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## Women Seldom Make History and Tradition: Patriarchal Originalism in Dobbs

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**WOMEN SELDOM MAKE HISTORY AND TRADITION: PATRIARCHAL  
ORIGINALISM IN DOBBS**

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\*Juris Doctor candidate, 2024, at DePaul University College of Law. Many thanks to Professor Manoj Mate for his instruction and guidance during the Supreme Court and Public Policy seminar course in which this essay was developed and written and for his feedback on the essay after the conclusion of the course. Additional thanks are owed to those who read this essay and provided invaluable feedback: Leonard Brahin, Professor David Franklin, and Valentine McLemore. I would like to thank Dr. Sarah White, a lecturer in medieval history at the University of Lancaster. Additionally, I want to thank the staff at DePaul's Rinn Law Library and the Chicago Public Library for helping me find and providing many of my sources.

ABSTRACT

*This essay juxtaposes New York Rifle & Pistol Association v. Bruen with Dobbs v. Jackson Women's Health Organization to examine the originalist methodology used in both cases and expose how superficially Dobbs treated the history and tradition of abortion.*

*Bruen is methodologically thorough in that Justice Thomas, writing for the majority, explains his analytical process in detail and provides justifications for his conclusions. He gives varying weight to sources from different time periods and after taking different factors into consideration, such as how long a statute existed. Regardless of the substance of Justice Thomas' conclusions, he delves into history and tradition, attempting to imagine the thought processes of those who crafted laws and the experiences of those who lived in a world shaped by those laws.*

*In contrast, Dobbs pays short methodological shrift to history and tradition, simply invoking various authorities without really exploring or expanding upon them. Justice Alito's majority opinion calls upon centuries-old English common-law treatises without acknowledging their age or justifying their use. The superficiality of the majority's historical accounting is most glaring in its kid-glove treatment of the 19th-century anti-abortion laws at the heart of the case's reasoning. If Justice Alito had plumbed the depths of the histories he uses to the extent that Bruen does, their failings would have become apparent. In Dobbs, the Court calls Matthew Hale "eminent common law authorit[y]," despite the fact that Hale single-handedly created the marital rape exception out of thin air. The case's constitutionally suspect shortcomings are further revealed upon actually reading the trial record of the only woman mentioned by name in Justice Alito's historical analysis: Eleanor Beare.*

*If the Court had looked to the full history and tradition of abortion as defined by those who had or needed abortions, the Court would have found a negative right to pre-quickening abortions under the Glucksberg test. Both pregnancy and abortion were understood in fundamentally different terms during the 19th century than they are today, and abortion was a prevalent part of women's lives. It was also something they had some measure of control over, as opposed to the many, many other aspects of their lives where they had little to no agency. However, the Court ignores the history of those who had or needed abortions, and Justices Thomas and Alito uncritically concur with each other without addressing their cases' starkly different approaches to history and tradition. The Supreme Court's unscrupulous use of history and tradition portends disastrous consequences for unenumerated rights cherished by marginalized communities.*

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## INTRODUCTION

The iconic phrase “well-behaved women seldom make history” was coined in an academic article written by Laurel Thatcher Ulrich in the 1970s.<sup>2</sup> Long before it became a feminist rallying cry, Professor Ulrich used the phrase to describe how history tends to chronicle women who defied expectations while conventional women largely fade into obscurity.<sup>3</sup> As the Supreme Court increasingly mandates history and tradition tests for constitutional rights, whose history and tradition will the Court consider? Two opinions from the 2021-2022 term—*New York Rifle & Pistol Association v. Bruen*<sup>4</sup> and *Dobbs v. Jackson Women’s Health Organization*<sup>5</sup>—deploy originalism in starkly different ways to strike down the fundamental right to abortion while expanding gun rights. Comparing these cases’ contrasting methodologies reveals the reality that women, well-behaved or otherwise, seldom make history and tradition, or at least of the kind the Court is willing to give credence to.

Juxtaposing *Bruen* with *Dobbs* exposes how the Court superficially engaged with sources and obscured history to eliminate the fundamental right to abortion. This essay challenges the Supreme Court’s disparate historical analyses by fully delving into the histories and traditions used by the Court and examining

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<sup>2</sup> See generally Laurel Thatcher Ulrich, *Well-Behaved Women Seldom Make History* xiii-xxxiv (2007).

<sup>3</sup> *Id.*

<sup>4</sup> *New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>5</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

them with an unflinching clarity absent from the *Dobbs* opinion. Essentially cite-checking *Dobbs*, this essay undertakes a significant amount of historical legwork for an opinion that, for all its talk of history and tradition, is light on historical detail. This essay confronts the Court's older sources as ancient texts written by men who opined on the criminal procedure for witchcraft and illuminates the Court's 19th-century sources as the handiwork of a sexist, anti-Catholic, and nativist movement.

Some of these observations are not novel, at least on a surface level. However, actually digging deep into the Court's histories and traditions—expounding on topics, such as the nature of court-ordered public humiliation in 12th-century England and the deadly consequences of admitting spectral evidence in the Salem Witch Trials—demonstrates just how shallow *Dobbs*' historical analysis is and how adrift the Court's sources are when divorced from their contexts. Examining the trial record of the only woman mentioned by name in Justice Alito's historical analysis shows the control of men, not just in history, but also in how history and tradition are framed and understood by the Court today. This essay rejects that constrained, constitutionally suspect version of history and tradition in favor of the lived experiences of those who had or needed abortions.<sup>6</sup>

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<sup>6</sup> Abortion impacts people who can become pregnant, which is a population far from monolith in terms of gender identity. We Testify, *Abortion Explained! Queer and Trans Justice*, <https://www.wetestify.org/abortion-explained-queer-trans-justice> (last visited Dec. 16, 2022). Trans, nonbinary, intersex, and other gender nonconforming people have existed in America since well before the Founding, as numerous Native American cultures embraced, and still embrace, gender nonconforming people. Genny Beemyn, *Transgender History in the United States* 5 (2022); see generally Katherine Davis-Young, *For many Native Americans, embracing LGBT members is a return to the past*, *The Washington Post* (Mar. 29, 2019),

An accurate accounting of their histories and traditions portrays a dramatically different view than the one presented by the Court, one where pregnancy and abortion were understood in fundamentally different terms than they are today and where pregnant people had and exercised agency.

This essay consists of five parts. Parts I and II feature selections from the many responses to *Bruen* and *Dobbs*, highlight previous scholarship on the Court's use of history and tradition, and briefly survey originalism to establish a baseline for the essay's substantive discussion. Part III uses *Bruen* as a jumping-off point of comparison to inform a lengthier analysis of *Dobbs* in Part IV, each part examining Justices Thomas' and Alito's varying uses and applications of history and historical sources on behalf of the Court, touching on what sources they were willing to use and how deeply they were willing to engage with these sources. After demonstrating how superficial and flawed Justice Alito's historical analysis is, Part V will propose a fundamental, negative right to pre-quickening<sup>7</sup> abortion by

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[https://www.washingtonpost.com/national/for-many-native-americans-embracing-lgbt-members-is-a-return-to-the-past/2019/03/29/24d1e6c6-4f2c-11e9-88a1-ed346f0ec94f\\_story.html](https://www.washingtonpost.com/national/for-many-native-americans-embracing-lgbt-members-is-a-return-to-the-past/2019/03/29/24d1e6c6-4f2c-11e9-88a1-ed346f0ec94f_story.html).

Thomas/Thomasine Hall was an intersex and genderfluid or bi-gender colonist ordered to wear men's pants and a woman's apron and cap by the Jamestown court in 1629. Beemyn, *supra* note 6, at 1. Gender nonconforming people became more visible in society shortly before the Fourteenth Amendment's ratification. *Id.* at 7. While putting modern terms like "transgender" on people who lived before that word existed could be problematic, historians are able to distinguish between those who could have been what modern society would call transgender versus those who dressed or acted outside of prescribed norms to escape narrow gender roles or to pursue same-sex relationships. *Id.* at 1. All research for this article was gleaned from sources that failed to discuss gender nonconforming people and focused solely on the histories of cisgender women. Hopefully, other researchers will be up to the task of addressing this gap in the readily accessible history and tradition of abortion.

<sup>7</sup> "Quickening" is the term for when a pregnant person can feel the fetus move within them. The timing varies but usually happens at sixteen to twenty weeks of pregnancy but can happen as early

applying *Washington v. Glucksberg*'s<sup>8</sup> test to the lived histories and legal traditions of those who had or needed abortions in the mid-to-late-19th century.

## I. LITERATURE REVIEW

A great deal of ink has already been spilled on *Bruen* and *Dobbs*. Professor Saul Cornell contends that the picture presented in *Bruen*'s historical analysis is nothing short of an ahistorical bizarro world.<sup>9</sup> He argues that Justice Thomas's originalist methodology has a more rigorous standard of review for histories and sources that cut against gun rights while being much less discerning when it comes to histories and sources that support gun rights.<sup>10</sup> Cornell says this is especially evident in the *Bruen* majority's treatment of Reconstruction regulations of gun possession and use. For example, contrary to Justice Thomas' portrayal of history, local gun laws flourished during the 1870s in both the East and the West.<sup>11</sup> Reaction to *Bruen* was not limited to legal academia. The case set out a new rule: a gun regulation is valid so long as it has a comparable analog in America's history and

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as thirteen weeks and as late as twenty-five weeks. Cleveland Clinic, *Quickening in Pregnancy* (Apr. 22, 2022), <https://my.clevelandclinic.org/health/symptoms/22829-quickening-in-pregnancy>; Brief for Amici Curiae American Historical Ass'n & Org. of American Historians in Support of Respondents at 2, *Dobbs v. Jackson Whole Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Am. Pregnancy Ass'n, *First Fetal Movement: Quickening*, <https://americanpregnancy.org/healthy-pregnancy/pregnancy-health-wellness/first-fetal-movement/> (last visited Dec. 15, 2022).

<sup>8</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>9</sup> Saul Cornell, *Cherry-picked history and ideology-driven outcomes: Bruen's originalist distortions*, SCOTUSblog (Jun. 27, 2022, 5:05 PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*



traditions.<sup>12</sup> Numerous courts have since been called on to adjudicate if current laws have sufficient historical analogs.<sup>13</sup> Faced with this issue, the Southern District of Mississippi *sua sponte* ordered the parties in an ongoing case to communicate their positions on a court-appointed historian.<sup>14</sup> Judge Carlton W. Reeves expressed concern that his court was not equipped to tackle historical analysis, particularly on a subject where historians seem to say one thing while legal actors say another.<sup>15</sup>

Approaching *Dobbs* from differing points on the ideological spectrum, Professors Reva Siegel<sup>16</sup> and Evan Bernick<sup>17</sup> heap criticism on the opinion. Siegel writes that *Dobbs* is anti-democratic originalism ventriloquizing history and tradition to mask the conservative justices' values and achieve the singular goal of overturning *Roe v. Wade*.<sup>18</sup> She argues that the majority clumsily mischaracterized and neglected the constitutionally suspect history of the anti-abortion statutes pivotal to its analysis, all for the movement-identified end of eliminating the right to abortion.<sup>19</sup> Bernick also observes Justice Alito's erasure of anti-Catholic bigotry along with multiple analytical flaws in *Dobbs*' originalist and doctrinal reasoning.<sup>20</sup>

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<sup>12</sup> *Bruen*, 142 S. Ct. at 2130.

<sup>13</sup> *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB (S.D. Mo. Oct. 27, 2022) (order requesting court-appointed experts).

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 Tex. L. Rev. (forthcoming 2023).

<sup>17</sup> Evan D. Bernick, *Vindicating Cassandra: A Comment on Dobbs v. Jackson Women's Health Organization*, Cato Sup. Ct. Rev. 227 (2022).

<sup>18</sup> Siegel, *supra* note 16, at 56-57.

<sup>19</sup> *Id.* at 58-59, 63.

<sup>20</sup> Bernick, *supra* note 17, at 262.

One such flaw is the Court's ambiguity in what kind of meaning history and tradition ascribes to the Constitution, failing to say if the original meaning is public understanding, original intent, or another form of meaning.<sup>21</sup> Another weakness is the majority's unattuned application of the *Glucksberg* test, which fails to precisely define the right at stake at a low level of generality.<sup>22</sup> Additionally, Bernick finds fault with how simply and quickly Justice Alito dispenses with the Equal Protection argument for abortion, criticizing his reliance on *Geldudig v. Aillo*.<sup>23</sup>

David H. Gans directly compared *Bruen* and *Dobbs* to assert that originalism served to mask the conservative justices' ideological motives.<sup>24</sup> In *Dobbs*, the conservative wing of the Court ignored the broad wording of the Reconstruction Amendments and cherry-picked history and tradition, and used the crop of state anti-abortion laws to remove abortion rights from the Constitution.<sup>25</sup> Gans then writes that *Bruen* selectively used history and tradition for the opposite end of expanding an enshrined right, making gun rights more tied to Founding era history than any other constitutional provision.<sup>26</sup> He further observes that *Bruen* spent far more time looking at historical tradition than the text and meaning of the

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<sup>21</sup> *Id.* at 258.

<sup>22</sup> *Id.* at 259.

<sup>23</sup> *Id.* at 262.

<sup>24</sup> David H. Gans, *This Court Has Revealed Originalism to Be a Hollow Shell*, *The Atlantic* (July 20, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/roe-overturned-alito-dobbs-originalism/670561/>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Second Amendment.<sup>27</sup> Gans concludes that the Roberts Court manipulates history and the Constitution for traditionalist ends and should not be called originalist if the term is to have any sound, methodological meaning.<sup>28</sup>

Many scholars have also already remarked on the types of history and tradition the Court tends to use in its analyses and offered alternatives. Professor Peggy Cooper Davis has written about how the stories of enslaved people have been neglected in the constitutional interpretation of personal and family autonomy despite the importance of these narratives and experiences in the creation of the Fourteenth Amendment.<sup>29</sup> Siegel has also written about the concept of constitutional memory, which is a kind of “collective memory” created by constitutional interpretation.<sup>30</sup> Constitutional memory shapes American identity and values but usually excludes marginalized voices, such as those of the suffragists, whose campaign existed over the span of two centuries yet is absent from the *United States or Supreme Court Reports*.<sup>31</sup> Professor Christina Mulligan has posited a model for diverse originalism, encouraging originalists to call on diverse historical speakers and to be inclusive in their analyses to distill a comprehensive original meaning.<sup>32</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values*, 13-14 (1998).

<sup>30</sup> Reva B. Siegel, *The Politics of Constitutional Memory*, 20 *Geo. J. of L. & Pub. Pol’y* 2022).

<sup>31</sup> *Id.* at 21, 24.

<sup>32</sup> Christina Mulligan, *Diverse Originalism*, 21 *Univ. of Penn. J. of Const. L.* 380, 413 (2018).

Finally, originalist arguments for abortion rights have already been made quite effectively. Professor Jack Balkin has argued that eliminating a right to abortion would violate the original meaning of the Fourteenth Amendment's Citizenship Clause because forced pregnancy and childrearing reduces women to second-class citizens.<sup>33</sup> Professor Davis points to stories of reproductive slavery and how enslaved women used "celibacy, contraception, abortion, and infanticide" to claw back some level of autonomy or save their children from being sold,<sup>34</sup> asserting that these experiences should inform understandings of the Reconstruction Amendments.<sup>35</sup> Professor Michele Goodwin echoes Davis in her argument and calls on the history of sexual and reproductive slavery and its prominence in the slave states and in the debates surrounding slavery and ratification of the Thirteenth and Fourteenth Amendments.<sup>36</sup> Professor Aaron Tang has also made an originalist argument for a fundamental right to abortion before quickening.<sup>37</sup> He contends that twenty-one of the union's thirty-seven states followed the common-law tradition of permitting pre-quickening abortions in 1868

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<sup>33</sup> Jack M. Balkin, *Abortion and Original Meaning*, 24 Univ. of Minn. Const. Comment. 291, 324-25 (2007).

<sup>34</sup> Davis, *supra* note 29, at 191.

<sup>35</sup> Peggy Cooper Davis, *The Reconstruction Amendments Matter When Considering Abortion Rights*, Wash. Post (May 3, 2022), <https://www.washingtonpost.com/outlook/2022/05/03/reconstruction-amendments-matter-when-considering-abortion-rights/>.

<sup>36</sup> Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. Times (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html>

<sup>37</sup> Aaron Tang, *The Originalist Case for an Abortion Middle Ground*, 60-61 (2022).

and reasons that this majority—combined with a better understanding of how people understood pregnancy and abortion at the time—demonstrates a sufficient national consensus for the right’s existence.<sup>38</sup>

This essay builds on and adds to this existing canon by both delving deeply into *Dobbs*’ sources and reorienting the lens of historical analysis. Many have written about the Supreme Court’s use of history and tradition in *Dobbs*, but based on exhaustive research, no one else has noted that *Dobbs*’ use of history extends as far back as 1114-1118. Nor has anyone else observed that this 12th-century legal precedent could have entailed court-ordered public humiliation. Although many others have moved for a more inclusive use of history and tradition, including on the topic of abortion, this essay is the first to this author’s knowledge to apply *Glucksberg*’s test to an originalist understanding of the quickening doctrine as both a legal tradition and historical practice where pregnant people had liberty or agency.

## II. A VERY BRIEF OVERVIEW OF ORIGINALISM

Identifying a singular, comprehensive definition of originalism is difficult.<sup>39</sup> Contemporary originalism can be described as a family of theories with a plethora of variations.<sup>40</sup> Some originalists emphasize the original intent of the Framers or

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<sup>38</sup> *Id.* at 32, 60-61.

<sup>39</sup> Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* 27 (2011), <https://scholarship.law.georgetown.edu/facpub/1353>. The term was actually coined by Paul Brest in his article criticizing originalism. *Id.* at 8.

<sup>40</sup> *Id.* at 33.

the Ratifiers or both, while others look to the original public meaning of the Constitution, and still, others examine how the Constitution would have been interpreted or constructed at the Founding.<sup>41</sup> However, these originalist theories all share two features: the Fixation Thesis (that the original meaning of the Constitution is fixed at the time each provision was drafted and ratified)<sup>42</sup> and the Contribution Thesis (that the original meaning of the Constitution should contribute at some level to understandings of the text of the Constitution and constitutional doctrine).<sup>43</sup> The Contribution Thesis fulfills the Constraint Principle, limiting constitutional text and doctrine to original meaning unless something significant justifies departure from that meaning as a means of preventing the abuse of judicial discretion.<sup>44</sup>

Originalism has faced the criticisms that lawyers, judges, and other legal professionals are not sufficiently trained or skilled to accurately analyze history,<sup>45</sup> and that present-day originalists manipulate their historical findings to impose their contemporary—often conservative—values on the Constitution.<sup>46</sup> Non-originalists

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<sup>41</sup> *Id.* at 28-29. Interpretation of the Constitution asks what the Constitution means while construction asks what is the *legal effect* of that meaning. Ilan Wurman, *A Debt Against the Living* 20-21 (2017). These must be distinguished from original expected application, which asks how a constitutional provision would *have been expected* to be applied at the time of its enactment. If originalists limited the Constitution's meaning to how the Framers would have expected the provision would be applied, the Fourth Amendment would not apply to GPS devices. *Id.* at 38-39.

<sup>42</sup> Solum, *supra* note 39, at 29.

<sup>43</sup> *Id.* at 32.

<sup>44</sup> *Id.*

<sup>45</sup> Wurman, *supra* note 41, at 99.

<sup>46</sup> Mulligan, *supra* note 32, at 386.

have also been suspicious of the movement because its scholars and adherents are overwhelmingly white, male, and conservative,<sup>47</sup> urging obeisance to a fixed and static understanding of a document written by white, wealthy men (many of whom owned other human beings)<sup>48</sup> in an era when women, people of color, and other marginalized communities were far from equal and had no say in the matter.<sup>49</sup> Historical inequality compounds the workability issue of originalism: the thoughts of women, people of color, and other marginalized communities on the Constitution have not been as well preserved through the ages if they were ever recorded or observed at all.<sup>50</sup> The “dead hand problem” looms over all of these critiques—i.e., whether the decrees of those long dead should govern the lives of the living today.<sup>51</sup>

Scholars debate whether *Dobbs* is originalist or not. The phrase “history and tradition” frequently appears throughout the opinion, but Justice Alito, writing for the majority, does not focus on the Fourteenth Amendment’s original meaning beyond acknowledging that Substantive Due Process rights are cabined in the word “liberty.”<sup>52</sup> The crux of his analysis turns on the existence of 19th-century anti-

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<sup>47</sup> *Id.* at 391.

<sup>48</sup> Steven Mintz, *Historical Context: The Constitution and Slavery*, <https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-constitution-and-slavery> (last visited Dec. 15, 2022). Twenty-five of fifty-five delegates to the Constitutional Convention owned enslaved people. *Id.*

<sup>49</sup> Mulligan, *supra* note 32, at 396.

<sup>50</sup> *Id.* at 413-14. Some Founding and Reconstruction era writings on the Constitution by women and people of color still exist today, but not nearly in the same quantity as the writings of elite, white men.

<sup>51</sup> *Id.* at 394.

<sup>52</sup> *Dobbs*, 142 S. Ct. at 2246.

abortion statutes because he says the word “liberty” is “capacious.”<sup>53</sup> He does not categorize the original meaning of these state anti-abortion statutes as demonstrations of original intent, original public understanding, or original interpretation/construction/application indicative of the original meaning of “liberty” in the Fourteenth Amendment. Professor Lawrence Solum argues that the Court’s focus on historical practice makes *Dobbs* a living constitutionalist opinion.<sup>54</sup> Professor Balkin writes that *Dobbs* is an exercise in what he has termed “traditionalism.”<sup>55</sup> Originalist scholars have also said that *Dobbs* is not originalist because the opinion does not focus its analysis on the Privileges or Immunities Clause, which is where they would seriously consider the existence of unenumerated rights.<sup>56</sup> Justice Alito briefly addresses Privileges or Immunities in a footnote but says the inquiry would be the same under that clause: an examination of history and tradition, citing *Corfield v. Coryell*.<sup>57</sup> Justice Alito mostly writes about the Due Process Clause in the body of the opinion, expending a single paragraph to dismiss a right to abortion under the Equal Protection Clause, even

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<sup>53</sup> *Id.* at 2247.

<sup>54</sup> Lawrence Solum (@lsolum), Twitter (May 5, 2022, 6:33 AM), <https://twitter.com/lsolum/status/1522162603291643904>.

<sup>55</sup> Jack Balkin, *More on Text, History, and Tradition - Discussion Questions for Dobbs, Part One*, Balkinization (July 8, 2022, 11:30 AM), <https://balkin.blogspot.com/2022/07/more-on-text-history-and-tradition.html>.

<sup>56</sup> Siegel, *supra* note 16, at 167 (citing Steven G. Calabresi, Letter to the Editor, *The True Originalist Answer to Roe v. Wade*, WALL ST. J. (May 8, 2022, 12:38 PM), <https://www.wsj.com/articles/the-true-originalist-answer-to-roe-v-wade11652027903>).

<sup>57</sup> *Dobbs*, 142 S. Ct. at n. 22.



though none of the parties advanced the issue.<sup>58</sup> The idea of Substantive Due Process is a non-starter for these originalist academics.<sup>59</sup>

Some natural law originalists have said that the opinion is originalist because its history-and-tradition analysis resembles ascertaining original meaning as much as a justice who respects larger fundamental rights precedent can without also explicitly endangering other unenumerated rights.<sup>60</sup> Professor Siegel argues that *Dobbs* is originalist because it is a product of the conservative legal movement that originated with the main ambition of overturning *Roe*<sup>61</sup> and that movement's campaign of promoting originalist, anti-abortion judges.<sup>62</sup>

This essay contends that *Dobbs* is originalist. The majority hews to the Fixation Thesis when it dismisses the quickening doctrine and declares that the rule was abandoned during the latter half of the 19<sup>th</sup>-century.<sup>63</sup> The Court pins the meaning of "liberty"<sup>64</sup> in the Due Process Clause of the Fourteenth Amendment to its meaning at the time of its enactment regardless of how it categorizes that meaning—be its original intent that of the Framers or Ratifiers, original public

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<sup>58</sup> *Id.* at 2245-46.

<sup>59</sup> William Baude, *Of course the Supreme Court needs to use history. The question is how.*, Wash. Post (Aug. 8, 2022, 9:27 AM EDT), <https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen/>.

<sup>60</sup> Siegel, *supra* note 16, at 45.

<sup>61</sup> Nathaniel Blake, *If the Supreme Court Whiffs on Abortion, They'll Blow Up the Legal Conservative Movement*, The Federalist (Dec. 7, 2021), <https://thefederalist.com/2021/12/07/if-the-supreme-court-whiffs-on-abortion-theyll-blow-up-the-conservative-legal-movement/>.

<sup>62</sup> Siegel, *supra* note 16, at 46.

<sup>63</sup> *Dobbs*, 142 S. Ct. at 2252.

<sup>64</sup> *Id.* at 2248.

meaning, or original methods. The Court also furthers the fixation thesis by discounting history that happened after the 19th-century, sweeping away *Roe*'s forty-nine years as valid precedent.<sup>65</sup> Justice Alito holds to the Contribution Thesis when he reasons that *Roe* was “egregiously” wrong because it did not adequately account for history and tradition, describing the decision as “freewheeling judicial policymaking” akin to that of the infamous *Lochner v. New York* decision.<sup>66</sup> Even if *Dobbs* does not strictly meet all the technical specifications of academic originalism, it bears an incredibly strong family resemblance to originalism. This, combined with it being the product the originalist movement created to overturn *Roe*,<sup>67</sup> makes it originalist, whether originalists want to claim it or not.

The *Dobbs* majority does mainly discuss the fundamental right to abortion in a Substantive Due Process framework abhorred by originalists, but it is working within the precedent available to it.<sup>68</sup> *Roe* was decided on Substantive Due Process grounds<sup>69</sup> and therefore had to be overturned on Substantive Due Process grounds at a minimum.<sup>70</sup> Unless a majority of the Court wanted to *sua sponte* overturn the

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<sup>65</sup> Siegel, *supra* note 16, at 9.

<sup>66</sup> *Id.*

<sup>67</sup> Siegel, *supra* note 16, at 46.

<sup>68</sup> And writing for a majority of the Court. Justice Thomas was the only one to question Substantive Due Process in his solo concurrence. *Dobbs*, 142 S. Ct. at 2300-01 (Thomas, J., concurring).

<sup>69</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973).

<sup>70</sup> *Dobbs*, 142 S. Ct. at 2248.

*Slaughter-House Cases* without so much as an amicus brief on the issue,<sup>71</sup> a good-faith discussion of Privileges or Immunities would be impossible in the realm of practiced law as opposed to legal academia. Without overturning the *Slaughter-House Cases*, a fundamental right to abortion automatically fails because it is not found on the very narrow list the Court ruled constituted and exemplified the privileges or immunities of citizenship in those consolidated cases.<sup>72</sup> Originalist Professor Randy Barnett has argued that Justice Thomas' concurrence in *McDonald v. Chicago* revived the Privileges or Immunities Clause,<sup>73</sup> but since then, the Privileges or Immunities Clause has only made guest appearances in a handful of concurring opinions by originalist justices.<sup>74</sup>

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<sup>71</sup> Ellena Erskine, *We read all the amicus briefs in Dobbs so you don't have to*, SCOTUSblog (Nov. 30, 2021, 5:24 PM), <https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-dont-have-to/>.

<sup>72</sup> *Slaughter-House Cases*, 83 U.S. 36, 79-80 (1872). A very generous reading of *Dobbs* could say that Alito further discussed abortion as a Privilege or Immunity when he dismissed it as a right under Equal Protection. The *Slaughter-House Cases* gave a few examples of Privileges or Immunities but concluded that “To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.” The next clause considered in the case was the Equal Protection Clause. *Id.* at 80. Some cases have made additions to the list of the Privilege or Immunities Clause's protections since the *Slaughter-House Cases*, such as *Saenz v. Roe*. Amdt14.S1.2.2 *Modern Doctrine on Privileges or Immunities Clause*, Constitution Annotated, [https://constitution.congress.gov/browse/essay/amdt14-S1-2-2/ALDE\\_00000815/](https://constitution.congress.gov/browse/essay/amdt14-S1-2-2/ALDE_00000815/) (last visited Jan. 29, 2023); 526 U.S. 489, 503 (1999) (stating that the Privileges or Immunities Clause protects the right to travel to another state, settle in that new state, and be treated the same as long-term residents).

<sup>73</sup> Randy Barnett, *Privileges or Immunities Clause Alive Again*, SCOTUSblog (June 28, 2010, 5:01 PM), <https://www.scotusblog.com/2010/06/privileges-or-immunities-clause-alive-again/>

<sup>74</sup> E.g., *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring); *Id.* (Thomas, J., concurring); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring).

III. ORIGINALISM IN *BRUEN*

Justice Thomas<sup>75</sup> originalism is methodologically thorough in that not only does he seem to leave no stone unturned (although he varies how closely, and perhaps how accurately,<sup>76</sup> he investigates what is underneath), but he also fully explains and presents justifications for his process.<sup>77</sup> *Bruen* establishes a new history and tradition test for Second Amendment rights, justifying its singular focus on history through comparison with other constitutional rights whose tests involve history and tradition, too.<sup>78</sup> Justice Thomas, writing for the majority, declares that while “historical analysis can be difficult,” judges and justices are better equipped to undertake the task instead of the traditional cost-benefit analyses applied to firearm regulations.<sup>79</sup> He writes that history should still guide courts, even though the Framers could not imagine the kind of firepower present in modern America, because the Constitution “can, and must, apply to circumstances beyond those the Founders specifically anticipated.”<sup>80</sup>

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<sup>75</sup> *Bruen*, 142 S. Ct. at 2121 (writing for the 6-3 majority).

<sup>76</sup> Cornell, *supra* note 9.

<sup>77</sup> This article surveys *Bruen*'s methodology, but not its content, to inform a focus on *Dobbs*' methodology and content. This article does not endorse *Bruen*'s reasoning or conclusions as correct or even quality. *Bruen* merely serves as a timely comparison point and springboard for a discussion of *Dobbs* and the Supreme Court's use of history and tradition.

<sup>78</sup> *Bruen*, 142 S. Ct. at 2130 (citing First and Sixth Amendment cases).

<sup>79</sup> *Id.* at 2118 (saying this, particularly because of “their ‘lack [of] expertise’ in the field [of firearms]” without a shred of self-awareness that the same could be said of history).

<sup>80</sup> *Id.* (citing *United States v. Jones*, comparing a GPS device to a tiny constable hiding inside a coach and spying on its owner in 1791, 565 U.S. 400, 420 (2012)).

The *Bruen* majority moves on to adjudicating the parties' claims, utilizing the case as an opportunity to develop rules governing the use of histories and historical sources. The Respondents submitted sources dating from the late 1200s to the early 1900s, and Justice Thomas sorts them into five distinct categories.<sup>81</sup> He reasons that the sources must be categorized because "when it comes to interpreting the Constitution, not all history is created equal."<sup>82</sup> He cautions against using sources too ancient, specifically warning against "English common-law practices and understandings at any given time in history" that "cannot be indiscriminately attributed to the Framers of our own Constitution."<sup>83</sup> Justice Thomas states that ancient common-law authorities can only be used in circumstances where medieval law continued as unbroken precedent up to the Founding.<sup>84</sup> He similarly advises against giving post-enactment history too much weight.<sup>85</sup> The *Bruen* majority adds a caveat to these rules: mid-to-late-19th-century history is much less relevant to the meaning of the Second Amendment,<sup>86</sup> even though the Fourteenth Amendment is necessary to incorporate the Second Amendment against the State of New York.<sup>87</sup>

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<sup>81</sup> *Bruen*, 142 S. Ct. at 2135-36 ( "(1) Medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early 20th centuries." ).

<sup>82</sup> *Id.* at 2136.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

The *Bruen* Court then puts these rules to practice, reiterating them as Justice Thomas' analysis sweeps through six centuries of history.<sup>88</sup> The majority dismisses the Respondents' English common-law histories, decrying the age of a 14th-century statute by listing how many years older the statute is than the Black Death, Shakespeare, the Salem Witch Trials, the ratification of the Constitution, and adoption of the Fourteenth Amendment.<sup>89</sup> The *Bruen* majority goes on to explain that the statute was intended to prohibit wearing armor or carrying lances because people who donned armor or wielded lances were spoiling for a fight as opposed to the ordinary person who wore a dagger on their hip for self-defense—which was common practice in the medieval world.<sup>90</sup> It also points out that handguns had not arrived in Europe yet.<sup>91</sup> After dabbling in this meaning gained from original intent and methods as applied to the 14th-century statute, the opinion draws out the original intent motivating later laws that regulated handgun or dagger use.<sup>92</sup> For instance, Henry VIII worried that reliance on handguns would weaken English prowess with the longbow, which had been crucial to England's military successes in the 14th and 15th centuries, including his ancestor's victory at the Battle of Agincourt.<sup>93</sup>

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<sup>88</sup> *Bruen*, 142 S. Ct. at 2139, 2156 (The earliest source is from 1285 and the most recent is from 1890).

<sup>89</sup> *Id.* at 2139.

<sup>90</sup> *Id.* at 2140.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 2140-42.

<sup>93</sup> *Id.* at 2140 (neglecting to mention the fact that the muddiness of the battlefield was also a crucial factor in English victory, stopping French forces in their tracks and trapping them under a

The *Bruen* Court repeats this mode of in-depth analysis with each new source and history, weighing its age and distilling an original meaning—be it categorized as original intent, original public understanding, or original methods. Justice Thomas considers each original meaning in relation to the Second Amendment in varying degrees of strength. Too distant in time from 1791? It has little bearing on Second Amendment protections.<sup>94</sup> Not sufficiently tested by judicial review because the law existed in the Old West? The Court cannot know the basis of any perceived legality.<sup>95</sup> Did a later contradictory law come along a few years after the first law’s enactment? The first law must not have lasted long enough to imbue relevant meaning.<sup>96</sup>

Whatever can be said about the substance of the Court’s analytical findings in *Bruen*, each one was spelled out and justified in some manner. The majority delved into each source’s and history’s impact on the original meaning of the Second Amendment, examining what policymakers thought when they created laws and what ordinary people understood and experienced as they lived in a world defined by those laws. Regardless of the soundness of Justice Thomas’ conclusions, the veracity of his historical findings, or the quality of his reasoning, *Bruen* is at

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rain of English arrows); *see generally* Julia Martinez, *The Battle of Agincourt*, ENCYCLOPEDIA BRITANNICA (Oct. 28, 2022) <https://www.britannica.com/event/Battle-of-Agincourt>.

<sup>94</sup> *Bruen*, 142 S. Ct. at 2139.

<sup>95</sup> *Id.* at 2121.

<sup>96</sup> *Id.* at 2144.

least thorough. This type of approach will not be repeated in the Court's treatment of history in *Dobbs*, which will be discussed in the next section.

#### IV. ORIGINALISM IN *DOBBS*

Writing for the 5-4 majority in *Dobbs*, Justice Alito's originalism is superficial in every regard.<sup>97</sup> Unlike Justice Thomas in *Bruen*, Justice Alito does not explain his methodology in much depth. Writing for the *Dobbs* majority, he invokes *Washington v. Glucksberg*'s history and tradition test<sup>98</sup> to determine the meaning of "liberty" in the Due Process Clause.<sup>99</sup> He then immediately delves into history and tradition without further ado, leaving his audience<sup>100</sup> to extract his methodology by reading between the lines.

Unlike Justice Thomas, Justice Alito does not, for the most part, differentiate between his sources and histories. However, his eight-century<sup>101</sup> survey of history can be divided into two portions: a broader one dedicated to common-law authorities and a narrower one dedicated to mid to late 19th-century authorities.<sup>102</sup> In the body of the majority opinion, Justice Alito cites Henry de Bracton's 13th-century treatise *De Legisbus et Consuetudinibus Angliae* (*On the*

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<sup>97</sup> *Dobbs*, 142 S. Ct. at 2240 (writing for a 5-4 majority).

<sup>98</sup> *Glucksberg*, 521 U.S. at 722.

<sup>99</sup> *Dobbs*, 142 S. Ct. at 2248.

<sup>100</sup> *Id.* Including courts that must follow his history and tradition test.

<sup>101</sup> Justice Alito's oldest source is from 1114-1118, and his most recent source is from 1952.

*Dobbs*, 142 S. Ct. at 2293, n. 25.

<sup>102</sup> *Id.* Accompanied by the outlying Mississippi law from 1952.



*Laws and Customs of England*),<sup>103</sup> Edward Coke's 17th-century *The Institutes of the Laws of England*,<sup>104</sup> Matthew Hale's 17th-century *History of Pleas of the Crown*,<sup>105</sup> and William Blackstone's eminent, common-law work *Commentaries*

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<sup>103</sup> *Id.* at 2249 (citing 1 Henry de Bracton, *Fleta*, reprinted in 72 Selden Soc. 61-62 (H.G. Richardson and G.O. Sayles eds. & trans., Bernard Quaritch 11 Grafton St. 1955) (13th century)). "He, too, in strictness is a homicide who has pressed upon a pregnant woman or has given her poison or has struck her in order to procure an abortion or to prevent conception, if the foetus was already formed and quickened and similarly he who has given or accepted poison with the intention of preventing procreation or conception. A woman also commits homicide if, by a potion or the like, she destroys a quickened child in her womb." *Id.*

<sup>104</sup> *Dobbs*, 142 S. Ct. at 2249 (citing 3 Edward Coke, *The Institutes of the Laws of England* 50-51 (Garland Publishing 1979) (1644)). "If a woman be quick with childe, and by a Potion or otherwise killeth it in her womb; if a man beat her, whereby the childe dieth in her body, and is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be borne alive, and dieth of the potion, battery, or other cause, this is murder: for only in law it is accounted a reasonable creature, in rerum natura, when it is born alive . . . And so horrible an offense would not go unpunished . . . And so was the law holden in Bracton's time . . . and herein the law is grounded upon the law of God . . . If a man counsell a woman to kill the childe within her womb, when it shall be born, and after the is delivered of the childe, she killeth it; the counsellor is an accessory to the murder, and yet at the time of the commandment, or counsell, no murder could be committed if the childe in utero matris . . ."

<sup>105</sup> *Dobbs*, 142 S. Ct. at 2249 (citing 1 Matthew Hale, *The History of Pleas of the Crown* 432-33 (Robert H. Small 25 Minor Street 1st Am. ed. 1847) (1736) (citing Exodus 21:22)). "If a woman be quick or great with child, if she take or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in rerum natura, tho it be a great crime, and by the judicial law of Moses was punishable with death, nor can it legally be made known, whether it were killed or not . . . so it is, if after such a child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide . . . But if a man procure a woman with child to destroy her infant, when born, and the child is born, and the woman in pursuance of that procurement kill the infant, this is murder in the mother, and the procurer is accessory to murder, if absent, and this, whether the child were baptized or not." Hale cites Exodus as the judicial law of Moses: "If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine. *Id.*; Exodus. 21:22. (King James). Hale's work was published posthumously sixty years after his death in 1676. David Eryl Corbet Yale, Sir Matthew Hale, *ENCYCLOPEDIA BRITANNICA* (Oct. 28, 2022), <https://www.britannica.com/biography/Matthew-Hale>.

on the *Laws of England* written in 1765.<sup>106</sup> In the footnotes, the Court cites<sup>107</sup> an even older source: *Leges Henrici Primi* (*The Laws of Henry I*), which was written by an anonymous Frenchman between 1114 and 1118.<sup>108</sup> The majority also invokes

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<sup>106</sup> *Dobbs*, 142 S. Ct. at 2249 (citing 2 William Blackstone, *Commentaries on the Laws of England* 150 (W. E. Dean 151 19th London ed. 1848) (1765)). “To kill a child in its mother’s womb, is now no murder, but a great misprison: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.”

<sup>107</sup> *Dobbs*, 142 S. Ct. at n. 25. “70, 16 Women who commit fornication and destroy their embryos, and those are accessories with them, so that they abort the foetus from the womb, are by an ancient ordinance excommunicated from the church until death. 70 16a A milder version has now been introduced: they shall do penance for ten years. 70, 16b A woman shall do penance for three years if she intentionally brings about the loss of her embryo before forty days; if she does this after it is quick, she shall do penance for seven years as if she were a murderess.” *Leges Henrici Primi* 222-223 (L.G. Downer ed) (12th century). Justice Alito describes the punishment for violating the law simply as a “penalty.” *Dobbs*, 142 S. Ct. at n. 25. For a textualist justice, this is a very shallow representation of what the word “penance” (penitea[n]t and peniteat in the original Latin) meant. Abortion was the providence of church law until the mid-1400’s, not the secular, common law. Email from Sarah White, Lecturer, Univ. of Lancaster to author (Jan. 31, 2023) (on file with author). Ecclesiastical courts existed separately from and operated alongside, although sometimes in tandem with, the secular king’s courts. *Id.* Their jurisdictions sometimes overlapped, but canon law dealt with miscellaneous crimes (or sins) from fornication to heresy to scolding to falling asleep in church. Richard Helmholz, *The Oxford History of the Laws of England: The History of the Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* 599, 627, 632-33, 635, 639 (2004). For civil and criminal transgressions of canon law, ecclesiastical courts meted out religious penances, which included prayer, fasting, pilgrimage, and public humiliation. Email from Sarah White to author, *supra*; Helmholz, *supra*, at 602-03. Examples of public humiliation included being whipped around the market square or having to stand before the Sunday congregation, wearing a white sheet and carrying a candle or wand while openly confessing fault. Helmholz, *supra* note 107, at 622. Ecclesiastic judges had broad discretion in sentencing, and canon law followed a rule of proportionality that varied depending on the severity of the crime and local practices. *Id.* at 618, 623. Excommunication itself meant exclusion from taking communion or speaking to Christians as long as the excommunication lasted, essentially make the excommunicate a “religious outlaw.” *Id.* at 620. However, there were many exceptions, incongruities, and procedural safeguards to ensure fairness in excommunication proceedings. *Id.* For violations of secular common law, the king’s courts handed out secular punishments, which included the pillory and flogging. Email from Sarah White to author, *supra*. Imprisonment was actually not a common punishment. *Id.* Instead, it was used mostly to contain people until a verdict was reached. *Id.* As an aside on how hard it is to research—let alone understand 12th-century English law—finding the foregoing information was incredibly difficult. I scoured the Internet and asked multiple medievalists before Dr. White, a historian and lecturer at the University of Lancaster, was able to help me. In *Dobbs*, the Supreme Court uses history that is not only incredibly old, but also incredibly inaccessible.

<sup>108</sup> *Leges Henrici Primi*, *supra* note 107, at 42, 36.

several common-law cases,<sup>109</sup> most notably that of Eleanor Beare, who was convicted in 1732 of “destroying the Foetus in the womb.”<sup>110</sup> Additionally, the majority writes that the common law treated as murder an abortion attempt, at any stage of pregnancy, that resulted in the death of the parent.<sup>111</sup> Justice Alito rounds up his common law sources with an American case from 1652.<sup>112</sup> From this array of sources, the *Dobbs* majority concludes that the common law treated post-quickening abortion as a crime—ranging from a misdemeanor to murder—and pre-quickening abortions were condemned as misprision (misdemeanor) rather than being endorsed as a positive right.<sup>113</sup>

The second, yet narrower, category of *Dobbs*’ histories and historical sources fall into the 19th-century. Not done with England—even though the colonies had been for years by that point—Justice Alito cites Lord Ellenborough’s 1803 act which criminalized abortion at any stage in pregnancy but reserved harsher punishment for post-quickening abortions.<sup>114</sup> He mentions a couple of mid-19th-century cases that reiterated the common law quickening doctrine<sup>115</sup> before calling on a series of 19th-century American authorities, from manuals to cases, that

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<sup>109</sup> *Dobbs*, 142 S. Ct. at 2249-50.

<sup>110</sup> *Id.* (citing The Tryal of Eleanor Beare of Derby, on Tuesday Aug. 15, 1732, 2 Gentleman’s Magazine 931, 932 (Aug. 1732)).

<sup>111</sup> *Dobbs*, 142 S. Ct. at 2250.

<sup>112</sup> *Id.* at 2251.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 2252 (citing Lord Ellenborough’s Act, 43 Geo. 3, c. 58 (1803)).

<sup>115</sup> *Dobbs*, 142 S. Ct. at 2251.

departed from that rule and made abortion a crime at any point in pregnancy.<sup>116</sup> The focal point of his 19th-century analysis rests on anti-abortion statutes in three-quarters<sup>117</sup> of the states that criminalized abortion at any stage in pregnancy by 1868, and he includes an appendix of these laws in his opinion.<sup>118</sup>

The Court largely explores these two implied categories of histories and historical sources, mostly evenhandedly, in that it does not explore them in much depth at all. When referencing *Leges Henrici Primi*, Justice Alito does not explain why an anonymous Frenchman could be an authority on English common law. The anonymous Frenchman, likely a member of the royal administration,<sup>119</sup> could be an expert on English common law because portions of modern-day France were still part of England between 1114 and 1118, courtesy of William the Conqueror, the Norman who conquered England in the late-11th-century.<sup>120</sup> This was hundreds of years before a handful of England's many wars for French territory and sovereignty would become regular subjects of William Shakespeare's history plays,<sup>121</sup> notably

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<sup>116</sup> *Id.* at 2252.

<sup>117</sup> Professor Tang disputes the notion that twenty-seven of the then-existing thirty-seven states prohibited abortion before quickening and argues that only sixteen states did so. Tang, *supra*, at 24. For a thorough accounting and originalist deconstruction of mid-to-late-19th-century abortion laws, see his pieces *The Originalist Case for an Abortion Middle Ground and After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*.

<sup>118</sup> *Dobbs*, 142 S. Ct. at 2285.

<sup>119</sup> Frederick Pollock & William Maitland, *The History of English Law Before the Time of Edward I* 219 (2010).

<sup>120</sup> Editors of Encyclopedia Britannica, *Normandy: Region, France*, ENCYCLOPEDIA BRITANNICA (Sept. 9, 2022), <https://www.britannica.com/place/Normandy>. See generally Bayeux Tapestry (embroidered cloth) (11th-century).

<sup>121</sup> Royal Shakespeare Company, *Histories Timeline*, <https://www.rsc.org.uk/shakespeares-plays/histories-timeline> (last visited Dec. 15, 2022).

in *Henry V*.<sup>122</sup> Neither does Justice Alito address that de Bracton’s work is actually incomplete.<sup>123</sup> De Bracton was a justice of the assize courts and used his station to get access to judicial records for his treatise.<sup>124</sup> However, he lost status for unknown reasons—possibly due to political intrigue and impending war—and had to return the “plea rolls” before finishing his treatise.<sup>125</sup> As to both sources, the Court fails to observe that they were written in medieval times. Not only centuries before Reconstruction or even the Founding, but also centuries before important features of current American life, from niceties like modern sleeves<sup>126</sup> to more basic things like the word “America.”<sup>127</sup>

The *Dobbs* majority also does not interrogate its 19th-century sources or histories in much depth, either. The main 19th-century case it cites<sup>128</sup> to show a departure from the quickening doctrine, *Mills v. Commonwealth*,<sup>129</sup> was an outlier in its rejection of the quickening doctrine<sup>130</sup> and did not actually concern a pre-quicken abortion. The indictment in that case described the pregnant woman,

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<sup>122</sup> William Shakespeare, *Henry V*, act 4, sc. 3, l. 69. Interestingly, Justice Thomas mentions the Battle of Agincourt, the climax of *Henry V* in *Bruen*. *Bruen*, 142 S. Ct. at 2140.

<sup>123</sup> Pollock & Maitland, *supra* note 119, at 219.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Tailored sleeves cut in the modern fashion first appeared in England in the 1330’s. Ian Mortimer, *The Time Traveler’s Guide to Medieval England*, 102 (2008).

<sup>127</sup> Martin Waldseemüller christened the “new” continents “America” in his 1507 map in honor of explorer Amerigo Vespucci. Erin Allen, *How Did America Get Its Name?*, Library of Congress Blog (Jul. 4, 2016), <https://blogs.loc.gov/loc/2016/07/how-did-america-get-its-name/>.

<sup>128</sup> *Dobbs*, 142 S. Ct. at 2252.

<sup>129</sup> *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850).

<sup>130</sup> Brief for Amici Curiae American Historical Ass’n & Org. of American Historians in Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) No. 19-1392.

Mary Elizabeth Lutz, as “big with child.”<sup>131</sup> 19th-century courts accepted that the pregnancy of someone “big” or “great” with child had quickened.<sup>132</sup> *Mills*’ statement against the quickening doctrine was pure dictum that lacked any precedential basis.<sup>133</sup>

The *Dobbs* majority’s lack of attention to historical detail is glaringly obvious in its treatment of the 19th-century anti-abortion statutes, which fails to adequately acknowledge the larger context of the anti-abortion movement and mischaracterizes the motivations for the statutes’ enactment.<sup>134</sup> The United States held to the common law treatment of abortion until an orchestrated movement of doctors—seeking to advance their profession’s appearances and business prospects—dismantled the quickening doctrine state by state.<sup>135</sup> These learned men of science, known as the Regulars, organized with the aim of professionalizing internal industry standards and societal standing for the singular goal of increased control over American healthcare.<sup>136</sup>

The Regulars operated in a vastly different landscape than exists today, facing fierce competition from a booming industry of midwives, homeopaths, and unschooled healers, termed the Irregulars.<sup>137</sup> Having to rely on patients to tell them

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<sup>131</sup> *Mills*, 13 Pa. at 633. She also was not on trial. The dentist who had procured her abortion, Jonathan Gibbons Mills, was the defendant. *Id.*

<sup>132</sup> Brief in Support of Respondents, *supra* note 130, at n. 2.

<sup>133</sup> *Id.* at 9.

<sup>134</sup> See *Dobbs*, 142 S. Ct. at 2228-2300.

<sup>135</sup> Brief in Support of Respondents, *supra* note 130, at 3.

<sup>136</sup> James C. Mohr, *Abortion in America* 33, 147 (1978).

<sup>137</sup> *Id.* at 44.

when their pregnancies had quickened made the Regulars dependent on women's insight in providing care and practicing their profession.<sup>138</sup> Mid-19th-century doctors increasingly rejected the significance of quickening, and this shift coincided nicely with their overarching goal of professionalism and becoming recognized as masters of life and death.<sup>139</sup> But it was not enough for Regulars to simply stop providing abortion services themselves. If a Regular told a patient that he would not restore her menstruation even though she had felt no fetal movement, she could easily go down the street to a midwife, homeopath, or unschooled healer for treatment.<sup>140</sup> Doctors were driven out of business by this kind of ferocious competition.<sup>141</sup> Regulars were worried that some of their own members would succumb to temptation and provide lucrative, pre-quickening abortions.<sup>142</sup> In fact, many did as the Regulars struggled to police their colleagues and professionalize their industry.<sup>143</sup> Observing the self-serving nature of the doctors' anti-abortion interests does not diminish how sincere their anti-abortion beliefs likely were, as Justice Alito accuses the dissent of doing when examining the motivations of state legislators in *Dobbs*.<sup>144</sup> Instead, it helps explain the intensity of the Regulars'

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<sup>138</sup> Leslie J. Reagan, *When Abortion Was a Crime*, 12 (1997).

<sup>139</sup> Mohr, *supra* note 136, at 162.

<sup>140</sup> *Id.* at 37.

<sup>141</sup> *Id.* at 34.

<sup>142</sup> *Id.* at 160-61.

<sup>143</sup> *Id.* at 162-63.

<sup>144</sup> *Dobbs*, 142 S. Ct. at 2256.

campaign,<sup>145</sup> the success of which directly resulted in the state anti-abortion statutes central to *Dobbs*' historical analysis.

The Regulars turned to state legislatures to solve their dilemma. Originally, physicians acted individually as advisors to code revisors, friends to legislators, or members of legislative committees,<sup>146</sup> but that changed as the 19th century plodded on. Led by Dr. Horatio Storer, the Regulars coalesced into a united movement that urged and convinced state legislatures to revise their criminal codes.<sup>147</sup> Storer's movement coincided with one sea-change and created another massive shift regarding abortion in mid-19th-century America. The first was the increasing number of abortions being performed.<sup>148</sup> Exact numbers do not exist, but contemporary writers, such as medical professionals, unequivocally observed high and prevalent rates of abortion across the country.<sup>149</sup>

Not unrelated was the increased visibility of abortion. Competition between abortion providers spurred an explosion of advertising.<sup>150</sup> Newspapers also riveted audiences in the 1830s and 1840s with reporting on trials and inquests involving abortions that had gone fatally wrong, dedicating multi-day, detailed coverage to these proceedings.<sup>151</sup> These pieces ran not just in the local papers but in far-flung

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<sup>145</sup> Mohr, *supra* note 136, at 166.

<sup>146</sup> *Id.* at 148.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 46-85.

<sup>149</sup> *Id.* at 76.

<sup>150</sup> *Id.* at 47.

<sup>151</sup> Brief in Support of Respondents, *supra* note 130, at 15-17.



publications, too.<sup>152</sup> The lurid depiction of abortion as unseemly and dangerous became outsized in popular culture because uneventful abortions that did not result in death did not merit any news coverage.<sup>153</sup> The first anti-abortion law in the 1820s had been a poison control measure to combat the use of poisonous black hellebore as an abortifacient due to the fatal risk it posed to the pregnant person if ingested in large enough quantities.<sup>154</sup> Now, in the mid-19th century, state legislatures began slowly rolling out more anti-abortion legislation in response to newspaper reporting.<sup>155</sup>

The second development was that the narrative of who was having abortions changed. Previously, the popular imagination of who had or needed abortions pictured poor, unfortunate, unmarried girls who had been taken advantage of or had gotten into trouble.<sup>156</sup> Lest their reputations be smeared, and their families and lives ruined, these pitiful creatures deserved a helping hand.<sup>157</sup> This narrative came from the newspaper reporting mentioned above.<sup>158</sup> The details of victims were splashed across newspaper pages and eagerly read by the public.<sup>159</sup> These stories focused much more on the plight of the deceased and only mentioned the fetus if a

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<sup>152</sup> *Id.* at 16.

<sup>153</sup> *Id.*

<sup>154</sup> Mohr, *supra* note 136, at 21.

<sup>155</sup> Brief in Support of Respondents, *supra* note 130, at 17.

<sup>156</sup> *Id.* at 16.

<sup>157</sup> Mohr, *supra* note 136, at 44.

<sup>158</sup> Brief in Support of Respondents, *supra* note 130, at 16.

<sup>159</sup> *Id.*

gestational age was necessary.<sup>160</sup> In the mid-to-late-19th century, however, most contemporary observers agreed that married women were responsible for the great upsurge in abortions,<sup>161</sup> and the anti-abortion movement conjured the specter of white, Protestant, well-to-do, married women shirking their rightful, patriotic, and spiritual duties of motherhood in favor of “fashion.”<sup>162</sup> Armed with his own faulty statistics,<sup>163</sup> Storer and the Regulars descended on state legislatures with ethnocentric and paternalistic exhortations that America would be ruined by women who did not know their place and would allow Catholic immigrants to overpopulate the country to satisfy their vanity.<sup>164</sup> “Shall [the lands claimed in westward expansion] be filled by our own children or of by those of aliens? This is a question our women must answer; upon their loins depends the future destiny of the nation.”<sup>165</sup>

Justice Alito, speaking for the majority, does not at all explore this history of abortion in 19th-century America or the story of the statutes indispensable to the majority’s reasoning.<sup>166</sup> He only mentions this history to castigate the dissent for, in his view, questioning the sincerity of the state legislatures’ anti-abortion beliefs.<sup>167</sup> Regardless of how sincere Storer’s or the legislatures’ anti-abortion

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<sup>160</sup> *Id.*

<sup>161</sup> Mohr, *supra* note 136, at 87-90

<sup>162</sup> *Id.* at 107.

<sup>163</sup> Brief in Support of Respondents, *supra* note 130, at 23.

<sup>164</sup> *Id.* at 23-25.

<sup>165</sup> Horatio Robinson Storer, *Why Not? A Book for Every Woman* 87 (Lee and Shepard 1866).

<sup>166</sup> *Dobbs*, 142 S. Ct. at 2228-2300.

<sup>167</sup> *Id.* at 2256.

beliefs, it does not change that the legislation was enacted with constitutionally suspect motivations based on sex,<sup>168</sup> religion,<sup>169</sup> race,<sup>170</sup> and national origin.<sup>171</sup> The Supreme Court is no stranger to discerning anti-religious bias<sup>172</sup> in its cases and has specifically pointed to historical anti-Catholic bias recently in its reasoning in *Espinoza v. Montana Department of Revenue*.<sup>173</sup> Justice Alito concurred with the *Espinoza* majority in full, writing separately to highlight 19th-century, anti-Catholic bigotry and nativism, and to assert that no-aid provisions could not be understood outside that context.<sup>174</sup>

Justice Alito's refusal to acknowledge the constitutionally suspect history of anti-abortion measures explains his shallow engagement with all his histories and sources. Regardless of the substance of the historical conclusions in *Bruen*, Justice Thomas fully engages with his sources and histories. He expounds on elite English concern for maintaining prowess with the longbow while neatly categorizing a 14th-century statute as too old to be of use.<sup>175</sup> Justice Thomas

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<sup>168</sup> *United States v. Virginia*, 518 U.S. 515, 531 (1996).

<sup>169</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

<sup>170</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>171</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>172</sup> See generally *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520.

<sup>173</sup> *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)). "The Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have a similarly 'shameful pedigree' . . . The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." Justice Alito concurs with the majority in full, writing separately to highlight anti-Catholic bigotry and nativism of the time and to assert that no-aid provisions cannot be understood outside that context. *Espinoza*, 140 S. Ct. at 2267, 2270.

<sup>174</sup> *Bruen*, 142 S. Ct. at 2139-40.

<sup>175</sup> *Id.* at 2144.

contemplates that an East New Jersey law banning planters from concealed carry was enacted due to rampant strife between those farmers and the colony's leaders.<sup>176</sup> He further guesses that the anti-planter law did not last very long because a later law was enacted that would not have made sense alongside the anti-planter one.<sup>177</sup> He dismisses 19th-century territorial laws because they were rarely subject to judicial review and enacted too late after the Second Amendment's ratification.<sup>178</sup> If Justice Alito had engaged with *Dobbs*' sources and histories in nearly commensurate depth, the sources' and histories' failings would have become apparent.

Sexism permeates every history and tradition presented in *Dobbs*' analysis. As just one example, 17th-century jurist Matthew Hale—whom the Court praises as “eminent common-law authorit[y]”<sup>179</sup>—single-handedly created the common law exception for marital rape out of thin air in his *History of the Pleas of the Crown*.<sup>180</sup> He also wrote that those who bring accusations of rape should be distrusted, which would be cited as a legal standard for centuries afterward, including in America up

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 2155.

<sup>178</sup> *Dobbs*, 142 S. Ct. at 2249 (quoting *Kahler v. Kansas*, 140 S. Ct. 1026 (2020)).

<sup>179</sup> Maria Pracher, *The Marital Rape Exception: A Violation of a Woman's Right to Privacy*, 11 Golden Gate Univ. L. Rev. 717 (1981). “For the husband cannot be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.”

<sup>180</sup> Jill Elaine Hasday, *On Roe, Alito Cites a Judge who Treated Women as Witches and Property*, Wash. Post, (May 9, 2022, 5:00 EDT), <https://www.washingtonpost.com/opinions/2022/05/09/alito-roe-sir-matthew-hale-misogynist/>; G. Geis, *Lord Hale, Witches, and Rape*, 5 British J. of L. & Soc'y 26, 42 (1978).

until the mid-20th century.<sup>181</sup> In addition to this, Hale presided over the trial of two women accused of witchcraft by the infamous Witchfinder General Matthew Hopkins.<sup>182</sup> In a time when many doubted witchcraft's existence, he instructed the jury that witchcraft was very real and allowed "spectral evidence" to be entered against the defendants.<sup>183</sup> The two women—Amy Duney and Rose Cullender—were convicted and hanged because of this evidence.<sup>184</sup> A report of their trial and Hale's jury instructions would lead the chief justice of the newly created Court of Oyer and Terminer to take the controversial tack of admitting spectral evidence in the Salem Witch Trials.<sup>185</sup> Thirty-three people were convicted, and nineteen were executed before the governor ordered the exclusion of spectral evidence, dissolving the Court of Oyer and Terminer shortly afterward.<sup>186</sup>

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<sup>181</sup> Nathan Dorn, *Sir Matthew Hale and Evidence of Witchcraft*, In Custodia Legis (Oct. 30, 2021), <https://blogs.loc.gov/law/2021/10/sir-matthew-hale-and-evidence-of-witchcraft/>.

<sup>182</sup> *Id.* Spectral evidence is testimony that the accused's spirit appeared to the witness in a dream or vision and harmed them. Nathan Dorn, *Evidence from Invisible Worlds in Salem*, In Custodia Legis (Aug. 20, 2021), <https://blogs.loc.gov/law/2020/08/evidence-from-invisible-worlds-in-salem/>.

<sup>183</sup> Dorn, *Sir Matthew Hale and Evidence of Witchcraft*, *supra* note 181.

<sup>184</sup> Dorn, *Evidence from Invisible Worlds in Salem*, *supra* note 182. In another interesting connection to *Bruen*, Justice Thomas invokes the Salem Witch Trials in that case to chastise the respondents' reliance on a statute that existed more than 350 years before that infamous episode. *Bruen*, 142 S. Ct. at 2139.

<sup>185</sup> Dorn, *Evidence from Invisible Worlds in Salem*, *supra* note 182. Nineteen were hanged after being convicted. Jeff Wallenfelt, *Salem Witch Trials*, ENCYCLOPEDIA BRITANNICA (Dec. 1, 2022), <https://www.britannica.com/event/Salem-witch-trials>. Five people died while imprisoned and one person was crushed to death—all without convictions. *Id.*; Emerson W. Baker, *A Storm of Witchcraft* 38 (2015). After the dissolution of the Court of Oyer and Termine, the Massachusetts legislature created the Superior Court of Judicature to address the remaining witch trials. *Id.* at 40-41. Spectral evidence was not allowed in these proceedings. *Id.* at 41. Twenty-two people were tried and only three convicted of witchcraft. *Id.* The three who were convicted had previously confessed, and none were executed. *Id.*

<sup>186</sup> *Dobbs*, 142 S. Ct. at 2249.

The only woman the *Dobbs* majority mentions by name in its historical reasoning<sup>187</sup> is Eleanor Beare, who was convicted of “destroying the Foetus in the womb” in 1732 in Derby, England.<sup>188</sup> Reading her “tryal” record is quite illuminating. She was indicted on three counts.<sup>189</sup> The first was for the “Misdemeanor” of “endeavoring to persuade Nich[olas] Wilson to poison his Wife, and for giving him a Poison to that End.”<sup>190</sup> The second count was for destroying the fetus within the womb of Grace Belfort by “putting an iron Instrument up into her Body, thereby causing her to miscarry.”<sup>191</sup> The third count was for destroying the fetus in the womb of an unknown woman by either instrument or potion.<sup>192</sup> Grace was a servant in Eleanor’s public house.<sup>193</sup> Eleanor was convicted of the first two charges, and the court did not think it necessary to consider the third indictment after the second had been so plainly proven.<sup>194</sup>

One thing that instantly jumps out at the reader is that Grace Belfort was not on trial, although she was the one that had the abortion.<sup>195</sup> The second thing that

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<sup>187</sup> *The Tryal of Eleanore Beare of Derby, on Tuesday Aug. 15, 1732, supra* note 110, at 931-32.

<sup>188</sup> *Id.* at 931.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 932.

<sup>194</sup> *Id.* at 931. For comparison, America granted people who had abortions, as opposed to those who provided abortions, common law immunity from prosecution until some states eliminated it in the mid-to-late-19th-century. Mohr, *supra* note 136, at 24, 128, 210.

<sup>195</sup> *The Tryal of Eleanor Beare of Derby, on Tuesday Aug. 15, 1732, supra* note 110, at 931-32.

immediately catches the reader's eye is that Eleanor had no defense attorney.<sup>196</sup> After reading Grace's testimony, several more things stand out. She became pregnant as the result of a man named "Ch-r" raping her while she lay intoxicated in the pub's stables.<sup>197</sup> Additionally, Grace wanted the abortion and wanted it to be done by instrument (the equivalent of a modern-day surgical abortion), or at least some measure other than a purgative or emmenagogue (the equivalent of a modern-day medication abortion).<sup>198</sup> Eleanor offered to "clear [Grace] from the Child, without giving [her] physick [medicine]" for 30 shillings, suggesting that she get the money from "Ch-r."<sup>199</sup> Grace took her up on the offer, not only choosing to

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<sup>196</sup> *Id.* at 931. Grace does not say that "Ch-r" raped her, but she testifies that she was drunk on ale and brandy pressed on her by Eleanor and had been sent to the stables to give hay to the horses. She was so inebriated, she was unable to perform this task and had to lie down, which is where "Ch-r" found her. *Id.*

<sup>197</sup> *Id.* Modern-day abortions are accomplished as either "medication abortions" or "surgical abortions." *What facts about abortion do I need to know?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/considering-abortion/what-facts-about-abortion-do-i-need-know> (last visited March 24, 2023). Surgical abortions can also be termed as "in-clinic" or "procedural" abortions. *Id.*; Regina Mahome, *Notes on Language: Why We Stopped Using 'Surgical Abortion' at Rewire News Group*, REWIRE (Apr. 16, 2020) <https://rewirenewsgroup.com/2020/04/16/notes-language-stopped-using-surgical-abortion/>. In a medication abortion, a patient takes two drugs (mifepristone and misoprostol) to stop the pregnancy's growth and cause cramping and bleeding to clear the uterus. *The Abortion Pill*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill> (last visited March 24, 2023). There are multiple kinds of surgical abortion that involve either suction only or suction and the use of medical tools to clear pregnancy tissue from the uterus. *In-Clinic Abortion*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures> (last visited March 24, 2023).

<sup>198</sup> *Id.* at 931 "Physick" is an archaic term for medicine. *Physick*, *Dictionarium Britannicum* (1730). What could be called a medication abortion using modern terminology would have been achieved either through ingesting a purgative or an emmenagogue, as opposed to an 18th-century analog to modern surgical abortion, which would have been accomplished with some instrument. In this case, it was an iron skewer. *The Tryal of Eleanor Beare of Derby, on Tuesday Aug. 15, 1732*, *supra* note 110, at 932.

<sup>199</sup> *Id.*

have the abortion but also exercising autonomy in selecting what seems to have been her preferred method.<sup>200</sup> Furthermore, Grace was apparently perfectly fine afterward, although she testified that the actual abortion hurt.<sup>201</sup> A closer read of Grace’s testimony reveals one last, notable thing: the abortion happened a little more than fourteen weeks after “Ch-r” raped her.<sup>202</sup> By current measures, she would have been at least sixteen weeks pregnant at the time of the abortion, and her pregnancy had almost certainly quickened.<sup>203</sup> The *Dobbs* majority is incorrect when it claims<sup>204</sup> quickening was not relevant to Eleanor’s trial. She was within the reach of the common law because Grace’s pregnancy had quickened.

An overarching theme emerges from the pages of Eleanor’s trial record: men’s control over the proceedings. The king’s counsel (prosecutor) and the judge must have been men because women were not allowed to practice law in the United Kingdom until 1919.<sup>205</sup> The prosecutor addressed the “gentlemen of the Jury.”<sup>206</sup> Eleanor was partially convicted based on the testimony given by a man she accused

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<sup>200</sup> *Id.* at 932.

<sup>201</sup> *Id.* at 931.

<sup>202</sup> Gillian Brockwell, *Abortion in the Founders’ Era: Violent, Chaotic, and Unregulated*, Wash. Post (May 15, 2022, 7:00 EDT), <https://www.washingtonpost.com/history/2022/05/15/abortion-history-founders-alito/>. Pregnancies are dated from the first day of the person’s last monthly period. Conception usually happens around two weeks after that. Grace testifies that the assault happened a little more than fourteen weeks before the abortion. Add two weeks to reach the modern estimate of sixteen weeks since her last monthly period. *See generally* Healthline Editorial Team, *How to Calculate Your Due Date*, Healthline.com (Jan. 4, 2018), <https://www.healthline.com/health/pregnancy/your-due-date>.

<sup>203</sup> *Dobbs*, 142 S. Ct. at 2250.

<sup>204</sup> Sex Disqualification (Removal) Act, 9 & 10 Geo. 5 c. 71.

<sup>205</sup> *The Tryal of Eleanore Beare of Derby, on Tuesday Aug. 15, 1732, supra* note 110, at 931.

<sup>206</sup> *Id.* at 932.



of lying.<sup>207</sup> Even Derby's mayor took the stand, reporting that he had received many complaints that she kept an untidy house.<sup>208</sup> Justice Alito quotes<sup>209</sup> the judge in Eleanor's trial saying that he had never encountered a case "so barbarous and unnatural," but that does not tell the full story of the remark. The judge's charged statement was in his summation of the evidence to the jury before Eleanor had even been found guilty, addressing both the charges of providing Grace's abortion and of the attempted poisoning of Nicholas Wilson's wife.<sup>210</sup> Furthermore, he was parroting what was essentially the prosecutor's opening argument as to the second indictment.<sup>211</sup> Following her conviction on the first two charges, the judge sentenced Eleanor to two market days in the pillory and three years' imprisonment.<sup>212</sup> On her first day in the pillory, the crowd hurled so many eggs and turnips at her that observers thought "she would hardly have escap'd with her Life."<sup>213</sup> Eleanor extricated herself from the pillory and fled into the crowd before she was recaptured and taken back to prison "with Difficulty."<sup>214</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> *Dobbs*, 142 S. Ct. at 2250

<sup>209</sup> *The Tryal of Eleanore Beare of Derby, on Tuesday Aug. 15, 1732, supra* note 110, at 931. Grace also implies an associate of Eleanor's poisoned her, too, in a separate incident after the abortion. *Id.* at 932.

<sup>210</sup> "Gentlemen . . . observe that the Misdemeanor for which the Prisoner stands indicted is of the most shocking Nature; to destroy the Fruit of the Womb carries something in it contrary to the natural Tenderness of the female sex, that I am amazed how ever any Woman should arrive at such a degree of Impiety and Cruelty, as to attempt it in such a manner as the Prisoner has done, it has something really so shocking in it . . . It is cruel and barbarous to the last degree." *Id.* at 931.

<sup>211</sup> *Id.* at 932.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See Dobbs*, 142 S. Ct. at 2228-98.

The Supreme Court’s opinion discusses absolutely none of this.<sup>215</sup> To learn Eleanor’s and Grace’s stories, readers would have to peruse Volume II of *The Gentleman’s Quarterly*, where Eleanor’s trial record is sandwiched between a list of bankruptcies and a paragraph reporting on the trial of a Gloucester man found guilty of committing a gruesome axe murder.<sup>216</sup> That reader would also have to pause regularly to re-read many words like “Mifdemeanor” as “Misdemeanor,” or “Prifoner” as “Prisoner.”<sup>217</sup> Those who had or needed abortions are starkly absent from Justice Alito’s eight-century survey of history and tradition, even though he acknowledges that abortion is “nothing new.”<sup>218</sup> What would an examination of their histories and traditions reveal?

V. THE HISTORY AND TRADITION OF THOSE WHO HAD OR NEEDED  
ABORTIONS

An analysis of the history and tradition of those who had or needed abortions must adequately comprehend the quickening doctrine. The *Dobbs* majority’s historical analysis is deeply flawed because its treatment of the quickening doctrine is egregiously wrong. The Court writes that the common-law quickening distinction was made because, due to technology throughout history,

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<sup>215</sup> *The Tryal of Eleanor Beare of Derby, on Tuesday Aug. 15, 1732*, *supra* note 110, at 930-32.

<sup>216</sup> *Id.*

<sup>217</sup> *See Dobbs*, 142 S. Ct. at 2258. The dissent also notes the absence of women in the majority’s historical analysis. *Dobbs*, 142 S. Ct. at 2324-25 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

<sup>218</sup> *Id.* at 2251-52.

there was no evidence of pregnancy before quickening.<sup>219</sup> That is not the entire story of the quickening doctrine and limiting it to an evidentiary standard distorts history and tradition.

The quickening doctrine refers to the non-criminal treatment by the common law of termination before quickening.<sup>220</sup> It also refers to a historical understanding of pregnancy in England and America, which persisted in the public consciousness beyond Storer's time and into the 20th century.<sup>221</sup> Justice Alito either does not know of, misunderstands, or outright ignores this crucial historical concept. As bizarre as it may sound to a modern audience, people genuinely did not believe a person was pregnant like modern society would until after the pregnancy quickened.<sup>222</sup> If a person with a regular period experienced amenorrhea, or lack of a period, there could have been two explanations. The first may have been a suspected pregnancy, but given the technology at the time, it would not at all be certain until quickening.<sup>223</sup> Additionally, the common law, religious scholarship, and society at large did not treat an embryo or pre-quickening fetus as having a soul or as being separate from the parent's existence.<sup>224</sup>

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<sup>219</sup> Mohr, *supra* note 136, at 3-4.

<sup>220</sup> Reagan, *supra* note 138, at 110.

<sup>221</sup> See Mohr, *supra* note 136, at 5-6.

<sup>222</sup> *Id.* at 4.

<sup>223</sup> Brockwell, *supra* note 202; Brief in Support of Respondents, *supra* note 130, at 2; Mohr, *supra* note 136, at 6.

<sup>224</sup> Reagan, *supra* note 138, at 8.

The second was that the person's period had been blocked or obstructed, which was hazardous to their health.<sup>225</sup> Amenorrhea was not a pretext for pre-quickening abortions but a legitimate medical concern.<sup>226</sup> Just as physicians bled their patients to equalize Galen's humors, menstruation was seen as a way for the body to rid itself of toxins.<sup>227</sup> In fact, healers did bleed patients in attempts to bring on missed periods, including by pulling teeth as late as the 1870s.<sup>228</sup> The cure for harmful amenorrhea was to restore a person's menstruation.<sup>229</sup> When patients ingested concoctions to bring on their menses, the resulting vomiting and evacuation demonstrated the drugs' efficacy.<sup>230</sup> Doctors, midwives, and women themselves restored menstruation by emmenagogues, purgatives, and instruments without ever considering such procedures abortions.<sup>231</sup> Women regularly grew abortifacient herbs, such as tansy and pennyroyal, in their gardens and mixed their own emmenagogues and purgatives, following recipes published in popular medical texts written for married women.<sup>232</sup> Or they purchased commercial abortifacients produced in the thriving industry that had taken root in America by the mid-18th century.<sup>233</sup> Restoration of menses was a common enough aspect of

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 8-9.

<sup>227</sup> Mohr, *supra* note 136, at 7-8.

<sup>228</sup> Reagan, *supra* note 138, at 8.

<sup>229</sup> *Id.*

<sup>230</sup> *E.g.*, *Id.* at 8-9; Mohr, *supra* note 136, at 10.

<sup>231</sup> Reagan, *supra* note 138, at 9.

<sup>232</sup> *Id.*

<sup>233</sup> Mohr, *supra* note 136, at 7. Meaning a missed period.

women's lives that multiple slang terms existed around it during the 18th and 19th centuries, such as "taking the cold"<sup>234</sup> and "taking the trade."<sup>235</sup>

The *Dobbs* majority reenacts the campaign of Storer when it dismisses the significance of quickening in its historical analysis. Storer diminished the significance of quickening by saying that it was just a "sensation" some women had and did not occur at a standard point in pregnancy.<sup>236</sup> In eliminating the importance of quickening, Storer redefined what had previously been a restoration of menses into a post-quickening abortion akin to infanticide.<sup>237</sup> As discussed above, this also removed doctors' reliance on women's insight and experiences in practicing their trade,<sup>238</sup> furthering professionalism in the Regulars' industry and their social standing as the sole authorities of medicine.<sup>239</sup>

But the public, including women excluded from legislative and academic halls of power, had not rejected the quickening doctrine by 1868.<sup>240</sup> While crafting their state's anti-abortion statute in 1867, Ohio legislators noted that public opinion extensively supported the quickening doctrine.<sup>241</sup> In 1868, several women attending a lecture given by Dr. Anne Densmore fainted upon hearing the doctor's arguments that abortion was murder, so overcome were they by the thought of having

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<sup>234</sup> Reagan, *supra* note 138, at 9. Meaning restoration of menstruation.

<sup>235</sup> *Id.* at 12.

<sup>236</sup> *Id.* at 13.

<sup>237</sup> Reagan, *supra* note 138, at 12.

<sup>238</sup> Mohr, *supra* note 136, at 147.

<sup>239</sup> *Id.* at 73.

<sup>240</sup> *Id.* at 207.

<sup>241</sup> *Id.* at 73.

committed murder.<sup>242</sup> Indeed, in the early-20th-century, the early birth control movement had a difficult time convincing people that prophylactic birth control was different from restoration of menstruation and that the former was morally acceptable and the latter was not.<sup>243</sup> In 1922, a doctor expressed dismay that the public still believed “that there can be no real life until fetal movements are felt.”<sup>244</sup> He said, “We often find women of unquestioned moral standing bitterly resenting their state of pregnancy, and . . . determined to put an end to the whole affair.”<sup>245</sup> He continued, “when the date of quickening arrives and they are conscious of sheltering and nourishing a human life, their viewpoint is completely changed.”<sup>246</sup>

The Court’s neglect of the quickening doctrine taints its analysis of any material before or during the 19th century. The majority makes a point of noting when quickening is not mentioned in its sources but overlooks the reason its absence could have been apparent to contemporary readers. It is entirely possible that when quickening was not mentioned, it was assumed that someone was not

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<sup>242</sup> Reagan, *supra* note 138, at 36.

<sup>243</sup> *Id.* at 109.

<sup>244</sup> *Id.* at 109-10.

<sup>245</sup> *Id.* at 110.

<sup>246</sup> Professor Tang also comes to this conclusion, also citing historian James Mohr’s guidance that “an ability to suspend one’s modern preconceptions and to accept the early nineteenth century on its own terms regarding the distinction between quick and unquick is absolutely crucial to an understanding of the evolution of abortion policy in the United States.” Tang, *supra* note 246, at 32 (citing Mohr, *supra* note 136, at 5). To this author’s knowledge, only Professor Tang, the Brief For Amici Curiae American Historical Association and Organization Of American Historians in Support Of Respondents, and this article have advocated for this view in an originalist sense.

pregnant until after quickening. If someone was described as pregnant, contemporary readers might have presumed the pregnancy had quickened.<sup>247</sup> Eleanor Beare's trial record is illustrative of this. Grace Belfort had told Eleanor that she believed she was pregnant after some time had passed since the assault.<sup>248</sup> She was about sixteen weeks pregnant, around the average time that quickening occurs. In anti-abortion statutes that did not explicitly mention quickening, the doctrine would have been implied in the *mens rea* component of those criminal codes. A defendant could not intentionally or knowingly cause another person to miscarry if the defendant did not know or believe that the person was pregnant, so intent could not be proven beyond a reasonable doubt without quickening.<sup>249</sup>

This is especially true if a prosecutor had to convince a jury of laymen.<sup>250</sup> Even under statutory regimes that explicitly criminalized abortion at any stage of pregnancy, convictions were exceedingly rare.<sup>251</sup> Before, during, and after 1868, public understanding, especially women's understanding, was that people had the liberty to restore menstruation before quickening.

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<sup>247</sup> *The Tryal of Eleanor Beare of Derby, on Tuesday Aug. 15, 1732, supra* note 110, at 931.

<sup>248</sup> Mohr, *supra* note 136, at 43.

<sup>249</sup> Brief in Support of the Respondents, *supra* note 130, at 28.

<sup>250</sup> *Id.* at 30. It was only in the mid-1870's and into the 1890's that state courts began shifting evidentiary and procedural rules to remove barriers to prosecuting abortion providers and make convictions easier to obtain. Mohr, *supra* note 136, at 230-37.

<sup>251</sup> This argument is limited solely to history and tradition informed by the quickening doctrine and the historical, lived experiences of people who had or needed abortions, because the Supreme Court does not take their reliance interests or their bodily autonomy seriously. *Compare Dobbs*, 142 S. Ct. at 2276-77 with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

Applying *Glucksberg*'s test to this more accurate and comprehensive vision of 19th-century America demonstrates—at a minimum—a negative, constitutional right to pre-quickening abortions.<sup>252</sup> The description of this right is more carefully crafted than the Court's treatment of the liberty interest at stake in Mississippi's 15-week abortion ban, which would have been better characterized as the right to post-quickening abortion instead of a general right to abortion.<sup>253</sup> Chief Justice Rehnquist wrote in *Glucksberg* that rights being adjudicated should be defined with care and should be refined based on “concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.”<sup>254</sup>

*Dobbs* looked to history and tradition as defined by cisgender men. If abortion is an issue that impacts only those who can become pregnant, and those people did not have any input<sup>255</sup> in history and tradition controlled by men, then the Court should have looked to where those people historically and traditionally had and exercised any scrap of agency—or liberty<sup>256</sup>—at the time of the Fourteenth Amendment's ratification. Legal philosopher H. L. A. Hart wrote about Positivism,

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<sup>252</sup> *Dobbs*, 142 S. Ct. at 2242; compare generally *Michael H. v. Gerald D.*, 491 U.S. 110, 126 n. 6 (1989) with *Michael H.*, 491 U.S. 136, 141 (J. Brennan, dissenting).

<sup>253</sup> *Glucksberg*, 521 U.S. at 722. See also *Michael H.*, 491 U.S. at 122-23.

<sup>254</sup> See generally U.S. Const. amend. XIX.

<sup>255</sup> “Liberty,” as defined in the 1868 edition of Webster's dictionary, meant “1. Ability to do as one pleases; freedom from restraint. 2. Permission granted; leave. 3. Privilege; immunity. 4. Place within which certain privileges are enjoyed.” *Liberty, A Dictionary of the English Language* (1868).

<sup>256</sup> Jeffrey Kaplan, *What is Legal Positivism?*, YOUTUBE (July 17, 2020), <https://www.youtube.com/watch?v=ATtqAjOkqwk>.



a theory of law that posits laws are a social phenomenon created by humans.<sup>257</sup> In his seminal work, *The Concept of Law*, he identified how groups of people make and abide by social rules and laws as the Rule of Recognition.<sup>258</sup> Simply stated, laws are valid not because they are written down, if they are written down at all, but because a group of people recognizes the law as valid and adheres to it.<sup>259</sup> One could ask, why turn to amorphous, legal philosophical questions when America has centuries of written laws, including a written Constitution? But that overlooks the main point. Women had little, if any, hand in creating those laws but created and followed their own laws specifically regarding abortion.<sup>260</sup> The quickening doctrine was fundamental to women's historical practices and the legal traditions they actually created and followed at the time of the Fourteenth Amendment's enactment.

Abortion was a regular part of women's lives, and it fell within their domain before, during, and after the Fourteenth Amendment's enactment. American women have a history and tradition of having the power to choose and choosing abortion, especially pre-quickening abortions. It was a truly fundamental part of their lives and was widely practiced, with a sharp, widespread increase in rates from

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<sup>257</sup> Jeffrey Kaplan, *Hart-Concept of Law-Ch 5 (Primary and Secondary Rules)*, YOUTUBE (July 20, 2020), [https://www.youtube.com/watch?v=Xg\\_9F2h89TE](https://www.youtube.com/watch?v=Xg_9F2h89TE); Jeffrey Kaplan, *Hart-Concept of Law-Ch 6 (The Rule of Recognition)*, YOUTUBE (July 21, 2020), <https://www.youtube.com/watch?v=4qtSYUccppc>.

<sup>258</sup> *Hart-Concept of Law-Ch 6 (The Rule of Recognition)*, *supra* note 259.

<sup>259</sup> See Reagan, *supra* note 138, at 21-22.

<sup>260</sup> Mohr, *supra* note 136, at 46-85.

1840 to 1880.<sup>261</sup> Where women could not count on professionals for abortions, they shared information on or performed them themselves.<sup>262</sup> Contemporary writers observed that many women were skillful and knowledgeable enough to perform abortions on themselves, and several abortion clinics run by women sprung up across America between the 1840s and 1870s.<sup>263</sup> A Colorado judge in 1870 took it for granted that a “mother or any other old lady” would help a girl who had missed her period.<sup>264</sup> Some of the principals in an 1855 abortion trial in rural Indiana notarized their depositions with marks because they were illiterate. These women must have been cooperating and communicating by word of mouth.<sup>265</sup>

Continuing after criminalization, women helped others obtain and recover from abortions, recommending providers, accompanying friends to appointments, and taking over domestic duties like house care and childcare afterward.<sup>266</sup> This mirrored the community support women provided for each other during pregnancy and childbirth.<sup>267</sup> The bond formed over this kind of support during reproductive events was crucial to the fabric of the female social world.<sup>268</sup> Doctors were appalled at how freely women spoke of abortions with each other—one doctor describing his

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<sup>261</sup> *Id.* at 106.

<sup>262</sup> *Id.* at 70.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 107.

<sup>265</sup> Reagan, *supra* note 138, at 30-31.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 31.

<sup>268</sup> *Id.* at 25-26.

patients as casually discussing abortion like they were planning supper for an upcoming charity event.<sup>269</sup>

Abortion was something that women had control over and the liberty to largely make and follow their own rules,<sup>270</sup> as opposed to many, many other aspects of their lives. In Wyoming, white women first got the vote in 1870, followed by white women in Utah who achieved enfranchisement that same year.<sup>271</sup> White female enfranchisement followed in Washington in 1883, Montana in 1887, and Colorado in 1893.<sup>272</sup> The Nineteenth Amendment was not ratified until 1920,<sup>273</sup> after a hard-fought campaign that included hunger strikes and forced feedings.<sup>274</sup> Native Americans could not vote until the passage of the Snyder Act in 1924.<sup>275</sup> While the Fifteenth and Nineteenth Amendments extended a theoretical right to vote to people of color, protection of this right was abysmal until the Voting Rights Act of 1965 following state-enacted violence on Bloody Sunday.<sup>276</sup>

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<sup>269</sup> See Mohr, *supra* note 136, at 103.

<sup>270</sup> Jennifer Billock, *Women Have Been Voting in Wyoming for 150 Years, and Here Is How the State Is Celebrating*, SMITHSONIAN (June 7, 2019), <https://www.smithsonianmag.com/travel/women-voting-wyoming-150-years-here-how-state-celebrating-180971263/>.

<sup>271</sup> *Id.*

<sup>272</sup> National Archives, *19th Amendment to the Constitution: Women's Right to Vote (1920)* (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/19th-amendment>.

<sup>273</sup> Victoria W. Wolcott, *Suffragists Used Hunger Strikes as Powerful Tools of Resistance*, THE VIEW (Aug. 21, 2020), <https://www.buffalo.edu/ubnow/stories/2020/08/wolcott-conversation-suffragists.html>.

<sup>274</sup> Library of Congress, *Voting Rights for Native Americans*, <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-native-americans/> (last visited Dec. 15, 2022).

<sup>275</sup> National Archives, *Voting Rights Act (1965)* (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/voting-rights-act>.

<sup>276</sup> Any discussion of the economy or labor before Emancipation in 1865 must account for the existence of slavery and the forced contribution of unpaid labor to America's economy. Enslaved

Women also did not have commensurate agency as men did in the economy or labor force. Although industrialization had revolutionized women's role in the paid<sup>277</sup> labor force,<sup>278</sup> only 20% of all women worked outside the home in 1900.<sup>279</sup> Less than 6% of married women over the age of fifteen worked for pay that same year.<sup>280</sup> Starting in 1820, the Cult of Domesticity relegated women to the private sphere of the home.<sup>281</sup> Justice Bradley concurred<sup>282</sup> with the ruling in *Bradwell v. Illinois* in 1873, the case in which the Supreme Court held that the Privileges or Immunities Clause did not entitle women to the right to hold the same occupations as men.<sup>283</sup> He wrote, “the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life” and

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women's labor was no exception to this. Emily West, *Hidden Voices: Enslaved Women in the Lowcountry and the U.S. South: Enslaved Women's Work*, LDHI,

<https://ldhi.library.cofc.edu/exhibits/show/hidden-voices/enslaved-womens-work>.

<sup>277</sup> The backbreaking work of running a 19th-century house or working on the family's farm or in the family's shop was not counted as occupational work at the time, and the contribution of domestic labor to the economy is still undervalued. Barry R. Chiswick & RaeAnn Halenda Robinson, *Women at Work in the Pre-Civil War United States: An Analysis of Unreported Family Workers*, I Z A INST. OF LAB. ECON. DISCUSSION SERIES, 6 (2020); Alexandra Finley, *Women's household labor is essential. Why isn't it valued?*, WASH. POST (May 29, 2020, 6:00 am EDT), <https://www.washingtonpost.com/outlook/2020/05/29/womens-household-labor-is-essential-why-isnt-it-valued/>.

<sup>278</sup> Dora L. Costa, *From Mill Town to Board Room: The Rise of Women's Paid Labor*, 14 J. OF ECON. PERSPECTIVES 101 (2000).

<sup>279</sup> *Id.*

<sup>280</sup> Catherine J. Lavender, *Notes on The Cult of Domesticity and True Womanhood, Prepared for Students in HST 386: Women in the City, Department of History, The College of Staten Island/CUNY* (1998), <https://csivc.csi.cuny.edu/history/files/lavender/386/truewoman.pdf> (last visited Dec. 16, 2022).

<sup>281</sup> *Bradwell v. Illinois*, 83 U.S. 130, 139-142 (Bradley, J., concurring).

<sup>282</sup> *Id.* at 139.

<sup>283</sup> *Id.* at 141.

that “the paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.”<sup>284</sup>

Thanks to friend of the Court, Matthew Hale,<sup>285</sup> women did not even have agency in their marital beds at the time of the Fourteenth Amendment’s enactment.<sup>286</sup> Contemporary feminists actually blamed abortions on men’s sexual violence, which feminists viewed as men’s lack of self-control and lack of respect for their wives.<sup>287</sup> Voluntary motherhood was a key tenet of first-wave feminism, although the vast majority of feminists did not endorse abortion or even contraception use.<sup>288</sup> Their focus was much more on the violence they viewed as inherent in marriage at the time and working towards a society where abortion would be unnecessary because of egalitarian respect between husbands and wives.<sup>289</sup> Suffragist Lucy Stone wrote:

It is very little to me to have the right to vote, to own property . . . if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now, and so long as she suffers this bondage, all other rights will not help her to her true position.<sup>290</sup>

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<sup>284</sup> Pracher, *supra* note 180, at 728.

<sup>285</sup> Hasday, *supra* note 181.

<sup>286</sup> Mohr, *supra* note 136, at 112.

<sup>287</sup> *Id.* at 111.

<sup>288</sup> *Id.* at 111-13.

<sup>289</sup> *Id.* at 112.

<sup>290</sup> Siegel, *supra* note 30, at 38-39 (quoting Lucy Stone, *Letter to Antoinette Brown Blackwell* (July 11, 1855), in *FRIENDS AND SISTERS: LETTERS BETWEEN LUCY STONE AND ANTOINETTE BROWN BLACKWELL, 1846-93*, at 144 (Carol Lasser & Marlene Deahl Merrill eds., 1987)).

Sexual and reproductive violence was even more inherent in the existence of slavery.<sup>291</sup> To counter the control of slaveowners over their bodies and prevent the atrocities of slavery from being inflicted on their potential children, enslaved women chewed cotton root to prevent or terminate pregnancies.<sup>292</sup> It was such a widespread practice that many slaveowners forbade enslaved women from even possessing cotton root, and defiance of this rule resulted in brutal beatings.<sup>293</sup> Enslaved people also used a combination of calomel and turpentine to restore their menstruation, along with pennyroyal, cedar gum, camphor, and rags inserted into their vaginas.<sup>294</sup> Physicians reported relatively high rates of abortion and miscarriage among enslaved women, and one physician remarked that “all country practitioners . . . [were] aware of the frequent complaints of planters about the unnatural tendency in the African female to destroy her offspring.”<sup>295</sup> Abortion was used in addition to other forms of reproductive resistance, such as breastfeeding

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<sup>291</sup> See Emily West, *Hidden Voices: Enslaved Women in the Lowcountry and the U.S. South: Exploitation Through Sexual Violence*, <https://ldhi.library.cofc.edu/exhibits/show/hidden-voices/enslaved-women-and-slaveholder/sexual-violence> (last visited Dec. 15, 2022); See also Emily West, *Hidden Voices: Enslaved Women in the Lowcountry and the U.S. South: Exploitation Through Reproductive Labor*, <https://ldhi.library.cofc.edu/exhibits/show/hidden-voices/enslaved-women-and-slaveholder/reproductive-exploitation> (last visited Dec. 15, 2022).

<sup>292</sup> Emily West, *Hidden Voices: Enslaved Women in the Lowcountry and the U.S. South: Reproduction and Resistance*, LDHI, <https://ldhi.library.cofc.edu/exhibits/show/hidden-voices/resisting-enslavement/reproduction-and-resistance> (last visited Dec. 15, 2022).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*; Davis, *supra* note 35.

<sup>295</sup> Davis, *supra* note 35.

longer than allowed to stave off pregnancy and feigning pregnancy to lessen workloads.<sup>296</sup>

Women did not have agency in the voting booth or the economy, or even control in their sexual lives, but they had control in their reproductive lives—some much more than others—and they exercised what control they had. Abortion was and is central to American women’s histories and traditions. The Supreme Court either failed to recognize this truth or outright ignored it in *Dobbs*. The original public meaning of “liberty” to ordinary women in 1868 would have included the right to abortion, at the very least, before quickening.

#### CONCLUSION

It stretches credulity to say that the originalist methodologies of *Bruen* and *Dobbs* are in any way reconcilable. The only colorable distinction between the two cases is that one right is enumerated<sup>297</sup> and the other was not.<sup>298</sup> But can such a shallow difference harmonize such discordant approaches? It cannot be sufficient justification for a method of interpretation that prides itself on judicial restraint and consistency.<sup>299</sup> Nevertheless, Justices Thomas and Alito join<sup>300</sup> each other’s

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<sup>296</sup> West, *Hidden Voices: Enslaved Women in the Lowcountry and the U.S. South: Reproduction and Resistance*, *supra* note 929.

<sup>297</sup> See U.S. Const. amend. II.

<sup>298</sup> See U.S. Const. amend. XIV.

<sup>299</sup> See Wurman, *supra* note 41, at 37-38.

<sup>300</sup> *Bruen*, 142 S. Ct. at 2121; *Dobbs*, 142 S. Ct. at 2240.

opinions and write uncritical concurrences,<sup>301</sup> uttering not a word about their vastly different applications of history and tradition.

This drastic inconsistency among originalist<sup>302</sup> justices portends disastrous consequences for rights cherished by marginalized communities. The justices in *Bruen*'s and *Dobbs*' majorities eagerly look to history and tradition but will close their eyes to certain histories and traditions that do not suit their conservative ambitions. The history and tradition of women's bodily autonomy certainly fall into the disfavored category. If this history and tradition—which was well-documented, widely practiced in 1868, and central to women's lives—cannot survive the historical scrutiny of the conservative justices, then what hope do other unenumerated, marginalized rights have? Justice Thomas' *Dobbs* concurrence specifically names *Lawrence v. Texas* and *Obergefell v. Hodges* as Substantive Due Process cases that should be revisited.<sup>303</sup> *Obergefell v. Hodges* did not apply the *Glucksberg* test when determining a fundamental right to same-sex marriage.<sup>304</sup> Justice Kennedy wrote that “History and tradition guide and discipline this inquiry” into the existence of Substantive Due Process rights “but do not set its outer

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<sup>301</sup> *Bruen*, 142 S. Ct. at 2156 (Alito, J., concurring); *Dobbs*, 142 S. Ct. at 2300 (Thomas, J., concurring).

<sup>302</sup> Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 4:00 PM), [https://web.archive.org/web/20170522135245/https://spectator.org/58731\\_sam-alito-civil-man/](https://web.archive.org/web/20170522135245/https://spectator.org/58731_sam-alito-civil-man/); YLS TODAY, *Rosenkranz Originalism Conference Features Justice Thomas' 74* (Nov. 4, 2019), <https://law.yale.edu/yls-today/news/rosenkranz-originalism-conference-features-justice-thomas-74>.

<sup>303</sup> 142 S. Ct. at 2301 (Thomas, J., concurring).

<sup>304</sup> *Obergefell v. Hodges*, 576 U.S. 644, 663-64 (2015).



boundaries . . . . That method respects our history and learns from it without allowing the past alone to rule the present.”<sup>305</sup> However, that does not foreclose the Court from using *Glucksberg*’s history and tradition test if it decides to revisit *Lawrence* and *Obergefell*.

*Dobbs* prophesies the consequences should the Court continue to be so unscrupulous in its use of history and tradition. *Britton* was a treatise written at the behest of King Edward I of England (r. 1272-1307), who wanted to make the law more accessible to his subjects, i.e., written in French instead of Latin.<sup>306</sup> Book I, Chapter X concerns arson and states:

Let inquiry also be made of those who feloniously in time of peace have burnt others’ corn or houses, and those who are attainted thereof shall be burnt, so that they may be punished in like manner as they have offended. The same sentence shall be passed upon sorcerers, sorceresses, renegades, sodomites,<sup>307</sup> and heretics publicly convicted.<sup>308</sup>

Consulting secondary sources by actual historians reveals that no one was ever actually burned alive for the crime or sin of sodomy.<sup>309</sup> Instead, canon law simply called for excommunication, and ecclesiastical courts imposed sentences of

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<sup>305</sup> *Id.* at 664.

<sup>306</sup> The Royal Collection, *Edward I ‘Longshanks’ (r. 1272-1307)* (2006) <https://www.royal.uk/edward-i-longshanks>; Francis Morgan Nichols, *Britton: An English Translation and Notes* viii (1901).

<sup>307</sup> The medieval concept of sodomy meant any form of non-procreative sex. Eleanor Janega, *The Once and Future Sex* at 100 (2023).

<sup>308</sup> Nichols, *supra* note 306, at 35.

<sup>309</sup> Helmholz, *supra* note 106, at 629.

public penance.<sup>310</sup> This nuance provides small mercy: instead of being set ablaze, people who engaged in same-sex sexual intimacy could have been, among other things, cast out of their communities or whipped around the market square.<sup>311</sup> This hypothetical citation to *Britton* is not hyperbole. The Supreme Court cited two sources older than *Britton* in *Dobbs* and did not expound on their historical contexts.<sup>312</sup>

This essay takes what should not have been the audacious step of compiling *Dobbs*' historical record and filling in the gaps. If the Court continues using history and tradition in this manner, future scholarship will have to cite-check opinions and contextualize sources. If the Supreme Court insists on using history and tradition, scholars, parties, and justices must reframe their analyses and look to the histories and traditions of those impacted by the Court's potential decisions. The *Dobbs* majority examined Eleanor Beare's narrative and found it wanting from the perspective of the men who tried her.<sup>313</sup> The Court should have examined Eleanor's trial record and recognized that its value lies not in Eleanor's story, but in Grace Belfort's. Grace was raped and chose to terminate the resulting pregnancy, which had quickened.<sup>314</sup> She reclaimed her bodily autonomy in selecting her preferred

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<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 622.

<sup>312</sup> *Dobbs*, 142 S. Ct. at 2249, n. 25.

<sup>313</sup> *Id.* at 2250.

<sup>314</sup> *The Tryal of Eleanor Beare of Derby, on Tuesday Aug. 15, 1732, supra* note 110, at 931.

method of abortion.<sup>315</sup> Grace was not charged with any crime and said not a word of regret or remorse in her testimony.<sup>316</sup> But Grace is not even mentioned in *Dobbs*, even though she was the person who had the abortion.<sup>317</sup>

Both *Bruen* and *Dobbs* have revealed cracks in the Supreme Court's legitimacy.<sup>318</sup> In *Dobbs*, the Court ripped away a fundamental right from millions,<sup>319</sup> including this essay's author. In researching the ignored histories and traditions of abortion, I felt what was taken from my forebears in my bones, experiencing the same loss again as it echoed across generations. The full history and tradition of abortion in America should send cracks spider-webbing through the edifice of originalism's legitimacy. Women, well-behaved and otherwise, often make history and tradition. But the Supreme Court's originalist vision of justice is blind to histories and traditions that do not serve its ideological ends.

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 931-32.

<sup>317</sup> *See Dobbs*, 142 S. Ct. at 2228-98.

<sup>318</sup> Jamelle Bouie, *The Supreme Court Seems Awfully Nervous About Its Own Legitimacy*, N.Y. TIMES (Oct. 4, 2022), <https://www.nytimes.com/2022/10/04/opinion/roberts-alito-kagan-barrett-thomas.html>.

<sup>319</sup> *The Impact of The Supreme Court's Dobbs Decision on Abortion Rights and Access Across the United States*, 117th Cong. 2 (2022) (statement of Carolyn Maloney, Chairwoman, House Committee of Oversight and Reform).