.

records that reflect only the thoughts of wealthy, landowning white men.<sup>27</sup>

By examining the life of women in nineteenth century<sup>28</sup> New York as a case study, this Note will show how abortion was central to women's fight for liberty and equality.<sup>29</sup> History and tradition can, and should, include a much broader analysis than just historical records that overvalue white, male landowners.<sup>30</sup> With some digging, the Court would have found that abortion was considered socially acceptable, advertised in popular papers, and used by all different types of women for various personal reasons.<sup>31</sup> The history analyzed by the *Dobbs* majority does not mention any of the historical records about women living in the period, or explain why the Court chose to ignore them.<sup>32</sup>

In the *Dobbs* opinion, Justice Alito adopts an originalist methodology to answer the following question: does the original public meaning of the word liberty at the time the Fourteenth Amendment was ratified include a right to abortion?<sup>33</sup> This Note argues that, assuming the Court is asking the right question under an originalist framework, the Court analyzes the historical sources in an astonishingly limited and isolated way that preordained the result. Within the Court's own originalist paradigm, the question can be answered in a different way by broadening the scope of the inquiry. An analysis of women's lives, views and behavior in nineteenth-century New York demonstrates that the right to abortion was paramount in their understanding of liberty.

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27. See Lesley Kennedy, *Voting Rights Milestones in America: A Timeline*, HISTORY (Apr. 19, 2021), <https://www.history.com/news/voting-rights-timeline> [<https://perma.cc/7E45-2SKH>].

28. This Note examines women's lives during this time period because it is era when the Fourteenth Amendment was ratified. Scholars have frequently turned to the era following the Fourteenth Amendment when conducting originalist analysis because "[o]riginalists frequently look to practices at the time a constitutional provision was adopted to determine its original meaning." CHEMERINSKY, *supra* note 19, at 164; see also, e.g., Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 464 (2012) ("Part IV [of the Article] turns to how the 'freedom . . . of the press' was understood around 1868, when the Fourteenth Amendment was ratified. Much recent scholarship has suggested that originalist analyses of Bill of Rights provisions applied to the states via the Fourteenth Amendment should consider the original understanding as of 1868 in addition to that of 1791.").

29. See *infra* Section III.A.

30. See *id.*

31. See *id.*

32. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243–44, 2248–54 (2022).

33. See *Dobbs*, 142 S. Ct. at 2242–43.

Section I.A of this Note discusses the history of abortion jurisprudence in the United States that led to the overturning of *Roe*,<sup>34</sup> while Section I.B briefly examines the origins of originalism and how it is currently used by the Court.<sup>35</sup> Section II.A summarizes the *Dobbs* case<sup>36</sup> and Section II.B explores the way originalism is used by the majority in the *Dobbs* decision.<sup>37</sup> Section III.A provides an in-depth look into the history and tradition of abortion in nineteenth-century New York to show its significance to women’s understanding of liberty.<sup>38</sup> Lastly, Section III.B considers how the historical evidence the Court fails to consider in *Dobbs* is paramount to a valid and complete originalist analysis.<sup>39</sup>

## I. RELEVANT BACKGROUND

In order to understand the *Dobbs* decision, it is vital to understand the history behind abortion jurisprudence in American history. It is also important to understand the origins of originalism and how the Court applies the current standard of originalism: public meaning originalism. This Part will address each in turn.

### A. Abortion Jurisprudence Through History

The right to reproductive autonomy has been a long-debated topic in American history.<sup>40</sup> While a majority of Americans believe abortion should be legal in most circumstances, the U.S. political parties have become increasingly polarized since *Roe v. Wade* was decided in 1973.<sup>41</sup> Part of this polarization comes from the decades-long conservative “pro-life” campaign that culminated in a conservative majority on the

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34. See *infra* Section I.A.

35. See *infra* Section I.B.

36. See *infra* Section II.A.

37. See *infra* Section II.B.

38. See *infra* Section III.A.

39. See *infra* Section III.B.

40. See, e.g., Indira Babic & Emile Richardson, *Abortion in America: A Visual Timeline*, ABC NEWS (June 24, 2022, 11:03 AM), <https://abcnews.go.com/Politics/abortion-america-visual-timeline/story?id=85588254> [<https://perma.cc/3Q3X-46HP>]; Chloe Thurston, *The History of Abortion Politics*, NORTHWESTERN INST. FOR POL’Y RSCH. (Aug. 16, 2022), <https://www.ipr.northwestern.edu/news/2022/the-history-of-abortion-politics.html> [<https://perma.cc/8C2C-TJ6W>].

41. See Jillian Weinberger, *How the US Polarized on Abortion — Even as Most Americans Stayed in the Middle*, VOX (June 24, 2022, 10:42 AM), <https://www.vox.com/23055389/roe-v-wade-timeline-abortion-overturn-political-polarization> [<https://perma.cc/SMP2-W45N>].

Supreme Court willing to overturn 50 years of precedent.<sup>42</sup> Section I.A will lay out the foundational cases that governed abortion laws until *Dobbs*.

### 1. *Roe v. Wade*

The right to abortion became a fundamental right protected by the United States Constitution in 1973 with the ruling in *Roe v. Wade*.<sup>43</sup> Plaintiff Jane Roe brought suit against the state of Texas after she was unable to obtain a legal abortion in Texas because her life did not appear to be in danger by her pregnancy and she was unable to travel out of state where abortion was legal and safe.<sup>44</sup> She alleged the statute criminalizing abortion was unconstitutional and asked the Court for an injunction to stop Texas from enforcing the law.<sup>45</sup> The Supreme Court held that the Due Process Clause of the Fourteenth Amendment provides a fundamental “right of privacy,” which protects the right to abortion.<sup>46</sup> The Court explained, “[t]his right of privacy . . . founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>47</sup>

The protections created by *Roe* were quite stringent because the majority utilized strict scrutiny, a review typically reserved for explicit race-based laws.<sup>48</sup> Strict scrutiny is more challenging to pass than other tests, such as rational basis review, where the government must only show a legitimate state interest, and a rational connection to the law imposed.<sup>49</sup> The Court in *Roe* found that regulations limiting women’s fundamental right to privacy were not justified by a compelling state interest, and the Texas law was not narrowly tailored to further that interest.<sup>50</sup> The majority offered a trimester framework to indicate when a State’s interest in fetal life becomes compelling.<sup>51</sup> The court

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42. *See id.*

43. 410 U.S. 113, 152–53 (1973).

44. *See Roe*, 410 U.S. at 120.

45. *See id.*

46. *See id.* at 153.

47. *Id.*

48. *See Roe*, 410 U.S. at 155; *Strict Scrutiny*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) [<https://perma.cc/79PU-FL4E>] (last visited Nov. 8, 2022).

49. *See Rational Basis Test*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/rational\\_basis\\_test](https://www.law.cornell.edu/wex/rational_basis_test) [<https://perma.cc/4S7B-V4RK>] (last visited Nov. 8, 2022).

50. *See Roe*, 410 U.S. at 155–156, 160–64.

51. *See id.* at 163.

held that until the end of the first trimester, all abortion decisions should be left to the woman and her physician, but for stages after the first trimester, the state could promote its interest in the health of the mother by choosing to regulate abortions in a way reasonably related to maternal health.<sup>52</sup> The Court noted that this may be an imperfect line-drawing measure, but it was justified based on the medical data available at the time.<sup>53</sup>

While Justice Blackmun, who authored the majority opinion, did not explicitly call out where, precisely, the right to privacy lies within the Constitution, it was understood to fall into the substantive due process rights covered under the word “liberty” in the Fourteenth Amendment.<sup>54</sup> In his concurrence, Justice Stewart includes a quote by Justice Frankfurter to expand on the power of the word liberty by stating: “Great concepts like . . . ‘liberty’ . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.”<sup>55</sup>

The conservative end of the Court disagreed with this analysis.<sup>56</sup> The dissent argued that although the Due Process Clause of the Fourteenth Amendment may provide some protections from legislative abuse, those protections only extend to liberty against deprivation without due process of law.<sup>57</sup> The dissent conceded that states would violate the due process clause if they implemented abortion bans that do not provide any health exceptions and therefore deliberately deprive women of life and liberty.<sup>58</sup> However, the sweeping application in *Roe*, the dissent argued, was a case of judges legislating from the bench.<sup>59</sup>

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52. *See id.* at 164–65.

53. *See id.* at 161–62.

54. *See id.* at 168 (Stewart, J., concurring).

55. *Id.* at 169 (citing *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

56. *See Roe*, 410 U.S. at 172–73 (Rehnquist, J., dissenting).

57. *See id.*

58. *See id.* (Rehnquist, J., dissenting) (“The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother’s life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective . . .”). This assertion is significant post-*Dobbs* as states continue to implement bans that do not create health exceptions for women.

59. *See id.* (Rehnquist, J., dissenting).

## 2. Planned Parenthood of Southeastern Pennsylvania v. Casey

The Court reconsidered *Roe* in the 1992 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>60</sup> Abortion providers sued the state of Pennsylvania seeking declaratory and injunctive relief from five provisions of the Pennsylvania Abortion Control Act of 1982 that created restrictions on women trying to seek an abortion.<sup>61</sup> While the *Casey* opinion upheld the constitutionality of abortion created under *Roe*, it limited the protections in two significant ways.<sup>62</sup> First, the holding removed the strict scrutiny requirement used to assess the constitutionality of an abortion statute and replaced it with an undue burden test.<sup>63</sup> The majority concluded:

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.<sup>64</sup>

An undue burden exists if a law's purpose or effect is to place a substantial barrier in the path of women seeking an abortion before the fetus becomes viable.<sup>65</sup> Under the undue burden test, the Court is no longer required to consider the compelling state interest and narrow tailoring structure of strict scrutiny.<sup>66</sup>

Second, the Court replaced the trimester framework created in *Roe* with a more subjective viability standard.<sup>67</sup> The Court found *Roe*'s trimester framework too rigid because it limited the state's ability to

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60. 505 U.S. 833, 833–34 (1992).

61. *See id.* at 844–45. These restrictions included a requirement that a woman seeking an abortion give her informed consent prior to the procedure and must be provided with certain information at least 24 hours before the abortion is performed. Anyone under 18 must have informed consent of one of her parents but provides for a judicial bypass option if the minor cannot obtain consent. Finally, unless certain exceptions apply, a married woman seeking an abortion must notify her husband. *See id.*

62. *See id.* at 845–46.

63. *See id.* at 874.

64. *Id.*

65. *See id.* at 877.

66. *See Casey*, 505 U.S. at 877, 922. Because the Court in *Casey* believed strict scrutiny did not give sufficient weight to a state's interest in protecting fetal life, it chose to reject the standard and replace it with a standard that did not require as stringent of a test. *See id.*

67. *See id.* at 837.

decide when a fetus could live outside the womb.<sup>68</sup> With the new standard, states could regulate abortion by determining their own definition of viability, rather than using the Court's.<sup>69</sup>

*Casey* permitted greater regulation by states because the state's interest in protecting fetal life could come at an earlier stage in pregnancy than in *Roe*. Countless restrictions such as informed consent, 24-hour waiting periods and parental notifications were not considered an undue burden.<sup>70</sup> *Casey* created an opportunity for states to implement targeted regulation of abortion providers ("TRAP laws") under the guise of health-justified restrictions that could pass the undue burden standard.<sup>71</sup> While *Casey* was considered a win at the time by abortion advocates who worried that the Court planned to overturn *Roe*, it paved the way for states to implement restrictions and near-total bans on abortion long before the *Dobbs* decision was rendered.<sup>72</sup>

### 3. Gonzales v. Carhart

The third notable abortion decision by the Supreme Court is *Gonzales v. Carhart*.<sup>73</sup> In this case, the plaintiff asked the Court to assess the constitutionality of the Partial-Birth Abortion Ban Act of 2003, which regulated and proscribed how doctors could perform an intact Dilation and Evacuation (D&E) procedure, otherwise known as partial-birth abortion.<sup>74</sup> Under the law, doctors faced criminal liability if they provided an intact D&E.<sup>75</sup> Opponents of the law argued its

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68. *See id.* at 870, 873.

69. *See id.* at 949.

70. *See id.* at 900–01.

71. *See* Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1432, 1480 (2016) ("Judges at war with *Casey* defer to the states' rationales in the face of overwhelming evidence that the health justifications for the restrictions offer a fig leaf for the expression of antiabortion sentiment.").

72. *See* Deepa Shivaram, *Roe Established Abortion Rights. 20 Years Later, Casey Paved the Way for Restrictions*, NPR (May 6, 2022, 5:00 AM), <https://www.npr.org/2022/05/06/1096885897/roe-established-abortion-rights-20-years-later-casey-paved-the-way-for-restricti> [<https://perma.cc/84HL-FNWB>].

73. *See generally* 550 U.S. 124 (2007).

74. *See id.* at 147; *see also* Megan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second-Trimester Procedure*, GUTTMACHER INST. (Feb. 21, 2017), <https://www.guttmacher.org/gpr/2017/02/de-abortion-bans-implications-banning-most-common-second-trimester-procedure> [<https://perma.cc/PV8T-4A43>] (discussing that D&E procedures are the most common method of second-trimester abortion and are proven to be safe).

75. *See Carhart*, 550 U.S. at 151.

scope was overreaching and the language of the law was unclear because it did not give physicians sufficient understanding of the scope of their liability or differentiate between legal and illegal D&Es.<sup>76</sup> In a 5-4 decision, the Court held the statute was not void for vagueness and did not impose an undue burden on women seeking an abortion prior to viability.<sup>77</sup> The *Carhart* decision indicated the Court's thinking on abortion was moving even further away from *Roe*.<sup>78</sup> After this decision, many states implemented laws that required doctors to perform a transvaginal ultrasound that often forced the woman to listen to the fetus's heartbeat before providing an abortion.<sup>79</sup> Following the *Cahart* case, a number of states passed laws banning abortion after 20 weeks of pregnancy.<sup>80</sup>

In the years between *Carhart* and *Dobbs*, abortion rights suffered more attacks.<sup>81</sup> Many states continuously attempted to undermine *Roe* by passing legislation that outlawed abortion after six weeks of pregnancy, created personhood laws, and took away abortion providers admitting privileges in hospitals as part of additional TRAP laws.<sup>82</sup> Most notably, Texas implemented Senate Bill 8 ("SB 8") in September 2021, a law which deputized citizens to sue anyone who performs an abortion or who aids and abets the provision of abortion. This bill was a clear violation of *Roe*, which was still the law of the land.<sup>83</sup> In a slip opinion, the Court declined to grant an emergency

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76. *See id.* at 147; *see also* Brief for Planned Parenthood Respondents at 43, *Gonzales v. Planned Parenthood*, No. 05-1382, 2006 WL 2725691 (9th Cir. Sept. 20, 2006) (arguing the statute's intent clause "fails to meaningfully distinguish between permitted and banned overt acts" by physicians).

77. *See Carhart*, 50 U.S. at 147-49 (finding the void-for-vagueness doctrine requires that a statute define what acts are considered criminal with a definiteness that the ordinary person can understand and with objective criteria that does not encourage arbitrary enforcement).

78. *See* David Masci & Ira C. Lupu, *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RSCH. CTR. (Jan. 16, 2013), <https://www.pewresearch.org/religion/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/#casey> [<https://perma.cc/96FG-XQ7N>].

79. *See id.*

80. *See id.*

81. *See Bans on Abortion at 6 Weeks*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/types-attacks/6-week-bans> [<https://perma.cc/NB8P-QSDT>] (last visited Dec. 25, 2022); *Targeted Regulation of Abortion Providers*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers> [<https://perma.cc/MNG3-5U8Q>] (last updated Dec. 1, 2022).

82. *See Targeted Regulation of Abortion Providers*, *supra* note 81.

83. *See* Shefali Luthra & Barbara Rodriguez, *Abortion Providers' Main Legal Challenge to Texas' Six-Week Abortion Ban is Effectively Over*, 19TH NEWS (Mar. 11,

injunction in *Whole Women's Health v. Jackson*, allowing SB 8 to go into effect while the litigation played out in federal court.<sup>84</sup>

### B. Originalism's Origin and Purpose

The legitimacy of originalism as an appropriate form of constitutional analysis is a widely debated topic.<sup>85</sup> This Note does not join this debate or make any determinations on originalism's legitimacy. For the sake of argument, this Note will engage with originalism as a valid form of analysis.<sup>86</sup> This Part will briefly lay out the theoretical underpinnings of originalism, and how its use has changed throughout the Court's history.

At its core, originalism is the idea that “the U.S. Constitution should be interpreted according to the meanings, purposes, intentions, or understandings of those who framed or adopted the Constitution, or who lived at the time of its framing and adoption.”<sup>87</sup> The idea that constitutional interpretation should stem from how the founders understood the document is not new; it was endorsed by James Madison in 1824.<sup>88</sup> The Court has made use of this approach throughout history. In the infamous 1857 *Dred Scott v. Sandford* case, the Court emphasized the original intent of the founders when it found that the Constitution does not offer citizenship to Black people.<sup>89</sup> But modern originalism's rise can be traced back to 1987 during Robert

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2022, 12:01 PM), <https://19thnews.org/2022/03/senate-bill-8-texas-abortion-ban-remains-enforced-supreme-court/> [<https://perma.cc/RN7T-EK3Y>].

84. See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021); Devin Dwyer, *Supreme Court Thwarts Bid to Block SB8 on 'Dark Day' for Texas Abortion Rights*, ABC NEWS (Dec. 10, 2021, 5:26 PM), <https://abcn.ws/3rRu99d> [<https://perma.cc/7GLN-RS2F>].

85. See, e.g., Siegel, *supra* note 20, at 9.

86. Most of the arguments are outside the scope of this Note. Legal scholar Reva Siegel describes a differing view of originalism in *Dobbs* in her recent Article that will serve as a helpful and informative source for readers hoping to learn more about this complex topic. See Siegel, *supra* note 20, at 9 (“[O]riginalist interpretive methods tend to amplify the Constitution's democratic deficits. This is because originalism (1) locates democratic authority in imagined communities of the past (2) about which originalism reasons in lawmaking stories that entrench norms, traditions, and modes of life associated with old status hierarchies . . . .”); see also Siegel, *supra* note 20 and accompanying text.

87. Jack M. Balkin, *Why Are Americans Originalist?*, in *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* 309, 309 (Richard Nobles & David Schiff eds., 2014).

88. See Ilya Somin, *The Origins of Originalism*, WASH. POST (Jan. 21, 2014, 7:05 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/21/the-origins-of-originalism/> [<https://perma.cc/Q9RR-5N4B>].

89. See *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

Bork's failed Supreme Court confirmation, when he testified about his originalist beliefs in front of the Senate.<sup>90</sup> Because conservatives' main criticism of *Roe* was that it was an example of judicial activism, originalism began to steadily gain more popularity and significance after 1973.<sup>91</sup> Since then, originalism has risen through the twenty-first century to become the Court's preferred method of interpretation.<sup>92</sup>

Judges who utilize originalism argue it is a way to interpret the Constitution that does not allow one to insert their own values into the analysis and therefore enforces limitations on the judiciary's power.<sup>93</sup> The Court's legitimacy is preserved if they commit to one method of interpretation that, in theory, does not change despite their beliefs.<sup>94</sup> Constitutional scholar Erwin Chemerinsky explains that proponents of originalism argue, "[a]s the supreme law of the land, the Constitution manifests the will of the sovereign citizen of the United States, and the interpreter's task is to ascertain their will."<sup>95</sup>

As mentioned, public meaning originalism is the predominant form of originalism used by the Court today.<sup>96</sup> "Original public meaning" is characterized by the assertion "that the meaning sought is that revealed by the text as reasonably understood by a well-informed reader at the time of the provision's enactment."<sup>97</sup> One way to understand how judges and scholars have applied public meaning originalism in recent years is by examining Justice Scalia's opinion in

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90. See CHEMERINSKY, *supra* note 19, at 3 (2022) ("Much of the opposition to Bork could be tied to his judicial philosophy of originalism, then relatively new and little mentioned outside of law review articles by constitutional law professors.").

91. *See id.* at ix.

92. Scholars disagree over the motivation behind contemporary originalism. *See* Siegel, *supra* note 20, at 22 (discussing the tension between the originalism used a value-neutral tool and the originalism used goal oriented political tool) ("[H]istory shows that overturning *Roe* was the defining goal of originalism as a political practice—and not the result of applying originalism as a value-neutral interpretive method."); *see also* Balkin, *supra* note 87, at 320 ("[C]ontemporary conservative originalism is the result of conservative political mobilizations that began in the late 1960s and early 1970s and came to fruition with the election of Ronald Reagan in 1980."); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 86 (2009) ("The originalism movement is connected to a set of political commitments. We need not guess at what those commitments are."); CHEMERINSKY, *supra* note 19, at 23 ("In the decades since the Bork hearings, originalism has gone from a fringe theory promoted by a few radicals to a mainstream theory espoused by a number of Supreme Court justices.").

93. *See* CHEMERINSKY, *supra* note 19, at 30.

94. *See id.* at 31.

95. *Id.* at 36 (internal citations omitted).

96. *See* Solum, *supra* note 21.

97. McGinnis & Rappaport, *supra* note 22, at 1371.

*District of Columbia v. Heller*.<sup>98</sup> *Heller* was the first time the Supreme Court interpreted the Second Amendment in terms of what it meant for an individual's right to own handguns for a private purpose such as self-defense in one's home.<sup>99</sup> Justice Scalia focused on what he calls the "public understanding" of a legal text during the period it was ratified or enacted.<sup>100</sup> To do this, he examines multiple interpretations from the nineteenth-century, including the laws, public view, and dictionary definitions.<sup>101</sup> The use of dictionary definitions from the ratifying generation was a central tool to Scalia's public meaning argument. He includes various definitions from eighteenth and nineteenth century dictionaries for "keep," "bear," and "arms" to indicate what the people at the time understood the combined phrases to mean.<sup>102</sup> He explained that when the Court interprets text, they consider that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."<sup>103</sup> Since *Heller*, this form of analysis has been a consistent way that the Supreme Court has interpreted Constitutional text.<sup>104</sup>

## II. RESULTS-ORIENTED ORIGINALISM

This Note argues that Justice Alito abandoned the central principles of public meaning originalism to reach the majority's inevitable decision in *Dobbs*. Rather than investigating the way that abortion related to notions of "liberty" at the time of the Fourteenth Amendment's passage, Justice Alito applied an improperly narrow historical analysis to overturn *Roe*. Section II.A of this Note contains a summary of the *Dobbs* case, and Section II.B examines the way

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98. *See* 554 U.S. 570, 605 (2008) (finding Washington D.C.'s prohibition of handguns in an individual's home unconstitutional under the Second Amendment).

99. *See id.* at 629.

100. *See id.* at 605.

101. *See id.* at 581–605.

102. *See id.* at 581–82.

103. *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

104. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136 (2022) ("We therefore examined a variety of legal and other sources to determine the public understanding of [the Second Amendment] after its . . . ratification.") (internal citations omitted); *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3025 (2010) ("A survey of contemporary legal authorities plainly shows that, at that time, the ratifying public understood the Clause to protect constitutionally enumerated rights . . ."); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020) ("Nor is this a case where the original public meaning was lost to time and only recently recovered.").

originalism was used in the *Dobbs* opinion to find a predetermined result.

### A. *Dobbs v. Jackson Women's Health Organization*

In May 2021, the Supreme Court indicated its willingness to revisit *Roe* altogether when it granted certiorari in *Dobbs* to assess the constitutionality of a Mississippi 16-week ban on abortion.<sup>105</sup> While many people expected the Court to reduce abortion access somewhat, it was not expected to explicitly overturn *Roe*.<sup>106</sup> However the Court shocked the American public by overruling *Roe* and *Casey* completely.<sup>107</sup> The Court was not convinced that the precedent under *Roe* should be protected by *stare decisis*, holding that *Roe* and *Casey* were wrongly decided.<sup>108</sup>

The majority found there is no constitutional right to abortion because it is not a fundamental right “deeply rooted” in the country’s history or implicit in ordered liberty.<sup>109</sup> The Court explained that rational basis review is the standard for abortion regulation challenges, rather than the undue burden test. Therefore, a law regulating abortion must be upheld if there is a rational basis on which legislatures thought the law would serve a legitimate state interest.<sup>110</sup> The Court considered the preservation of life during all states of pregnancy as a

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105. See Amy Howe, *Court to Weigh in on Mississippi Abortion Ban Intended to Challenge Roe v. Wade*, SCOTUSBLOG (May 17, 2021, 11:55 AM), <https://www.scotusblog.com/2021/05/court-to-weigh-in-on-mississippi-abortion-ban-intended-to-challenge-roe-v-wade/> [<https://perma.cc/49LJ-FF3X>]; *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244 (2022).

106. See Mark Joseph Stern, *The Alternative to Overturning Roe That Terrifies Anti-Abortion Advocates*, SLATE (Nov. 30, 2021, 12:04 PM), <https://slate.com/news-and-politics/2021/11/dobbs-abortion-roe-casey-supreme-court.html> [<https://perma.cc/8LWG-AWRM>] (evaluating the potential for the Supreme Court to uphold *Roe* and *Casey*) (“The Supreme Court has surprised us before. And *Casey*’s curious history demonstrates that justices may defy expectations even when the future of reproductive freedom seems bleaker than ever before.”).

107. See, e.g., Michael Scherer, *Supreme Court Goes Against Public Opinion in Rulings on Abortion, Guns*, WASH. POST (June 24, 2022, 6:33 PM), <https://www.washingtonpost.com/politics/2022/06/24/supreme-court-goes-against-public-opinion-rulings-abortion-guns/> [<https://perma.cc/MF2Y-QTRD>]; *Dobbs*, 142 S. Ct. at 2284.

108. See *Dobbs*, 142 S. Ct. at 2262 (discussing the seriousness of overruling the Court’s precedents but arguing settled law should only stay that way when it was settled correctly).

109. See *id.* at 2235.

110. See *id.* at 2284.

legitimate state interest.<sup>111</sup> Therefore, states now have the authority to regulate all access to abortion, as these are nearly guaranteed to be “rationally related” to the state interest of preserving fetal “life.”<sup>112</sup>

### B. Originalism in *Dobbs* and its Discrepancies

The originalist methodology used in *Dobbs* forms an incomplete analysis of the role abortion has played in our nation’s history. *Dobbs* primarily focuses on two areas of history: that of English common law scholars from the thirteenth to eighteenth centuries, and legislation dating from around the time the Fourteenth Amendment was ratified.<sup>113</sup> This Note argues that the use of these select portions of history indicates that the Court was acting in a result-oriented way; the desire to overturn *Roe* resulted in an inaccurate application of originalism.

#### 1. Reliance on English Common Law Scholars

The *Dobbs* opinion cites English common law scholars such as William Blackstone, Henry de Bracton, Sir Edward Coke, and Sir Matthew Hale as experts on the early beliefs around abortion.<sup>114</sup> Justice Alito explains, “all wrote that a post-quickening abortion was a crime. Moreover, many authorities asserted that even a pre-quickening abortion was ‘unlawful’ and that, as a result, an abortionist was guilty of murder if the woman died from the attempt.”<sup>115</sup> At that time, a fetus was described as quick once the mother first felt the fetus move in her womb, which usually occurs between the sixteenth and eighteenth week of pregnancy.<sup>116</sup> Under the common law, abortion was a crime after quickening,<sup>117</sup> although the majority phrases this as “a crime *at least after* ‘quickening’” to slip in their personal beliefs on that law.<sup>118</sup> The opinion of these scholars that Justice Alito references, therefore, did not reflect the common law at that time since a pre-quickening abortion was not unlawful.<sup>119</sup>

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111. *See id.* (considering fetal pain, the integrity of the medical profession, and the elimination of gruesome procedures as additional legitimate state interests).

112. *See id.* at 2283–84.

113. *See id.* at 2249.

114. *See Dobbs*, 142 S. Ct. at 2249. (referring to these four men as the “eminent common-law authorities”) (internal citations omitted).

115. *Id.* at 2236.

116. *See id.* at 2249.

117. *See* JAMES C. MOHR, ABORTION IN AMERICA 3 (1979).

118. *Dobbs*, 142 S. Ct. at 2249 (emphasis added).

119. *See* MOHR, *supra* note 117.

While the founders looked to common law English scholars to help form the Constitution, Justice Alito makes no mention of the fact that none of these scholars were women, nor that the scholars he cited did not consider women as individual beings with their own rights.<sup>120</sup> William Blackstone has an enormous influence on the American legal system and the Supreme Court.<sup>121</sup> Specifically, the Court has stated that Blackstone, “constituted the preeminent authority on English law for the founding generation.”<sup>122</sup> His work is especially popular among originalists.<sup>123</sup> However, there is evidence that the Court overstates Blackstone’s influence on eighteenth and nineteenth century Americans.<sup>124</sup> Therefore, Justice Alito’s heavy reliance on Blackstone to defend the Court’s decision should give readers pause. He focuses on some of Blackstone’s views while leaving out others’ controversial beliefs. For example, in his renowned book, *Commentaries on the Laws of England*, Blackstone claims “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.”<sup>125</sup> Under his view, women had no legal ownership over their own life or body, so it is not surprising to hear he also did not believe they should have bodily autonomy during pregnancy.<sup>126</sup> It is therefore improper for the Court

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120. See generally *Dobbs*, 142 S. Ct. at 2228.

121. See Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359, 1360 (2018).

122. *Id.* at 1361 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008)) (internal quotations omitted).

123. See *id.* (explaining the consequences of relying on Blackstone’s beliefs as a tool for constitutional interpretation).

124. See *id.* at 1393; see also Jed H. Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J. L. & HUM. 125, 152 (2022) (“Even if, *arguendo*, the English royal prerogative was the model for the republican Founding, and even if we assume Blackstone was the most influential expositor of these powers, the unitary scholars fundamentally misunderstand Blackstone’s bottom line of legislative supremacy. These errors reflect a lack of attention to historical context beyond a convenient passage, and a mix of confirmation bias, belief preservation, and motivated reasoning.”); Ruth Paley, *Modern Blackstone: the King’s Two Bodies, the Supreme Court and the President*, in RE-INTERPRETING BLACKSTONE’S COMMENTARIES 188, 197 (Wilfrid Prest ed., 2014) (“What emergences from a study of the Commentaries . . . is that they are complex and multi-layered production, full of complexities, ambivalences and contractions. Blackstone provided us with a thoughtful introductory guide, not an accurate and systematic analysis of eighteenth-century English law and constitutional thought.”).

125. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK I: OF THE RIGHTS OF PERSONS 284 (David Lemmings ed., Oxford 2016) (1765–69).

126. See Teresa Michals, “*That Sole and Despotical Dominion*”: *Slaves, Wives, and Game in Blackstone’s Commentaries*, 27 EIGHTEENTH-CENTURY STUDIES 195, 202 (1993–94), [https://www.jstor.org/stable/2739380#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/2739380#metadata_info_tab_contents)

to rely on the opinion of Blackstone, especially when deciding the constitutionality of law primarily affecting women.<sup>127</sup>

In its attempt to represent the beliefs of Americans in the nineteenth century, the Court chooses to cite the personal views of Blackstone and select English scholars rather than a single woman.<sup>128</sup> This may be because women were not allowed to be educated as legal scholars, hold political office, or even vote at the time.<sup>129</sup> However, the Court fails to acknowledge this as a major historical factor to consider when making claims about the lives these women led.<sup>130</sup>

Additionally, relying on scholars like Blackstone and Coke leads to contradicting conclusions, as shown by comparing how these scholars are cited in *Dobbs* and *Roe*. In *Roe*, Justice Blackmun argued the predominant view among common law scholars was that abortion was not homicide.<sup>131</sup> In that case, Blackmun used these scholars' beliefs to help create the constitutional right to abortion.<sup>132</sup> In *Dobbs*, Justice Alito strategically found a way to use the same beliefs as evidence for why abortion is not protected by the Constitution.<sup>133</sup> He argues that common law authorities like Bracton, Coke, Hale, and Blackstone all

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[<https://perma.cc/AS4C-6WGG>]. Blackstone asserts that husbands, fathers, and masters have ownership over their children, and servants by stating: “[T]he inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior . . . the child hath no property in his father or guardian[ ] as they have in him . . . [the servant] had no property in his master.” *Id.* Here, he is comparing women to children and slaves in terms of their rights. *See id.*

127. However, since the Court did rely on him, it is also important to note that Blackstone explains in his book that, “life begins, in contemplation of law, as soon as an infant is able to stir in the mother’s womb.” *Evans v. People*, 49 N.Y. 86, 90 (1872) (quoting from BLACKSTONE, *supra* note 125, at 129). Despite holding a different moral view on abortion, Blackstone was able to acknowledge his personal views were more constrictive than the law. This is a realization Justice Alito fails to mention when citing to Blackstone throughout *Dobbs*.

128. *See generally Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

129. *See id.* at 2325; Kelly Weisberg, *Barred From The Bar: Women And Legal Education In The United States 1870-1890*, 28 J. LEGAL EDUC. 485, 499–501 (1977).

130. *See Dobbs*, 142 S. Ct. at 2325 (Sotomayor, J., Breyer, J., and Kagan, J., dissenting) (“Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women’s rights. When the majority says that we must read our foundational charter as viewed at the time of ratification . . . it consigns women to second-class citizenship.”).

131. *See Roe v. Wade*, 410 U.S. 113, 135 (1973) (“Coke took the position that abortion of a woman ‘quick with childe’ is ‘a great misprision, and no murder.’ Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), ‘modern law’ took a less severe view.”).

132. *See id.* at 153.

133. *See Dobbs*, 142 S. Ct. at 2249.

wrote that a post-quickening abortion was a serious crime.<sup>134</sup> Moreover, Hale and Blackstone (and many other authorities following them) asserted that even a pre-quickening abortion was “unlawful.”<sup>135</sup> Both opinions bring in Blackstone’s beliefs on pre-quickening abortions but interpret them to reach opposing views.

Proponents of originalism maintain that it limits the judicial abuse that Justice Alito argues was committed in *Roe*, but Justice Alito has no explanation for why his interpretation of Blackstone and Coke is truth and Blackmun’s is abuse.<sup>136</sup>

## 2. Nineteenth-Century Statutes

The majority also focuses on state legislation on the books around the time the Fourteenth Amendment was ratified to prove why abortion is not rooted in the nation’s history and tradition.<sup>137</sup> Justice Alito looks to statutes in place around 1868 and indicates that 28 out of 37 states had statutes making abortion a crime.<sup>138</sup> However, he fails to dig further into that analysis.<sup>139</sup>

For example, he cites the 1828 New York statute,<sup>140</sup> but fails to indicate that the more serious crime applied to abortions only after a mother was quick with child.<sup>141</sup> For example, section 21 of the New

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134. *See id.* at 2254.

135. *Id.* Citing the majority’s interpretation of Hale and Blackstone, Justice Alito criticizes *Roe*’s use of common law authorities. *See id.* (“Instead of following these authorities, *Roe* relied largely on two articles by a pro-abortion advocate who claimed that Coke had intentionally misstated the common law because of his strong anti-abortion views.”).

136. *See id.* at 2243.

137. *See id.* at 2252–53.

138. *See id.* at 2253. Justice Alito attaches these statutes to the Appendix.

139. *Dobbs*, 142 S. Ct. at 2253.

140. *See id.* at 2285 (“Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree . . . . Every person who shall willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument of other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.”). For more discussion on the New York statute, *see infra* Section III.A.1.

141. *See id.* at 2253, 2285 (Appendix A).

York statute considered abortion at any state of gestation only a misdemeanor with no serious charge attached.<sup>142</sup> Additionally, Justice Alito fails to recognize the significance of the medical emergencies,<sup>143</sup> a health exception that allowed abortions to be performed if the woman's life was at risk, a clause that signified that the pregnant human's life was more important than a fetus's.<sup>144</sup> Justice Alito also does not indicate whether those statutes led to any arrests or prosecutions which would show how seriously the state took the statute and the crime.<sup>145</sup>

Lastly, as he considered the statutes, he did not mention that women were not legislators at the time.<sup>146</sup> If women had been able to vote and hold office, would 28 states have had statutes criminalizing abortion? This seems like a necessary consideration when trying to understand the public meaning of the word liberty at that time.

### 3. *Liberty vs. Ordered Liberty*

Justice Alito also differentiates the idea of "liberty" from the idea of "ordered liberty."<sup>147</sup> When discussing *Casey's* decision to connect liberty with personal dignity and autonomy, he states: "License to act on the basis of such beliefs may correspond to one of the many understandings of 'liberty,' but it is certainly not 'ordered liberty.' Ordered liberty sets limits and defines the boundary between competing interests."<sup>148</sup>

The Court's interpretation of "ordered liberty" has differed extensively throughout the years, leaving its legal definition up for debate. The interpretation of ordered liberty was central in the Court's process of extending the Bill of Rights to the states via the Fourteenth

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142. *See id.* at 2285.

143. For more information on therapeutic exceptions, see *Understanding and Navigating Medical Emergency Exceptions in Abortion Bans and Restrictions*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Aug. 15, 2022), <https://www.acog.org/news/news-articles/2022/08/understanding-medical-emergency-exceptions-in-abortion-bans-restrictions> [<https://perma.cc/R8M4-MBZ7>].

144. *See id.*; see also Mary Ziegler, *Why Exceptions for the Life of the Mother Have Disappeared*, ATLANTIC (Aug. 2, 2022, 5:53 PM), <https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582/> [<https://perma.cc/5FZM-VHCB>]. Since *Dobbs*, multiple state legislatures have removed the life of the mother exception to their abortion bans and pending bills despite that exception being in the earliest statutes. *See id.*

145. *See Dobbs*, 142 S. Ct. at 2253.

146. *See id.*

147. *See id.* at 2257.

148. *Id.*

Amendment Due Process Clause.<sup>149</sup> The term was first mentioned in 1937 by Justice Cardozo in *Palko v. Connecticut* when he found that not all rights listed in the Fifth Amendment could reach the states through the Fourteenth Amendment.<sup>150</sup> Instead, a state could choose not to apply a right if it was not viewed as essential to the scheme of ordered liberty.<sup>151</sup> In the years after, the Court narrowly interpreted ordered liberty to prevent total incorporation of the Bill of Rights to the states.<sup>152</sup>

However, in the decades to follow, the Court has overturned cases relying on the narrow interpretation as they have incorporated the Bill of Rights through the due process clause.<sup>153</sup> As Justice Marshall stated in the 1969 case *Benton v. Maryland*, “[o]ur recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of ‘fundamental fairness.’”<sup>154</sup> Therefore, Americans are protected against abuse by not just the federal government, but also the states.<sup>155</sup> In more recent cases, ordered liberty has been described as “a continuum of rights to be free from ‘arbitrary impositions and purposeless restraints.’”<sup>156</sup> This progression shows that the interpretation of ordered liberty has changed drastically since it was introduced in *Palko*. Therefore, Justice Alito relies too heavily on the original definition from *Palko*,<sup>157</sup> rather than

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149. *See id.*

150. *See Palko v. Connecticut*, 302 U.S. 319, 325–27 (1937).

151. *See id.*

152. *See, e.g., Adamson v. California*, 332 U.S. 46, 54 (1947), *overruled by* *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (interpreting ordered liberty narrowly to find that the Fourteenth Amendment did not prevent states from abridging the privileges and immunities of state citizenship); *Wolf v. Colorado*, 338 U.S. 25, 33 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643, 645 (1961) (“[I]n a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.”); *Betts v. Brady*, 316 U.S. 455, 471 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding that the Due Process Clause of the Fourteenth Amendment does not obligate states to furnish counsel for defendants in every criminal case).

153. *See supra* note 147–52 and accompanying texts.

154. 395 U.S. 784, 795 (1969) (internal citations omitted).

155. *See id.* (“Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ the same constitutional standards apply against both the State and Federal Governments.”) (internal citations omitted).

156. *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

157. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246, 2355 n.19 (2022).

acknowledging that his approach to ordered liberty may be just as “unprincipled” as the approach to liberty that he rejects in *Roe*.<sup>158</sup>

The Court in *Dobbs* conceded that the right to abortion can be considered a “liberty” but emphasizes that it must be an “ordered liberty” to be protected by the Constitution, and therefore the state’s interest in fetal life is stronger than a woman’s right to choose.<sup>159</sup> However, this analysis fails to consider ways in which women have found their right to bodily autonomy within the nation’s historical understanding of ordered liberty.<sup>160</sup> In his original ordered liberty analysis, Justice Cardozo explained why some rights were not considered essential to ordered liberty by stating, “few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.”<sup>161</sup> If, according to the originator of the phrase, ordered liberty means that a fair and enlightened system of justice cannot exist without certain rights, how can the Court contend that women’s bodily autonomy is not one of these rights? An enlightened justice system cannot exist if over half the people in the country cannot make fundamental choices about their health and body.

The use of ordered liberty in *Dobbs* leads to an answer that does not abide by the history or precedent. It is precisely this kind of arbitrary rulemaking that ordered liberty is meant to protect against<sup>162</sup> and that originalists claim to avoid with their method of interpretation.<sup>163</sup> Finally, it demonstrates why respecting precedent through *stare decisis* is so important for cases that have interpreted complex terms like ordered liberty.<sup>164</sup>

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158. *See id.* at 2248 (suggesting the Court, in interpreting the word liberty, “not fall prey to such an unprincipled approach” as it did in past decisions); *see also id.* at 2257 (“Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.”).

159. *See id.* at 2257.

160. *See id.*

161. *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

162. *See Washington v. Glucksberg*, 521 U.S. at 702, 765 (1997).

163. *See* CHEMERINSKY, *supra* note 19, at 30.

164. *See, e.g., Dobbs*, 142 S. Ct. at 2333 (“*Stare decisis* . . . ‘contributes to the integrity of our constitutional system of government’ by ensuring that decisions ‘are founded in the law rather than in the proclivities of individuals.’ As Hamilton wrote: It ‘avoid[s] an arbitrary discretion in the courts.’ And as Blackstone said before him: It ‘keep[s] the scale of justice even and steady, and not liable to waver with every new judge’s opinion.’”) (internal citations omitted); Amy C. Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1922 (2017) (“[I]t is important to emphasize that precedent itself is not only consistent with, but critical to, originalism.”); *Justice Alito Discusses Faith & Originalism at TAC Town Hall*, THOMAS AQUINAS COLL. (Nov. 9, 2021), <https://www.thomasaquinas.edu/news/justice-alito-discusses-faith->

### III. THE QUESTION THE COURT ASKED IN *DOBBS* MAY BE CORRECT, BUT THE ANSWER IS WRONG

Assuming, as this Note does, that originalism is a valid form of Constitutional analysis, the problem of *Dobbs* is not in how the question is framed, but rather, in how it is answered. The Court asked a valid originalist question when they considered if the original public meaning of the word liberty at the time the Fourteenth Amendment was ratified include a right to abortion. But when answering the question, it ignored a substantial amount of history that, if considered, would have led to a much more complicated answer. Section III.A of this Note will lay out a history of abortion in nineteenth-century New York that was left out of the historical analysis in the *Dobbs* opinion. Section III.B will argue this history ignored by the Court is central to a valid originalist analysis.

#### A. Abortion in Nineteenth-Century America: New York as a Case Study

In its historical inquiry, this Note will focus on the history of New York for three reasons. First, Justice Alito cites to the New York statute criminalizing abortion in the opinion.<sup>165</sup> Because the New York statute was one of the first of its kind, many states used it as the framework to implement their abortion statutes.<sup>166</sup> Second, New York was the largest metropolitan area at the time, offering insight into a diverse population, and was the center of new technology and medical developments.<sup>167</sup> The 1860 New York State census indicates the population was 3,880,735, which broke down by gender as 1,921,311 women and 1,910,279 men.<sup>168</sup> Therefore more than half of the people of New York in 1860 were women.<sup>169</sup> Because New York was both

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originalism-tac-town-hall [<https://perma.cc/6W39-YWBF>] (“‘Applying Originalism as a justice, however, means you take into account some practical realities,’ such as stare decisis, or the power of precedent.”).

165. *Cf. Dobbs*, 142 S. Ct. at 2254 n.36.

166. *See MOHR, supra* note 117, at 26.

167. Edward L. Glaeser, *Start-Up City*, CITY J. (2010), <https://www.city-journal.org/html/start-city-13323.html> [<https://perma.cc/6M4Q-ENFG>] (last visited Dec. 28, 2022); Kay Hymowitz, *New York Values: How Immigrants Made the City*, N.Y. TIMES (Nov. 1, 2016), <https://www.nytimes.com/2016/11/06/books/review/city-of-dreams-history-of-immigrant-new-york-tyler-anbinder.html> [<https://perma.cc/DN38-NTU3>].

168. U.S. CENSUS BUREAU, N.Y. STATE CENSUS (1860), <https://www2.census.gov/library/publications/decennial/1860/population/1860a-26.pdf> [<https://perma.cc/2WHA-GLLQ>].

169. *Id.*

America's wealthiest city and a hub for immigrants, it contained a vast wealth gap between its poorest and wealthiest populations.<sup>170</sup> This wealth gap is meaningful because it indicates that abortion affected poor and rich women.<sup>171</sup> Third, looking at a state's traditions and law to color in a historical picture is a common tool of originalist analysis, as it serves as a helpful example of how people at the time understood their rights.<sup>172</sup>

1. *1664–1828: Nineteenth Century Abortion Legislation in New York*

From the start of the colonial era until 1821, there was no abortion legislation on the books in the United States.<sup>173</sup> America was governed by local courts' interpretation of English common law, which criminalized abortion only after the quickening of the fetus.<sup>174</sup> Although abortion was considered a crime post-quickening, the consensus among courts was that abortion was not considered the murder of a human being and therefore was not punished as such.<sup>175</sup>

During the early 1800s, a physician named Valentine Seaman taught a course to midwives at New York Hospital and New York City Almshouse on how to perform abortions.<sup>176</sup> He sought to help midwives learn how to deliver a fetus that had died in utero or to help save a woman who had a poorly handled prior abortion attempt.<sup>177</sup> He published his lectures in 1800 and, by doing so, made it known to women all over the state that midwives had the tools to help them

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170. See Edward T. O'Donnel, *Are We Living in the Gilded Age 2.0?*, HISTORY (Jan. 31, 2019), <https://www.history.com/news/second-gilded-age-income-inequality> [https://perma.cc/5SRE-QPC5].

171. See MOHR, *supra* note 117, at 46, 64.

172. See *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008) (supporting an originalist interpretation of the Second Amendment through a review of state tradition) ("New Hampshire's proposal, the Pennsylvania minority's proposal, and Samuel Adams' proposal in Massachusetts unequivocally referred to individual rights, as did two state constitutional provisions at the time."); see also *Washington v. Glucksberg*, 521 U.S. 702, 715 (1997) (highlighting that the New York criminal code of 1828 was the first to outlaw assisted suicide and set the example for following states).

173. See Ranana Dine, *Scarlet Letters: Getting the History of Abortion and Contraception Right*, CTR. FOR AM. PROGRESS (Aug. 8, 2013), <https://www.americanprogress.org/article/scarlet-letters-getting-the-history-of-abortion-and-contraception-right/> [https://perma.cc/Y5WV-5H39]; see MOHR, *supra* note 117.

174. See MOHR, *supra* note 117 ("The common law did not formally recognize the existence of a fetus in criminal cases until it had quickened.")

175. See *id.* at 3–4.

176. See *id.* at 11.

177. See *id.*

procure an abortion.<sup>178</sup> This evidence indicates that abortion was considered a legitimate procedure recognized and performed by doctors.<sup>179</sup>

Although there were physicians with medical degrees at that time, there were also “irregular” practitioners who did not have the same formal training as doctors but were still capable of performing some types of medicine.<sup>180</sup> These self-taught irregular providers, as well as herbal healers, spread abortifacient information during the early nineteenth-century to women using local papers.<sup>181</sup>

In 1828, New York legislatures passed a revised criminal code that included a mention of abortion three times.<sup>182</sup> Two of the clauses banned abortion after quickening, which seemed to follow from the common law.<sup>183</sup> The law under title VI, chapter I, part IV stated:

§8. The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.<sup>184</sup>

§9. Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall be deemed guilty of manslaughter in the second degree.<sup>185</sup>

Section 9 was revised a few months later to include a list of exceptions that also indicated that the physician would be liable if either the woman or quick fetus died during the abortion.<sup>186</sup> This addition

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178. *See id.*

179. *See id.*

180. *See id.* at 34.

181. *See id.* at 11–12 (“[S]urviving pamphlets, of which Peter Smith’s 1813 brochure entitled ‘The Indian Doctor’s Dispensary’ is an example, contained abortifacient recipes that typically combined the better-known cathartics with native North American ingredients thought to have emmenagogic properties.”).

182. *See* Cyril C. Means Jr., *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 446–47, 449 (1968).

183. *See id.* at 446–47.

184. *Id.* at 446 (quoting N.Y. Rev. Stat., pt. 4, ch. 1, tit. 5, § 8 (1828)).

185. *Id.* at 447 (quoting N.Y. Rev. Stat., pt. 4, ch. 1, tit. 5, § 9 (1828)).

186. *See id.* (“[T]he Legislature of 1830 amended this section by inserting, after the word ‘shall,’ and before the words ‘be deemed guilty of manslaughter in the second degree,’ the qualification: ‘in case the death of such child or of such mother be thereby produced.’”) (internal citation omitted).

indicates the legislatures move towards protecting patient health against ill trained physicians.<sup>187</sup>

The third mention of abortion in the 1828 statute considered abortion during any time of gestation a misdemeanor.<sup>188</sup> Section 21 of title VI, chapter I, part IV stated:

Every person who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail no more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.<sup>189</sup>

It is important to note the exception of preserving a woman's life because this was the first time a statute included a therapeutic exception to abortion in the United States.<sup>190</sup> Law professor Cyril C. Means, Jr. explains the importance of this language based on his discovery of the notes of the commission that revised the New York Criminal Code.<sup>191</sup>

Although these laws were on the book by 1830, virtually nothing in practice changed for the women of New York who continued to share their knowledge about how to access abortion and medication through word of mouth and local papers.<sup>192</sup> Through the early 1870s, "convictions in cases of abortion remained difficult to obtain," resulting in infrequent prosecution.<sup>193</sup> This was, at least in part, because no law at that time held women liable for procuring an abortion.<sup>194</sup> For example, Madame Restell, the most famous New York abortionist at the time, advertised her immensely successful business openly for four decades.<sup>195</sup> Despite Madam Restell's decision to advertise her abortion services openly and frequently, providing ample evidence for prosecutors, the state had a very difficult time securing a

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187. See *infra* Section III.B.3.

188. See Means Jr., *supra* note 182, at 449.

189. *Id.* (quoting N.Y. Rev. Stat., pt. 5, ch. 1, tit. 6, § 21 (1828)).

190. See *id.*

191. See *id.* at 418. This Note discusses the New York Criminal Code in more detail in Section III.B.3. See *infra* Section II.B.3.

192. See MOHR, *supra* note 117, at 39, 47.

193. *Id.* at 230.

194. See Means Jr., *supra* note 182, at 454.

195. See MOHR, *supra* note 117, at 48; see also Abbott, *infra* note 211.

conviction against her.<sup>196</sup> Her first arrest occurred in 1841 and at trial, prosecutors warned that if she was not stopped, “abortion would be the inevitable occurrences of every day.”<sup>197</sup> Still, the jury convicted her of only minor infractions and she immediately restarted her practice.<sup>198</sup> The publicity of the trial actually increased her popularity and business in the coming years.<sup>199</sup>

In 1872, the New York Court of Appeals considered a case where a man was charged with helping a woman procure an abortion that resulted in a miscarriage.<sup>200</sup> Although the State was able to prove the woman had been pregnant, they were unable to prove she had suffered miscarriage or that the plaintiff’s act had led to the death of a child.<sup>201</sup> The court held that, before quickening, “although there may be embryo life in the foetus, there is no living child.”<sup>202</sup> The court explained it is impossible to cause death when there was never life to begin with.<sup>203</sup> Referencing Blackstone’s belief in the womb as “instinct with embryo life” after gestation, the court understood that there is no living being whose life can be taken until quickening.<sup>204</sup> In *Dobbs*, Justice Alito argued New York criminalized abortion because they believed abortion equated to killing a human life — but this case took place in 1872, four years after the Fourteenth Amendment was ratified and decades after New York implemented their abortion statute.<sup>205</sup> The New York Court of Appeals rejected Justice Alito’s argument at that time, a powerful message that the quickening debate was still prevalent.

## 2. 1800–1878: Madam Restell and New York Abortionists

As trained physicians worried about providing abortions, irregular providers and midwives made up many of the abortionists at the time because the knowledge of potions and medications was available in at-home guides.<sup>206</sup> These irregular practitioners, sometimes women who

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196. See MOHR, *supra* note 117, at 48.

197. *Id.*

198. *See id.*

199. *See id.*

200. *See Evans v. People*, 49 N.Y. 86, 87 (1872).

201. *See id.*

202. *See id.* at 90.

203. *See id.* at 91.

204. *See id.* at 90 (“It is not the destruction of the foetus, 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 causing the death of a living child.”).

205. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2252, 2256 (2022).

206. *See MOHR, supra* note 117, at 16.

were not allowed to attend medical school,<sup>207</sup> knew that if regular physicians refused to help women seeking an abortion, they could step in as providers in a rapidly growing area of medicine.<sup>208</sup> They began to advertise their services openly and frequently.<sup>209</sup>

From 1800 through 1880, the advertisements for abortion and contraception were widely accessible, both for the procedure and pills or potions that would cause a miscarriage.<sup>210</sup> The most famous abortionist in New York was Ann Lohman, who went by the alias Madame Restell.<sup>211</sup> Restell's first advertisement ran in 1839 and after much success, she printed hundreds of advertisements to women all over New York.<sup>212</sup> It is evident Restell treated both poor and rich women because she sold her abortifacients at different prices based on a woman's ability to pay.<sup>213</sup>

As abortionists like Madam Restell found huge success, regular physicians grew angry at their loss of business.<sup>214</sup> Trained physicians became interested in abortion policy as a way to have an edge over their competition and assert more control over the medical field.<sup>215</sup> In 1827, regular physicians pushed through legislation that declared any unauthorized practice of medicine a misdemeanor and achieved their long time goal of requiring consultations for difficult cases.<sup>216</sup> For example, the act required consultation of two physicians to obtain an abortion for medical reasons.<sup>217</sup> Physicians asserted control over the ability to decide when the law "would be applied to its letter and when it would be bent on behalf of a patient."<sup>218</sup>

As physicians found success with the legislators in their attempt to monopolize abortion practice, irregular practitioners capitalized on the

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207. See LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, at 11 (1st ed. 1997).

208. See MOHR, *supra* note 117, at 37.

209. *See id.*

210. *See id.* at 50.

211. 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/RX69-CL2Z>] (last visited Nov. 11, 2022).

212. *See id.*

213. *See id.* ("Restell counted on clients returning for surgical abortions if the abortifacients failed—\$20 for poor women, \$100 for the rich.")

214. See MOHR, *supra* note 117, at 34 (describing the reaction from doctors as their incomes fell sharply during this period due to the work of Irregulars).

215. *See id.* at 37.

216. *See id.* at 38.

217. *See id.*

218. *Id.*

anti-elitist beliefs of the late 1830s and the “attitude of the American people as a whole regarding the right to decide one’s own fate.”<sup>219</sup> Irregulars organized protests and petitions opposing the overregulation of the medical field.<sup>220</sup> By the early 1840s, 30,000 to 40,000 people had signed petitions opposing the new rigid regulations around medicine in New York.<sup>221</sup> It was clear that the general population of New York did not share the same beliefs as the small group of upper-class physicians.

In 1845, New York State legislators, growing frustrated with the crisis between regular and irregular physicians,<sup>222</sup> updated the abortion clauses<sup>223</sup>. Most notably, they added a misdemeanor criminal charge for women seeking an abortion,<sup>224</sup> hoping it would dissuade women from visiting Irregulars who practice abortions.<sup>225</sup> While this may seem like a dramatic shift, it made virtually no impact on the daily lives of the women of New York.<sup>226</sup> In reality, these laws only applied to a “pregnant woman” or a woman “quick with child,” and therefore prosecuting abortions rested on the state’s ability to prove the woman was ever pregnant.<sup>227</sup> At that time, pregnancy was nearly impossible to diagnose with accuracy — making it difficult to determine how far along a woman was in her pregnancy.<sup>228</sup> Women who suspected they could be pregnant prior to quickening would often ask their doctors for help with their “menstrual blockage.”<sup>229</sup> Because doctors had no way to prove otherwise, they would oblige.<sup>230</sup> The 1845 statute also

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219. *Id.* at 39.

220. *See id.*

221. *Id.*

222. *See id.* at 37–39 (describing the general tensions between regulars and Irregulars).

223. *See* Means Jr., *supra* note 182, at 454.

224. *See id.* at 454 n.101 (“Every woman who shall solicit of any person any medicine, drug, or substance or thing whatever, and shall take the same, or shall submit to any operation, or other means whatever, with intent thereby to procure a miscarriage, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.”).

225. *See id.* at 454 (“The Legislature enacted a statute of six sections intended to deal comprehensively with abortion and related offenses.”), MOHR, *supra* note 117, at 39 (Regulars advocated for the updated clause to weaken the appeal of visiting Irregulars for abortions).

226. *See* Tracy A. Thomas, *Misappropriating Women’s History in the Law and Politics of Abortion*, 36 SEATTLE UNIV. L. REV. 1, 26 (2012).

227. *See id.*

228. *See* MOHR, *supra* note 117, at 14–15.

229. *Id.* at 15.

230. *See id.*

required prosecutors to prove “intent to procure miscarriage,” another aspect that made enforcing the law nearly impossible.<sup>231</sup> As law professors Evan Bernick and Jill Wieber Lens discuss in their recent article:

[E]ven if (male) state legislators did foolishly believe in enforceability, a pre-quickening abortion ban did not change the lived reality that pregnancy was practically undetectable before quickening. This reality gives us one reason to question whether these bans are meaningful contributors to the public meaning of the Fourteenth Amendment.<sup>232</sup>

The 1840s saw a significant shift in the way abortion was perceived in New York.<sup>233</sup> First, abortion shifted significantly into public view through a surge of advertisements by practitioners trying to edge out their competition.<sup>234</sup> These advertisements were found in local urban and rural newspapers, specialty papers, popular magazines, and even religious journals.<sup>235</sup> This meant that women not only knew of abortion, they knew where to access it and knew who was performing it.<sup>236</sup> Author James Mohr explains, “[d]uring the 1840s Americans also learned for the first time not only that many practitioners would provide abortion services, but that some practitioners had made the abortion business their chief livelihood.”<sup>237</sup>

Second, the prevalence of abortion increased dramatically in the 1840s through the 1870s because “abortion was no longer a marginal practice whose incidence probably approximated that of illegitimacy, but rather a widespread social phenomenon during the period.”<sup>238</sup> Dr. Elisha Harris, a public health official who served as the Registrar of

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231. *See id.* at 124.

232. Evan D. Bernick & Jill Wieber Lens, *Abortion, Original Public Meaning, and the Ambiguities of Pregnancy* 32 (N. Ill. Univ. Coll. of L. Legal Studs. Rsch. Paper 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4342905](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4342905) [<https://perma.cc/7XZX-SE8V>]. This Article contains another perspective on the issues around public meaning originalism in the Dobbs opinion. *Id.* Rather than focus on the understanding of liberty, this Article focuses on Justice Alito’s choice to ignore women and doctor’s understanding of pregnancy prior to the passage of the Fourteenth Amendment in 1868. *See id.* For example, the Article explains, “[i]n evaluating laws banning pre-quickening abortion, Justice Alito never considers how those laws would have been understood by women and doctors.” *Id.* This important piece offers a look at similar themes through a different lens.

233. *See generally* MOHR, *supra* note 117.

234. *See id.* at 47.

235. *See id.*

236. *See id.*

237. *Id.*

238. *See id.* at 46.

Vital Statistics in New York City, proved that 20% of all pregnancies in mid-nineteenth-century New York ended in abortion.<sup>239</sup> In 1873, New York police arrested William R. Merwin of New York for running a mail-order drug business from his home.<sup>240</sup> Authorities found 1560 boxes of abortifacient pills and a number of abortifacient instruments for women who performed abortions on themselves.<sup>241</sup> In his book, *The Detection of Criminal Abortion, and A Study of Foeticidal Drugs*, anti-abortion doctor Ely Van De Warker revealed that 9,072 abortifacient pills were sold in the Syracuse-Troy area in 1969, out of a total population of 100,000.<sup>242</sup>

Lastly, more wealthy women began to have abortions even though they were married and Protestant and could afford more children.<sup>243</sup> Until that time, there was a belief that only poor women sought out abortions so they would not be thrust further into poverty, but it was clear that women of all socioeconomic statuses were utilizing the procedure to gain control of their body and their families.<sup>244</sup>

While this is only a glance into the way abortion played a role in nineteenth-century New York, it is evident that fully understanding its historical significance requires much more than merely looking to the statutes on the books.

## **B. Abortion is Deeply Rooted in New York's History and Ordered Liberty**

Section III.B of this Note presents the four key pieces of evidence that Justice Alito fails to consider in his historical analysis that are central to how the public in nineteenth century New York understood the term liberty. These are dictionary definitions, positive vs. negative rights, legislative history, and historical evidence.

### *1. Nineteenth-Century Definition of Liberty*

The first category of evidence missing from the *Dobbs* opinion is a dictionary definition of the word liberty from the nineteenth-century.

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239. *See id.* at 79.

240. *See id.* at 59.

241. *See id.*

242. *See* ELY VAN DE WARKE, *THE DETECTION OF CRIMINAL ABORTION, AND A STUDY OF FOETICIDAL DRUGS* 41 (1872) (indicating measurements in gross which written represents groups of 12<sup>2</sup>, therefore 63 multiplied by 144 is 9,072).

243. *See* MOHR, *supra* note 117, at 86 (noting Protestant women were often native-born and part of the middle or upper-class, which helped diminish the stigma around abortion).

244. *See id.*

Looking to this definition is one of the main components of the meaning of originalism, as described in *Heller*.<sup>245</sup> If Justice Alito had looked, he would find the following definition from 1828:

LIB'ERTY, noun [Latin *libertas*, from *liber*, free.] Freedom from restraint, in a general sense, and applicable to the body, or to the will or mind. The body is at liberty when not confined; the will or mind is at liberty when not checked or controlled. A man enjoys liberty when no physical force operates to restrain his actions or volitions.<sup>246</sup>

If a woman looked up this definition after the Fourteenth Amendment was ratified, she would interpret freedom from restraint on the body to mean freedom from the government controlling her bodily autonomy and pregnancy outcomes. The liberty to choose how to raise a family and what decisions to make about her uterus would naturally fit into that definition, a crucial insight into the public understanding of the word during that era.<sup>247</sup>

## 2. *Abortion as a Negative Right*

The Court's choice to frame abortion as a positive right is another example of how they predetermined their decision in *Dobbs* before they even began the analysis. In his discussion of the abortion beliefs of the common law, Justice Alito concedes that the severity of punishment for abortion differed among authorities, specifically because the law only criminalized physicians providing abortions to women with a quick child.<sup>248</sup> But he argued that it cannot be said that this is indicative of an endorsement of the practice or positive right to the practice.<sup>249</sup> However, the Constitution is not made up of only positive rights. As Judge Richard A. Posner explained, "the Constitution is a charter of negative rather than positive liberties . . . . The Fourteenth Amendment . . . sought to protect Americans from oppression by state government, not to secure them basic governmental services."<sup>250</sup>

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245. See *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

246. *Liberty*, WEBSTER'S DICTIONARY OF 1828, <https://webstersdictionary1828.com/Dictionary/liberty> [<https://perma.cc/97KL-NTFX>] (last visited Nov. 12, 2022).

247. See *Heller*, 554 U.S. at 605.

248. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2251 (2022).

249. See *id.*

250. *Jackson v. Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (discussing that the authors of the Bill of Rights were worried about too much government action, not too little government inaction) (internal citations omitted).

The Court opted to look through nineteenth-century common law and statutory history to find a positive right to abortion.<sup>251</sup> This is an impossible task; the Court knew that no such evidence would exist. In framing the question this way, the Court asks a question whose answer was predetermined. The Court is deliberately overlooking that the right to abortion is much better understood as a negative right protected by government interference.<sup>252</sup> The right to abortion is better seen as protection from government interference over a woman's medical decisions over her own body. And when the Fourteenth Amendment was ratified to protect citizens from that oppression, each population interpreted liberty differently; Black Americans interpreted liberty to mean they could not be discriminated against based on race,<sup>253</sup> butchers interpreted liberty to mean the government could not stop them from exercising their trade,<sup>254</sup> and women interpreted liberty to mean the government could not take away their bodily autonomy.

### 3. *Legislative History that Supports Abortion Access*

Additionally, legislative history and case law shed light on New Yorkers' views on abortion. In the *Dobbs* opinion, the Court argues, “[t]here is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being.”<sup>255</sup> But Professor Means discovered a proposed section of the 1828 New York code that held physicians criminally liable if humans were killed in surgeries such as hernias and amputations unless the surgery was necessary to save their life.<sup>256</sup> The legislators declined to adopt the statute, but it included a Revisers' Note that stated in part:

The rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing

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251. *See Dobbs*, 142 S. Ct. at 2251.

252. *See id.*

253. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (arguing Homer Plessy's constitutional rights under the Fourteenth Amendment were violated when he was arrested for sitting in a “Whites Only” train car).

254. *See generally* Slaughter-House Cases, 83 U.S. 36 (1872) (arguing law limiting butchers in New Orleans in slaughtering animals created of a monopoly that deprived citizens of their right to practice their trade).

255. *See Dobbs*, 142 S. Ct. at 2256.

256. *See* Means Jr., *supra* note 182, at 451 (“Every person who shall perform any surgical operation, by which human life shall be destroyed or endangered, such as the amputation of a limb, or of the breast, trepanning, cutting for the stone, or for hernia, unless it appear that the same was necessary for the preservation of life, or was advised, by at least two physicians, shall be adjudged guilty of a misdemeanor.”).

themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by the practice, is alarming . . . . By making it a misdemeanor, and leaving the punishment discretionary, a just medium seems to be preserved.<sup>257</sup>

Means believes that the Revisers' Note would be applied to the abortion statutes in sections 9 and 21 because they are written in practically the same way as proposed in section 28.<sup>258</sup> He explains, “[t]he *purpose* of the exception . . . was to preserve for the patient, within the restricted confines of the exception . . . the liberty which one had enjoyed, without restriction, at common law to risk one’s life in general surgery (or abortion before quickening).”<sup>259</sup> The medical field at the time was riddled with malpractice lawsuits due to the dangers around surgery and other kinds of medical treatment.<sup>260</sup> It can therefore be argued that although New York was creating statutes to criminalize abortion, the motives behind these statutes were not simply moral — they also reflected a desire to address the dangers women faced due to the unregulated surgical field in the nineteenth century.<sup>261</sup> The legislatures can be seen as responding to this malpractice epidemic when they passed stricter laws regulating all types of medical procedures.

#### 4. *Abortion is Deeply Rooted in Women’s History*

Lastly, *Dobbs* fails to acknowledge the deep tradition of the practice of abortion within the lived history of the nineteenth century. The dissent touches on this issue when they state:

In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women

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257. *Id.*

258. *See id.* at 452.

259. *See id.*

260. *See* Allen Spiegel & Florence Kavalier, *America’s First Medical Malpractice Crisis, 1835-1865*, 22 J. CMTY. HEALTH 283, 283–84, 287 (1997) (“Dr. Frank H. Hamilton, a respected Buffalo surgeon and a perpetual witness, estimated that nine out of every ten physicians in western New York had been charged with malpractice by the mid-nineteenth century.”)

261. *See* Means Jr., *supra* note 182, at 452.

control over their bodies, most women could not imagine having that kind of autonomy.<sup>262</sup>

While it is true that the suffrage movement was in full swing and women began to demand more rights outside the home,<sup>263</sup> this Note argues that the dissent's claim does not extend far enough. Women did imagine having control over their body as part of that movement.

Even though women were unable to write legal scholarship or pass legislation on abortion, that does not mean they did not view bodily autonomy as an essential right. The Court looked too narrowly at the history of abortion at the time by not considering the cultural reality of women's lives in the nineteenth century; women were legally disenfranchised, and therefore lived separately from the law.<sup>264</sup> Women in New York worked to protect their rights in a way that was accessible to them, by using the press and word of mouth.<sup>265</sup> The liberty to have an abortion helped poor women escape the dangers of childbirth,<sup>266</sup> keep their families from falling deeper into poverty,<sup>267</sup> or stop having more children because they were happy with their families.<sup>268</sup> These types of decisions impacted women of all social statuses.<sup>269</sup>

Abortion was not an underground, illegitimate service that women sought to avoid. Rather, it was a powerful tool used by women to exercise their liberty. One of the most important examples was women's use of the press.<sup>270</sup> Madam Restell's first advertisement in 1837 read in part:

TO MARRIED WOMEN. — Is it not but too well known that the families of the married often increase beyond what the happiness of those who give them birth would dictate? . . . Is it moral for parents

262. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2325 (2022) (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

263. See MOHR, *supra* note 117, at 105 (“[A] number of male commentators believed that feminist ideology outside the home had its counterpart in the upsurge of abortion among women in the home, and that the former was partly responsible for the latter.”).

264. See *Dobbs*, 142 S. Ct. at 2325 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

265. See Abbott, *supra* note 211.

266. See Erin Blakemore, *How U.S. Abortion Laws Went From Nonexistent to Acrimonious*, NAT'L GEOGRAPHIC (May 17, 2022), <https://www.nationalgeographic.com/history/article/the-complex-early-history-of-abortion-in-the-united-states> [<https://perma.cc/FN6E-T9LF>].

267. See MOHR, *supra* note 117, at 110 (“Abortion was not a purposeful female conspiracy, but an undesirable necessity forced by thoughtless men”).

268. See MOHR, *supra* note 117, at 63.

269. See *id.* at 66.

270. See Abbott, *supra* note 211.

to increase their families, regardless of consequences to themselves, or the well being of their offspring, when a simple, easy, healthy, and certain remedy is within our control? The advertiser, feeling the importance of this subject, and estimating the vast benefit resulting to thousands by the adoption of means prescribed by her, has opened an office, where married females can obtain the desired information.<sup>271</sup>

This advertisement spoke to the cultural impact of abortion in multiple ways. First, it indicated how well-known the issue of accidental pregnancy was to women in this era, a time where access to contraception was rare.<sup>272</sup> Restell also used the phrase “within our control,” a saying that held significant power to women at a time where they lacked control over many areas of their life.<sup>273</sup> Her advertisement created a community of women who all shared similar experiences and needed the resources to solve them.<sup>274</sup>

Throughout the mid-nineteenth century, Madam Restell’s business grew on a massive scale.<sup>275</sup> She provided many services to women; along with abortions, she provided a safe place to give birth anonymously, and she helped facilitate adoption.<sup>276</sup> She used letters from women she had saved or helped in her advertisements.<sup>277</sup> She expanded her services into Philadelphia and Boston where she continued targeting married women in her advertisements.<sup>278</sup> Despite some brushes with the law, her business remained hugely popular and successful through the late 1870s.<sup>279</sup> Even as laws became stricter as men worked to regulate women’s health, the demand for abortion and the ability to access abortion only grew.<sup>280</sup>

While this Note focuses on history in New York, it represents an entire area of historical inquiry, rooted in tradition and ordered liberty, that the Court neglected to consider when making its weighty decision in *Dobbs*.<sup>281</sup>

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271. *See id.*

272. *See id.*

273. *See id.*

274. *See id.* (“[Women] knew the key ingredients—pennyroyal, savin, black draught, tansy tea, oil of cedar, ergot of rye, mallow, motherwort—as well as the most trusted name in the business . . . whose 40-year career as a ‘female physician’ made her a hero to desperate patients . . .”).

275. *See MOHR, supra* note 117, at 48.

276. *See Abbott, supra* note 211.

277. *See id.*

278. *See id.* For example, one advertisement read, “married ladies whose delicate or precarious health forbids a too rapid increase of family.” *Id.*

279. *See MOHR, supra* note 117, at 48.

280. *See id.* at 50.

281. *See generally* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

### CONCLUSION

When reexamining the originalist question the Court asked in *Dobbs* — does the original public meaning of the word liberty at the time the Fourteenth Amendment was ratified include a right to abortion — is the correct answer clear? If the answer is based on the product of state legislatures, then the Court's conclusion makes sense. But if the answer expands beyond spheres where the people's views are not likely to be represented, the answer becomes much more complicated than the Court made it out to be. If the Court does not want to be perceived as result-oriented in its use of originalism, it ought to undertake a broader historical inquiry that considers the complexities behind the customs, beliefs, behaviors, and traditions of the American population not represented by the ratifiers. And if the Court is committed to originalism, then it needs to make sure there is a way women's (as well as any minority group's) voices are present in the methodology. When the Court asks what is rooted in history and tradition, they focus on describing the country's *legal* tradition. But the people of this country would be better protected if the Court used history and tradition to determine what is core to fairness and justice. If women saw access to abortion as essential to their liberty, then it follows that access is core to fairness and justice for women today.

As the Court faces more questions around substantive due process, originalism should be used to draw out the public meaning of the word liberty understood by the people whose rights were at risk. After all, it makes little sense for the Court to understand the Fourteenth Amendment's Due Process Clause as only enriching the status quo when it was passed with the intention of altering the status quo by protecting individual rights from encroachment by states. For originalism to be effective, history and tradition cannot exclude those whose rights were not adequately represented by the law at the time. Some cultural norms and traditions are not as visible because they were practiced by people who were not represented in government. While more challenging and complicated than referencing statutes, a correct historical inquiry would reveal to the Court an understanding of liberty far more profound than meets the eye.

This Note's goal is to leave the reader with the understanding that the answer to the originalist question asked by the Court in *Dobbs* is much more complex than how the majority answered it. Whether one believes that the right to abortion is fundamental and protected by the Constitution or not, this Note hopes to prove that the Court's answer was established through an insufficient and bare-boned analysis. With nineteenth-century history in New York as just a starting point, the

Court would have found abortion's essential impact on women's understanding of their liberty and due process. The fact that none of the history discussed in this Note is mentioned in the *Dobbs* opinion should cast serious doubt on the way this Court uses originalism. To maintain the legitimacy of an originalist methodology, the Court ought to delve deeper into a robust historical analysis as it considers cases where individual rights are at risk. An analysis where history deeply rooted in the Constitution reflects the thinking and understanding of minority groups whose ability to speak up were limited at the time. An analysis that brings life to the founding phrase: "We the people."