



## ARTICLE

## After *Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban

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**Abstract.** For many Americans, *Dobbs v. Jackson Women's Health Organization* signaled the end of things once thought secure: the constitutional right to reproductive autonomy, a vision of women as equal citizens, and the belief that the Supreme Court could rise above politics to protect cherished liberties. To many anti-abortion groups, however, *Dobbs* was just the beginning. Merely permitting states to prohibit abortion was never the endgame; their goal has always been a nationwide ban. One path to that end takes the form of a federal statute, including calls for a new national prohibition and efforts to revive the existing 1873 Comstock Act. A second runs back through the Court in the form of constitutional fetal personhood, or the argument that an unborn fetus is a "person" whose life states are compelled to protect under the Fourteenth Amendment.

In this Article, I examine the legal future of both pathways in light of the *Dobbs* majority's historical analysis. With respect to a federal statutory ban, many commentators have focused on Congress's Article I authority. Yet if Congress has the power to codify a statutory right to abortion, it also has the power to ban it. I thus consider a different possibility: Even if there were no deeply rooted liberty interest in abortion when the Fourteenth Amendment was enacted against the states, as *Dobbs* posits, such a history arguably did exist when the Fifth Amendment was enacted against the federal government. As *Dobbs* admits, every state at the Founding permitted abortion before quickening, at roughly sixteen to eighteen weeks of pregnancy. *Dobbs*'s own history-and-tradition test thus plausibly suggests a surprising result: A federal abortion ban—whether in the form of a new statute or a resurrected Comstock Act—may violate the Fifth Amendment Due Process Clause.

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With respect to fetal personhood, *Dobbs* conceded that, even as of the Fourteenth Amendment's enactment in 1868, some states continued to permit abortion early in pregnancy. In truth, *Dobbs* severely undercounts that number: As many as twenty-one states, not merely the nine *Dobbs* suggests, permitted pre-quickening abortion. This casts doubt on the fetal personhood argument because it shows that, when the Amendment was ratified, most states did not understand unborn fetuses to be "persons" with respect to the precise question at hand. To recognize fetal personhood would require one to conclude that a majority of states were violating the very amendment they had just ratified.

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## Introduction

Thirty-one years ago, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Harry Blackmun warned that “[a]ll that remained between the promise of *Roe* and the darkness of [overruling it] was a single, flickering flame.”<sup>1</sup> That flame has now been extinguished. After relentless pressure from anti-abortion groups, a conservative Supreme Court majority has overruled *Roe* and *Casey* in the most consequential case in modern history, *Dobbs v. Jackson Women’s Health Organization*.<sup>2</sup>

Anti-abortion groups are far from finished.<sup>3</sup> To them, the ruling is only the “end of the beginning of the end of abortion.”<sup>4</sup> Because “this first step has been taken” in *Dobbs*, one anti-abortion commentator wrote on the day of the decision, “now the work begins anew.”<sup>5</sup> The object of this work is no secret: an America in which abortion will be banned everywhere and at any point in pregnancy.<sup>6</sup> Not only would pregnant people in red states where abortion is illegal be unable to travel to blue states to obtain care, but anyone who seeks the procedure anywhere in America—even in the most pro-choice states—would have to leave the country. As a pair of anti-abortion advocates put it, “*Dobbs* is not the end of the pro-life struggle”; the end is outright “abortion abolitionism.”<sup>7</sup>

Anti-abortion groups are currently mobilizing around two strategies to bring such a day about. The first involves an Act of Congress that would ban all abortions. Although such a bill would fail in the current Congress, the picture would be vastly different if Republicans are able to capture the House, Senate, and White House in 2024. Indeed, more than 160 Republicans in the

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1. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 922 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).
  2. *Dobbs*, 142 S. Ct. at 2242.
  3. Nor is the Court’s own work finished. *Dobbs* will lead to a host of thorny new legal problems for the Court to resolve, such as the permissibility of restrictions on the right to travel for abortion care and whether FDA regulations of mifepristone preempt state bans on medicated abortion. David Cohen, Greer Donley, and Rachel Rebouché have flagged many of these issues in a prescient article. See generally David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023) (canvassing a host of complicated legal questions that have arisen in the wake of *Dobbs*).
  4. Hadley Arkes, *The End of the Beginning of the End of Abortion*, FIRST THINGS (June 24, 2022), <https://perma.cc/5NVA-6JQT>.
  5. *Id.*
  6. See MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT 25 (2022) (describing how early abortion opponents agreed on the goal of “mak[ing] abortion unconstitutional nationwide while opposing alternative proposals that let each state set its own policy”).
  7. Josh Hammer & Josh Craddock, Opinion, *The Next Pro-Life Goal Is Constitutional Personhood*, NEWSWEEK (July 19, 2022, 6:30 AM EDT), <https://perma.cc/6NFW-R7VS>.

House have already co-sponsored a total federal abortion ban.<sup>8</sup> More pressingly, anti-abortion groups have recently pushed the argument that federal law *already* bans the mailing of any item used in abortion under the Comstock Act of 1873—an argument one federal judge has embraced.<sup>9</sup> The second strategy involves the Supreme Court adopting a constitutional rule of fetal personhood, defining an unborn fetus as a “person” whose life states would be bound to protect under the Fourteenth Amendment.<sup>10</sup> A test case has already been filed raising this precise claim.<sup>11</sup>

These strategies may sound radical.<sup>12</sup> But to disregard them would underestimate the pace at which arguments can move from “off-the-wall” to “on-the-wall” in both politics and law, as well as the stunning success that anti-abortion forces have had in shaping public policy.<sup>13</sup>

Accordingly, this Article presents a sober assessment of the legal future of both a federal statutory abortion ban and the constitutional argument for fetal personhood. In doing so, I advance arguments based on the assumption that the doctrinal rules and reasoning used in *Dobbs* will remain controlling, though I by no means intend to endorse or defend that ruling.<sup>14</sup> My point is that, even

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8. Andrew Solender, *GOP Eyes Federal Abortion Restrictions After Dobbs*, AXIOS (June 24, 2022), <https://perma.cc/5KAD-EU3H>.

9. *Alliance for Hippocratic Medicine v. FDA*, No. 22-cv-00223-Z, 2023 WL 2825871, at \*35 (N.D. Tex. Apr. 7, 2023) (holding that “federal criminal law declares [abortion pills to be] ‘nonmailable’” (citing 18 U.S.C. § 1461)).

10. See John Finnis, *Abortion Is Unconstitutional*, FIRST THINGS (April 2021), <https://perma.cc/TY7Z-Z5DV>; Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 14 (2013).

11. See *infra* notes 185–86 and accompanying text.

12. After all, only 8% of Americans think abortion should be illegal everywhere and in all circumstances—a number that rises to 37% if one includes persons who believe abortion should generally be illegal subject to some exceptions, such as to protect the mother’s life. See PEW RSCH. CTR., *AMERICA’S ABORTION QUANDRY* 26–28 (2022), <https://perma.cc/L6XB-JLVY>. And one of the five justices in the *Dobbs* majority, Justice Kavanaugh, wrote separately, seemingly to reject fetal personhood. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) (suggesting that “[t]he Constitution neither outlaws abortion nor legalizes abortion”).

13. Cf. JACK M. BALKIN, *LIVING ORIGINALISM* 294, 306 (2011) (describing how constitutional understandings can move from “off-the-wall” to “on-the-wall” over time).

14. In other words, many progressive constitutionalist arguments exist for rejecting either argument—such as the *Dobbs* dissenters’ view that the Constitution’s “meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution’s most fundamental commitments to new conditions.” *Dobbs*, 142 S. Ct. at 2326. (Breyer, Sotomayor & Kagan, JJ., dissenting). But given that those arguments held little weight in *Dobbs*, they seem unlikely to attract new votes in a following case concerning a federal abortion ban or fetal personhood.

within *Dobbs*'s own analytical framework, strong constitutional arguments exist against both a federal statutory ban and fetal personhood.

With respect to a federal statutory abortion ban, most of the commentary thus far has focused on the question of Congress's Article I authority, in particular its Commerce Clause power.<sup>15</sup> For supporters of reproductive autonomy, however, arguing that Congress lacks the power to ban abortion under the Commerce Clause is a double-edged sword: If the act of providing an abortion is not "economic activity" for the purpose of *Wickard v. Filburn*'s aggregation principle,<sup>16</sup> then Congress would be equally powerless to use the Commerce Clause to enshrine abortion as a statutory right.<sup>17</sup> That, in turn, would prevent Democrats from protecting abortion access nationwide via federal statute.<sup>18</sup> For that reason—and because I think providing a medical service for payment is a quintessential economic act that falls within Congress's power to regulate interstate commerce—I do not argue that Article I poses a barrier to a federal abortion ban.

I argue instead that *Dobbs* settled the application of only one Due Process Clause: the one enacted against the states in the Fourteenth Amendment in 1868. Indeed, this focus on the time of enactment was, according to the *Dobbs* majority, "the most important" part of its reasoning.<sup>19</sup> It was only because "three quarters of the States made abortion a crime at all stages of pregnancy" at the time "*when the Fourteenth Amendment was adopted*" that the Court was able to conclude that a right to abortion could not "be 'deeply rooted in this Nation's history and tradition.'"<sup>20</sup> So crucial to its analysis was this assessment of state

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15. See, e.g., Ilya Somin, *Could Congress Ban Abortion Nationwide if Roe Gets Overruled?*, VOLOKH CONSPIRACY (May 3, 2022, 4:34 PM), <https://perma.cc/BS6M-YG8B> (arguing that Congress likely has such power under current Commerce Clause doctrine, but suggesting that Justice Thomas might be a swing vote); Michael C. Dorf, *Reinvigorating Defensive Crouch Liberal Constitutionalism Part 2: Will Clarence Thomas Save Abortion Rights?*, TAKE CARE BLOG (July 19, 2018), <https://perma.cc/AE5B-W9DP> (similar); Robert J. Pushaw, Jr., Essay, *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?* 42 HARV. J. ON LEGIS. 319, 353 (2005) (arguing that abortion is a "commercial activity for all purposes, without regard for whether the specific legislation at issue is . . . 'liberal' . . . or 'conservative'").

16. 317 U.S. 111, 127-28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

17. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (permitting aggregation of economic effects—and thus Congressional regulation pursuant to the Commerce Clause's substantial effects test—only with respect to economic activities).

18. For an example of a proposed federal statute that would enshrine the right to abortion, see Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021).

19. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2267 (2022).

20. *Id.* at 2242-43, 2260 (emphasis added) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

law as of the Fourteenth Amendment's adoption that the majority repeated the same claim almost verbatim four times and included a twelve-page appendix identifying every single state abortion ban enacted as of 1868.<sup>21</sup>

In a future case challenging a *federal* statutory abortion ban, including the 1873 Comstock Act if it is interpreted to ban the mailing of abortion pills, *Dobbs's* own mode of analysis would thus seem to require that the Court ask a different historical question than the one asked in *Dobbs* itself. Because any substantive due process right against federal encroachment on abortion access would exist by virtue of the Fifth Amendment's guarantee that no person shall be deprived of "liberty . . . without due process,"<sup>22</sup> the Court would have to ask whether a fundamental liberty interest in abortion was deeply rooted in history and tradition when *that* amendment was enacted.

The *Dobbs* majority's own historical account reveals that asking that different question would seem to yield a different answer. The Court conceded that, "[i]n this country, the historical record" is clear: Just like under English common law, only the abortion of a "quick child" was criminally proscribed at the Founding.<sup>23</sup> An abortion performed before "quickening," or the fetus's first discernible movement (often at sixteen to eighteen weeks in pregnancy), was not punishable by law.<sup>24</sup> Indeed, whereas U.S. "courts frequently explained that the common law made abortion of a *quick* child a crime" well into the nineteenth century,<sup>25</sup> the *Dobbs* majority could not identify a single state court that deemed pre-quickening abortion punishable at common law until many decades after the Founding.<sup>26</sup> The majority thus did not dispute that, as of the Founding, *every single state in the union* respected the "distinction between pre- and post-quickening abortions," under which a pregnant person was at liberty to obtain the procedure prior to quickening.<sup>27</sup> Put another way, strong evidence suggests that a pregnant person's liberty interest in obtaining an

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21. *Id.* at 2242-43, 2248, 2252-53, 2256, 2285-96.

22. *See* U.S. CONST. amend. V.

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

24. *See id.* at 2250-51 (recognizing that "[m]anuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion," a rule under which, in the majority's own telling, "a pre-quickening abortion was not itself considered homicide" or otherwise punished by law).

25. *Id.* at 2251 (emphasis added).

26. *Id.* at 2255 (responding to the Solicitor General's argument that, at the Founding, "the common law[] fail[ed] to criminalize abortion before quickening" by pointing to state court cases decided in 1850 and 1880—namely, *Mills v. Commonwealth*, 13 Pa. 630, 633 (1850), and *State v. Slagle*, 83 N.C. 630, 632 (1880)).

27. *Id.* at 2251.

abortion during the first sixteen to eighteen weeks of pregnancy was deeply rooted in history and tradition when the Fifth Amendment was enacted.<sup>28</sup>

Anti-abortion groups' second argument—that unborn fetuses are constitutional “persons”—falters in light of *Dobbs*'s analysis, too, but for different reasons. To start, the entire thrust of the *Dobbs* majority's conclusion that states may ban abortion consistent with the Fourteenth Amendment is that many states did exactly that at the time of the Amendment's ratification.<sup>29</sup> The majority recognizes that these abortion bans were not uniform, and that in fact “many states in the late 18th and early 19th century did not criminalize pre-quickening abortions.”<sup>30</sup> The majority's argument, though, was that the divide among the states simply meant the matter was left open to democratic debate.<sup>31</sup>

This reasoning undercuts the fetal personhood argument. As of the Fourteenth Amendment's ratification, some states (28 of 37, on the *Dobbs* majority's telling) acted consistently with the concept of fetal personhood, banning abortion at all points in pregnancy.<sup>32</sup> The remaining nine states, according to the majority, contravened that position, continuing to allow abortions for much of early pregnancy.<sup>33</sup> This divide is evidence that the Fourteenth Amendment did not take a definitive position on fetal personhood, instead leaving the matter open for democratic debate.<sup>34</sup> Furthermore, when several states chose to continue allowing pre-quickening abortions after 1868, I am unaware of any contemporaneous argument that they violated the Fourteenth Amendment in doing so—another form of evidence the *Dobbs* majority found persuasive.<sup>35</sup>

But the argument against fetal personhood is even stronger for a remarkable reason: The *Dobbs* majority demonstrably erred in counting the number of states that banned abortion at all points in pregnancy as of the

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28. To be sure, there are several plausible counterarguments to this conclusion, which I respond to more fully below. See *infra* Part II.B.

29. See *supra* notes 19-21 and accompanying text.

30. *Dobbs*, 142 S. Ct. at 2255.

31. *Id.* at 2259 (arguing that, in light of the historical evidence, the Court must “return the power to weigh [competing] arguments to the people and their elected representatives”).

32. See *supra* notes 19-21 and accompanying text.

33. *Id.*; see also *Dobbs*, 142 S. Ct. at 2253 (referring to the “nine states that had not yet criminalized abortion at all stages”).

34. Justice Kavanaugh wrote separately expressing this same conclusion, albeit without supplying the historical basis for it discussed in this Article. See *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring) (arguing that “[t]he Constitution neither outlaws abortion nor legalizes abortion,” but instead “leaves the question of abortion for the people . . . in the democratic process”).

35. *Id.* at 2255 (arguing that “[w]hen legislatures began to” ban pre-quickening abortion as the nineteenth century “wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right”).

Fourteenth Amendment's ratification. Several of these errors are glaring. The majority counted Alabama as banning all abortions, for example, when its Supreme Court actually held that Alabama law simply codified the common law rule of punishing only abortions performed on a quickened fetus.<sup>36</sup> The majority's count also erroneously includes Nebraska and Louisiana even though those states only banned abortion via poison, permitting safer procedures performed via surgical instrument.<sup>37</sup> The majority also counts Oregon as banning pre-quickening abortion, even though the state's *own prosecutors* admitted otherwise in open court.<sup>38</sup> Other mistakes abound. As I show below, when the Fourteenth Amendment was ratified, the actual number of states that banned abortion at all stages in pregnancy was not 28 of 37, as the *Dobbs* majority asserts, but as few as 16.<sup>39</sup>

It is tempting to argue that this error should have changed the outcome in *Dobbs* itself, and I have argued as much in other work before the case was decided.<sup>40</sup> But that is now water under the bridge; I have no illusions that this Court would ever relitigate *Dobbs*. (Whether a future Court might point to the *Dobbs* majority's historical errors as evidence that the ruling was "egregiously wrong" even on its own terms and thus subject to overruling, much like historical errors contributed to the overruling of *Bowers v. Hardwick* in *Lawrence v. Texas*,<sup>41</sup> is something only time will tell.)

Nevertheless, accurately counting the number of states that permitted abortion early in pregnancy as of the Fourteenth Amendment's ratification remains crucial because of its implications for fetal personhood. If a majority of states actually continued the common law rule of permitting pre-quickening procedures, then it is very difficult to reconcile *Dobbs's* historical approach with the argument that unborn fetuses are Fourteenth Amendment persons. To conclude otherwise would require arguing that, even as the states ratified an Amendment that supposedly banned all abortions, a majority of them simultaneously left in place laws permitting that exact practice for much of early pregnancy.<sup>42</sup>

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36. *Smith v. Gaffard*, 31 Ala. 45, 51 (1857); *see infra* text accompanying notes 204–21.

37. *See* NEB. TERR. REV. STAT. pt. III § 42 (1866); LA. REV. STAT. § 24 (1856).

38. *State v. Dunn*, 100 P. 258, 258 (Or. 1909); *see infra* text accompanying notes 255–59.

39. *See infra* Part III.A.

40. *See* Aaron Tang, Opinion, *A Middle Ground on Abortion That Originalists Should Embrace*, WASH. POST (Oct. 26, 2021, 3:43 PM EDT), <https://perma.cc/WC69-ERF6>; Aaron Tang, *The Originalist Case for an Abortion Middle Ground 1-5* (Sept. 13, 2021) (unpublished manuscript), <https://perma.cc/R4FK-ESEN> [hereinafter Tang, *Abortion Middle Ground*].

41. *See* *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (arguing that *Bowers's* "historical premises are not without doubt and, at the very least, are overstated").

42. As with the federal abortion ban argument, there are counterarguments to the fetal personhood claim, in particular raised by Lee Strang in an amicus brief filed in *Dobbs*.  
*footnote continued on next page*

The Article proceeds in three parts. Part I briefly recaps the majority’s reasoning in *Dobbs*. I do so to be clear about both the time-sensitive nature of the legal test the majority applies and the evidence it finds dispositive when applying that test.

I then use *Dobbs*’s test to assess the constitutionality of a federal abortion ban in Part II. Just as *Dobbs* asked about the history and tradition of abortion in 1868, because that was when states became bound by the Fourteenth Amendment, Part II asks whether a federal abortion ban would run afoul of a fundamental right—or, more accurately, a liberty interest<sup>43</sup>—that was deeply rooted in this nation’s history and tradition as of the Fifth Amendment’s ratification in 1791. Part II describes evidence that the liberty interest in obtaining an abortion during early, pre-quickening pregnancy was indeed respected at that time by every state in the union. Part II also grapples with several important counterarguments.

Part III considers the fetal personhood argument. Part III begins by correcting the *Dobbs* majority’s erroneous count of states that banned abortion throughout pregnancy as of the Fourteenth Amendment’s ratification. Part III then explains why, in light of this evidence, the public could not have understood the Amendment’s protections to extend to unborn fetuses.

## I. History and Tradition in *Dobbs*

To decide whether the Fourteenth Amendment protects an unenumerated substantive due process right to abortion, the *Dobbs* majority asked whether access to abortion was “deeply rooted in this Nation’s history and tradition.”<sup>44</sup> This Part attempts to ascertain (but not endorse) the content of *Dobbs*’s history-and-tradition test. Two aspects of the Court’s analysis stand out: the critical moment in time at which history and tradition must be assessed, and the kind of evidence relevant to proving whether a right is deeply rooted.

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*See* Brief of Amicus Curiae Lee J. Strang in Support of Petitioners at 21–23, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19–1392), 2021 WL 3375870, at \*21–24. I respond to them below. *See infra* Part III.B.

43. The *Dobbs* majority used the term “right” to describe the focus of its history-and-tradition test, but that term is famously ambiguous. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–36 (1913) (describing different concepts of what it means for something to be a “right”). The best way to understand the *Dobbs* test is as asking whether an asserted right was deeply rooted in history and tradition *in the particular sense of a recognized liberty interest*, in that individuals were free to engage in a practice without government intervention. *See id.* at 36. “Liberty,” after all, is what the Due Process Clause actually protects. Thus, when I refer in this Article to the history of a “right to abortion” at various points in time, I am referring to whether individuals had the liberty to obtain (or perform) the procedure free of governmental interference. *See infra* notes 115–18 and accompanying text.

44. *Dobbs*, 142 S. Ct. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

On the temporal issue, the majority evaluated the legal status of abortion at four points in time. It first considered English common law, pointing to a range of thirteenth-, seventeenth-, and eighteenth-century treatises, all of which established a simple rule: Abortion was generally only a crime “after ‘quickening’—i.e., the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.”<sup>45</sup> Second, the majority assessed whether this common law rule persisted in America at the Founding and acknowledged that it did.<sup>46</sup> Third, the Court asked about the legal status of abortion as of “1868, the year when the Fourteenth Amendment was ratified.”<sup>47</sup> By that point, the majority asserts, the common law rule allowing abortions for the first sixteen to eighteen weeks of pregnancy “was abandoned,” with “three-quarters of the States, 28 out of 37, [enacting] statutes making abortion a crime even if it was performed before quickening.”<sup>48</sup> Finally, the majority noted developments long after the Fourteenth Amendment’s ratification, including “a ‘trend toward liberalization’” of abortion law that had begun in “about ‘one-third of the States’” shortly before *Roe*, as well as judicial rulings and scholarly articles advancing an abortion right.<sup>49</sup>

Which of these four points in time was dispositive for the majority’s history-and-tradition analysis? “[T]he most important historical fact,” the majority announced, was “how the States regulated abortion when the Fourteenth Amendment was adopted.”<sup>50</sup> By contrast, the history of English and American common law was “of little importance” because the quickening rule adopted in those eras “was abandoned” by the time of the Fourteenth Amendment’s enactment.<sup>51</sup> And the majority treated it as self-evident that the post-ratification liberalization of abortion laws, nearly a century after the Fourteenth Amendment’s enactment, was irrelevant to deciding whether abortion was deeply rooted in history and tradition.<sup>52</sup>

The majority’s temporal focus on history and tradition at the time of the relevant constitutional provision’s enactment makes some intuitive sense. After all, the claim that state laws banning abortion are unconstitutional rests on the meaning of the Fourteenth Amendment; *Roe* itself located the right to

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45. *See id.* at 2249.

46. *Id.* at 2251 (“In this country, the historical record is similar.”).

47. *Id.* at 2252–53.

48. *Id.*

49. *Id.* at 2253–54 (quoting *Roe v. Wade*, 410 U.S. 113, 140 (1973)).

50. *Id.* at 2267.

51. *Id.* at 2252.

52. *Id.* at 2253.

abortion in that amendment's Due Process Clause.<sup>53</sup> If one assumes the proper way to hash out the contours of substantive due process is to focus on history and tradition, it seems natural to ask about history and tradition when that amendment was enacted—not at some other point in time.

The *Dobbs* majority's decision to limit its history-and-tradition test to the moment of the relevant constitutional enactment was also a logical necessity given abortion's shifting legal status in society over time. Put simply, relying on historical evidence about abortion at a time other than 1868 would have severely undercut the majority's holding. *Dobbs* held, after all, that states may ban abortion *at any time in pregnancy*, so it needed to point to a historical moment in time when states did exactly that. Yet as the history makes clear, states *didn't* do that for much of early American history, when the common law quickening rule persisted. It was only "[b]y 1868, the year when the Fourteenth Amendment was ratified, [that] three-quarters of the states, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening."<sup>54</sup>

The second important aspect of the majority's reasoning concerned the kinds of evidence relevant to its historical inquiry. In other words, what sources of law may a litigant point to in order to establish that a claimed right or liberty is, in fact, deeply rooted in history and tradition for the purpose of substantive due process? The opinion mentions three possibilities.

The first is rights that are enshrined in state constitutions at the relevant moment. The importance of state constitutional provisions is clear in at least two parts of the opinion. Early in the opinion, the majority points to *Timbs v. Indiana*<sup>55</sup> as a model of how the "history and tradition" test should be applied.<sup>56</sup> In *Timbs*, the Court ruled unanimously that the Eighth Amendment's Excessive Fines Clause should be incorporated against the states via the Fourteenth Amendment because, among other things, "35 of the 37 state constitutions in effect at the ratification of the Fourteenth Amendment" included the same right.<sup>57</sup> The *Dobbs* majority also faulted the abortion clinic and Solicitor General for failing to identify any historical state constitutions that conferred

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53. Serena Mayeri, Melissa Murray, and Reva Siegel filed an important amicus brief arguing that the right to abortion could be grounded alternatively in the Equal Protection Clause, but the majority rejected that argument too. *See id.* at 2245-46 (citing Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340072).

54. *Id.* at 2252-53. *But see infra* Part III.A (showing that substantially fewer than twenty-eight states did so).

55. 139 S. Ct. 682 (2019).

56. *Dobbs*, 142 S. Ct. at 2246-47.

57. *Timbs*, 139 S. Ct. at 688.

the right to abortion, whether explicitly or via court ruling.<sup>58</sup> The implication is that one way to show that a right is deeply rooted in history and tradition, and thus protected under substantive due process, is to point to a critical mass of state constitutional provisions or state court rulings protecting it at the time the relevant Due Process Clause was enacted.

But is that the *only* way to show that a right is deeply rooted in history and tradition? Here again, the majority opinion is instructive. If state constitutional provisions were *necessary* to show that a claimed right was deeply rooted in history and tradition, the majority could have written a much simpler opinion. Neither the Solicitor General nor the abortion clinic in *Dobbs* suggested that the word “abortion” was included in any state constitution in the eighteenth or nineteenth century;<sup>59</sup> given our nation’s sordid history of treating women as second-class citizens, courts did not recognize such a right until well into the twentieth century. The majority could have noted the absence of such state constitutional language and rested its case.

Instead, the Court took five pages in the heart of its opinion—and an additional twelve pages in an appendix<sup>60</sup>—to consider a second possibility: that a claimed right or liberty interest could be deeply rooted in history and tradition because it was a practice free of government intervention under state common and statutory law. The majority concluded that this *wasn’t* true of abortion because, by 1868, only a minority of states continued to permit pre-quickening procedures under their common law.<sup>61</sup> But the majority never suggested that the number of states that permitted or instead banned abortions as a matter of law in 1868 was *irrelevant*. It instead described the question of “how the States regulated abortion when the Fourteenth Amendment was adopted” as the “most important historical fact” in a proper substantive due process analysis.<sup>62</sup> Justice Kavanaugh even wrote separately to emphasize the importance of this state statutory and common law. “As I see it,” he opined, “the dispositive point in analyzing American history and tradition for purposes of the Fourteenth Amendment inquiry is that abortion was largely prohibited in most American States as of 1868 when the Fourteenth Amendment was ratified.”<sup>63</sup>

This view—that a liberty interest can become a right deeply rooted in history and tradition through a consensus in state law—is, in truth, an

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58. *See id.* at 2254 (“The earliest sources called to our attention [to support the existence of an abortion right] are a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period.”).

59. *Id.* at 2242.

60. *Id.* at 2249-53, 2285-97.

61. *Supra* notes 19-21 and accompanying text.

62. *Dobbs*, 142 S. Ct. at 2267.

63. *Id.* at 2304 n.1 (Kavanaugh, J., concurring).

uncontroversial proposition. Conservative justices have repeatedly recognized it in other cases in which they have tallied states to determine if a claimed liberty is deeply rooted. In *Washington v. Glucksberg*, for example, the Court recognized that the Due Process Clause “specially protects” certain liberty interests “which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’” but refused to recognize a right to assisted suicide because states had long banned the practice at common law and by statute.<sup>64</sup> The importance of counting up state laws is a proposition on which many scholars have found common ground.<sup>65</sup> Thus, when the Court counted the states that either permitted pre-quickening abortion or banned abortion throughout pregnancy when the Fourteenth Amendment was enacted, that evidence was presumably necessary to its holding: If all (or an overwhelming number) of the states had continued to permit early-term abortion under their common law or via statute, that would have been evidence of a deeply rooted history and tradition in favor of abortion as a fundamental liberty interest.

The third and final kind of legal authority to which the *Dobbs* majority alluded was law review articles and treatises. No “scholarly treatise” or “law review article,” the majority noted, advanced a constitutional right to abortion “until the latter part of the 20th century.”<sup>66</sup> It is not obvious what to make of this argument. Surely, the majority did not mean to suggest that law professors could create new substantive due process rights through sufficiently prolific scholarship. The likelier interpretation is that, where there exists a historical division among the states, with some protecting a claimed right and others

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64. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); see also *Lawrence v. Texas*, 539 U.S. 558, 596 (2003) (Scalia, J., dissenting) (“In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 states in the Union had *criminal sodomy laws*.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986))); *Obergefell v. Hodges*, 576 U.S. 644, 737 (2015) (Alito, J., dissenting) (“In this country, no State permitted same-sex marriage until . . . 2003.” (quoting *United States v. Windsor*, 570 U.S. 744, 808 (2013) (Alito, J., dissenting))).

65. See, e.g., RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 243 (2021) (arguing that a “longstanding and widespread” privilege that was “enjoyed by citizens of the United States as a matter of the positive law of the states” can rise to the level of a constitutionally protected unenumerated right); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 698 (similar). Notably, the most important academic work connecting the unenumerated rights protected under substantive due process to state constitutional provisions explicitly declined to argue “that the question of what unenumerated rights, if any, the Fourteenth Amendment protects can be definitively answered solely by looking at state constitutional law in 1868.” Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 12 (2008).

66. *Dobbs*, 142 S. Ct. at 2248.

punishing it, perhaps the opinions of legal scholars might conceivably help to break a tie.

In summary, the *Dobbs* majority's history-and-tradition test for discerning substantive due process rights has two key features. First, the history and tradition that matters is the one that existed at the time the Due Process Clause was enacted. And second, a right or liberty interest can become deeply rooted in history and tradition not only if a large number of states explicitly protect it in their constitutions, but also if they respect it sub-constitutionally via common law or statute.

## II. What *Dobbs* Got Right—And the Case Against a Federal Statutory Abortion Ban

*Dobbs*'s impact was as swift as it was sweeping. Within one week of the decision, abortion became or was poised to become illegal in seventeen states, affecting millions of women of reproductive age.<sup>67</sup> Laws severely restricting—but not totally banning—abortion were set to take effect in an additional four states.<sup>68</sup> Twenty blue states and Washington, D.C., by contrast, either already protected abortion explicitly or acted to expand access.<sup>69</sup>

If anti-abortion advocates are successful, this division among the states will not last. Major anti-abortion groups are already meeting with Senate and House Republicans to discuss a strategy for Congress to enact a nationwide ban on abortion after six weeks of pregnancy.<sup>70</sup> Students For Life, a prominent anti-abortion advocacy group, has called on Senate Minority Leader Mitch McConnell to “lead the way in beginning a strategic campaign to protect life from an infant’s first heartbeats.”<sup>71</sup> The president of another leading anti-abortion group, the Susan B. Anthony List, has even obtained assurances from ten “possible Republican presidential contenders,” including Donald Trump,

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67. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, <https://perma.cc/S9HF-AS7N> (archived June 30, 2022) (listing seven states with bans already in effect and ten more where bans would soon go into effect, albeit with four temporarily blocked by court order); Maggie Koerth & Amelia Thomson-DeVeaux, *Over 66,000 People Couldn't Get an Abortion in Their Home States After Dobbs*, FIFTYEIGHT (Apr. 11, 2023, 8:00 AM), <https://perma.cc/7SMU-GMYH>.

68. *Tracking the States Where Abortion Is Now Banned*, *supra* note 67.

69. *Id.* And in nine more states, abortion remained legal subject to judicial rulings or uncertain legislative action. *Id.*

70. Caroline Kitchener, *The Next Frontier for the Antiabortion Movement: A Nationwide Ban*, WASH. POST (updated May 2, 2022, 10:54 PM EDT), <https://perma.cc/283T-3YCH>.

71. Kristi Hamrick, *SFLAction Asks Pro-Life Americans to Encourage Minority Leader McConnell to Protect Infants from Their First Heartbeats*, STUDENTS FOR LIFE OF AM. (July 19, 2022), <https://perma.cc/T4VH-ABJV>.

that they would make a nationwide six-week ban “a centerpiece of a presidential campaign.”<sup>72</sup>

Would such a ban violate the Constitution?<sup>73</sup> Scholars have focused so far on the question of Congress’s authority to enact such a law.<sup>74</sup> That question cuts two ways, however: Any argument that Congress lacks the power to ban abortion under the Commerce Clause would also limit its power to codify a federal abortion right. And because Congress likely possesses the power to regulate abortion under the Commerce Clause in any case,<sup>75</sup> a more promising line of attack would involve constitutional arguments that are uniquely applicable to a federal abortion ban.

The need to consider such arguments is especially pressing in light of recent developments concerning the 1873 Comstock Act, a federal statute that forbids the mailing of “every article or thing designed, adapted, or intended for producing abortion.”<sup>76</sup> The federal government has long understood the Act only to forbid the mailing of items that may be used in an abortion where the sender possesses the “intent that the recipient . . . will use them unlawfully.”<sup>77</sup> But from the moment *Dobbs* was decided, anti-abortion advocates and groups

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72. Kitchener, *supra* note 70.

73. The constitutionality of a much later ban—such as one that would apply to abortions after sixteen or eighteen weeks in pregnancy—would be a much closer question given its consistency with the pre-quickening tradition that existed at the Founding.

74. *See, e.g., supra* note 15.

75. Congress might claim the power to enact abortion legislation under its Section 5 enforcement power, but the Commerce Clause argument is a clearer path. The most unassailable way for Congress to protect abortion access under the Clause would be to fashion a statute after Title II of the Civil Rights Act, as a ban against medical providers refusing to sell services to a certain class of customers based on a particular characteristic. For example, Congress could provide that “no provider may refuse to sell a medical good or service to a pregnant patient on the ground that such good or service may terminate the life of the patient’s unborn fetus, unless the provider has a medical or moral reason for such refusal.” Such a statute would clearly regulate an “economic activity”—the sale of medical goods and services—and thus permit aggregation for purposes of satisfying the Commerce Clause’s substantial effects test. *See United States v. Morrison*, 529 U.S. 598, 613 (2000) (permitting aggregation of effects of “activity that is economic in nature”). And under basic conflict preemption principles, the law would preempt any state abortion ban that forces abortion providers to deny a good or service on the ground that it would terminate the life of an unborn fetus. Note that a safe harbor for providers with medical or moral reasons to refrain from offering care would be advisable to protect physicians who are not trained or do not wish to provide abortion care—including those who are not comfortable performing later-term abortions (much like the Mississippi abortion clinic in *Dobbs*, which only offered procedures up to sixteen weeks in pregnancy).

76. 18 U.S.C. § 1461.

77. Application of the Comstock Act to the Mailing of Prescription Drugs that Can Be Used for Abortions, 46 Op. O.L.C., slip op. at 1-2 (Dec. 23, 2022); *see also id.* at 5-11 (describing a line of federal court cases reaching this conclusion beginning in 1915).

have pushed for a broader interpretation of the Act.<sup>78</sup> As a coalition of twenty anti-abortion attorneys general wrote in a letter to CVS and Walgreens, “[f]ederal law expressly prohibits using the mail to send or receive any drug that will ‘be used or applied for producing abortion,’” including abortion pills.<sup>79</sup> And in April 2023, a federal judge interpreted the Act to broadly ban the mailing of abortion pills in a decision that threatened to unwind the FDA’s approval of mifepristone,<sup>80</sup> a drug used in more than half of all abortions performed in America.<sup>81</sup>

This Part considers the constitutionality of a federal abortion ban, including a revived Comstock Act. Applying the *Dobbs* majority’s history-and-tradition test, I suggest that there is a reasonable argument that a federal abortion ban would violate the Fifth Amendment Due Process Clause. This is true even though *Dobbs* squarely holds that a similar state ban would not violate the Fourteenth Amendment. Subpart A advances the affirmative case, while Subpart B considers several counterarguments and Subpart C considers what these arguments may suggest for *Dobbs*’s history-and-tradition test more broadly. If faithfully applying that test can suggest individuals enjoy a constitutional right to abortion as against the federal government but not as against the states, perhaps that is a sign of something wrong with the test.

#### A. How *Dobbs* Undermines a Federal Abortion Ban

Recall that *Dobbs* made two key moves in applying its history-and-tradition test.<sup>82</sup> First, when deciding whether the Fourteenth Amendment Due Process Clause protected an unenumerated right to abortion, the Court focused on the history and tradition of abortion at the time of that amendment’s ratification.<sup>83</sup> Second, to establish the relevant tradition, the Court examined not only what state constitutions had to say about abortion in 1868, but also how abortion was treated under state common law and statutory law.<sup>84</sup>

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78. See, e.g., Ed Whelan, *Federal Laws Bar Mailing and Interstate Carriage of Abortion Drugs*, NAT’L REV. (June 27, 2022, 2:10 PM), <https://perma.cc/QW7Y-YCSK>.

79. Letter from Andrew Bailey, Mo. Att’y Gen., to Danielle Gray, Exec. Vice President, Walgreens Boots Alliance (Feb. 1, 2023), <https://perma.cc/6G2E-ZHYT>.

80. See *Alliance for Hippocratic Medicine v. FDA*, No. 22-cv-00223-Z, 2023 WL 2825871, at \*21-28 (N.D. Tex. Apr. 27, 2023).

81. Rachel K. Jones, Elizabeth Nash, Lauren Cross, Jesse Philbin & Marielle Kirstein, *Medication Abortion Now Accounts for More than Half of All US Abortions*, GUTTMACHER INST. (updated Dec. 1, 2022), <https://perma.cc/3F7T-VNH2>.

82. See *supra* Part I.

83. See *supra* Part I.

84. See *supra* Part I.

The upshot is that, in a future challenge to a federal abortion ban, one cannot simply import *Dobbs*'s bottom-line holding regarding the Fourteenth Amendment to the different context of the Fifth Amendment. To do so would not only ignore the reasoning that underpins *Dobbs*, but would also accept the staggering prospect that states could override an established constitutional right applicable against the federal government at the Founding simply by enacting contrary laws nearly a century later. The better approach is to apply *Dobbs*'s history-and-tradition test from the ground up, asking whether the liberty interest in abortion was deeply rooted in 1791, when the Fifth Amendment was ratified.

That inquiry yields a surprising outcome, all the more so because it is firmly supported by *Dobbs*'s own historical assessment. When the Fifth Amendment Due Process Clause was enacted, every state in the union permitted pregnant individuals to obtain an abortion before quickening, during the first sixteen-to-eighteen weeks of pregnancy. That rule was hardly an American innovation, as it continued a centuries-old tradition that the *Dobbs* majority acknowledged.

The earliest authority cited in *Dobbs* is a thirteenth-century treatise written by Henry de Bracton: “[I]f a person has ‘struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide.’”<sup>85</sup> Abortion was criminal, in other words, only if performed after the fetus has quickened—an event the *Dobbs* majority describes as “the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.”<sup>86</sup> (The majority misleadingly cites another authority from the same period to suggest that “English law imposed punishment for the killing of a fetus,” but the cited treatise actually recommends religious penance, not criminal punishment.)<sup>87</sup> Later treatises from other English common law authorities such as Matthew Hale and William Blackstone made the same point: Abortion was punishable only after quickening.<sup>88</sup>

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85. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249 (2022) (quoting 2 HENRY DE BRACTON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* 279 (Travers Twiss ed. & trans., London, Longman & Co. 1879) (c. 1235)) (emphasis added).

86. *Id.*

87. *Id.* at 2249 n.25 (citing LEGES HENRICI PRIMI 222-23 (L.J. Downer ed. & trans., Clarendon Press 1972) (c. 1115) (requiring repentance for abortion, including “penance for seven years” for a woman who aborted a “quick” child)).

88. *Id.* at 2249 (citing MATTHEW HALE, *PLEAS OF THE CROWN: A METHODICAL SUMMARY*, 1678, at 53 (P.R. Glazebrook ed., Prof'l Books Ltd. 1972) (1678); 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 433 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736); and 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*129-30).

This uniform common law rule crossed the ocean and dominated Americans' views on abortion. "Manuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion," the majority conceded, and "by the 19th century, courts frequently explained that the common law made abortion of a *quick child* a crime."<sup>89</sup> By contrast, the few cases that were brought against persons for abortions that even *might* have been performed prior to quickening all encountered the same fate: dismissal under the common law understanding that only post-quickening abortion was unlawful. The Supreme Judicial Court of Massachusetts was the first American court to express this understanding in 1812, when it announced in *Commonwealth v. Bangs* that, under the common law, "the averment that the woman was quick with child at the time is a necessary part of the indictment."<sup>90</sup> Other state courts of last resort repeated this rule: New Jersey in 1849,<sup>91</sup> Maine in 1851,<sup>92</sup> and Alabama in 1857.<sup>93</sup> As Iowa's Supreme Court summarized in 1856, "to cause, or procure an abortion, before the child is quick, is not a criminal offence at common law."<sup>94</sup>

The consistency of the quickening rule in early America is especially significant because it stands in contrast to English law. In 1803, the conservative Chief Justice of England and Wales, Lord Ellenborough, proposed an omnibus bill to remedy what he believed had been a dangerous liberalization in British criminal law.<sup>95</sup> The bill—formally given the alarming title of the Malicious Shooting or Stabbing Act of 1803, but known more colloquially as Lord Ellenborough's Act—identified ten new capital felonies.<sup>96</sup> One of them was for the act of administering a "deadly poison, or other noxious and destructive substance or thing" with the intent to "procure the miscarriage of any woman, then being quick with child."<sup>97</sup> More significant,

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89. *Id.* at 2251 (emphasis added).

90. *Commonwealth v. Bangs*, 9 Mass. (8 Tyng) 387, 388 (1812).

91. *State v. Cooper*, 22 N.J.L. 52, 58 (1849) ("[T]he procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law . . .").

92. *Smith v. State*, 33 Me. 48, 55 (1851) ("At common law, it was no offence to perform an operation upon a pregnant woman by her consent, for the purpose of procuring an abortion, and thereby succeed in the intention, unless the woman was 'quick with child.'" (quoting *Bangs*, 9 Mass. (8 Tyng) at 388)).

93. *Smith v. Gaffard*, 31 Ala. 45, 51 (1857) ("At common law, the production of a miscarriage was a punishable offense, provided the mother was at the time 'quick with child.'" (quoting BLACKSTONE, *supra* note 88, at \*129-30)).

94. *Abrams v. Foshee*, 3 Iowa 274, 279 (1856) (emphasis omitted).

95. See JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900*, at 23 (1st paperback ed. 1979).

96. See *id.*; see also HELENA KELLY, *JANE AUSTEN, THE SECRET RADICAL* 48 (2016).

97. Lord Ellenborough's Act, 43 Geo. 3 c. 58, § 1 (1803) (Eng.).

however, was the Act's departure from the common law treatment of abortions performed *before* quickening. Lord Ellenborough's Act made it a crime to "cause the miscarriage of any woman not being . . . quick with child," punishable by transportation to a penal colony for up to fourteen years.<sup>98</sup>

For current purposes, the important point is how the United States responded to Lord Ellenborough's Act. Not a single state court deemed the Act's new punishment for pre-quickening abortions relevant to the question of whether pre-quickening abortion was unlawful in *America*. The New Jersey Supreme Court even suggested, for example, that the UK's desire to criminalize the previously lawful practice of pre-quickening abortion was likely "the very particular . . . that led to the passing of [Lord Ellenborough's Act]," before distinguishing New Jersey's own common law.<sup>99</sup> The liberty to obtain pre-quickening abortion was thus so rooted in early America that significant changes to English abortion law were held to be of no moment.

As *Dobbs* highlights, some states did eventually begin to depart from the uniform common law rule many years later.<sup>100</sup> New York was the first to do so by statute, nearly four decades after the Fifth Amendment's ratification, when it made performing an abortion prior to quickening a misdemeanor (and manslaughter if performed after).<sup>101</sup> And the Pennsylvania Supreme Court was the first to depart from the settled common law quickening rule,<sup>102</sup> some six decades after the Fifth Amendment's adoption.

These later developments in American abortion law surely affect the history and tradition that existed in 1868, and the *Dobbs* majority appropriately considered them in interpreting the meaning of the Fourteenth Amendment Due Process Clause. But mid-1800s changes to state abortion laws do not have a role to play in assessing the meaning of the Fifth Amendment when it was ratified in 1791. This much is clear from *Dobbs*'s own treatment of similar post-ratification developments decades after the Fourteenth Amendment: The fact that one-third of states began to liberalize their abortion statutes in the mid-twentieth century, the majority held, was too late to matter.<sup>103</sup>

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98. *Id.* § 2.

99. *State v. Cooper*, 22 N.J.L. 52, 56 (Sup. Ct. 1849).

100. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2252-53 (2022).

101. 2 N.Y. Rev. Stat. pt. 4, ch. 1, tit. 6, § 21, at 578-79 (1828); *id.* tit. 2, § 9, at 550-51; see Mohr, *supra* note 95, at 26-27 (pointing out that the 1828 law went into effect on January 1, 1830).

102. *Mills v. Commonwealth*, 13 Pa. 631, 632-33 (1850); see also Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents at 9, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4341742 (describing *Mills* as an "outlier").

103. See *Dobbs*, 142 S. Ct. at 2267 (describing *Roe*'s historical survey, including its discussion of post-Fourteenth Amendment developments, as largely "irrelevant").

The bottom line is that, for centuries before the Fifth Amendment Due Process Clause was ratified, common law authorities consistently respected women’s liberty to obtain an abortion before quickening. This understanding persisted in every single state at the Founding and for several decades thereafter. When it comes to deciding whether Fifth Amendment substantive due process encompasses a right to abortion, *Dobbs’s* “most important historical fact” cuts in the opposite direction: In 1791, such a right during the first sixteen to eighteen weeks of pregnancy was indeed deeply rooted in our Nation’s history and tradition.

## B. Counterarguments

Anti-abortion groups may advance at least four plausible counterarguments. Before considering them, I pause to acknowledge an obvious yet important point: For a jurist who is unyielding in their motivation to ban abortion, any of the counterarguments I am about to present will suffice. Rational legal argument may thus be beside the point. Even still, it is important to be clear about the consequences that would follow were such a jurist to accept any of these arguments. Doing so would not only affect the fate of reproductive freedom in America; it would jeopardize countless other rights as well.<sup>104</sup>

### 1. Counterargument 1: The mere absence of state criminal prohibitions does not create a fundamental liberty interest

The first counterargument downplays the significance of the uniform decision by every state at the Founding to not criminally punish abortion in the first sixteen to eighteen weeks of pregnancy. Historical evidence that states punished an act, the argument goes, is sufficient to *reject* that act’s status as a fundamental liberty. But a litigant on the other side who seeks to *establish the existence* of a fundamental liberty interest cannot rest on the inverse historical fact—i.e., that states chose to permit the practice at issue. Such a litigant must point instead to some different kind of historical evidence.<sup>105</sup>

This argument is hard to square with the reasoning in *Dobbs*. After all, the majority says that the “most important historical fact” in its substantive due process analysis is “how the States regulated abortion”—not some other fact.<sup>106</sup> If some other historical data point was actually the crucial fact on which the recognition of a substantive due process right turned, presumably the Court

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104. *See id.* at 2301 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

105. *See infra* text accompanying notes 115-57.

106. *Dobbs*, 142 S. Ct. at 2267.

would have called *that* fact the “most important” one, not the fact of how states regulated abortion.<sup>107</sup>

Moreover, just one day before *Dobbs* was decided, the Court issued another opinion that explicitly treated the historical absence of state regulation as grounds for recognizing a constitutional right. In *New York Rifle & Pistol Ass’n v. Bruen*, the Court held that “[o]nly if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct” is unprotected by the Second Amendment.<sup>108</sup> This rule has already led to striking outcomes in lower federal courts, including a Fifth Circuit decision invalidating a federal ban on firearm possession by persons subject to domestic violence restraining orders.<sup>109</sup> In reaching that outcome, the Fifth Circuit did not require affirmative evidence that persons subject to restraining orders would have enjoyed the right to bear arms in the eighteenth or nineteenth century; instead, it applied the opposite presumption, reasoning that, under *Bruen’s* test, the Government failed to carry its “burden of proffering ‘relevantly similar’ historical regulations” to disprove the constitutional right at issue.<sup>110</sup> Applying that same approach to the abortion context would suggest that the complete absence of pre-quickening abortion bans at the Founding forecloses similar regulation today.

*Dobbs’s* reasoning and *Bruen’s* historical analysis aside, though, I must acknowledge that the counterargument possesses logical force. It cannot be the case that the mere nonregulation of some act by state legislatures in 1791 or 1868 automatically raises that act to the status of a constitutional right. If that were true, surprising rights would be everywhere around us: We’d have constitutional rights to drink through straws, jump rope, and write in cursive, all because no lawmaker banned any of those acts two centuries ago. There are, in short, lots of things that lawmakers have not criminally prohibited, not because they are fundamental rights but rather for the more mundane reason that no one ever thought to regulate them.

That does not, however, describe the matter of abortion. Abortion *was* regulated under the common law for centuries, with post-quickening procedures

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107. Likewise, when Justice Kavanaugh called it “dispositive” that “abortion was largely prohibited in most American States,” the implication is that the states’ choice to permit or proscribe the practice is crucial to the recognition of a fundamental liberty interest. *Id.* at 2304 n.1 (Kavanaugh, J., concurring).

108. 142 S. Ct. 2111, 2126 (2022).

109. *See* *United States v. Rahimi*, 61 F.4th 443, 460-61 (5th Cir. 2023).

110. *Id.* at 455 (quoting *Bruen*, 142 S. Ct. at 2132). As Jacob Charles has forcefully argued, the net effect of *Bruen’s* test is that “if the government cannot point to past legal regulation [of firearms] . . . it cannot regulate today.” Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming 2023) (manuscript at 33), <https://perma.cc/C2E5-3687>.

punished as homicide as early as the thirteenth century.<sup>111</sup> Yet up through—and after—the American Founding, courts and lawmakers steadfastly refused to extend this prohibition to abortions performed before quickening.<sup>112</sup> The fact that pregnant people at the Founding had the liberty to obtain pre-quickening abortions thus reflects a conscious choice, not inadvertence.

But does that choice necessarily reflect abortion’s position as a fundamental right? Perhaps not. The states’ universal refusal to punish pre-quickening abortion at the Founding might not establish that practice’s status as a *right*, but rather as a *policy choice*—the kind of thing all states were free to prohibit if they wished, but that every state chose not to regulate for reasons of policy. Or, as Josh Blackman has argued in a response to my work, the existence of historical evidence that “states did not expressly criminalize” some conduct at most “suggests that the democratic process, and not the courts, made decisions concerning this conduct.”<sup>113</sup>

This argument, too, possesses significant force. So let us suppose it is correct. Let us suppose, in other words, that *Dobbs* was wrong (or at least overclaiming) when it held that the “most important historical fact” in determining the existence of a fundamental liberty interest is “how the States regulated” a practice at the relevant time of enactment.<sup>114</sup> Even then, a vital question would remain. If the states’ uniform decision to permit pre-quickening abortion in the face of a contrary rule for post-quickening procedures is not enough to create a fundamental liberty, then what *is* enough? What kind of historical evidence would abortion advocates have to show to establish the existence of a substantive due process right to abortion? *Dobbs* gestures at three different possibilities.

*Historical evidence that the practice was protected by state constitutions.* One possibility is that establishing a substantive due process right requires evidence that the states historically enshrined the practice at issue in their constitutions. This argument turns on a particular understanding of the kind of “right” the *Dobbs* majority was searching for in history: evidence that a practice was already recognized as an inalienable constitutional right that no government could proscribe.

The first problem with this argument is the text of the Due Process Clause. The clause, after all, protects people from government deprivation of *liberty*

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111. See *supra* notes 85-88 and accompanying text.

112. See *supra* notes 89-94 and accompanying text.

113. Josh Blackman, *The Fact That X States Failed to Criminalize an Act in 1868 Does Not Mean That Committing the Act Is a Fundamental Right*, VOLOKH CONSPIRACY (Sept. 13, 2021, 9:02 PM), <https://perma.cc/7RUQ-XHES>.

114. *Dobbs*, 142 S. Ct. at 2267.

without due process—not government deprivation of *rights*.<sup>115</sup> The constitutional text thus encompasses conduct that individuals were free to engage in without government intervention, not the much narrower set of rights deemed inalienable in state constitutions.<sup>116</sup> To this point, *Dobbs* notably relies on the history-and-tradition test used in *Washington v. Glucksberg*, which held that the Due Process Clause protects both “fundamental rights *and liberties* which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”<sup>117</sup> *Glucksberg* thus never insisted that assisted suicide must be codified as a right in state constitutions; it instead deemed the practice inconsistent with our history and tradition because it was not even a protected *liberty*, given it had long been punished under both the common law and state penal codes.<sup>118</sup>

Just as importantly, this argument would have sweeping implications for other substantive due process rights on both sides of the ideological spectrum. Many such rights lack historical support in the particular form of state constitutional protections. States would thus be free, under this standard, to compel attendance at public schools because state constitutions did not enshrine a right to the contrary, abrogating *Pierce v. Society of Sisters*.<sup>119</sup> States could also punish grandparents for cohabitating with their grandchildren and engage in forced sterilization because state constitutions did not enshrine contrary rights.<sup>120</sup> And no state constitutions in 1868 protected the rights to interracial or same-sex marriage, intimate sexual conduct, or contraception.<sup>121</sup>

*Historical evidence that the practice was not the target of social hostility.* Certain passages in the *Dobbs* majority opinion point to a second kind of historical

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115. U.S. CONST. amend. XIV, § 1.

116. To the extent the better argument for grounding unenumerated rights in the Fourteenth Amendment lies in the Privileges or Immunities Clause, the term “privilege” carries a similar connotation. See *Dobbs*, 142 S. Ct. at 2248 n.22 (discussing potential applicability of the Privileges or Immunities Clause); Hohfeld, *supra* note 43, at 36 (“A ‘liberty’ considered as a legal relation (or ‘right’ in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as *privilege* . . .”).

117. 521 U.S. 702, 720-21 (1997) (emphasis added) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); see also *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (explaining that “due process of law” includes “a substantive component, which forbids the government to infringe certain ‘fundamental’ *liberty* interests” (emphasis added)).

118. See *Glucksberg*, 521 U.S. at 714-15.

119. 268 U.S. 510 (1925); see also Calabresi & Agudo, *supra* note 65, at 108-10 (identifying an express right to attend a *public* school in 36 of 37 state constitutions in 1868, but no state constitutional right to refrain from public school attendance).

120. See Calabresi & Agudo, *supra* note 65, at 22-113 (cataloging every express right contained in state constitutions as of 1868 and not listing a right to cohabit with extended family or a right against forced sterilization).

121. See *id.* (finding no express right to interracial or same-sex marriage, intimate sexual conduct, or contraception in any state constitution in 1868).

evidence that might give rise to a substantive due process right. At different moments in the opinion, the majority notes that, even though pre-quickening abortion was not criminally punished at common law, some members of society nevertheless looked askance at the practice.<sup>122</sup> The majority thought it significant, for example, that an English judge in 1732 described abortion as “barbarous and unnatural.”<sup>123</sup> (In truth, moral opposition to abortion at the time was largely the product of societal disfavor of extra-marital sex.)<sup>124</sup> The majority further inferred social hostility to abortion from the fact that, at common law, if a person gave a pregnant woman a noxious potion or “put skewers into the woman” to procure an abortion—and the woman died as a result—the “law will imply [malice]” and punish the person for murdering the woman.<sup>125</sup> Based on these historical artifacts, the majority concluded that “[a]lthough a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*.”<sup>126</sup>

I confess that I do not really know what the majority means when it says that pre-quickening abortion might not have been “*permissible* at common law.”<sup>127</sup> After all, it recognizes (in the very same sentence!) that pre-quickening abortion was not considered homicide, and it fails to identify a single court case punishing the act of pre-quickening abortion at common law until many decades after the Founding.<sup>128</sup> The majority grants, in other words, that at common law before, during, and long after the Founding, every single provider anywhere in America who performed a safe, pre-quickening abortion could do so without any criminal consequence—and that pregnant women

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122. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2250 (2022).

123. *Id.*; see Gillian Brockell, *Abortion in the Founders’ Era: Violent, Chaotic and Unregulated*, WASH. POST (May 15, 2022, 7:00 AM EDT), <https://perma.cc/AP22-8X7R> (explaining that the judge referred to the entire case, which also included an attempted murder by poisoning, as “barbarous and unnatural,” and that the abortion may have occurred post-quickening).

124. See American Historical Association, *Abortion, Choice, and the Supreme Court: History Behind the Headlines*, YOUTUBE, at 21:47-23:49 (July 6, 2022), <https://perma.cc/YV74-8QCB> (to locate, select “View the live page”).

125. *Dobbs*, 142 S. Ct. at 2250 & n.29 (first quoting 1 WILLIAM OLDNALL RUSSELL & CHARLES SPRENGEL GREAVES, *A TREATISE ON CRIMES AND MISDEMEANORS* 540 (Daniel Davis, Theron Metcalf & George Sharswood eds., Philadelphia, T. & J.W. Johnson 5th Am. ed. 1845); and then quoting 4 BLACKSTONE, *supra* note 88, at \*200-01). As the majority conceded, however, the reported version of the 1732 case made “no mention of quickening.” *Id.* at 2250. If, as British common law required, the patient’s fetus had quickened before the procedure, the judge’s description of the crime would tell us nothing about the distinct (and distinctly lawful) practice of pre-quickening abortion.

126. *Id.* at 2250.

127. *Id.*

128. *Id.*; see *supra* notes 26, 102.

could seek out such care without punishment, too. If that does not establish pre-quickening abortion's permissibility, that word has lost all meaning to me.

Perhaps the majority means to suggest that early term abortions were not permissible—and thus not “a legal right”<sup>129</sup>—because some members of society (like the unnamed 1732 judge) thought the practice was immoral. But such a rule would be wildly inconsistent with our constitutional tradition. Many venerated social practices that are recognized as constitutional rights, both enumerated and unenumerated, are the subject of public disdain. The right to free speech, for example, exists precisely to protect offensive or “unpopular ideas.”<sup>130</sup> To suggest that public distaste for a certain expressive act removes it from the First Amendment's aegis gets things backwards. And of course, various members of society believe that the use of contraception, intimate same-sex conduct, same-sex marriage, and even the act of taking one's child out of the public school system are morally dubious.<sup>131</sup> Yet each of these acts remains protected under substantive due process.<sup>132</sup> Unless the Court wishes to revisit all of these cases and announce a rule for how much social hostility is enough to remove a right, societal disfavor alone cannot preclude a practice from being deeply rooted in our history and tradition.<sup>133</sup> As the Court put it in

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129. *Dobbs*, 142 S. Ct. at 2250 (emphasis omitted).

130. *Mahanoy Area Sch. Dist. v. B.L. Levy*, 141 S. Ct. 2038, 2046 (2021); *see also, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

131. *See, e.g., Allison Benedikt, If You Send Your Kid to Private School, You Are a Bad Person*, SLATE: DOUBLEX (Aug. 29, 2013, 5:50 AM), <https://perma.cc/Z98Y-CKE6>.

132. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Lawrence v. Texas*, 539 U.S. 558 (2003) (intimate same-sex conduct); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (private school attendance).

133. The Court is also misguided to rely on the common law rule under which an abortion provider may be punished for the mother's murder if the provider prescribes a poison so noxious or performs a procedure so dangerous as to cause the mother's death. This rule does mean something was “not a legal right”: namely, the act of killing a patient through a dangerous procedure. But that fact does nothing to impugn the permissibility of performing a safe abortion that produces no such tragic outcome—conduct that the majority concedes was not punishable in any state at the Founding.

The majority's logic would also radically alter our settled landscape of constitutional rights. If a lawful, non-harmful act (like performing a safe abortion) can lose its status as a right simply because some *different* act produces a harm and is thus punishable (like prescribing a noxious poison that kills a pregnant woman), then many other established rights would be at risk. For example, parents today enjoy a substantive due process right to direct the upbringing of their children, including the right to educate them at home. *See Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). And this right is widely understood to exist even though the law criminally punishes parents who abuse the right in a harmful manner, such as by neglecting the educational needs of their children. *See, e.g., State v. Inmon*, No. M2016-00596-CCA-R3-CD, 2017 WL 2704124, at \*3 (Tenn. Crim. App. June 22, 2017) (affirming the criminal conviction of a parent who

*footnote continued on next page*

*Lawrence v. Texas*, “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .”<sup>134</sup>

More to the point, the question at hand is not whether social hostility toward a practice disproves its existence as a fundamental right, but rather whether the *absence* of hostility affirmatively creates such a right. The answer to that question seems even more straightforward. There are, after all, many practices that generate little societal disfavor because people simply do not care all that much about them—take a homeowner’s decision to plant red rather than white flowers, or a person’s choice to recycle the newspaper. The lack of historical antipathy toward these practices hardly seems like the kind of thing that could ground an unenumerated constitutional right.

*Historical evidence that the practice was the subject of “rights talk.”* *Dobbs* alludes to a third, more persuasive possibility. At times, the majority seems to fault abortion-rights advocates for failing to introduce historical evidence of what might be termed “rights talk,” or public discourse describing abortion as a right. Such discussion of abortion as a right, the majority asserts, did not exist “[u]ntil the latter part of the 20th century.”<sup>135</sup> The implication is that historical rights talk may be a necessary precondition to recognizing an act’s status as a fundamental right. Or as one anti-abortion commentator has argued, “to make the originalist case that the right to abortion is ‘deeply rooted,’” abortion would need to be “mentioned in the same breath as other well-known fundamental rights . . . [like] the freedom of speech, freedom of conscience, [and] liberty of contract.”<sup>136</sup>

As an initial matter, the absence of briefing in *Dobbs* concerning abortion rights talk in early America is largely the product of the Court’s own bait-and-switch. When the Court granted certiorari in *Dobbs*, it did so on the narrow question of whether “all pre-viability prohibitions on elective abortions are unconstitutional,” such that Mississippi’s 15-week ban might survive alongside *Roe*—not on the question of whether to overrule *Roe* and disclaim the existence of any abortion right, period.<sup>137</sup> Had the Court openly sought briefing on *that* question, the litigants and amici would have been on notice of the need to present evidence that the eighteenth- and nineteenth-century American public viewed access to abortion as an inalienable right, not a mere policy choice.

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neglected to send his children to school for an entire year, despite the assertion that they were being informally homeschooled).

134. *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

135. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022).

136. Blackman, *supra* note 113.

137. *See Dobbs*, 142 S. Ct. at 2310 (Roberts, C.J., concurring in the judgment).

The evidence on this score may be surprising. To start, there is meaningful historical support for the conclusion that some early Americans *did* think and speak of abortion as an inalienable right. For example, a popular yet controversial<sup>138</sup> progressive reformer named Thomas Low Nichols published a book in 1853 called *Esoteric Anthropology*; the book sold thousands of copies.<sup>139</sup> In it, Nichols unabashedly described the pregnant mother's liberty to obtain an abortion not as a matter of legislative grace, but as a right. "[S]he alone," he wrote, "has the right to decide whether she will continue the being of the child she has begun."<sup>140</sup> "[M]oral, social, religious" obligations should be relevant to her choice, Nichols continued, "but *she alone has the supreme right to decide.*"<sup>141</sup>

Nichols's views were not an outlier. Indeed, they spread quickly, apparently persuading even some who personally opposed abortion on moral grounds—an especially strong indication of the practice's status as a right. Thus, shortly after *Esoteric Anthropology's* publication, another book, *Dr. W.C. Lispernard's Practical Private Medical Guide*, began circulating.<sup>142</sup> Its author left no doubt as to his personal stance on abortion: "[W]here [abortion] is practiced for any other reason than that of preserving the life of the mother, to it I am utterly opposed."<sup>143</sup> And yet Lispernard ultimately admitted that his personal distaste for abortion was beside the point, because the choice was ultimately a right that belonged to the mother. Echoing Nichols's earlier writing, Lispernard urged that abortion "is exclusively the affair of the mother," and that "[s]he alone has the supreme right to decide."<sup>144</sup>

Nichols reinforced these views in an 1854 issue of his periodic journal, in an entry he called *A New Philosophical Dictionary*.<sup>145</sup> The dictionary contained a lengthy discussion of abortion and, like Lispernard's medical guide and his own earlier work, its argument was unequivocally in the register of legal rights: "[N]o woman ought to be compelled to bear a child, against her wishes; and no

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138. See Patricia Cline Cohen, *The "Anti-Marriage Theory" of Thomas and Mary Gove Nichols: A Radical Critique of Monogamy in the 1850s*, 34 J. EARLY REPUBLIC 1, 1-2 (2014).

139. T.L. NICHOLS, *ESOTERIC ANTHROPOLOGY* (Cincinnati, Valentine Nicholson & Co. 1853); see JEAN L. SILVER-ISENSTADT, *SHAMELESS: THE VISIONARY LIFE OF MARY GOVE NICHOLS* 140 (2002) (describing *Esoteric Anthropology's* wide circulation).

140. NICHOLS, *supra* note 139, at 190. I am indebted to Pat Cohen for bringing this source to my attention.

141. *Id.* (emphasis added).

142. W.C. LISPERNARD, *DR. W.C. LISPERNARD'S PRACTICAL PRIVATE MEDICAL GUIDE* (Rochester, 1854).

143. *Id.* at 196.

144. *Id.* at 194. It is clear that Lispernard was heavily persuaded by Nichols's writing, as Lispernard quotes and refers to Nichols copiously. See *id.* at 195.

145. T.L. Nichols & M.S.G. Nichols, *A New Philosophical Dictionary*, NICHOLS' J., Sept. 9, 1854, at 10, 10-11. I am deeply indebted to Pat Cohen for identifying this source.

principle is more clear and undeniable, than that every woman has the inherent and *inalienable right to choose . . .*”<sup>146</sup> “[A]ny law,” Nichols continued, that “violates this right, is a despotism and an outrage.”<sup>147</sup>

Do these publicly disseminated writings count as enough historical “rights talk” to establish abortion as a deeply rooted fundamental liberty interest? In truth, I do not know how to answer that question without succumbing to motivated reasoning. I fully recognize that those inclined to reject abortion as a fundamental liberty may object that historical sources like these are insufficient to ground an abortion right, perhaps because they do not establish that some (undefined) supermajority of Americans shared the same view.

Yet those inclined to accept abortion’s status as a fundamental liberty may offer a powerful response: Any historical evidence of public opposition to abortion as a “right” at the time likely teaches us more about society’s bigoted views concerning women writ large than about the status of abortion as a particular practice. Women at the turn of the nineteenth century were, after all, widely viewed as ineligible to possess many basic rights. “Married women could not sign contracts; they had no title to their own earnings, to property even when it was their own by inheritance or dower, or to their children in case of legal separation.”<sup>148</sup> No state recognized women’s suffrage until 1890.<sup>149</sup> And perhaps most on point, married women were denied the right to sexual autonomy under coverture and marital rape laws that granted a husband “substantial rights to his wife’s person.”<sup>150</sup>

Viewed against this backdrop, the fact that some Americans might have opposed the notion of a right to abortion may reflect little more than their abhorrent view that women did not enjoy the basic right to control their bodies in the first place. Historical public opposition to abortion, in other words, may not tell us much of modern constitutional relevance. That is, not unless one is willing to defend an approach to constitutional rights that treats the past denial of rights due to outright bigotry and prejudice as a self-fulfilling prophecy.<sup>151</sup> Such a view would gore many an ox, sweeping away the rights of

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146. *Id.* at 11 (emphasis added).

147. *Id.*

148. ELEANOR FLEXNER & ELLEN FITZPATRICK, *CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES* 7 (enlarged ed. 1996).

149. Wyoming did so in 1890. WYO. CONST. art. VI, § 1 (1889). Technically, Wyoming had extended voting rights to women in 1869, when it was still a territory. *See An Act to Grant to the Women of Wyoming Territory the Right of Suffrage and to Hold Office*, ch. 31, 1869 Wyo. Terr. Sess. Laws 371.

150. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1389, 1392 (2000).

151. Indeed, prominent originalists argue that factual errors of this nature are not binding on modern-day legal decisionmakers. *See infra* note 348 and accompanying text.  
*footnote continued on next page*

many groups that have been the object of historical discrimination: women, Black Americans, and Catholics, to name a few.<sup>152</sup>

This point is especially salient in the historical context of abortion, where the specific link between prejudiced worldviews and later nineteenth-century efforts to restrict abortion access is a notorious fact. Thus, for example, the leading proponent of criminal abortion prohibitions in the mid-to-late nineteenth century, Horatio Storer, explicitly grounded his campaign in outmoded stereotypes about women. “If each woman were allowed to judge for herself in this matter,” Storer argued, her decision “would be too sure to be warped by personal considerations, and those of the moment” because a “[w]oman’s mind is prone to depression, and, indeed, to temporary actual derangement.”<sup>153</sup>

The shameful status of women’s rights in the mid-nineteenth century is relevant to the quantum of abortion rights talk for another reason: It helps to explain why prominent feminists at the time chose to focus on other goals. As Reva Siegel has explained, nineteenth-century feminists actually “*did demand reproductive choice.*”<sup>154</sup> But because women could not vote and enjoyed such little reproductive agency to begin with, those feminists had to make difficult choices about which essential freedoms were most worthy of their public championing. For these reasons, feminists coalesced around a campaign for “voluntary motherhood,” which referred “not to abortion,” but to the antecedent—and even more basic—right of a married woman to “refuse her husband’s sexual advances.”<sup>155</sup> In other words, the feminist movement’s relative silence on abortion rights may have reflected a *strategic* choice rather than principled opposition to abortion as such.

It is hard to quibble with that strategy. Siegel recounts a letter written by the prominent advocate Lucy Stone, which powerfully expressed the

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Moreover, any inquiry into nineteenth-century practices ought to include the voices and experiences of those who were excluded from equal participation. See Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1198-1201 (2023).

152. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) (describing the relevance of historical prejudice against Black Americans to laws permitting non-unanimous juries); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2268-74 (2020) (Alito, J., concurring) (describing how historical prejudice against Catholics produced state laws depriving them of religious freedom).

153. HORATIO ROBINSON STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* 74-75 (Boston, Lee & Shepard 1866); see also, e.g., Siegel, *supra* note 151 (manuscript at 61-63) (describing sexist and nativist arguments advanced by anti-abortion advocates in an 1867 Ohio Senate report).

154. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 304-05 (1992) (emphasis added).

155. *Id.* at 305.

movement's logic: "It is very little to me to have the right to vote, to own property, &c. if I may not keep my body, and its uses, in my absolute right."<sup>156</sup> Measured against all of the other rights then denied to women, what could be more important than the ability to control one's sexual autonomy—indeed, one's very body? The voluntary motherhood movement thus took aim at the unjust legal apparatus that allowed husbands to claim control over their wives' sexual services and labor. For that reason, the movement's lack of emphasis on abortion access simply reflected a conscious choice to make freedom from marital rape its foremost priority, not some underlying disagreement with reformers like Nichols who explicitly urged abortion's status as an inalienable right. This conclusion is bolstered further by the fact that some proponents of voluntary motherhood actually justified abortion as a form of self-defense in response to marital rape.<sup>157</sup> In other words, abortion might well have been viewed by some feminists as an inalienable right in need of protection. There just happened to be so many others on the list.

In summary, one could conclude that, because many eighteenth- and nineteenth-century Americans viewed women as second-class citizens who could not possess rights (including the right to abortion), the same should still be true today with respect to their reproductive autonomy rights. But the better takeaway is that the existence of early public discourse advocating an inalienable right to abortion is especially probative of that right's existence given the societal headwinds facing such views. Thus, even if one were to take the view that grounding a fundamental liberty interest requires "rights talk," in addition to a legislative consensus permitting a challenged practice, those conditions are arguably satisfied by America's history and tradition concerning abortion.

## 2. Counterargument 2: Post-ratification abortion laws from the mid-nineteenth century override history as of the Fifth Amendment

A second counterargument to recognizing a Fifth Amendment right to abortion is that the states' later enactment of abortion bans by 1868, long after the Fifth Amendment's ratification in 1791, should override the meaning of the liberty guaranteed by that Amendment. Following this argument, it does not matter that Americans in every state at the Founding would have understood abortion to be legally permitted before quickening because, seventy or eighty years later, some states took that right away.

The biggest problem with this argument is its incompatibility with precedent. *Dobbs* itself declined to consider a later trend among the states

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156. *Id.* at 305-06 (quoting Letter from Lucy Stone to Antoinette Brown (Blackwell) (July 11, 1855) (quoted in ELIZABETH CAZDEN, ANTOINETTE BROWN BLACKWELL: A BIOGRAPHY 100 (1983))).

157. *See id.* at 306-07.

toward liberalized abortion laws as meaningful evidence of the relevant historical tradition.<sup>158</sup> Anti-abortion advocates cannot have it both ways: If a nearly centuries-old change in state laws is irrelevant for Fourteenth Amendment substantive due process, a nearly centuries-old change in state laws must also be irrelevant for Fifth Amendment substantive due process.

*Dobbs*'s refusal to consider post-ratification state law changes is also no outlier. Indeed, the Court explicitly rejected reliance on post-ratification history in *New York Rifle & Pistol Ass'n v. Bruen*: "[P]ost-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text."<sup>159</sup> Or as the Court put it again in *Bruen*, when states enact laws after a constitutional provision's ratification that "contradict[] earlier evidence" of the provision's meaning, the earlier evidence controls; the later "evidence cannot provide much insight."<sup>160</sup>

To be certain, the Court does sometime defer to post-enactment practice to "liquidate" the meaning of certain provisions.<sup>161</sup> But Justice Scalia's concurring opinion in *Noel Canning* explained the circumstances under which that is appropriate: It is only "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic" that it can guide constitutional interpretation.<sup>162</sup> With respect to abortion at the Founding, "governmental practice" in the "early days of the Republic" was indeed open, widespread, and unchallenged, *only in the opposite direction*: Every single state continued the unbroken tradition of permitting abortion during early pregnancy, before, at, and long after the Founding. Unless anti-abortion jurists are willing to accept the view that the Constitution's understanding at the moment of enactment can be overridden via ordinary state laws promulgated almost a century later, this counterargument should be dead on arrival.

3. Counterargument 3: Recognizing a Fifth Amendment right to pre-quicken abortion would violate the rule against "dual-track" rights

Yet another possible counterargument would seek to leverage *Dobbs*'s holding—that no substantive due process right to abortion can be found in the Fourteenth Amendment—to reach the same conclusion under the Fifth

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158. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2253 (2022).

159. 142 S. Ct. 2111, 2137 (2022) (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

160. *Id.* at 2154.

161. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 6-8 (2019).

162. *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment).

Amendment. Rather than applying *Dobbs's* history-and-tradition test to examine American practices when the Fifth Amendment was ratified, however, this argument would apply a different rule announced in a separate line of cases—the rule against “dual-track” constitutional rights.

In *Ramos v. Louisiana*, Justice Gorsuch described the dual-track theory as “the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government.”<sup>163</sup> The Court rejected this approach in *Ramos*, holding that the Sixth Amendment guarantee of jury unanimity in a federal criminal trial is equally applicable against the states under the Fourteenth Amendment.<sup>164</sup> It did the same the preceding year in *Timbs v. Indiana*, holding that the Eighth Amendment prohibition against excessive fines must be “enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”<sup>165</sup>

At first blush, this rule sounds awfully promising for anti-abortion advocates. If rights must mean the same thing as against states and the federal government, and if no right to abortion exists vis-a-vis the states, how can it exist against federal action?

There is indeed a logical problem here, but it does not bolster anti-abortion arguments. Quite the opposite. In every case rejecting the dual-track theory of rights, the Court did so to *ratchet up* the rights afforded by the Fourteenth Amendment to match the rights enshrined against the federal government. *Ramos* held that states could not water down the federal juror unanimity requirement,<sup>166</sup> *Timbs* held that states could not dip below the Eighth Amendment’s prohibition against excessive fines,<sup>167</sup> *McDonald* leveled up the Second Amendment rights individuals enjoy against states,<sup>168</sup> and *Malloy v. Hogan* did the same for the Fifth Amendment privilege against self-incrimination.<sup>169</sup> If the right to abortion was deeply rooted in history and tradition as of the Fifth Amendment’s adoption, in other words, the dual-track theory would require recognizing the same right as against the states—not ignoring the federal right.

What the anti-abortion position needs, therefore, is not simply to reject the dual-track theory of Fifth and Fourteenth Amendment substantive due process, but also for a particular theory to take its place: one in which the non-

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163. 140 S. Ct. 1390, 1398 (2020).

164. *Id.* at 1397.

165. 139 S. Ct. 682, 687 (2019) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010)).

166. *See supra* note 164 and accompanying text.

167. *See supra* note 165 and accompanying text.

168. *McDonald*, 561 U.S. at 750.

169. 378 U.S. 1, 6 (1964).

existence of a Fourteenth Amendment right can override an earlier history and tradition of respecting that right at the time of the Fifth Amendment's ratification, effectively incorporating the later amendment's historical understanding into that of the earlier amendment.

As Ryan Williams has argued, such a reverse-incorporation theory makes little sense: “[I]t is not clear why the understandings of the ratifying public in 1868 as to the meaning of ‘due process of law’ in the Fifth Amendment should be allowed to trump the understandings of that phrase shared by members of the ratifying public at the time of the Fifth Amendment’s enactment in 1791.”<sup>170</sup> True, as Williams points out, it would be one thing “[i]f the language of the two Due Process Clauses reflected some sort of actual conflict such that the competing understandings of the two generations of ratifiers could not be honored simultaneously.”<sup>171</sup> Yet no such conflict exists: “There is no direct conflict presented by two separate provisions restraining different levels of government in different ways and thus no occasion to resort to the unexpressed intentions of the framers and ratifiers in 1868 to resolve such a perceived conflict.”<sup>172</sup> “As a textual matter,” Williams concludes, “the reverse incorporation model thus seems like a nonstarter.”<sup>173</sup>

#### 4. Counterargument 4: The one and only substantive due process clause

Accepting the possibility of divergent state and federal rights—and attention to Williams’s work—hints at one final counterargument. Williams has identified substantial evidence that, by the time of its ratification, the Fourteenth Amendment was understood to afford some substantive (not just procedural) protections, but that no such understanding existed when the Fifth Amendment was adopted.<sup>174</sup> Accepting this argument would mean that states and the federal government could both ban abortion at all points in pregnancy, just for different reasons: for states, because abortion was not deeply rooted in history and tradition in 1868; for the federal government, because there is no such thing as (federal) substantive due process to begin with.

Williams’s evenhanded engagement with the historical record is impressive.<sup>175</sup> But accepting his conclusion that there is no Fifth Amendment

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170. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 504 (2010).

171. *Id.* at 504-05.

172. *Id.* at 505.

173. *Id.*

174. *Id.* at 416.

175. *See id.* at 428-59 (evaluating evidence of whether “due process of law” was understood to include a substantive dimension in 1791).

doctrine of substantive due process would pose sweeping implications for our constitutional order. Eliminating federal substantive due process root and branch would mean the Court erred in *Bolling v. Sharpe* when it held that segregated public schools in Washington, D.C., violated the Fifth Amendment.<sup>176</sup> It would mean Congress could use racial hiring preferences, abrogating *Adarand Constructors, Inc. v. Peña*.<sup>177</sup> Congress could also ban contraception, punish parents who homeschool their children or enroll them to private schools, engage in a nationwide program of forced sterilization, or forbid women from working.<sup>178</sup>

Perhaps these outcomes would not bother the Court's conservatives, and a federal abortion ban could be just the precipitating cause they need to abandon substantive due process—at least in its federal incarnation.<sup>179</sup> One hopes, however, that the radical consequences of that choice would give them pause. A reading of the Constitution that tolerates invidious racial and sex-based discrimination and remarkable intrusions into the private choices of families and parents would be one that quickly loses its hold on the public's faith.

### C. Implications for the History & Tradition Test

As a strictly legal realist matter, it seems likely that a majority of justices on the current Supreme Court would embrace one of these four counterarguments to avoid an outcome in which a right to abortion exists under federal, but not state, substantive due process. But the fact that serious logical and practical consequences would follow from adopting any of the counterarguments has significant doctrinal implications. Perhaps a history-based test that points to such contrasting conclusions because of the passage of time between 1791 and 1868 is a test that suffers from significant logical difficulties to begin with.

Indeed, there are problems with *Dobbs's* history-and-tradition test beyond the awkwardness of divergent federal and state due process rights. One major concern is the test's inability to limit false positives, or practices that were permitted throughout our history and tradition but that might nevertheless

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176. 347 U.S. 497, 500 (1954). *But see* *United States v. Vaello Madero*, 142 S. Ct. 1539, 1547 (2022) (Thomas, J., concurring) (suggesting that the Fourteenth Amendment's Citizenship Clause may prohibit the federal government from discriminating on the basis of race); *see also* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 501 (2013) (advancing this argument).

177. 515 U.S. 200, 235 (1995).

178. *Cf., e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing a right to use contraceptives); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing a right to direct the upbringing of one's children).

179. *Cf. Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

be something less than constitutional rights. After all, many practices were legally permitted at the time of the Fourteenth Amendment's adoption, but, as discussed earlier, it would seem odd if all those practices were constitutionally protected.<sup>180</sup>

Some of the counterarguments suggested above might be thought as ways out of this problem. For instance, one way to reduce the number of false positives is to limit substantive due process rights to only those rights that were enshrined in state constitutions, socially favored, or talked about by some significant number of early Americans as rights. But applying these approaches would mean swapping false positive substantive due process rights for a problem of false negatives. Recognizing only state constitutional rights, socially favored conduct, and practices widely discussed as rights would require discarding a number of substantive due process rights cherished on both sides of the aisle, such as the right to send one's children to private schools, the right to contraception, the right to same-sex marriage, and so on.

I do not have a magic test to replace *Dobbs's* approach to the history-and-tradition inquiry. Others have suggested competing theories; it is beyond the scope of my project to defend them.<sup>181</sup> For now, it is enough to note that faithfully applying *Dobbs's* history-and-tradition test could generate one of two significant takeaways. If it is the right test, then a total federal abortion ban likely violates Fifth Amendment substantive due process, even though an identical state ban would not violate its Fourteenth Amendment cousin. But if no such Fifth Amendment right exists, by virtue of any of the counterarguments discussed above, then *Dobbs's* approach to history and tradition was dubious from the start. Anti-abortion groups can have *Dobbs's* history-and-tradition test, or they can have a nationwide abortion ban—but they cannot have both.

### **III. What *Dobbs* Got Wrong—And the Case Against Fetal Personhood**

A second pathway to a nationwide abortion ban sidesteps congressional action. In a lawsuit against a blue state that permits abortion, anti-abortion advocates could argue that the Fourteenth Amendment forbids abortion because the unborn fetus is a “person” entitled to protection under the Equal

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180. See *supra* Part II.B.1.

181. See, e.g., BARNETT & BERNICK, *supra* note 65, at 248-59; *Dobbs*, 142 S. Ct. at 2326 (Breyer, Sotomayor & Kagan, JJ., dissenting) (arguing that substantive due process “gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution’s most fundamental commitments to new conditions”).

Protection and Due Process Clauses.<sup>182</sup> Many prominent anti-abortion advocates and groups have already publicly embraced this constitutional fetal personhood theory.<sup>183</sup> Americans United for Life, for example, has argued that the “14th Amendment’s safeguards of due process and equal protection . . . extend to all human beings, born and not yet born.”<sup>184</sup> And a test case has already been filed on behalf of two unborn children in Rhode Island seeking to invalidate an abortion-protective state law on the ground that it violates their Fourteenth Amendment rights.<sup>185</sup> The Rhode Island Supreme Court rejected that argument, and the United States Supreme Court denied certiorari.<sup>186</sup> But no one should mistake that choice as reflecting the conservative justices’ views on the merits; after all, the conservative-dominated Court also denied petitions seeking to overturn *Roe* in the years before *Dobbs*.<sup>187</sup>

This Part responds to the constitutional personhood argument. It does so in two parts. Part A corrects the historical record, showing that the number of states that permitted abortion before quickening as of the Fourteenth Amendment’s enactment was much larger than the *Dobbs* majority asserted.<sup>188</sup> Far from being a small minority—9 of the 37 states in the union, on the majority’s account—the best evidence suggests that as many as 21 states continued the longstanding common law quickening rule that existed at the Founding and for centuries before.

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182. Supporters of the fetal personhood argument have pointed to either clause as being sufficient, on the theory that allowing abortion would either deny the fetus “equal protection of the laws” or deprive the fetus of “life” without due process. See Finnis, *supra* note 10 (“Either [clause] would suffice. Each protects ‘any person.’”).

183. See, e.g., sources cited *supra* notes 4, 7 & 10; *infra* note 185 and accompanying text. I use the term “fetal personhood” as a shorthand for the constitutional argument that fetuses are entitled to protection under the Fourteenth Amendment. This should be distinguished from legislative efforts to recognize or protect fetuses as persons, which would not enshrine a constitutional rule against abortion. The latter efforts are no doubt important, but because they operate sub-constitutionally are not my focus here. For an important discussion of statutory fetal protection laws and their harms, see generally Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781 (2014).

184. Mary Ziegler, Opinion, *The Next Step in the Anti-Abortion Playbook is Becoming Clear*, N.Y. TIMES (Aug. 31, 2022), <https://perma.cc/AXF9-XJCE>; see also Hammer & Craddock, *supra* note 7 (advocating a rule of constitutional fetal personhood).

185. See *Benson v. McKee*, 273 A.3d 121, 131 (R.I. 2022), cert. denied sub nom. *Doe ex rel. Doe*, 143 S. Ct. 309 (2022). Note that I assume, for the sake of argument, that a court would find the existence of a plaintiff with standing to bring such a suit on the fetus’s behalf.

186. See *id.*

187. See, e.g., *Horne v. Isaacson*, 571 U.S. 1127 (2014) (mem.) (denying certiorari from a petition asking the Court to uphold Arizona’s twenty-week abortion ban in contravention of *Roe*’s viability rule).

188. I focus here on state laws as of the Fourteenth Amendment’s ratification because that is the constitutional provision relied on by advocates of a personhood theory.

Part B explains why this accurate count is so important. The fetal personhood claim was already difficult to sustain on the majority’s version of history because the presence of nine states that allowed abortions throughout early pregnancy suggests that the Fourteenth Amendment did not remove that choice from democratically elected state legislatures. But if a *majority* of states actually allowed early-term abortions, then fetal personhood is untenable: To accept it would mean that a majority of the states were blithely violating the very Amendment they had just ratified.

A. Correcting the Record: Three-Quarters of States Did Not Ban All Abortions When the Fourteenth Amendment Was Ratified

The *Dobbs* majority repeatedly asserts that “three-quarters of the States” banned abortion at all stages in pregnancy when the Fourteenth Amendment was ratified.<sup>189</sup> By that point in time, it claims, “28 out of 37” states had “enacted statutes making abortion a crime even if it was performed before quickening.”<sup>190</sup>

That is false. Substantial evidence suggests that as many as 12 of the 28 states on the majority’s list actually continued the centuries-old common law tradition of permitting pre-quickening abortions. I describe these states below in two categories. I will begin by discussing states for which specific evidence disputes the majority’s characterization before turning to states where circumstantial evidence does the same.<sup>191</sup>

1. Nine states where specific evidence undermines the *Dobbs* majority’s conclusion

The *Dobbs* majority includes in its twenty-eight-state count nine states where specific historical evidence suggests that the respective states did not prohibit abortion throughout pregnancy. In Alabama, Florida, Louisiana, Nebraska, New Jersey, Oregon, Texas, Virginia, and West Virginia, the ordinary public as of the Fourteenth Amendment’s ratification likely understood state laws to permit pre-quickening abortions.

*Alabama.* The abortion law in force in Alabama when the Fourteenth Amendment was adopted punished “[e]very person who . . . willfully administer[s] to any pregnant woman any medicines . . . [or] employ[s] any instrument . . . with intent thereby to procure the miscarriage of such

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189. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, at 2242-43, 2248, 2252-53, 2256 (2022).

190. *Id.* at 2253.

191. I presented some of the historical evidence that follows in an unpublished manuscript on SSRN prior to the Court’s ruling in *Dobbs*; this Article updates that evidence in light of *Dobbs* and applies it to the important, forward-looking question of fetal personhood. See Tang, *The Originalist Case*, *supra* note 40, at 22-54.

woman.”<sup>192</sup> The *Dobbs* majority assumed, without analysis, that the language used to describe the object of the statute—“any pregnant woman”—meant the law applied regardless of whether the pregnancy had quickened.<sup>193</sup> (It even italicizes that phrase in its appendix, as if that alone proves that Alabama abandoned the common law quickening rule.)<sup>194</sup>

In a sense, the assumption is understandable. Few modern readers would think the phrase “any pregnant woman” actually refers only to *some* pregnant women—namely, those whose fetuses had quickened. But if one is committed to an originalist approach to legal interpretation, faithful historical analysis forbids one to view historical sources from a present-day lens. Instead, such a reader must engage in what Lawrence Solum has called “the originalist method of immersion,” or the concept of immersing oneself in the “linguistic and conceptual world of the authors and readers” of the legal provision being studied.<sup>195</sup>

Approaching Alabama’s statute from this perspective, an alternative understanding emerges. To the ordinary person at the time, “the distinction between quick and unquick” pregnancies was “virtually universal in America during the early decades of the nineteenth century and accepted in good faith.”<sup>196</sup> And there is strong evidence that this settled understanding persisted through the Fourteenth Amendment’s ratification. In 1869, for example, anti-abortion advocate Montrose Pallen reported a story in which a married woman consulted her *pastor* about abortion, only to be told that, prior to four months in gestation, abortion was “no crime, because the child was not alive.”<sup>197</sup> Another physician admitted in 1870 that women “almost universally” continued to believe in the significance of the “fourth and half-month of [a fetus’s] development, the usual period of ‘quickening.’”<sup>198</sup> Even as late as 1895, a prominent anti-abortion advocate named Dr. Joseph Taber Johnson recognized that “[m]any otherwise good and exemplary women” believed “that

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192. Act of Jan. 9, 1841, ch. 6, § 2, 1841 Ala. Laws 103, 143.

193. See *Dobbs*, 142 S. Ct. at 2286-87 (emphasis omitted).

194. *Id.*

195. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1624 (2017).

196. MOHR, *supra* note 95, at 5.

197. Montrose A. Pallen, *Foeticide, or Criminal Abortion*, Address Before the Missouri State Medical Association (April 1868), in 3 MED. ARCHIVES 193, 197 (1869), <https://perma.cc/B5Q6-RAX7>.

198. ANDREW NEBINGER, *CRIMINAL ABORTION: ITS EXTENT AND PREVENTION* 19 (1870), <https://perma.cc/L7JQ-RRJU>.

prior to quickening it is no more harm to cause the evacuation of the contents of their wombs than it is that of their bladders or their bowels.”<sup>199</sup>

One more general point is essential before moving on to the evidence that this understanding was also prevalent in Alabama. When deciding whether an early nineteenth-century law punishing abortions on “any pregnant woman”<sup>200</sup> applied only to persons whose pregnancies had quickened, it is also crucial to remember the legal backdrop against which state legislatures were acting. As explained above, the dominant understanding across the nation since the Founding was that abortion was regulated by the common law rule that abortion was lawful prior to quickening.<sup>201</sup> This background understanding is crucial because, as Stephen Sachs has observed, one “common assumption of legal systems” is that “the law stays the same until it’s lawfully changed.”<sup>202</sup> And when it comes to lawfully changing the common law, an important rule applies: “[S]tatutes in derogation of the common law are narrowly construed.”<sup>203</sup> It was thus the *Dobbs* majority’s burden to show that when states codified generic bans on abortions performed on “any pregnant woman” or “any woman pregnant with child,” they actually meant to eliminate, rather than continue, the longstanding quickening distinction.

With these initial points in mind, we can now better apprehend the public’s understanding of the legality of abortion in Alabama when the state enacted its 1841 law. Would the public have thought the criminalization of procedures performed on “any pregnant woman” applied only after quickening, or throughout the entire period of pregnancy? The answer is only after quickening, which is how the state’s supreme court interpreted the law in the 1857 case of *Smith v. Gaffard*.<sup>204</sup>

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199. LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, at 25 (1997) (quoting Joseph Taber Johnson, *Abortion and Its Effects*, 33 AM. J. OBSTETRICS & DISEASES WOMEN & CHILD. 86, 91 (1896)).

200. Act of Jan. 9, 1841, ch. 6, § 2, 1841 Ala. Laws 103, 143.

201. See *supra* notes 89-94 and accompanying text.

202. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 818 (2015). To be sure, motivated jurists sometimes ignored this rule to accomplish other ends. See, e.g., José Argueta Funes, *The “Civilization” Canon: Common Law, Legislation, and the Case of Hawaiian Adoption* 51-54 (Nov. 7, 2022) (unpublished manuscript) (on file with author) (arguing that Anglo judges ignored common law traditions in Hawaii to the detriment of adopted Hawaiians in order to “civilize” the Hawaiian kingdom).

203. Sachs, *supra* note 202, at 840; see also David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 936 n.74 (1992) (collecting sources). Thus, for example, the Supreme Court declined in *Heckler v. Chaney* to hold that the ambiguous terms of the Administrative Procedure Act overrode the “common law” understanding that agency decisions not to enforce a law are “presumed immune from judicial review.” 470 U.S. 821, 832-33 (1985).

204. 31 Ala. 45 (1857).

*Smith* involved a tort claim brought by a woman named Caroline Smith against a man named James Gaffard. Smith alleged that Gaffard had impugned her chastity (an actionable tort under Alabama law) by declaring in public that Smith had “‘taken something to make her lose’ a child.”<sup>205</sup> Under Alabama precedent, however, comments like Gaffard’s were “only actionable, when they charge[d] the commission of an offense indictable by law,” or one involving “moral turpitude.”<sup>206</sup> Alabama’s 1841 law did not permit the indictment of pregnant persons themselves for procuring abortions, so Smith’s most obvious route to tort liability was off the table.<sup>207</sup> But the Court explained that Gaffard’s words could have still charged Smith of an offense involving “moral turpitude” if Smith’s abortion were performed “under circumstances not allowed by law”<sup>208</sup>—which is to say, if the *abortion provider had committed a crime*. This is how the Court came to address the crucial question for present purposes: Under what circumstances would it be a crime for Smith’s provider to perform an abortion?

Citing the 1841 Alabama abortion statute, the state supreme court offered the following answer: “Unless the words convey th[e] imputation” that “the woman was ‘quick with child,’” they “do not charge an offense punishable by law.”<sup>209</sup> In other words, Caroline Smith lost her tort claim because in 1857 Alabama, there was nothing illegal (and thus nothing impugnable) about the practice of pre-quickening abortion.

Some have suggested that the *Smith* case actually announced a strikingly different rule, one under which *pregnant individuals themselves* could be prosecuted for *post*-quickening abortions.<sup>210</sup> Because that counterargument entails a dispute over the meaning of the Alabama Supreme Court’s words, I reproduce below the key passage from the opinion in *Smith*:

[Section 3230, Alabama’s abortion statute] reaches and provides for the punishment of him who administers the drug, who directs or causes it to be taken, but not the woman who herself takes it. At common law, the production of a miscarriage was a punishable offense, provided the mother was at the time “quick with child.” 1 [BLACKSTONE, *supra* note 88, at \*]129-30. This principle is

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205. *Id.* at 49.

206. *Id.* at 50.

207. *See id.* at 51 (“This statute reaches and provides for the punishment of him who administers the drug, who directs or causes it to be taken, but not the woman who herself takes it.”).

208. *Id.* at 50.

209. *Id.* at 51.

210. *See* John Finnis & Robert P. George, *Indictability of Early Abortion c. 1868*, at 10-11 (Oct. 15, 2021) (unpublished manuscript), <https://perma.cc/E96R-VJQZ> (interpreting *Smith* as holding that common law abortion punishments “did extend to self-abortion” so long as the pregnant person was “quick with child”).

thoroughly discussed, in reference to the authorities, in the case of *The State v. Cooper*, [22 N.J.L. 52 (1849)]. To that decision, and the authorities cited in it, we refer, for a full vindication of the principle. See, also, *Commonwealth v. Bangs*, 9 Mass. [(8 Tyng), 387,] 388 [(1812)]; *Same v. Parker*, [50 Mass. (9 Met.) 263,] 263 [(1845)]. In this case, it does not appear from the words themselves, nor from any part of the complaint, that the imputation of an abortion, procured when the woman was quick with child, was conveyed . . . [Thus, the words are not actionable in tort.]<sup>211</sup>

The dispute boils down to a simple syntactic question: When the Alabama Supreme Court wrote that, “[a]t common law, the production of a miscarriage was a punishable offense, provided the mother was at the time ‘quick with child,’”<sup>212</sup> whose production of the miscarriage was the court describing? My reading is that the court was describing the person who provides the abortion. Yet others have argued that the sentence describes when the pregnant person could be criminally punished under the common law for producing their own abortion.<sup>213</sup>

The best way to resolve this disagreement is to consult the three cases the Alabama Supreme Court cites for “full vindication of the principle” at issue—namely, that only post-quickening procedures are punishable.<sup>214</sup> If my reading is correct, one would expect these cases to involve prosecutions of persons who perform abortions, since they are the subject of the principle I believe the Alabama Supreme Court meant to embrace. But if I am wrong and the court was actually describing criminal liability for pregnant mothers themselves, then one would naturally expect the cases to involve prosecutions of those mothers.

This analysis yields a decisive answer: Every single case involves the prosecution of a person who performed an abortion, and not one involves the prosecution of a mother. *State v. Cooper* concerned an indictment “charging . . . that the defendant assaulted the mother and administered the potions” to produce her miscarriage.<sup>215</sup> In *Commonwealth v. Bangs*, “[t]he defendant was indicted . . . for assaulting and beating one Lucy Holman, and administering to her a certain dangerous and deleterious draught or potion . . . with intent to procure the abortion.”<sup>216</sup> And in *Commonwealth v. Parker*, the indictment “alleged that the defendant . . . did force and thrust a sharp metallic instrument into the womb and body of a married woman” with the intent to cause an abortion.<sup>217</sup>

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211. *Smith v. Gaffard*, 31 Ala. at 51 (internal quotation marks and some citations omitted).

212. *Id.*

213. Finnis & George, *supra* note 210, at 10-11.

214. *Smith*, 31 Ala. at 51.

215. 22 N.J.L. 52, 53 (Sup. Ct. 1849).

216. 9 Mass. (8 Tyng) 387, 387 (1812).

217. 50 Mass. (9 Met.) 263, 263 (1845).

In all three of the cited cases, the courts held that the *person who administered the abortion* could not be punished unless the pregnancy had quickened<sup>218</sup>—precisely the principle I understand the Alabama Supreme Court to have “vindicated” in *Smith*. It is thus no surprise that other commentators, such as noted pro-life writer Eugene Quay, have also interpreted *Smith* as holding that Alabama’s 1841 statute punished abortion providers only for procedures they perform after quickening.<sup>219</sup>

There is another historical problem with interpreting *Smith* as a ruling about the culpability of pregnant individuals rather than abortion providers. After canvassing historical cases through 2007, pro-life writer P.B. Linton concluded that “[n]o American court has ever upheld the conviction of a woman for self-abortion or consenting to an abortion.”<sup>220</sup> Interpreting *Smith* to declare that women were criminally punishable thus requires one to accept a proposition that has been thoroughly discredited by two centuries of case law across the country. Rather than rejecting the widely recognized immunity for pregnant mothers who consent to their own abortion,<sup>221</sup> it is far more likely the Alabama Supreme Court simply interpreted the state’s 1841 abortion statute to be consistent with the long-settled common law quickening rule.

*Florida.* The *Dobbs* majority counts Florida as one of the twenty-eight states that banned abortion when the Fourteenth Amendment was adopted. But the Fourteenth Amendment obtained approval from three-fourths of the states—and thus became a part of our Constitution under the terms of Article V—on July 9, 1868.<sup>222</sup> As of that date, Florida had enacted no statute addressing abortion.<sup>223</sup> At the relevant moment in time, the public in Florida would thus have understood abortion to be regulated under the common law, which, as previously discussed, permitted abortion at any time prior to quickening.<sup>224</sup>

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218. *Cooper*, 22 N.J.L. at 58; *Bangs*, 9 Mass. (8 Tyng) at 388; *Parker*, 50 Mass. (9 Met.) at 268.

219. See Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 448 (1961) (concluding that *Smith v. Gaffard* held Alabama’s statute to “appl[y] only after quickening”).

220. Paul Benjamin Linton, *The Legal Status of Abortion in the States if Roe v. Wade is Overruled*, 23 ISSUES L. & MED. 3, 6 n.15 (2007).

221. See, e.g., *State v. Carey*, 56 A. 632, 636 (Conn. 1904) (“At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another . . .”).

222. See *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT’L ARCHIVES, <https://perma.cc/5XLC-9G32> (last updated Feb. 8, 2022).

223. Florida did not enact its abortion ban until August 6, 1868. See Act of Aug. 6, 1868, ch. 3, §§ 10-11, 1868 Fla. Laws ch. 1637, no. 13, at 61, 64.

224. See *supra* notes 89-94 and accompanying text.

Florida did enact an abortion ban on August 6, 1868—one month after the Fourteenth Amendment became law.<sup>225</sup> (Florida itself had voted to ratify the Fourteenth Amendment in June 1868, two months before it enacted the new prohibition.)<sup>226</sup> And some may have the reasonable instinct that the one-month gap in time should not matter. On this view, what really matters is that Florida banned pre-quickening abortion soon after the Fourteenth Amendment became our law, permitting us to infer that members of the public might well have anticipated the new legal regime.<sup>227</sup> But *Dobbs* itself cuts against this approach, declaring that the “most important historical fact [is] how the States regulated abortion *when the Fourteenth Amendment was adopted*.”<sup>228</sup> Furthermore, if the original-public-meaning originalist believes “constitutional text means what it did at the time it was ratified,”<sup>229</sup> then it seems like we ought to care most about evidence of its meaning at the time it was ratified, not at a later point in time.<sup>230</sup> Opening the door to other temporal reference points, after all, can swing both ways. Why wouldn’t it be equally viable to speculate that the public in states where abortion bans were enacted in early 1868, shortly *before* the Fourteenth Amendment’s ratification, would have yet to learn of the new restrictions?<sup>231</sup> The easiest way to avoid these line-drawing problems is also the most logical way: focusing on the law that actually existed when the Amendment was ratified.

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225. This ban punished post-quickening procedures as manslaughter and pre-quickening procedures more leniently. See ch. 3, § 11, 1868 Fla. Laws at 64 (punishing abortion of a “quick child” as manslaughter); ch. 8, § 9, 1868 Fla. Laws at 97 (providing one to seven-year sentence for procuring “miscarriage of any woman”).

226. See *Intro.34 Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments)*, CONGRESS.GOV, <https://perma.cc/M5EP-QLP2> (archived Mar. 4, 2023).

227. John Finnis and Robert George have noted that, in theory, a post-constitutional-amendment statutory enactment like Florida’s *could* shed light on the same amendment’s original meaning if there were reason to think the state was “hasten[ing] to align its . . . law with [the] new constitutional provision.” Finnis & George, *supra* note 210, at 6. But they concede that they have no evidence of any actual Florida lawmaker who held the belief that the Fourteenth Amendment’s reference to “person” encompassed unborn fetuses. *Id.* at 49 (“We were talking about hypothetical legislators and a hypothetical constitutional revision.”).

228. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2267 (2022) (emphasis added).

229. See Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017).

230. Justice Thomas implied as much recently in his concurring opinion in *Gamble v. United States*, 139 S. Ct. 1960 (2019), arguing that the majority opinion’s reliance on “several postratification treatises” is not “conclusive without a stronger showing that they reflected the understanding of the Fifth Amendment *at the time of ratification*.” *Id.* at 1987 (Thomas, J., concurring) (emphasis added).

231. See, e.g., Act of Mar. 28, 1868, § 2, 1868 Md. Laws ch. 179, at 314, 315.

*Louisiana.* The inclusion of the next three states in the pro-life twenty-eight-state count reflects a different kind of error. In Louisiana, Nebraska, and New Jersey, the governing abortion statutes at the time of ratification prohibited only certain *methods* of abortion that were known to be dangerous, while leaving safer procedures untouched.

Louisiana's 1856 abortion law provided that anyone who administers "to any woman pregnant with child, any drug, potion, or any other thing, for the purpose of procuring abortion . . . shall be imprisoned . . . for not less than one, nor more than ten years."<sup>232</sup> The language of this statute bears a strong resemblance to a widely known 1830 Connecticut statute, which punished anyone who administered "any medicine, drug, noxious substance, or other thing, with an intention thereby to procure [a] miscarriage."<sup>233</sup> Critically, however, that law also went on to punish persons who "use and employ any instrument, or other means to produce such miscarriage."<sup>234</sup> As Eugene Quay has explained, Connecticut added this abortion-via-instrument provision to its law in 1830 to fill a gap in its 1821 statute that punished only the use of poisons.<sup>235</sup> Connecticut's choice to ban the use of abortions via "instrument" was eventually replicated in many other states.<sup>236</sup>

As of the Fourteenth Amendment's ratification, however, Louisiana was not one of them. The state's lawmakers refrained from banning instrumental abortions, leaving such acts within the law. Louisiana did eventually amend its abortion statute to punish the "[u]se of any instrument or any other means whatsoever on a pregnant female" for the purpose of procuring an abortion.<sup>237</sup> Prior to that amendment, however, abortions via instrument remained legal, at least prior to quickening.

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232. LA. REV. STAT. § 24 (1856).

233. Act of June 5, 1830, § 16, 1830 Conn. Pub. Acts, ch. 1, at 253, 255.

234. *Id.* That Connecticut felt the need in 1830 to explicitly ban the separate use of instruments for procuring a miscarriage suggests that the term "other thing" is meant to refer to other kinds of drugs or medicinal substances, following the familiar canon of *ejusdem generis*. See *Gooch v. United States*, 297 U.S. 124, 128 (1936) ("The rule of *ejusdem generis* . . . limits general terms which follow specific ones to matters similar to those specified . . .").

235. Quay, *supra* note 219, at 435.

236. See, e.g., Act of Feb. 3, 1859, §§ 10, 37, 1859 Kan. Sess. Laws ch. 28, at 231, 233, 237 ("Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means" is guilty of manslaughter in the second degree; abortion on "any pregnant woman" was punishable "by imprisonment in a county jail not exceeding one year") (emphasis added); Act of Mar. 31, 1860, §§ 87-88, 1860 Pa. Laws No. 374, at 382, 404-05 (enacting a similar ban on the use of "any instrument or other means whatsoever").

237. See New Criminal Code art. 87, 1942 La. Acts no. 43, at 137, 92-93 (separate printing). This statute left in place the separate provision prohibiting the "[a]dministration of any drug, potion, or any other substance to a pregnant female" to procure an abortion. *Id.*

*Nebraska.* Anti-abortion advocates make a similar error in counting Nebraska as banning all pre-quickening abortions. Enacted in 1866, Nebraska’s abortion prohibition appeared in the same provision as the state’s general ban against administering “any poison or other noxious or destructive substance or liquid, with the intention to cause the death of such person.”<sup>238</sup> After setting a sentence of between one and seven years for murder-by-poison, the law then offered a different punishment for the use of poisons to procure an abortion: “[E]very person who shall administer . . . any such poison, substance or liquid, with the intention to procure the miscarriage of any woman then being with child . . . shall be imprisoned for a term not exceeding three years in the penitentiary.”<sup>239</sup>

Just as in Louisiana, Nebraska’s statute did not ban all abortions, but only a particularly dangerous *method* of abortion—that performed via “poison or other noxious or destructive substance.”<sup>240</sup> The law was a response to a particular problem: the use of dangerous poisons to induce miscarriages. This problem was substantiated by contemporary evidence. An 1850 physician’s treatise noted, for instance, that some pregnant persons had been administered a poison known as savin, derived from the shoots of an evergreen shrub, and “many deaths result[ed]” from savin poisoning.<sup>241</sup> Critical, however, is what Nebraska’s lawmakers did *not* prohibit: abortions performed using other means, including commonplace procedures using medical instruments.<sup>242</sup>

*New Jersey.* Enacted in 1849, the relevant New Jersey law created criminal liability for any person who, “maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child,” administered “any poison, drug, medicine, or noxious thing,” or used “any instrument, or means whatever, with the like intent.”<sup>243</sup>

As in Louisiana and Nebraska, New Jersey’s law did not actually proscribe all abortions, but rather targeted certain dangerous practices. That, at least, is

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238. NEB. TERR. REV. STAT. pt. III § 42 (1866).

239. *Id.*

240. *Id.*

241. AMOS DEAN, PRINCIPLES OF MEDICAL JURISPRUDENCE: DESIGNED FOR THE PROFESSIONS OF LAW AND MEDICINE 133-34 (New York, Banks & Bros. 1850); *see also* ALEXANDER C. DRAPER, OBSERVATIONS ON ABORTION. WITH AN ACCOUNT OF THE MEANS BOTH MEDICINAL AND MECHANICAL, EMPLOYED TO PRODUCE THAT EFFECT, TOGETHER WITH ADVICE TO FEMALES 17-18 (Philadelphia, 1839) (describing deaths from the use of savin to procure abortions).

242. *See* MOHR, *supra* note 95, at 61 (describing how “beginning in the 1830s,” pregnant persons became “accustomed . . . to the idea that instruments could be used safely and effectively to control their reproductive functions”). Just as was true of Louisiana, Nebraska lawmakers did eventually proscribe abortion via instrument in a later enactment. NEB. GEN. STAT. ch. 58, § 39 (1873).

243. Act of Mar. 1, 1849, 1849 N.J. Laws 266.

what the New Jersey Supreme Court held in the 1858 case of *State v. Murphy*.<sup>244</sup> The case involved the criminal prosecution of one Leonard Murphy, a man who had directed a pregnant person to take a poison for the purpose of procuring a miscarriage.<sup>245</sup> Murphy's argument on appeal was that he should be acquitted because no proof had been introduced at his trial that his patient *had actually taken* the poison in question.<sup>246</sup> But the court rejected this argument, clarifying two key points along the way.

First, the court stated what New Jersey's 1849 law set out to do. "[T]he mischief designed to be remedied by the statute," the court explained, "was the supposed defect in the common law . . . that the procuring of an abortion, or an attempt to procure an abortion, with the assent of the woman, was not an indictable offence, *as it affected her*, but only as it affected the life of the foetus."<sup>247</sup> The 1849 statute was accordingly enacted to correct the common law's failure to "guard the health and life of the mother against the consequences of [abortion] attempts."<sup>248</sup>

Second, and more crucially for our purposes, the court also explained what the state's 1849 abortion law did *not* do: "The design of the statute *was not to prevent the procuring of abortions . . .*"<sup>249</sup> To interpret the statute as actually banning *all* abortions, whether before or after quickening, would make a mockery of the court's words. And the court's words were worthy of particular respect given that two of its justices, Henry Green and Daniel Haines, were, respectively, the primary proponent of New Jersey's 1849 abortion statute and the governor who signed it into law.<sup>250</sup> Thus, rather than banning *all* abortions, New Jersey's statute was really a kind of "malpractice indictment before the fact."<sup>251</sup> By enacting it, New Jersey did not mean to prohibit safe and lawful abortion advice; it merely meant to "guard the health and life of the mother against" shadowy practitioners whose dangerous poisons or procedures endangered them.<sup>252</sup>

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244. 27 N.J.L. 112, 114-115 (Sup. Ct. 1858).

245. *Id.* at 113.

246. *Id.* at 112-13.

247. *Id.* at 114 (emphasis added).

248. *Id.*

249. *Id.* (emphasis added).

250. MOHR, *supra* note 95, at 136-37.

251. *Id.* at 138.

252. *Murphy*, 27 N.J.L. at 114. A later New Jersey Supreme Court decision reflected the same understanding, albeit after the Fourteenth Amendment's ratification, when it explained that the "statute requires that the thing used to effect the miscarriage should be noxious—that is, hurtful." *State v. Gedicke*, 43 N.J.L. 86, 89 (Sup. Ct. 1881). I note that, unlike Louisiana and Nebraska, New Jersey's law did ban instrumental abortions. See *supra* note 243 and accompanying text. But it did so only if they were performed  
*footnote continued on next page*

*Oregon.* Another state that the *Dobbs* majority miscounts is Oregon. In fairness, one piece of circumstantial evidence implies that Oregon may have meant to ban pre-quickening procedures. In 1854, legislators in the then-territory had enacted a provision banning abortions performed on persons who were “pregnant with a quick child.”<sup>253</sup> When Oregon became a state and revised its criminal code in 1864, it did not include the word “quick” in its new abortion ban.<sup>254</sup> This omission creates the possibility that Oregon may have meant to expand its ban to include procedures performed on persons whose pregnancies had not yet quickened.

But there is direct evidence that a crucial authority in Oregon—the State’s own prosecutors—affirmatively believed the 1864 abortion statute did *not* extend to pre-quickening procedures. Indeed, Oregon prosecutors took the position that providing an abortion to a pregnant person before quickening was not a crime, and did so in open court. The case, *State v. Dunn*, involved a prosecution of an abortion provider, one Dr. Dunn, for contributing to the delinquency of a minor child.<sup>255</sup> State prosecutors had introduced evidence that Dr. Dunn had performed an abortion on one of the key defense witnesses in order to undermine the witness’s credibility.<sup>256</sup> When the Oregon Supreme Court reversed the defendant’s conviction on the ground that the testimony about the witness’s abortion was unfairly prejudicial,<sup>257</sup> the State argued on rehearing that it should not have been considered prejudicial, because under Oregon law, “unnecessary abortion is not a crime . . . unless it results in the death of the mother, or of a quick fœtus.”<sup>258</sup> That state prosecutors would publicly take this position in their own Supreme Court suggests that it was the widely understood view within Oregon even as late as 1909, four decades after the Fourteenth Amendment’s adoption.<sup>259</sup>

*Texas.* When the Fourteenth Amendment was ratified, the relevant abortion law in Texas was an 1858 statute making it a crime for any person to

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“maliciously, and without lawful justification.” Act of Mar. 1, 1849, 1849 N.J. Laws 266 (emphasis added). Instrumental procedures performed safely, and thus without malice, were accordingly within the law.

253. OR. STAT. ch. 3, § 13 (1854).

254. OR. GEN. LAWS ch. 43, § 509 (1866) (punishing abortion administered on “any woman pregnant with a child”).

255. 100 P. 258, 259 (Or. 1909).

256. *Id.* at 258-59; see also *State v. Dunn*, 99 P. 278, 281-82 (Or. 1909).

257. *Id.* at 258.

258. *Id.* (emphasis added).

259. It is fair to ask whether Oregon prosecutors’ view that the state’s abortion ban did not apply to pre-quickening procedures was an outlier. I think this is unlikely; consider the kind of public support that would be necessary before prosecutors today would consider declaring that some act plausibly within the text of an abortion ban is actually lawful.

“designedly administer to a pregnant woman . . . any drug or medicine . . . or any means whatever, externally or internally applied” such as to “procure an abortion.”<sup>260</sup> Again, the crucial question is whether the law’s applicability to a procedure performed on “a pregnant woman” meant to continue or instead override the settled common law distinction between quickened and un-quickened pregnancies.

A 1915 Texas Court of Criminal Appeals ruling suggests that the state left the quickening rule in place. *Gray v. State* concerned a criminal prosecution of M.E. Gray, a woman who was convicted at trial for performing an instrumental abortion.<sup>261</sup> Gray’s conviction was ultimately reversed on appeal due to a mistaken evidentiary ruling not relevant to our inquiry.<sup>262</sup> For present purposes, the key language in the opinion occurs in the court’s description of the history of Texas abortion legislation.

The court began its discussion by quoting language from the state’s abortion law as of 1858. Under this provision, “[i]f any person shall designedly . . . use toward’ a pregnant woman, with her consent, ‘any violence, or means whatever, externally or internally applied and shall thereby procure an abortion, he shall be punished.’”<sup>263</sup> The court then observed that the state legislature amended the 1858 provision in 1907 to define the term “abortion” to mean that “the life of the fetus *or embryo* shall be destroyed in the mother’s womb, or that a premature birth thereof be caused.”<sup>264</sup>

The legislature’s decision to expand the definition to include the destruction of an embryo, a term typically reserved for a fetus less than eight weeks old,<sup>265</sup> was significant. As the Texas Court of Criminal Appeals explained, the 1907 law’s expanded definition was meant to mark the state’s departure from the prior legal understanding in which pre-quickened abortions remained lawful. The court thus began with the by-now-familiar observation that “at common law . . . an abortion [could] be [legally] produced at any time after conception and before

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260. TEX. GEN. STAT. LAWS art. 531 (1859).

261. 178 S.W. 337, 338 (Tex. Crim. App. 1915).

262. *Id.* at 343. It is also significant to note the racist undertones to the prosecution; Gray was a Black woman whom the sheriff admitted at trial he resented, albeit “not because she was a negro, but because she is a character.” *Id.* at 341. For an important critique of Justice Clarence Thomas’s misleading use of race to attack reproductive autonomy, see generally Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021).

263. *Gray*, 178 S.W. at 338.

264. *Id.* (emphasis added).

265. See *Fetal Development: Stages of Growth*, CLEVELAND CLINIC, <https://perma.cc/9PW4-5RGR> (last updated Apr. 16, 2020) (“Generally, [a developing fetus will be] called an embryo from conception until the eighth week of development.”).

the woman was ‘quick’ with child.”<sup>266</sup> The court then reasoned that Texas legislators expanded the definition of an abortion in 1907 “for fear that the courts of this state” would continue abiding by this common law view.<sup>267</sup> And so the state explicitly expanded the law’s application to the destruction of an “embryo” in order to “prevent that construction of the [abortion law] as it formerly existed.”<sup>268</sup> In Texas, in other words, the law that existed before 1907 was the settled common law understanding that women had the right to obtain an abortion before quickening.

*Virginia and West Virginia.* Specific evidence undermines the *Dobbs* majority’s inclusion of two more states in its twenty-eight-state count: Virginia and West Virginia.<sup>269</sup> (I discuss these states together because, upon its admission into the union, West Virginia adopted the law that was then in force in Virginia.)<sup>270</sup>

In the appendix to its opinion, the majority cites a Virginia law enacted in 1848 that punished post-quickening procedures more harshly than pre-quickening ones.<sup>271</sup> Specifically, the law provided that a person who performs an abortion resulting in “the death of a quick child” would be punished by between one and five years in prison, whereas an abortion resulting in “the death of a child, not quick” would be punished by less than twelve months in prison.<sup>272</sup>

But that law was no longer in force when the Fourteenth Amendment was ratified. Indeed, the 1848 statute barely survived a year; it was replaced in August 1849, when Virginia’s General Assembly passed a new code with a different abortion law that no longer mentioned the quickening distinction.<sup>273</sup> Here is the text of the new provision, which remained in force in 1868:

Any *free* person who shall administer to, or cause to be taken, by a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or

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266. *Gray*, 178 S.W. at 338.

267. *Id.*

268. *Id.* (emphasis added).

269. For both states, as well as Texas, a set of interlocking circumstantial clues also undermine the majority’s assertion; I discuss these clues in Part III.A.2 below.

270. See Robert W. Kerns, Jr., *The History of the West Virginia Code*, 120 W. VA. L. REV. 165, 167 (2017) (“At the very beginning of its statehood, West Virginia simply adopted most of Virginia’s laws.”); W. VA. CONST. art. XI, § 8 (1863) (“[T]he laws of the State of Virginia as are in force within the boundaries of the State of West Virginia when this Constitution goes into operation . . . shall be and continue the law of this State until altered or repealed by the Legislature.”).

271. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2288 (2022); see also Act of Mar. 14, 1848, tit. 2, ch. 3, § 9, 1848 Va. Acts, ch. 120, at 93, 96.

272. Act of Mar. 14, 1848, tit. 2, ch. 3, § 9.

273. See VA. CODE tit. 54, ch. 191, § 8 (1849).

produce such abortion or miscarriage, shall be confined in the penitentiary not less than one, nor more than five years.<sup>274</sup>

The *Dobbs* majority knows—or at least *should* know—that Virginia amended its abortion law in this way. When it quotes West Virginia’s governing abortion law later in its appendix, it correctly notes that West Virginia had “adopted the laws of Virginia when it became its own State” in 1863.<sup>275</sup> And when it quotes the Virginia law in force at that time, it correctly points to the 1849 statute, not the (superseded) 1848 one.<sup>276</sup> Thus, at the time of ratification, both Virginia and West Virginia made it illegal for “[a]ny free person [to] administer to, or cause to be taken, by a woman, any drug or other thing, or [to] use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and . . . thereby destroy such child.”<sup>277</sup>

The key question, then, is what effect Virginia’s General Assembly created when it chose to amend its abortion statute so shortly after its initial enactment. What was the effect of eliminating the 1848 law’s two-tiered approach, which subjected post-quickening abortions to a one-to-five-year prison term and pre-quickening abortions to a term of less than twelve months, and retaining just the one-to-five-year term?

There are two possibilities. One is that, by eliminating the punishment associated with pre-quickening procedures, Virginia meant to punish both pre- and post-quickening abortions equivalently under the harsher, one-to-five-year punishment range. The best support for this interpretation lies in the 1849 amendment’s legislative history. The lawyers to whom the Virginia General Assembly delegated the task of compiling and recommending revisions to the state’s code suggested, in a footnote in a pre-enactment report to the General Assembly, that their proposed change would “abolish[] the distinction as to the offence and the degree of punishment between ‘a quick child’ and one that is not quick.”<sup>278</sup>

This footnote, however, was neither voted on by the legislature nor codified into Virginia law. Nor were either of the lawyers in question members

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274. *Id.* (emphasis added).

275. *Dobbs*, 142 S. Ct. at 2291.

276. *See id.* at 2292-93.

277. VA. CODE tit. 54, ch. 191, § 8 (1849); *see also supra* note 270 and accompanying text (showing that West Virginia adopted Virginia law upon its statehood); W. VA. CODE ch. 144, § 8 (1868) (imposing the same one-to-five year sentence on “[a]ny person who shall administer . . . any drug or other thing, or use any means, with intent to destroy [an] unborn child, or to produce abortion or miscarriage” and who “shall thereby destroy such child”).

278. 2 JNO. M. PATTON & CONWAY ROBINSON, REPORT OF THE REVISORS OF THE CIVIL CODE OF VIRGINIA, MADE TO THE GENERAL ASSEMBLY IN JANUARY 1849, at 941 n.\* (1849).

of the General Assembly that ultimately enacted the code.<sup>279</sup> So the pre-enactment report footnote’s persuasive authority likely turns on one’s views concerning the value of legislative history written by unelected staff.<sup>280</sup>

Several other pieces of evidence suggest a different conclusion: When the 1849 statute dropped the punishment term previously applicable to pre-quicken abortions—and only that punishment term—the public would have understood the new law’s effect as no longer punishing such conduct.

One important piece of evidence is an 1856 essay in the *Virginia Medical Journal* written by an anti-abortion physician named Dr. R.H. Tatum.<sup>281</sup> In that essay, Tatum expressed his personal opposition to abortion throughout pregnancy.<sup>282</sup> Yet Tatum lamented that “few states ha[d] enacted statutes” punishing abortion prior to quickening, including “New York, Missouri and one or two other states,” but—and this is crucial—*not Tatum’s home state of Virginia*.<sup>283</sup> Why, Tatum pleaded, is a fetus in “its present consideration, in the statutes” of states like Virginia, entitled to protection only “*after quickening*”?<sup>284</sup>

It is telling that an ardently anti-abortion Virginia physician such as Dr. Tatum read the state’s 1849 abortion law—which made no mention of quickening and punished any effort to destroy an “unborn child” by a one-to-five-year prison sentence—and concluded that it (like most other state abortion laws in the nation) did not reach procedures prior to quickening. If an *anti-abortion advocate* understood the state’s 1849 law to permit abortion prior to

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279. Both men, John Patton and Conway Robinson, were prominent Virginia lawyers then in private practice. See Christopher M. Curtis, *Codification in Virginia: Conway Robinson, John Mercer Patton, and the Politics of Law Reform*, 117 VA. MAG. HIST. & BIOGRAPHY 140, 142 (2009).

280. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (criticizing “reliance on legislative materials like committee reports” because doing so gives “unelected staffers and lobbyists[] both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text”). To this point, there is language in the revisors’ report suggesting circumstances that may lead to doubt regarding the authors’ impartiality. See PATTON & ROBINSON, *supra* note 278, at 941 n.\* (arguing that “[t]his distinction [between quick and un-quicken pregnancies] is founded on a vulgar and antiquated error which in medical science has been long ago exploded”). The sole source relied on by the authors was a letter written by “a gentleman of the medical faculty” who expressed arguments purportedly backed by “all medical men, and by all intelligent persons of every class.” *Id.*

281. R.H. Tatum, *A Few Observations on the Attributes of the Impregnated Germ*, 6 VA. MED. J. 455 (1856).

282. See *id.* at 457 (“The death of an embryo either by direct physical force or the administration of some noxious substance, should be declared murder in the first degree.”).

283. See *id.* at 456.

284. *Id.*

quickenings, it seems reasonable that ordinary members of the public would have thought the same.

This understanding draws support from a notable aspect of Virginia’s 1849 abortion law. Virginia’s 1849 provision applied on its face only to “[a]ny free person” who performed a prohibited abortion.<sup>285</sup> The 1849 Code contains no specific law punishing slaves for performing abortions. It is highly unlikely that this was an oversight: The legality of abortions performed by slaves had clearly occupied the General Assembly’s attention, as the Assembly had enacted a statute in 1843 making it a crime for any “slave, free negro or mulatto” to administer “any drug or substance whereby the abortion of any pregnant woman is caused.”<sup>286</sup> But the 1849 Code repealed this 1843 law,<sup>287</sup> even as it consciously retained the amended version of the 1848 abortion statute applicable to free persons.

Why might this matter? The answer starts with what the applicable law would have been for abortions performed by slaves after the General Assembly enacted the 1849 Code. Even though that code repealed the preexisting abortion statute applicable to slaves, a slave who performed an abortion would have still been punished—only under *common law* rather than statutory law.<sup>288</sup> On this point, at least, Virginia’s 1849 Code was clear: The code left the common law in force to fill any gaps in the state’s statutes.<sup>289</sup> And because the common law of abortion unquestionably punished persons only for procedures

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285. VA. CODE tit. 54, ch. 191, § 8 (1849).

286. Act of Jan. 28, 1843, § 4, 1843 Va. Acts ch. 87, at 59, 60.

287. See VA. CODE tit. 57, ch. 216, § 1 (1849) (“[A]ll acts . . . in force at the time of passing this act[] shall be repealed . . .”).

288. The 1849 Code contained a generic provision imposing “stripes” upon any slave who committed an “offence for which a free negro, if he had committed it, might be punished by . . . less than three years” in prison. VA. CODE tit. 54, ch. 200, § 5 (1849). But a freedman convicted of performing an abortion under the 1849 law could be punished by *more* than three years in prison, such that the generic provision would not have applied—and the common law would have instead. See VA. CODE tit. 54, ch. 191, § 8 (1849) (imposing a punishment of up to five years on freedmen who perform abortions). Furthermore, even if the generic provision did apply, it would merely show that Virginia lawmakers took a *more lenient* view of abortion in 1849. The 1843 law applicable to slaves imposed exactly thirty-nine lashes for one convicted of performing an abortion. See Act of Jan. 28, 1843, § 4, 1843 Va. Acts, ch. 87, at 59, 60. If it applied, the 1849 generic provision would have permitted fewer than thirty-nine lashes. See VA. CODE tit. 54, ch. 200, §§ 5, 9 (1849). Of course, if Virginia lawmakers held a more lenient view of abortion in 1849, that would make it unlikely that they chose to punish prequickenings more harshly—and more likely that they chose to permit it. But the likelier conclusion is that the generic provision did not apply to abortion by slaves in the first place, leaving such conduct punishable under the common law.

289. See VA. CODE tit. 9, ch. 16, § 1 (1849) (recognizing that the common law “shall continue in full force . . . and be the rule of decision, except in those respects wherein it is or shall be altered by the general assembly”).

performed *after* quickening,<sup>290</sup> the law governing slaves in Virginia after 1849 would have punished the same conduct. The converse, though, would have also been true. Under the settled common law rule,<sup>291</sup> *pre*-quickening procedures performed by slaves would have triggered no criminal liability.

This fact generates a powerful inference when it comes to what Virginia's 1849 statute meant for *free* persons who performed abortions. To conclude that the 1849 law applied equally to pre- and post-quickened abortions would lead to an untenable anomaly: Free persons could be thrown in jail for conduct (i.e., performing a pre-quickening abortion) that slaves could perform without legal punishment. Fortunately, there is an easy way to avoid this incongruity: to conclude that when the 1849 abortion statute eliminated the preexisting twelve-month punishment term for pre-quickened abortions, such procedures became lawful when performed by free persons, too.<sup>292</sup>

One final point supports this reading: how Virginia law in 1849 treated pregnant prisoners who were sentenced to death. The state would stay the execution of a prisoner who was quick with child, but not the execution of one whose pregnancy had yet to quicken.<sup>293</sup> Virginia law thus deemed an un-quickened fetus unworthy of legal protection to the point that the State would prefer to cause its death via the mother's execution than stay the execution by mere months so that the child could be born. A quickened fetus, by contrast, received a legal reprieve. This sharp divergence is far more consistent with the understanding that Virginia's 1849 abortion law banned only post-quickening procedures—a conclusion West Virginia would have embraced when it codified the same law.

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All of this evidence casts doubt on the *Dobbs* majority's assertion that Alabama, Florida, Louisiana, Nebraska, New Jersey, Oregon, Texas, Virginia, and West Virginia banned abortion throughout pregnancy as of the Fourteenth Amendment's ratification. Instead, the evidence suggests that

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290. See *supra* notes 89-94 and accompanying text.

291. See *id.*

292. To be sure, once slaves became free after the Thirteenth Amendment's ratification, they, too, became bound by the plain text of Virginia's 1849 abortion law. But that would not change the fact that the Virginia public would have understood the 1849 law all along to have never applied to pre-quickening procedures.

293. See L.S. Joynes, *On Some of the Legal Relations of the Foetus in Utero*, 7 VA. MED. J. 179, 186-87 (1856) (criticizing the durability of Virginia's quickening-based rule for executing pregnant prisoners). I am indebted to Pat Cohen for bringing this essay to my attention. The rule permitting the state to execute a woman pregnant with a pre-quickened fetus was itself deeply rooted in the common law. See 2 HALE, HISTORIA PLACITORUM CORONAE *supra* note 88, at 413 (arguing that pregnancy is "no cause to stay execution, unless [the prisoner] is [pregnant] with a quick child").

persons in these states retained the liberty to obtain an abortion up through the moment of quickening, at roughly sixteen weeks in pregnancy. In the three additional states discussed next, this same conclusion is likely true. I separate them out, however, because their cases are more circumstantial.

2. Three states where circumstantial evidence undermines the  
*Dobbs* majority's conclusion

The *Dobbs* majority lists California, Illinois, and Nevada as states that banned pre-quickening abortion when the Fourteenth Amendment was ratified.<sup>294</sup> I am aware of no specific court ruling or commentary from the time period that supports or disproves this claim. I believe, however, that a meaningful body of circumstantial evidence cuts in favor of the conclusion that pre-quickening abortions remained lawful in each state.

Start with the text of the abortion laws in the three states. California's 1861 law made it illegal to "administer . . . any medicinal substances" or "use . . . any instruments" to procure a miscarriage "of any woman then being with child."<sup>295</sup> Illinois's 1867 law made it a crime to use "any . . . means whatever" to "cause any pregnant woman to miscarry."<sup>296</sup> And Nevada's 1861 law outlawed the use of "medicinal substance[s]" or "any instruments" to "procure the miscarriage of any woman then being with child."<sup>297</sup>

Did these generic prohibitions preserve or eliminate the common law's quickening distinction? Four clues suggest that, in each state, abortion remained lawful prior to quickening.

The first clue lies in the language the three states chose *not* to enact. Put simply, if any of the states wanted to depart from the common law rule permitting pre-quickening abortions, they would not have had to look far for examples: Many of their sister states had enacted express statutory language to punish pre-quickening abortions. Eight states, for example, followed the most well-known model in existence—the two-tiered approach adopted by England in 1803 in Lord Ellenborough's Act, which punished pre-quickening abortions more leniently (typically via a prison sentence of less than one year) than post-quickening abortions.<sup>298</sup> Five more states enacted laws with a single punishment

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294. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285, 2289, 2291 (2022).

295. Act of May 20, 1861, § 1, 1861 Cal. Stat. ch. 521, at 588, 588.

296. Act of Feb. 28, 1867, § 1, 1867 Ill. Laws 89, 89.

297. Act of Nov. 26, 1861, § 42, 1861 Nev. Terr. Laws ch. 28, at 56, 63.

298. See Act of Feb. 3, 1859, §§ 10, 37, 1859 Kan. Gen. Laws ch. 28, at 231, 233, 237 (deeming abortion on "any woman, pregnant with a quick child," manslaughter in the second degree, whereas abortion on "any pregnant woman" was punishable "by imprisonment in a county jail not exceeding one year"); MICH. REV. STAT. tit. 30, ch. 153, §§ 33-34 (1846) (treating abortion on "any woman pregnant with a quick child" as manslaughter, while

*footnote continued on next page*

equally applicable to pre- and post-quickening abortions.<sup>299</sup> Critically, these states used explicit language to extend their bans before quickening, such as Maine’s prohibition against abortion “*whether such child is quick or not*,”<sup>300</sup> and Maryland’s punishment of “abortion o[n] any woman pregnant with child, *at any period of her pregnancy*.”<sup>301</sup> California, Illinois, and Nevada, however, included no such language in their statutes,<sup>302</sup> suggesting that none of them meant to depart from the common law’s quickening rule at all.

To be certain, the mere failure to follow other states’ well-known approaches to statutory drafting is not decisive. California, Illinois, and Nevada could have thought they were also punishing pre-quickening abortions, despite the absence of any clear statutory expression to that effect. But a second clue suggests this was not what the states’ lawmakers thought they were doing: the fact that authorities in multiple other states viewed their similarly worded statutes as *not* banning pre-quickening procedures.

The Alabama Supreme Court, for example, deemed a statute that used similarly generic statutory language (i.e., a ban against procedures on “any pregnant woman”) not to criminalize pre-quickening abortions.<sup>303</sup> *Smith* was

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abortion on “any pregnant woman” was punishable “by imprisonment in a county jail not more than one year”); MO. REV. STAT. art. 2, §§ 10, 36 (1835) (abortion on “any woman pregnant with a quick child” was manslaughter in the second degree; abortion on “any pregnant woman” was punishable “by imprisonment in a county jail not exceeding one year”); Quay, *supra* note 219, at 493-94 (citing N.H. Laws ch. 743, §§ 1-2 (1848) (abortion on “any woman pregnant with a quick child” punishable by one to ten years in prison; abortion on “any pregnant woman” punishable “by imprisonment in the county jail not more than one year”)); *id.* at 500 (citing N.Y. Laws ch. 260, §§ 1-2 (1845) (abortion on any “person pregnant with a quick child” deemed manslaughter in the second degree; abortion on any “pregnant woman” punishable by three to twelve months in prison)); Act of Feb. 27, 1834, §§ 1-2, 1841 Ohio Laws 252, 252 (abortion on any person “pregnant with a quick child” punishable by one to seven years in prison; abortion on any “pregnant woman” punishable by no more than one year in prison); Act of Mar. 31, 1860, §§ 87-88, 1860 Pa. Laws No. 374, at 382, 404-05 (abortion on any person “pregnant or quick with child” where “such woman, or any child with which she may be quick, shall die” punishable by up to seven years in prison; abortion on “any woman” punishable by less than three years in prison); WIS. REV. STAT. ch. 164 § 11, ch. 169 § 58 (1858) (abortion on “any woman pregnant with a child” punishable as manslaughter in the second degree; abortion on “any pregnant woman” punishable by no more than one year in prison).

299. ME. REV. STAT. tit. 11, ch. 124, § 8 (1857); Act of Mar. 28, 1868, § 2, 1868 Md. Laws ch. 179, at 314, 315; *see also* Quay, *supra* note 219, at 468 (citing Ind. Laws ch. 81, § 2 (1859) (“to any woman whom [the abortion provider] supposes to be pregnant”)); *id.* at 516 (citing Vt. Acts No. 57, § 1 (1867) (“any woman supposed by such person to be pregnant”)); Act of Mar. 15, 1861, § 1, 1861 R.I. Pub. Laws ch. 371, at 128, 128 (same).

300. ME. REV. STAT. tit. 11, ch. 124, § 8 (emphasis added).

301. Act of Mar. 28, 1868, § 2, 1868 Md. Laws ch. 179, at 314, 315 (emphasis added).

302. *See supra* notes 295-97 and accompanying text.

303. *See Smith v. Gaffard*, 31 Ala. 45, 51 (1857).

decided in 1857, before lawmakers in California, Illinois, and Nevada enacted their respective abortion statutes.<sup>304</sup> Perhaps those lawmakers were unaware of the ruling. But if they *were* aware of it, it is unlikely they would have felt confident that their materially similar statutes would be interpreted as banning pre-quickening procedures. The more logical inference is that all three states agreed with *Smith's* conclusion: Pre-quickening abortion was lawful under a statute that banned procedures on a “pregnant woman,” just as it had been since the Founding.<sup>305</sup> They would not have been alone in this understanding: Authorities in Oregon and Texas also interpreted similarly generic statutes to apply only after quickening.<sup>306</sup>

A third clue about the California, Nevada, and Illinois abortion laws lies in their punishment terms. All three states imposed harsh punishment on the covered procedures. California’s law imposed a minimum two-year sentence with a statutory maximum of five years.<sup>307</sup> Nevada’s law did the same.<sup>308</sup> And Illinois imposed a two-year minimum with a ten-year maximum.<sup>309</sup>

These stringent sentencing provisions create a strong inference that the laws only applied to the most culpable kind of abortion procedures: those performed on a quickened fetus. To see why, consider how the states’ punishment terms compared to the prison sentences that Lord Ellenborough’s Act states explicitly imposed on abortions performed after quickening. New Hampshire, for instance, expressly punished abortions performed on “any woman pregnant with a quick child” by “not less than one year, nor more than

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304. *See supra* notes 295-97 and accompanying text.

305. To be sure, one state court had held similarly generic statutory language to reach pre-quickening procedures by the time the three states enacted their own laws. *See Commonwealth v. Wood*, 77 Mass. (11 Gray) 85, 93 (1858) (holding that Massachusetts’s 1845 abortion statute reached procedures performed without regard to quickening); Act of Jan. 31, 1845, 1845 Mass. Acts ch. 27, at 406 (punishing “[w]hoever, maliciously or without lawful justification . . . procure[s] the miscarriage of a woman then pregnant with child”). But if lawmakers in California, Illinois, or Nevada truly wished their abortion bans to reach pre-quickening procedures, the very existence of a conflict in interpretation between *Commonwealth v. Wood* and *Smith v. Gaffard* would have been a powerful reason to avoid any doubt by adopting a law *explicitly* banning procedures prior to quickening, just as many other states had done.

306. *See State v. Dunn*, 100 P. 258, 258 (Or. 1909) (state prosecutors conceded that “abortion is not a crime . . . unless it results in the death of the mother, *or of a quick fœtus*” (emphasis added)); *Gray v. State*, 178 S.W. 337, 338 (Tex. Crim. App. 1915) (observing that Texas amended its law to define “abortion” as including the destruction of an “embryo” in order to “prevent that construction of the [state’s abortion law] *as it formerly existed*,” namely that “the courts of this state might hold that an abortion could not be [punished] unless [the mother] was ‘quick’ with child” (emphasis added)).

307. Act of May 20, 1861, § 1, 1861 Cal. Stat. ch. 521, at 588, 588.

308. Act of Nov. 26, 1861, § 42, 1861 Nev. Terr. Laws ch. 28, at 56, 63.

309. Act of Feb. 28, 1867, § 1, 1867 Ill. Laws 89, 89.

ten years.”<sup>310</sup> Ohio’s law imposed a sentence of “not more than seven years, nor less than one year” on anyone who performed an abortion on “any woman, pregnant with a quick child.”<sup>311</sup> California, Illinois, and Nevada imposed sentences with a higher mandatory minimum and similar statutory maximums—implying that their bans were targeted at the same, post-quickenening conduct.

By contrast, the Lord Ellenborough’s Act states imposed substantially less onerous prison sentences on persons convicted of performing an abortion on an un-quickened fetus. For example, the only state to explicitly require a mandatory minimum sentence for pre-quickened abortions was New York, which required a minimum term of just *three months*.<sup>312</sup> That is a far cry from the *two-year* minimum imposed by California, Illinois, and Nevada.<sup>313</sup> The Ellenborough Act states also imposed far lower statutory maximums for pre-quickening abortions. Seven states set the maximum prison sentence for a pre-quickened abortion at one year; an eighth (Pennsylvania) permitted a maximum sentence for a pre-quickened abortion of no more than three years.<sup>314</sup> These terms are difficult to square with the five-year maximum sentence in California and Nevada and the ten-year maximum in Illinois.<sup>315</sup> In short, if California, Illinois, and Nevada’s laws had truly applied to pre-quickened abortions, they would have stuck out like a sore thumb as the most draconian in the nation.<sup>316</sup> The stronger inference is that, by making their punishment terms similar to (or even harsher than) those that applied exclusively to *post*-quickening abortions in other states, California, Illinois, and Nevada meant for their laws to apply only to that same conduct.

A fourth and final clue is the lack of reported prosecutions in the three states for abortions performed prior to quickening. If any of the three state laws were understood to punish pre-quickening procedures, one would expect state prosecutors to have actually charged—and convicted—providers for such conduct. But to my knowledge, no such prosecutions or convictions were

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310. Quay, *supra* note 219, at 494 (citing N.H. Laws ch. 743 § 2 (1848)).

311. Act of Feb. 27, 1834, § 2, 1841 Ohio Laws 252, 252.

312. Quay, *supra* note 219, at 500 (citing N.Y. Laws ch. 260, § 2 (1845)).

313. *See supra* notes 307-09 and accompanying text.

314. *See supra* note 298.

315. *See supra* notes 307-09 and accompanying text.

316. The three states’ punishment terms were also far harsher than many of the states that explicitly banned pre- and post-quickenening procedures subject to equivalent punishment terms. *See, e.g.*, Act of Mar. 15, 1861, § 1, 1861 R.I. Acts & Resolves ch. 371, at 128, 128 (setting a one-year maximum sentence for any abortion, quick or not); Quay, *supra* note 219, at 468 (1961) (citing Ind. Laws. ch. 81, § 2 (1859) (same)).

reported in these states in at least the period surrounding the Fourteenth Amendment's ratification.<sup>317</sup>

In the end, the *Dobbs* majority's conclusion that California, Illinois, and Nevada banned abortion throughout pregnancy requires one to believe that all three states: (i) attempted to depart from the common-law quickening rule without the use of express statutory language already employed by other states; (ii) believed their generic bans against abortions on "any woman then with child" applied to pre-quickening procedures, even though a number of states with materially identical language, including Alabama, Oregon, and Texas, understood the opposite to be true of their laws; (iii) meant to punish pre-quickening abortions far more harshly than virtually any other state that explicitly outlawed pre-quickening procedures; and (iv) did so all despite the absence of any reported convictions for pre-quickening procedures. One could attempt this quadruple bank shot. Or one could conclude that the three states were simply embracing the uniform common law understanding, engrained since the Founding, that pregnant persons had the liberty to obtain an abortion before quickening.

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I have written elsewhere to criticize the *Dobbs* majority for its faulty historical analysis,<sup>318</sup> so it is not my purpose to relitigate that case here. Suffice it to say that, for an opinion that claims *Roe* was "egregiously wrong" in its own historical conclusions, it is extremely troubling that the "most important historical fact" the *Dobbs* majority believed it had proven was no fact at all.<sup>319</sup> At a minimum, it is much harder to claim that *Roe* was egregiously wrong on the bottom-line existence of a deeply rooted history and tradition of permitting abortion when a majority of states at the Fourteenth Amendment's

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317. I base this conclusion on two Westlaw searches for cases from the relevant jurisdictions containing either the terms "abortion" and "quick!" or "abortion" and "months" between 1861 (when California and Nevada adopted their laws) and 1900. I searched for "months" in order to determine if any defendant was convicted for performing an abortion in a case where the fetus was fewer than four months old. However, my search returned cases where the fetus was older and thus quickened at the point of abortion. *See, e.g.,* *Scott v. People*, 30 N.E. 329, 332 (Ill. 1892) (prosecution for abortion in a case where the "age of the foetus was seven months"). In fairness, the absence of reported cases involving pre-quickened abortions could surely reflect other factors, such as contemporary reporting practices or prosecutorial discretion, so it would be too much to conclude on this evidence alone that the three states did not prohibit pre-quickening procedures.

318. Aaron Tang, Opinion, *Op-Ed: The Supreme Court Flunks Abortion History*, L.A. TIMES (May 5, 2022, 3:00 AM PT), <https://perma.cc/LMJ5-3Z99>; Aaron Tang, *What Justice Alito Can Learn from a 114-Year-Old Sex Abuse Scandal*, SLATE (June 2, 2022, 12:32 PM), <https://perma.cc/7ZRK-L2BS>.

319. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265, 2267 (2022).

ratification embraced exactly that tradition. And at a maximum, the existence of this tradition—plus the universal permission of pre-quicken abortion at the Founding—should have created a plausible originalist case for grounding a middle-ground right to abortion in the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>320</sup>

Again, this is all water under the bridge. But getting the history of abortion law right matters for the future, too. For starters, if there comes a point in time when *Dobbs* itself is reconsidered, it will be important for stare decisis purposes to show that the decision was itself egregiously wrong.<sup>321</sup> The fact that the majority erred in the historical state count that served as the backbone of its ruling could be an important part of that argument.

Even more pressingly, the correct state count will be central to the fate of anti-abortion groups’ second strategy for banning abortion across the country. For if a majority of states permitted abortion for much of early pregnancy when the Fourteenth Amendment was ratified, it is difficult to see how those same states could have possibly understood the Amendment to actually ban all abortions when it granted due process and equal protection rights to “any person.”<sup>322</sup> I consider this argument now.

## B. The Historical Case Against Fetal Personhood

If anti-abortion groups cannot enact a federal statutory abortion ban, the “next frontier” is the argument that unborn fetuses are “persons” entitled to protection under the Fourteenth Amendment.<sup>323</sup> The *Dobbs* majority explicitly left this argument open, writing that its decision did not reflect “any view” on the question of when “prenatal life” should be regarded as “having rights or legally cognizable interests.”<sup>324</sup>

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320. See Tang, *Abortion Middle Ground*, *supra* note 40, at 60-63; BARNETT & BERNICK, *supra* note 65 at 239 (suggesting, as a rule of originalist construction, that “if individual citizens have for at least a generation—that is, thirty years or more—been entitled to enjoy a right as a consequence of the constitutional, statutory, or common law of a supermajority of the states, it is presumptively a privilege” protected under the Clause); McConnell, *supra* note 65, at 696 (arguing that the original understanding of the Privileges or Immunities Clause should permit an individual to “challenge the denial of any right that has been recognized by a sufficiently large number of states for a sufficiently long period of time so that it can truly be said to be part of the fabric of American liberty”).

321. *Dobbs*, 142 S. Ct. at 2265 (holding that the “nature of the Court’s error” is an important factor in the stare decisis framework, with “egregiously wrong” rulings especially susceptible to overruling).

322. See U.S. CONST. amend. XIV, § 1.

323. Lisa Needham, *A Brief Guide to Fetal Personhood, the Next Frontier in Anti-Choice Politics*, BALLS & STRIKES (May 25, 2022), <https://perma.cc/U3HQ-GDG5> (capitalization altered).

324. *Dobbs*, 142 S. Ct. at 2256.

Recognizing fetal personhood under the Fourteenth Amendment would have profound implications—a fact that was apparent even in *Roe*. If fetal “personhood is established,” Justice Blackmun wrote, “the fetus’s right to life would then be guaranteed specifically by the Amendment” and any right to abortion would “collapse[.]”<sup>325</sup> Not only would states be free to ban abortion subject to the democratic process, as is the case after *Dobbs*, but they would be constitutionally obligated to ban it.<sup>326</sup> And unlike a federal abortion ban—which would at least be reversible through federal legislation—a constitutional ruling that the unborn fetus is entitled to Fourteenth Amendment protection could only be overridden through a constitutional amendment (or subsequent Supreme Court decision).

To be sure, fetal personhood is not imminent. Justice Kavanaugh wrote separately in *Dobbs* to express his view that the fetal personhood argument was “wrong as a constitutional matter.”<sup>327</sup> But it is just as notable that no other justice from the majority joined him in that declaration. It is quite possible, in other words, that we are just one vote away from the Supreme Court enshrining a constitutional rule that would forbid abortion nationwide, a vote that could be in play when the Chief Justice chooses to retire. For this reason, it is more important than ever to respond to the fetal personhood argument—and especially important to do so using logic consistent with *Dobbs* itself.

Such a response begins with an important line of reasoning in *Dobbs*, which focuses on the field of state abortion law at the time of the Fourteenth Amendment’s adoption. In responding to the Solicitor General’s argument that a right to abortion was deeply rooted in history and tradition in 1868 because some (but not all) states permitted it under the common law quickening rule, the Court pointed to the existence of disagreement among the states as evidence that abortion bans remained legitimate objects of democratic lawmaking. “[T]he fact that many States . . . did not criminalize pre-quickening abortions,” the majority argued, “does not mean that anyone thought the States lacked the authority to do so.”<sup>328</sup> Moreover, the majority also argued that “[w]hen legislatures began to exercise” their authority to ban abortions in the mid-nineteenth century, “no one, as far as we are aware, argued that the laws they enacted violated a fundamental right.”<sup>329</sup> The presence of divergent state

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325. *Roe v. Wade*, 410 U.S. 113, 156-57 (1973), *overruled by Dobbs*, 142 S. Ct. 2288.

326. See Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners at 2, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3374325.

327. *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring).

328. *Id.* at 2255.

329. *Id.*

policy choices was thus evidence that abortion policy was within the legislatures' legitimate discretion.

But if that is true for abortion bans, it must also be true for laws *permitting* abortion. That is to say, the fact that some states in 1868 chose not to permit abortion “does not mean that anyone thought the States lacked the authority to do so.”<sup>330</sup> When some states considered the abortion issue and chose to ban the procedure and others chose to permit it in early pregnancy, they provided evidence that allowing abortion *also* remained a legitimate object of the democratic process. Indeed, the *Dobbs* majority wrote on the very first page of its opinion that, “[f]or the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens.”<sup>331</sup> Given this observation, if a state's citizens wished to permit abortion, it is hard to see how the Fourteenth Amendment could pose a barrier. What is more, I am aware of no evidence from the time of the Fourteenth Amendment's ratification that anyone thought the states that chose to permit abortion were violating the Constitution. Even though “abortion was known, had been known for millennia, and there had been arguments about whether life began at quickening or some other stage prior to birth,” one pro-life advocate admits, “the records are bare of any such question or discussion” at the time of the Fourteenth Amendment's introduction and ratification.<sup>332</sup>

To their great credit, several ardently pro-life legal thinkers have recognized the force of this evidence from the time of the Fourteenth Amendment's ratification. Justice Scalia, for example, famously quipped that “some states prohibited [abortion], some states didn't,” proof enough to him that abortion “was one of those many things . . . left to democratic choice.”<sup>333</sup> Judge Robert Bork was even more forceful, writing that “[i]t is impossible to suppose that the states ratified an Amendment they understood to outlaw all abortions but simultaneously left in place their laws permitting some abortions.”<sup>334</sup> And more recently, Lee Strang has observed that the “strongest originalist reason that supported Justice Blackmun's conclusion that unborn human beings are not constitutional persons was the historical evidence that some states in 1868 allowed abortion in some instances.”<sup>335</sup>

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330. *Id.*

331. *Id.* at 2240.

332. Nathan Schlueter & Robert H. Bork, *Constitutional Persons: An Exchange on Abortion*, FIRST THINGS (Jan. 2003), <https://perma.cc/8UGH-FLSY>.

333. *Piers Morgan Tonight: Interview with Antonin Scalia*, (CNN television broadcast July 21, 2012), <https://perma.cc/X52N-BUZZ>.

334. Schlueter & Bork, *supra* note 332.

335. Strang, *supra* note 42, at 5.

Each of these pro-life writers has evenhandedly acknowledged the strength of the historical evidence against fetal personhood based on the assumption that nine of the thirty-seven states allowed pre-quickening abortion when the Fourteenth Amendment was adopted.<sup>336</sup> But if the argument is strong on that set of facts, it is even stronger when one realizes that a much larger number—as many as twenty-one states<sup>337</sup>—actually permitted abortions during early pregnancy. Put another way, when the Fourteenth Amendment was ratified, a majority of the states took the view that unborn fetuses were not persons with respect to the exact question at hand.

Other evidence supports this understanding. *Roe* undertook a careful analysis of other provisions in the Constitution to conclude that its other references to the term “person” applied “only postnatally.”<sup>338</sup> The most significant other use of the word “person” comes in Section 2 of the Fourteenth Amendment, just words away from the Due Process and Equal Protection Clauses.<sup>339</sup> That section repealed the infamous Three-Fifths Compromise, reapportioning congressional representation based on the “whole number of persons in each State.”<sup>340</sup> Yet when the nation went about counting the whole number of persons for the 1870 census, not only did officials never discuss the possibility of counting unborn persons, but they affirmatively rejected it. Thus, when it turned out that the census had accidentally counted “tens of thousands of children” who were born months after the official 1870 census date—who were, in other words, unborn fetuses at that time—everyone from census bureau officials to a Senate committee on the census found it obvious that such fetuses should not be counted as constitutional “persons.”<sup>341</sup>

There is also direct evidence indicating a popular understanding of whether and when an unborn fetus became a “person,” separate and apart from state law. This evidence would seem especially relevant to an original public meaning originalist who believes the Constitution’s text should be interpreted in accordance with “the meaning that the text had for . . . the citizens who constituted the United States.”<sup>342</sup> As Siegel has shown, “most Americans held fast to the quickening distinction” as of the Fourteenth Amendment’s

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336. See *Dobbs*, 142 S. Ct. at 2252-53.

337. This number is the sum of the nine states *Dobbs* agrees permitted abortion as of the Fourteenth Amendment’s adoption and the twelve states discussed in Part III.A above.

338. *Roe v. Wade*, 410 U.S. 113, 157 (1973); see also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 774-75 (1999) (praising *Roe*’s intratextualist approach).

339. See U.S. CONST. amend. XIV, § 2.

340. *Id.*

341. See Michael L. Rosin, *Congress Has Never Considered Fetuses Persons Within the Meaning of the 14th Amendment*, SLATE (June 9, 2022, 11:50 AM), <https://perma.cc/DD5N-NLTX>.

342. See Solum, *supra* note 195, at 1626.

adoption.<sup>343</sup> Anti-abortion lawmakers in Ohio thus complained of the lay view in 1867 that “prevail[ed] very generally that a woman can throw off the product of conception, especially in the early stages, without moral guilt.”<sup>344</sup> An 1867 article in the *Boston Medical & Surgical Journal* likewise described the understanding that had “become prevalent among so-called intelligent women, that miscarriage or abortion at less than three months is a matter of small consequence [because] [t]here is no life at that period.”<sup>345</sup> Similar evidence is plentiful.<sup>346</sup> The public’s widespread understanding that the abortion of a pre-quickenened fetus was not wrongful is difficult to reconcile with any attempt to defend constitutional fetal personhood as a matter of original public meaning.

The strongest counterargument to all of this evidence is advanced in an amicus brief filed by Strang in *Dobbs*. In Strang’s view, the fact that so many states continued to permit abortion in violation of constitutional fetal personhood can be excused as a factual mistake made by nineteenth-century state lawmakers.<sup>347</sup> This argument trades on the important originalist distinction between a provision’s original meaning and how its ratifiers expected it to apply. Whereas original expected applications are certainly *evidence* of a provision’s original meaning, they are defeasible if they are based on what Larry Solum has called a “false belief about the facts.”<sup>348</sup> Strang thus argues that the original meaning of “person” in the Fourteenth Amendment includes “the natural kind of human being,”<sup>349</sup> but that some nineteenth-century state lawmakers mistakenly permitted abortion in 1868 because they were unaware of developments in medical knowledge suggesting that unborn fetuses were in fact “human from conception.”<sup>350</sup>

The trouble with this argument is that it depends on a version of history that *Dobbs* itself refutes. To carry force, the original-meaning/expected-application distinction would require medical arguments that the unborn fetus is human from the moment of conception to have been unknown, or a fringe

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343. Siegel, *supra* note 151, at 62 n.232.

344. 1867 OHIO SENATE J. APP’X 234.

345. L.C. Butler, *The Decadence of the American Race, as Exhibited in the Registration Reports of Massachusetts, Vermont [and Rhode Island]; the Cause and the Remedy*, 77 BOS. MED. & SURGICAL J. 89, 93 (1867).

346. *See supra* notes 196-99 and accompanying text (showing the prevalent understanding that pre-quickenening abortion was morally permissible); Evan D. Bernick & Jill Wieber Lens, *Abortion, Original Public Meaning & the Ambiguities of Pregnancy* 25-48 (Feb. 2, 2023) (unpublished manuscript), <https://perma.cc/Q63J-9TEC> (describing the public’s experience in 1868 as not viewing personhood as beginning upon conception).

347. Brief of Amicus Curiae Lee J. Strang, *supra* note 42, at 23.

348. Solum, *supra* note 195, at 1664-66.

349. Brief of Amicus Curiae Lee J. Strang, *supra* note 42, at 14.

350. *Id.* at 2, 6, 19-20.

theory, to lawmakers in the many states that permitted abortion at the Fourteenth Amendment's adoption in 1868. Only then could it be said that their decision to continue permitting abortion—in apparent contravention of fetal personhood—was the product of a factual error that was later corrected as medical knowledge advanced.

Yet as *Dobbs* points out, physicians had argued for several decades before the Fourteenth Amendment's ratification that the fetus was alive and human from conception. The *Dobbs* majority thus cites a litany of medical literature, including works from 1807, 1823, and 1836, all of which raised the supposedly “new” factual claim (as of 1868) that fetal life begins upon conception.<sup>351</sup> In fact, a renowned English physician named Thomas Percival had advanced this proposition as early as 1803, when he wrote that “[t]o extinguish the first spark of life is a crime of the same nature . . . as to destroy an infant, a child, or a man.”<sup>352</sup>

The takeaway is that when state lawmakers voted to ratify the Fourteenth Amendment, they were fully aware of medical arguments about when life begins. And when they ratified that Amendment and simultaneously chose to permit abortion for much of early pregnancy, their decision reflected not a factual error, but a conscious understanding of what the Amendment *meant*. Unborn fetuses were not constitutional “persons” entitled to the protection of obligatory state law abortion bans.

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351. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2252 n.32 (2022) (citing JOSEPH CHITTY, A PRACTICAL TREATISE ON MEDICAL JURISPRUDENCE 438 (2d Am. ed., Philadelphia, Carey, Lea & Blanchard 1836); 1 THEODRIC ROMEYN BECK & JOHN B. BECK, ELEMENTS OF MEDICAL JURISPRUDENCE 293 (5th ed., Albany, O. Steele 1835); and 2 THOMAS PERCIVAL, THE WORKS, LITERARY, MORAL, AND MEDICAL 430 (Bath, Richard Cruttwell 1807)).

352. THOMAS PERCIVAL, MEDICAL ETHICS; OR A CODE OF INSTITUTES AND PRECEPTS 79 (London, S. Russell 1803). Nor can it be argued that lawmakers were unaware of abortion as a social practice. Abortion was an open and common activity; medical records show that thousands of abortions were performed across the twenty-one states, with some contemporary commentators estimating a rate of roughly one abortion for every five pregnancies. See P.S. Haskell, *Criminal Abortion*, 4 TRANSACTIONS OF THE MAINE MEDICAL ASSOCIATION, 1871-1873, at 465, 466 (1873) (describing no fewer than two thousand abortions each year in the state of Maine); W.J. Chenoweth, *A Case of Criminal Prosecution for Murder by Causing Abortion*, 41 CINCINNATI LANCET & CLINIC 361, 362 (1879) (suggesting that, in Illinois, 25% of all pregnancies were terminated by abortion). But see Patricia Cline Cohen, *Horatio R. Storer and the Statistics of Nineteenth-Century Abortion*, ORG. AM. HISTORIANS BLOG (forthcoming) (on file with author) (arguing that claims about abortion's statistical prevalence in the mid-nineteenth century were artificially inflated in order to advance the anti-abortion movement's agenda). The claim that the Fourteenth Amendment rendered each and every one of these thousands of state-permitted operations a constitutional violation would have been, to put it mildly, surprising news to the public.

### Conclusion

“It is not often in the law that so few have so quickly changed so much,” Justice Breyer observed fifteen years ago, after the Court’s decision to invalidate voluntary school desegregation efforts in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>353</sup> “[T]hat has never been more true than today,” Justices Breyer, Sotomayor, and Kagan lamented in their joint dissent in *Dobbs*.<sup>354</sup>

But it is possible we are only in the middle of the arc of change. Fresh off their victory in *Dobbs*, and unsatisfied with state-by-state prohibitions, anti-abortion advocates are hungry for a nationwide abortion ban. One way they are pursuing it is through a congressional statute;<sup>355</sup> the other is by constitutionalizing fetal personhood.<sup>356</sup> Either way, they are coming for reproductive autonomy in blue states, too. This Article has presented evidence that the Constitution—and a correct understanding of our nation’s history—precludes both approaches.

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353. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES (July 1, 2007), <https://perma.cc/6PZZ-PU2F>.

354. *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (quoting STEPHEN BREYER, *BREAKING THE PROMISE OF BROWN: THE RESEGREGATION OF AMERICA’S SCHOOLS* 30 (2022)).

355. *See supra* notes 70-72 and accompanying text.

356. *See supra* notes 182-87 and accompanying text.