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## Lessons from *Lawrence*: How “History” Gave Us *Dobbs* – And How History Can Help Overrule It

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**ABSTRACT.** *Dobbs v. Jackson Women’s Health Organization* is not the first time the Supreme Court has relied on dubious history to deny a constitutional right of profound importance. When the Court rejected what it described as the right of “homosexuals to engage in acts of consensual sodomy” in *Bowers v. Hardwick*, it did so based on disputed historical claims about criminal sodomy laws in early America. Indeed, when the Court later overruled *Bowers* in *Lawrence v. Texas*, it openly confessed that *Bowers*’s “historical premises are not without doubt and, at the very least, are overstated.”

This Essay explores three important lessons that reproductive-justice advocates can learn from *Lawrence*’s use of history to discredit *Bowers*. First, *Lawrence* shows that *Dobbs* is vulnerable to overruling because it, like *Bowers*, rests on faulty historical premises, including (but hardly limited to) *Dobbs*’s self-proclaimed “most important historical fact” that twenty-eight out of thirty-seven states banned abortion throughout pregnancy as of the Fourteenth Amendment’s enactment. Second, *Lawrence* suggests that these historical errors should undermine any claim *Dobbs* might make to stare decisis treatment. Finally, *Lawrence* reveals history’s limited utility in modern constitutional disputes. The problem with *Dobbs*’s dubious history, *Lawrence* teaches, is not that it represents the misapplication of a tractable test. The problem is that the history-and-tradition test *Dobbs* purports to apply is often deeply underdeterminate.

### INTRODUCTION

When the Supreme Court overturned the right to abortion in *Dobbs v. Jackson Women’s Health Organization*, it did so based on a version of abortion history that has drawn fierce criticism: it asserted that the right to abortion is not deeply rooted in our history and tradition because three-quarters of the states banned abortion at the time the Fourteenth Amendment was ratified.<sup>1</sup> Professor Leslie Reagan, for example, challenged the *Dobbs* majority for downplaying how abor-

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1. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248-49 (2022).

tion at the Founding was “legal under common law and widely accepted in practice” if performed before quickening, or the fetus’s first noticeable movement.<sup>2</sup> Professor Michele Goodwin forcefully argued that *Dobbs* ignored the Thirteenth Amendment’s prohibition against slavery and involuntary servitude, thus rendering “Black women and their bondage invisible.”<sup>3</sup> Professor Reva B. Siegel chastised the *Dobbs* majority for its “refus[al] to deal with the historical record” showing that nineteenth-century abortion bans were rooted in impermissible misogynistic and anti-immigrant motives.<sup>4</sup> Other historical critiques have proliferated.<sup>5</sup>

History, as they say, has a way of repeating itself.<sup>6</sup> *Dobbs* is not the first time the Supreme Court has relied on dubious history to reject a constitutional right of profound importance. The Court did the same thing in 1986, when it held in *Bowers v. Hardwick* that the Constitution does not confer a “fundamental right upon homosexuals to engage in sodomy.”<sup>7</sup> The *Bowers* Court reached that conclusion by asking, much like *Dobbs* asked,<sup>8</sup> whether the claimed right was

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2. Leslie Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022), <https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174> [<https://perma.cc/7JZD-ULKR>].
  3. 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> [<https://perma.cc/RFU8-GP2E>].
  4. Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1185-86 (2023).
  5. See, e.g., Patricia Cline Cohen, *The Dobbs Decision Looks to History to Rescind Roe—But the History It Relies on Is Not Correct*, WASH. POST (June 24, 2022), <https://www.washingtonpost.com/outlook/2022/06/24/dobbs-decision-looks-history-rescind-roe> [<https://perma.cc/5URF-TRUY>]; Gillian Brockell, *Abortion in the Founders’ Era: Violent, Chaotic and Unregulated*, WASH. POST (May 15, 2022), <https://www.washingtonpost.com/history/2022/05/15/abortion-history-founders-alito> [<https://perma.cc/C7B7-BMG5>]; Samira K. Mehta & Lauren MacIvor Thompson, *The Supreme Court’s Abortion Decision Is Based on a Myth. Here’s Why*, WASH. POST (June 24, 2022), <https://www.washingtonpost.com/outlook/2022/06/24/supreme-courts-abortion-decision-is-based-myth-heres-why> [<https://perma.cc/J7V6-RQBD>]; Sarah Hougen Poggi & Cynthia A. Kierner, *A 1792 Case Reveals that Key Founders Saw Abortion as a Private Matter*, WASH. POST (July 19, 2022), <https://www.washingtonpost.com/made-by-history/2022/07/19/1792-case-reveals-that-key-founders-saw-abortion-private-matter> [<https://perma.cc/8K9H-279Z>]; Miranda McGowan, *The Democratic Deficit of Dobbs*, 55 LOY. U. CHI. L.J. (forthcoming 2023) (manuscript at 25-71).
  6. See, e.g., GEORGE SANTAYANA, *THE LIFE OF REASON; OR THE PHASES OF HUMAN PROGRESS* 284 (2d ed. 1905) (“Those who cannot remember the past are condemned to repeat it.”).
  7. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).
  8. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

“deeply rooted in this Nation’s history and tradition.”<sup>9</sup> Such a claim, *Bowers* smugly asserted, was “at best, facetious” given that “[i]n 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.”<sup>10</sup>

If *Dobbs* represents a repeat of *Bowers*’s reliance on disputed history, the question moving forward is whether history will also repeat itself in the form of a course correction. After all, the Supreme Court eventually overruled *Bowers* in an opinion that owned up to *Bowers*’s historical mistakes: *Bowers*’s “historical premises,” the Court admitted in *Lawrence v. Texas*, were susceptible to “fundamental criticisms.”<sup>11</sup> In particular, *Lawrence* described how *Bowers* misunderstood the motives behind early sodomy bans and failed to account for how those bans were rarely enforced against same-sex couples acting consensually and in private.<sup>12</sup> Those criticisms paved the path to *Bowers*’s demise in two ways: *Bowers*’s reliance on contested history both undermined the force of stare decisis and justified *Lawrence*’s use of a different, non-historically-focused legal test. If similar historical errors pervade *Dobbs*, might that open the door for the Court to make the same moves in a future case readvancing a constitutional right to abortion?

This Essay explores that question. I argue that *Lawrence v. Texas* holds three important lessons for reproductive-justice advocates and concerned Americans who are dedicated to overturning *Dobbs*. First, *Dobbs* does indeed suffer from historical inaccuracies like those in *Bowers*. If anything, *Dobbs*’s mistakes are more severe. Whereas *Bowers* erred in its assessment of *why* thirty-two of thirty-seven states punished sodomy when the Fourteenth Amendment was ratified,<sup>13</sup> *Dobbs* erred in a more fundamental way. Even assuming the Court was right to fixate on a centuries-old state law consensus to demarcate the outer boundaries of substantive due process — an approach I do not endorse,<sup>14</sup> but that I accept for the sake of exposition — the Court still miscounted the number of states that banned abortion altogether. *Dobbs*’s assertion that twenty-eight out of thirty-seven states banned all abortion as of the Fourteenth Amendment’s adoption — a claim *Dobbs* calls the “most important historical fact” in its analysis<sup>15</sup> — rests on a series of historical errors. For example, *Dobbs* counts some states as prohibiting abortion throughout pregnancy based on abortion bans that state supreme

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9. *Bowers*, 478 U.S. at 192.

10. *Id.* at 192-94.

11. *Lawrence*, 539 U.S. at 567-71.

12. See *infra* Section I.B.

13. See *id.*

14. See *infra* Section II.B.2.

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

courts had actually interpreted as applying only after quickening, at roughly sixteen to eighteen weeks into pregnancy.<sup>16</sup> *Dobbs* counts two states as banning all abortions when in fact their statutes prohibited abortion only via noxious poisons; surgical procedures remained lawful.<sup>17</sup> *Dobbs* even counts one state as banning abortion throughout pregnancy despite state prosecutors' open admission to the contrary.<sup>18</sup> As I have argued elsewhere, the evidence suggests that as few as sixteen states banned abortion throughout pregnancy when the Fourteenth Amendment was adopted, a minority of the states then in the union.<sup>19</sup> And that is just the tip of the iceberg: *Dobbs*, like *Bowers*, also erred by failing to grapple with how early abortion bans were actually enforced.<sup>20</sup> Even more, it mischaracterized the right to abortion as a late-twentieth century innovation when in truth it was a publicly advocated antebellum view.<sup>21</sup>

Second, *Lawrence* teaches that these historical errors should undercut any force *stare decisis* might otherwise exert in *Dobbs*'s favor. Indeed, if *Bowers*'s mistaken history was sufficient to justify its overruling, the same should be even truer of *Dobbs*—a case in which the majority shouldered the initial burden of overcoming fifty years' worth of *stare decisis* under *Roe* and *Casey*.<sup>22</sup> Put another way, if the “most important historical fact” that *Dobbs* could muster to prove that *Roe* and *Casey* were egregiously wrong relied on an inaccurate and misrepresented historical record, it is hard to see why *Dobbs* deserves unstinting adherence.

Third, *Lawrence* sheds light on the doctrinal arguments reproductive-justice advocates may wish to emphasize—and that others may embrace—in efforts to advocate a new constitutional right to abortion once *Dobbs* is stripped of its historical foundations. More specifically, *Lawrence* did not discuss *Bowers*'s historical errors for the purpose of suggesting that the right to intimate, same-sex conduct was historically grounded. It instead used the existence of historical uncertainty to cast doubt on the first-order matter of the proper approach to

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16. See, e.g., *Smith v. Gaffard*, 31 Ala. 45, 51 (1857) (“Unless the words convey th[e] imputation” that “the woman was ‘quick with child,’” they “do not charge an offense punishable by law.”); *State v. Murphy*, 27 N.J.L. 112, 114 (N.J. 1858) (“The design of the statute was not to prevent the procuring of abortions.”).

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

18. *State v. Dunn*, 100 P. 258, 258 (Or. 1909).

19. Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1099 (2023).

20. See *infra* Section II.A.2.

21. See *infra* Section II.A.3.

22. For a trenchant critique of *Dobbs*'s own approach to *stare decisis*, see Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845 (2023).

substantive due process, which *Bowers* had argued protected only those liberty interests that were deeply rooted in history and tradition.

Reproductive-justice advocates should consider a similar strategy in challenging *Dobbs*. A faithful account of abortion history does not suggest that there is an unassailable, historically rooted right to abortion, but that such an analysis looks for rights in an underdeterminate place. *Lawrence* teaches, in other words, that history is hard and often uncertain—a reality *Dobbs* never grapples with. What is more, this underdeterminacy is even more problematic when one recognizes the normative concerns that plague an approach to constitutional rights that is fixed to the worldviews of white male voters centuries ago.<sup>23</sup> Alas, a competing approach to substantive due process that grounds the right to abortion in evolving societal views is itself susceptible to the charge of underdeterminacy.<sup>24</sup> The upshot is that future reproductive-justice advocates might be wise to raise a range of legal arguments in support of an abortion right, including arguments rooted in modern Equal Protection Clause doctrine in particular—a position many eminent thinkers have advanced.<sup>25</sup>

In identifying these lessons from *Lawrence*, I should be clear (and realistic) about the time horizon and audience for my argument. None of the five conservative justices who voted to overrule *Roe* is going to change their minds in light of a more accurate historical accounting. For those justices, the outcome in *Dobbs* came first; history was but a means to that end. For that reason, my aim here is to speak to advocates in the movement for reproductive justice and those who will hear their arguments: future judges, students, and the public writ large. Change may not be around the corner. But as Professors David S. Cohen, Greer

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23. Indeed, as Professor Reva B. Siegel explains in this collection, the *Dobbs* majority employed its particular approach to history and tradition in order to “express rather than constrain [its] values” in a way that closely resembles how segregationists sought to mobilize history to defend *Plessy v. Ferguson*. Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs’s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 112 (2023).

24. See *infra* note 136 and accompanying text.

25. See Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents at 5-34, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Cary Franklin & Reva B. Siegel, *Equality Emerges as a Ground for Abortion Rights in and After Dobbs 2* (Jan. 9, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4315876](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4315876) [<https://perma.cc/3LJN-UVH2>]; *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures . . . center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”).

Donley, and Rachel E. Rebouché have forcefully argued, that should not stop us from talking about a strategy for overturning *Dobbs*.<sup>26</sup>

This Essay proceeds in two parts. Part I recounts how *Bowers* relied on historical assertions that *Lawrence* later revealed to be highly contested. Part I also reflects on how *Lawrence* leveraged these historical errors to ultimately overrule *Bowers* in two ways: it minimized the pull of stare decisis, and it applied a test for recognizing constitutional rights that looked beyond disputed claims concerning nineteenth-century practices.

Part II shows how these same arguments are available in future efforts to overrule *Dobbs*. It describes the crucial historical mistakes at the heart of *Dobbs*'s reasoning and explains why *Dobbs* is undeserving of stare decisis treatment as a result. And finally, it suggests a path forward rooted in equal-protection principles that are not shackled by historical conjecture over what a particular minority of Americans might (or might not) have thought more than a century and a half ago, before the advent of the light bulb.<sup>27</sup>

## I. HOW HISTORY HELPED LAWRENCE OVERRULE BOWERS

When the Supreme Court set out twenty years ago in *Lawrence v. Texas* to explain why it was overturning its earlier decision to reject the right to same-sex intimacy, the *New York Times* observed that “six justices turned to . . . history.”<sup>28</sup> As Professor George Chauncey, one of the historians responsible for an amicus brief cited in *Lawrence*, would later write, “it was deeply rewarding for historians to see their collective scholarly enterprise contribute to such a momentous decision.”<sup>29</sup> This Part briefly describes the historical claims that *Bowers* relied on before showing how *Lawrence* called them into doubt. It then identifies how *Lawrence*'s act of historical accounting enabled it to overrule *Bowers*.

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26. See David S. Cohen, Greer Donley, Rachel E. Rebouché, *We Need to Talk About Overturning the Dobbs Decision*, N.Y. TIMES (June 24, 2023), <https://www.nytimes.com/2023/06/24/opinion/dobbs-overturn-strategy-abortion.html> [https://perma.cc/G9ZS-RC23].

27. Thomas Edison is credited with inventing the light bulb in 1879, eleven years after the Fourteenth Amendment's passage. See *The Incandescent Light Bulb (1879)*, U.S. CENSUS BUREAU (Oct. 22, 2022), <https://www.census.gov/newsroom/stories/incandescent-light-bulb.html> [https://perma.cc/9MKB-ZD7Q].

28. Peter Edidin, *Word for Word/Educating the Court; In Changing the Law of the Land, Six Justices Turned to Its History*, N.Y. TIMES (July 20, 2023), <https://www.nytimes.com/2003/07/20/weekinreview/word-for-word-educating-court-changing-law-land-six-justices-turned-its-history.html> [https://perma.cc/YP3J-ABUT].

29. George Chauncey, “*What Gay Studies Taught the Court*”: *The Historians' Amicus Brief in Lawrence v. Texas*, 10 GLQ: J. LESBIAN & GAY STUD. 509, 510 (2004); see generally Brief of Professors of History George Chauncey, Nancy F. Cott, John D'Emilio, Estelle B. Freedman, Thomas C. Holt, John Howard, Lynn Hunt, Mark D. Jordan, Elizabeth Lapovsky Kennedy,

A. Bowers's *Historical Claims*

*Bowers v. Hardwick* concerned a challenge to Georgia's criminal sodomy statute, which prohibited "any sexual act involving the sex organs of one person and the mouth or anus of another" on pain of up to twenty years in prison.<sup>30</sup> The law applied on its face both to same-sex and opposite-sex couples. Significantly, however, the Court in *Bowers* addressed only the narrower question of "whether the Federal Constitution confers a fundamental right upon *homosexuals* to engage in sodomy."<sup>31</sup>

To answer that question, *Bowers* applied a test that will sound familiar to those immersed in the jurisprudential debate over *Dobbs*. "[T]o assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values," *Bowers* remarked, the Court has recognized only those "fundamental liberties that are implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition."<sup>32</sup> For support for this test, the Court cited Justice Powell's plurality opinion in *Moore v. City of East Cleveland*, which recognized a grandmother's right to cohabit with her grandchildren because "the institution of the family is deeply rooted in this Nation's history and tradition."<sup>33</sup> And for its part, Justice Powell's opinion quoted Justice Harlan's concurring opinion in *Griswold v. Connecticut* for the proposition that substantive due process should be constrained by continued "respect for the teachings of history."<sup>34</sup>

*Bowers* then offered two pieces of evidence for why the Court thought it "obvious" that the "right to engage in homosexual sodomy" could not satisfy the historical component of this test.<sup>35</sup> First, the Court noted that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original

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and Linda P. Kerber as Amici Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (presenting evidence from a wide array of historians to challenge *Bowers*'s historical assertions).

30. 478 U.S. 186, 188 n.1 (1986) (quoting GA. CODE ANN. § 16-6-2 (1984)).

31. *Id.* at 190 (emphasis added).

32. *Id.* at 191-92 (internal quotation marks omitted); see also *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) ("[T]he Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" (citations omitted)).

33. 431 U.S. 494, 503 (1977) (plurality opinion).

34. *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)). Professor Miranda McGowan has argued that the Court's varied references to "history and tradition" in substantive due process actually reflects four different approaches. See McGowan, *supra* note 5, at 6-7.

35. *Bowers*, 478 U.S. at 191-92.

thirteen States when they ratified the Bill of Rights.”<sup>36</sup> Second, and most important given that *Bowers* involved a Fourteenth Amendment due process challenge, the Court pointed out that “[i]n 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 states in the Union had criminal sodomy laws.”<sup>37</sup> Given this history, *Bowers* concluded that the “claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ . . . is, at best, facetious.”<sup>38</sup>

Chief Justice Burger wrote a short concurring opinion elaborating on the majority’s historical claims. Describing the “ancient roots” of antisodomy laws, Burger added references to how sodomy was condemned not only by many states at the Founding, but also under “Judeo-Christian moral and ethical standards,” Roman law, and English law.<sup>39</sup> *Bowers* thus relied firmly on history in rejecting the right of gay and lesbian couples to engage in private, consensual sexual activity. That history, however, would eventually come under fire from historians and legal scholars.<sup>40</sup> And these historical critiques would play a major role in *Bowers*’s undoing.

### B. Lawrence’s *Historical Accounting*

Unlike the Georgia law at issue in *Bowers*, *Lawrence* involved a challenge to a Texas law that targeted only gay and lesbian couples. More specifically, Texas’s law criminalized the act of “engag[ing] in deviate sexual intercourse *with another individual of the same sex*.”<sup>41</sup> That distinction—between laws targeting sodomy generally and laws singling out intimacy between gay or lesbian couples in par-

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36. *Id.* at 192.

37. *Id.* at 192-93.

38. *Id.* at 194.

39. *Id.* at 196-97 (Burger, C.J., concurring).

40. See, e.g., William N. Eskridge Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631 (criticizing the *Bowers* Court’s historical analysis in ways that prefigured *Lawrence*’s eventual reasoning); JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 121 (2d ed. 1997) (arguing that “[t]he modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions”—a quote later cited in *Lawrence*); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1081-86 (1988) (criticizing the *Bowers* majority’s historical premises).

41. TEX. PENAL CODE ANN. § 21.06(a) (West 1993) (emphasis added); see also *id.* § 21.01(1) (defining “deviate sexual intercourse” to include “any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object”).



ticular—proved to be significant. Indeed, *Lawrence* explained that *Bowers*'s failure to grapple with this distinction undermined its historical conclusions in two respects.

First, *Lawrence* pointed out that not a single one of the criminal sodomy laws on which *Bowers* relied was “directed at homosexuals as such.”<sup>42</sup> Like the ban at issue in *Bowers*, which applied to gay and straight couples alike, the early American laws were instead enacted for a distinct aim: “to prohibit nonprocreative sexual activity more generally.”<sup>43</sup> In fact, the Court pointed out that “the concept of the homosexual as a distinct category of person did not emerge until the late 19th century,” making it impossible that the centuries-old laws cited in *Bowers* could support a historical tradition of targeting same-sex intimacy for punishment.<sup>44</sup> *Lawrence* thus concluded “that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”<sup>45</sup> Instead, “far from possessing ‘ancient roots,’” as *Bowers* had claimed, “American laws targeting same-sex couples did not develop until the last third of the 20th century.”<sup>46</sup>

*Bowers* succumbed to a second historical oversight that further undermined its reasoning: the early sodomy laws were rarely, if ever, enforced against consenting same-sex couples acting in private. *Lawrence* thus recounted how surviving records of early sodomy prosecutions involved “predatory acts against those who could not or did not consent.”<sup>47</sup> Rather than being used to target “relations between consenting adults in private,” much less private relations between adults of the same sex, “19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.”<sup>48</sup> And to the extent some reported decisions did involve the prosecution of consensual relations between persons of the same sex, “a significant number involved conduct in a public place” — and in any event post-

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42. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

43. *Id.*

44. *Id.*

45. *Id.*; see also Brief of Professors of History, *supra* note 29, at 3-21 (making the same argument).

46. *Lawrence*, 539 U.S. at 570 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)).

47. *Id.* at 569; see also Brief Amici Curiae of the ACLU and the ACLU of Texas in Support of Petitioner, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 164132, at \*12-14 (describing the history of criminal sodomy laws' enforcement); Brief of the CATO Institute as Amicus Curiae in Support of Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152342, at \*10-12, \*1aa-4aa (similar).

48. *Lawrence*, 539 U.S. at 569.

dated the Fourteenth Amendment's ratification.<sup>49</sup> Reflecting on this extensive history of nonenforcement, *Lawrence* observed that it was “difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults.”<sup>50</sup>

*Bowers's* dual errors – its failure to comprehend the true motive behind early American sodomy laws and its inattention to the extensive history of nonenforcement against same-sex couples acting consensually and in private – gave the *Lawrence* Court pause. “[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate,” *Lawrence* concluded.<sup>51</sup> “Their historical premises are not without doubt and, at the very least, are overstated.”<sup>52</sup>

### C. History's Role in *Lawrence*

Having clarified the historical record surrounding early criminal sodomy laws, the *Lawrence* Court got to work overruling *Bowers*. History played two significant roles in that project.

First, by calling *Bowers's* historical premises into question, *Lawrence* blunted the force of *stare decisis*. At the outset, *Lawrence* did acknowledge that “[t]he doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law.”<sup>53</sup> Yet it argued that “*Bowers* itself causes uncertainty” rather than stability, in part because of the doubt surrounding *Bowers's* historical assertions.<sup>54</sup> The *Lawrence* Court thus observed that *Bowers* had engendered “fundamental criticisms of the historical premises” upon which it relied. And driving the point home, it emphasized how overruling *Bowers* would be appropriate given that “criticism of *Bowers* has been substantial and continuing,” including “as to its historical assumptions.”<sup>55</sup>

Second, *Lawrence* drew on the uncertain history of early American criminal sodomy laws to cast doubt on the wisdom of *Bowers's* approach to identifying fundamental liberties protected under substantive due process. This move bears emphasis. *Lawrence* did not attempt to conclusively resolve the debate over whether the liberty interest in private, consensual sexual relations with a person

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49. *Id.* at 570 (citing Brief Amici Curiae of the ACLU, *supra* note 47, at \*14-15, \*14 n.18); *id.* (noting that these prosecutions spanned from 1880 to 1995).

50. *Id.* at 569-70.

51. *Id.* at 571.

52. *Id.*

53. *Id.* at 577.

54. *Id.*

55. *Id.* at 576.

of the same sex was actually deeply rooted in history or tradition. The Court instead announced that it “need not enter this debate in the attempt to reach a definitive historical judgment.”<sup>56</sup>

Nor is it clear that the Court *could* have reached such a judgment had it tried. *Lawrence* candidly recognized that even accepting that the sodomy statutes cited in *Bowers* were motivated by a distaste for nonprocreative sex (rather than a concern for same-sex intimacy in particular) would not necessarily imply historical “approval of homosexual conduct.”<sup>57</sup> The problem with *Bowers* was that it was impossible to tell on the historical record which way history pointed. “The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance,” the Court pointed out, “is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.”<sup>58</sup>

So rather than attempting to show that the right to same-sex intimacy *satisfied Bowers’s* history-and-tradition test, *Lawrence* instead pointed to the “complex” and “overstated” nature of *Bowers’s* historical claims to undermine *Bowers’s* reliance on the history-and-tradition test in the first place. Because “scholarship casts some doubt” on *Bowers’s* historical foundations, *Lawrence* pronounced, “we think that our laws and traditions *in the past half century* are of most relevance here” because they reveal “an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>59</sup> *Lawrence* thus squarely rejected an approach to substantive due process that focuses myopically on what states criminally punished in 1791 or 1868: “History and tradition are the starting point but not in all cases the ending point of the substantive-due-process inquiry.”<sup>60</sup>

In summary, *Lawrence* did not dispute that, when the Fourteenth Amendment was ratified, thirty-two of thirty-seven states did in fact have laws on the books that proscribed sodomy generally—laws that, on their face, would have applied also to same-sex intimacy. *Lawrence* argued, though, that these laws were motivated not by disapproval of same-sex relations, but by a different, outmoded aim: disapproval of nonprocreative sex. What is more, *Lawrence* thought it significant that the older sodomy laws generally had not been enforced against consensual same-sex partners acting in private. These historical facts did not af-

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56. *Id.* at 568.

57. *Id.* at 568-69 (emphasis added).

58. *Id.* at 570.

59. *Lawrence*, 539 U.S. at 571-72 (emphasis added in both instances).

60. *Id.* at 572 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

firmatively prove that a right to private, same-sex intimacy was viewed as fundamental in the nineteenth century. What they showed instead is historical underdeterminacy: that laws on the books do not necessarily correspond to condemnation of a given activity, in that they might be animated by entirely different motivations or prove discordant with the dominant social practices that constitute a truer, more nuanced account of history and tradition. And the revelation that appendices of laws are insufficient to foreclose or exhaust fundamental-rights inquiries was enough to persuade the Court to look beyond the state laws that existed in 1868 to answer the constitutional question at hand. The next Part explores why the same should be true in a future case advancing the right to abortion.

## II. LESSONS FROM *LAWRENCE*: HOW HISTORY CAN HELP OVERRULE *DOBBS*

*Lawrence* offers a plausible strategy by which reproductive-justice advocates can use history to challenge *Dobbs* in a future case. This Part sketches a path forward, beginning with a discussion of how *Dobbs*, much like *Bowers*, suffers from “fundamental criticisms” as to its historical premises. It then describes how *Dobbs*’s reliance on dubious history should, again like *Bowers*, erode its claim to stare decisis respect and undermine its choice of a history-and-tradition focused doctrinal test.

Prior to this discussion, I should offer a candid observation in the spirit of legal realism. None of the arguments I am about to present is likely to persuade any of the five justices who voted to overrule the right to abortion in *Dobbs*. The object of this writing is instead forward-looking: it is to speak to future generations of advocates, jurists, and individuals whose interests are implicated in the battle over the abortion right. On this score, *Lawrence* is again instructive, as the efforts of historians and legal scholars in the years after *Bowers* were instrumental in laying the groundwork for that case’s eventual overruling.<sup>61</sup> My hope, in other words, is that by remembering *Lawrence* and its use of history, future advocates may be able to marshal a more nuanced account of abortion history to overrule another dark chapter in the Supreme Court’s legacy. In that sense, careful attention to history in this context represents a twist on the familiar aphorism: those who *remember* the past stand the greatest chance to repeat it.<sup>62</sup>

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61. See *supra* note 40. Indeed, the *Lawrence* Court even cited some of the historians’ work in explaining its decision to overrule *Bowers*. See, e.g., *Lawrence*, 539 U.S. at 568 (citing D’EMILIO & FREEDMAN, *supra* note 40); *Lawrence*, 539 U.S. at 571 (citing Eskridge, *supra* note 40).

62. See SANTAYANA, *supra* note 6, at 284.

A. Dobbs's *Historical Mistakes*

Before diving into *Dobbs*'s questionable historical premises, it is useful to identify some important features that *Dobbs* and *Bowers* have in common. Doctrinally, both rulings relied on a particular approach to deciding whether a given practice constitutes a fundamental liberty for purposes of substantive due process. *Dobbs* could well have quoted from *Bowers* when it announced the relevant test as “ask[ing] whether [a claimed] right is ‘deeply rooted in our history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’”<sup>63</sup>

The two cases are also similar in the way they *applied* the history-and-tradition test. Like *Bowers*, *Dobbs* focused on the picture of state law that existed when the Fourteenth Amendment was ratified. “The most important historical fact” in a proper substantive-due-process analysis, *Dobbs* announced, is “how the States regulated abortion when the Fourteenth Amendment was adopted.”<sup>64</sup> And on that front, *Dobbs* seemed to score a decisive blow: “By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime” at all stages in pregnancy.<sup>65</sup>

It bears mentioning that *Dobbs* never grappled with the fact that its particular version of this history-and-tradition test departed from the approach used in other substantive-due-process cases such as *Obergefell v. Hodges* and *Lawrence*, both of which “reasoned about traditions as living and evolving” rather than forever frozen as of 1868.<sup>66</sup> Nor did the majority acknowledge that, by fixing its analysis to the state of the law in 1868 – a time when “women and people of color were judged unfit to participate and treated accordingly by constitutional law,

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63. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246 (2022) (citations and internal alterations omitted) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019)); *see also* *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1985) (asking whether a claimed liberty is “implicit in the concept of ordered liberty” and “deeply rooted in this Nation’s history and tradition”). As noted above, the Court has referenced history and tradition in a range of substantive-due-process cases. *See supra* notes 30-31 and accompanying text. Notably, the Court relied on a similar history-and-tradition test in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). For important historical context on how the history-and-tradition test evolved – in particular how it was mobilized by the conservative legal movement – see Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161 (2023).

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

65. *Id.* at 2252-53. Of course, state-law counting of this kind played no role in the Court’s decisions in *Obergefell* and *Lawrence*. *See* *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Lawrence*, 539 U.S. 558.

66. *See* Siegel, *supra* note 23, at 133. As Siegel explains, the *Dobbs* majority’s choice of history-and-tradition approaches was itself an expression of the justices’ values, not some dispassionate act of evenhanded legal reasoning. *Id.*

common law, and positive law” – the Court effectively entrenched Founding Era inequalities into modern law.<sup>67</sup>

Nonetheless, the *Dobbs* majority leaned into its state law count. That count was in one sense slightly less impressive than the count in *Bowers*, where thirty-two of thirty-seven states had criminally punished sodomy as of the Fourteenth Amendment’s enactment.<sup>68</sup> But *Dobbs* left no doubt as to the vital importance of the state law count in its analysis, repeating it nearly verbatim four times and including a twenty-two-page appendix of the historical state of abortion laws in its slip opinion.<sup>69</sup> The upshot was thus much the same as in *Bowers*: the historical evidence of states “prohibiting abortion on pain of criminal punishment” convinced the *Dobbs* court that “a right to abortion is not deeply rooted in the Nation’s history and traditions.”<sup>70</sup>

How, then, did *Dobbs* err in its historical analysis? Even assuming that its particular history-and-tradition approach is correct, *Dobbs* suffers from three historical mistakes. The first concerns the accuracy of its state law count. The second is *Dobbs*’s failure, like *Bowers* before it, to grapple with a significant history of nonenforcement. The third mistake is unique to *Dobbs*: its erroneous assertion that no one thought of abortion as a constitutional right “[u]ntil the latter part of the 20th century.”<sup>71</sup>

### 1. *Dobbs*’s Mistaken State Law Count

*Dobbs*’s most basic error is its portrayal of state law as of the Fourteenth Amendment’s ratification. As an initial matter, it is worth noting how the nature of this error differs from the analogous error in *Bowers*. Recall that *Lawrence* did not dispute *Bowers*’s claim that thirty-two states had proscribed sodomy generally as of the Fourteenth Amendment’s ratification through laws that would have technically encompassed same-sex intimacy. The problem, *Lawrence* explained,

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67. Reva B. Siegel, *How “History and Tradition” Perpetuates Inequality: Dobbs on Abortion’s Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 101, 106 (2023). Neither is it clear that the state-law count focused approach taken by the majority really constitutes a form of originalism, as Professors Randy E. Barnett and Larry B. Solum have incisively explained. See Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 1, 27 (2023) (“[T]he ‘history and tradition’ of the regulation of abortion is potentially relevant to the original meaning of whether a right is a ‘privilege or immunity’ of citizens. But if that is the question the Court is answering, Justice Alito’s opinion falls short . . .”).

68. See *supra* notes 36–37 and accompanying text.

69. *Dobbs*, 142 S. Ct. at 2242, 2248, 2253, 2256, 2285–96.

70. *Id.* at 2253.

71. *Id.* at 2248.

was that *Bowers* misapprehended the *motive* behind those laws: the early sodomy bans were grounded in disapproval of all nonprocreative sex, not disapproval of same-sex intimacy in particular.<sup>72</sup> *Dobbs*, to be sure, suffers from that mistake, too: there is ample evidence that efforts to ban abortion in the mid-nineteenth century were motivated by an all-male medical profession's desire to drive out economic competition, combined with anti-immigrant and openly misogynist sentiment.<sup>73</sup> But *Dobbs* is guilty of another error that, by comparison, is far more fundamental: a significant number of the twenty-eight states it claims banned abortion throughout pregnancy – as many as a dozen by my best estimation<sup>74</sup> – actually did no such thing. What follows is an abbreviated account of *Dobbs*'s erroneous state law count; a complete version can be found in a separate Article published in the *Stanford Law Review*.<sup>75</sup>

Alabama offers a useful starting point. *Dobbs* asserts that the state banned abortion throughout pregnancy under an 1841 statute that made it a crime to “administer to any pregnant woman any medicines . . . [or] employ any instrument . . . with intent thereby to procure the miscarriage of such woman.”<sup>76</sup> At first blush, it is understandable why the majority might have thought this law criminalized abortion in Alabama “at all stages of pregnancy.”<sup>77</sup> To the present-day reader, “any pregnant woman” should mean just that – *any* pregnant woman, no matter how far along their pregnancy might be. Such a reading would, however, ignore crucial historical context.

The problem for the majority is that according to its own test, the whole point of counting up state abortion bans as of the Fourteenth Amendment's ratification is to ask whether access to abortion was “deeply rooted in this Nation's history and tradition.”<sup>78</sup> Asking someone alive in 2023 what they think archaic abortion laws might mean if they were still in force today hardly seems relevant to that task. Far more relevant to deciphering our nation's history and tradition

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72. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (“Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.”).

73. See generally Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 280-323 (1992) (describing the varied motives behind the American Medical Association's efforts to ban abortion).

74. See Tang, *supra* note 19 and accompanying text.

75. See *id.*

76. Act of Jan. 9, 1841, ch. 6, § 2, 1841 Ala. Laws 103, 143; see also *Dobbs*, 142 S. Ct. at 2286-87 (quoting this statute).

77. *Dobbs*, 142 S. Ct. at 2243.

78. *Id.* at 2246 (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019)); see also, e.g., *id.* at 2248 (“We must ask what the *Fourteenth Amendment* means by the term ‘liberty’ – not what modern jurists might think).

is how *people in 1868* would have understood then-existing state abortion laws at the time.<sup>79</sup>

Once this analytical objective is clarified, *Dobbs*'s "most important" historical fact starts to crumble. To the ordinary person alive in 1868, pregnancy was understood to encompass two distinct periods divided by the moment of "quickening," or the first noticeable movement of the fetus at roughly sixteen to eighteen weeks. As historian James C. Mohr has explained, "the distinction between quick and unquick" pregnancies was "virtually universal in America during the early decades of the nineteenth century and accepted in good faith."<sup>80</sup> And to most Americans at the time, prequickening abortions were neither legally nor morally culpable.<sup>81</sup> Legally, this view was rooted in a lengthy and unbroken line of authority holding that "to cause, or procure an abortion, before the child is quick, is not a criminal offence at common law."<sup>82</sup> Morally, even antiabortion lawmakers as late as 1867 were aware of the belief that "prevail[ed] very generally that a woman can throw off the product of conception, especially in the early stages, without moral guilt."<sup>83</sup>

When interpreting a law like Alabama's 1841 abortion ban, then, the question is whether it incorporated or discarded the longstanding quickening distinction embraced by the common law and ordinary public. As pro-life writer Eugene Quay evenhandedly admitted in his comprehensive survey of historic abortion bans in 1961, the Alabama Supreme Court answered that question in the 1857 case of *Smith v. Gaffard*.<sup>84</sup> Under *Smith*, Alabama's 1841 abortion law did not apply unless an abortion was "procured when the woman was 'quick with

79. See, e.g., Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621, 1624 (advocating the "originalist method of immersion," which involves immersing oneself in the "linguistic and conceptual world of the authors and readers" of the legal provision at issue).

80. JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900*, at 5 (1979).

81. See Tang, *supra* note 19, at 1129-30 nn.196-99, 1154 nn.343-346, and accompanying text.

82. *Abrams v. Foshee*, 3 Iowa 247, 279 (1856) (emphasis omitted); see also, e.g., *Smith v. State*, 33 Me. 48, 55 (1851) ("At common law, it was no offence to perform an operation upon a pregnant woman by her consent, for the purpose of procuring an abortion . . . unless the woman was 'quick with child.'"); *Commonwealth v. Bangs*, 9 Mass. (8 Tyng) 387, 388 (1812) (same); MATTHEW HALE, 1 *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 433 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736) (same); 1 WILLIAM BLACKSTONE COMMENTARIES 129-30 (same).

83. 1867 OHIO SEN. J. APP'X 234.

84. Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 448 (1961) (citing *Smith v. Gaffard*, 31 Ala. 45 (1857), for the proposition that Alabama's 1841 abortion "[s]tatute applies only after quickening").



child[]’ . . . .”<sup>85</sup> A letter sent by an antiabortion physician in Mobile, Alabama to Horatio Storer in 1859 confirms this understanding, as the physician expressed disappointment that state lawmakers had yet to ban prequickening abortion.<sup>86</sup> *Dobbs* is thus wrong to count the state as having banned abortion at all stages of pregnancy.

*Dobbs* is guilty of a similar mistake with respect to Texas. Counting that state as banning prequickening abortion ignores a Texas Court of Criminal Appeals opinion, which discussed the state legislature’s choice in 1907 to amend its abortion ban to encompass the destruction of a “fetus or embryo” in the mother’s womb.<sup>87</sup> That change, the Texas Court explained, was made to “prevent the construction of the [state’s abortion ban] as it formerly existed,” namely, the settled common law understanding that abortion remained lawful until “the woman was ‘quick’ with child.”<sup>88</sup> Texas lawmakers were worried, in other words, that prior to the 1907 amendment’s inclusion of the term “embryo,”<sup>89</sup> the state’s abortion law did not apply before quickening.

*Dobbs* likewise errs in counting Oregon as proscribing prequickening abortion. The evidence here is slightly different, yet equally powerful: the state’s own prosecutors appeared in the Oregon Supreme Court to speak on the issue. “Unnecessary abortion is not a crime” under the state’s 1866 abortion law, prosecutors admitted in 1909, “unless it results in the death of the mother or of a quick fetus.”<sup>90</sup>

*Dobbs*’s inclusion of Virginia and West Virginia in its twenty-eight-state count reflects yet another historical error. As of the Fourteenth Amendment’s ratification, both states provided that “any free person who shall administer to, or cause to be taken by a woman, any drug or other thing . . . with intent to . . . produce abortion or miscarriage” would be punished by between one and five years in prison.<sup>91</sup> Like many of the other mid-nineteenth-century abortion

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85. *Smith*, 31 Ala. at 51; see also Tang, *supra* note 19, at 1131-33 (explaining how *Smith v. Gaffard* interpreted Alabama’s 1841 abortion statute as applying only after quickening).

86. Letter from A. Lopes to Horatio R. Storer (Apr. 2, 1859) (promising to “persevere . . . with our Legislators” to enact Storer’s proposed prequickening abortion ban).

87. *Gray v. State*, 178 S.W. 337, 338 (1915) (emphasis added).

88. *Id.*

89. See *Fetal Development: Stages of Growth*, CLEV. CLINIC (Apr. 16, 2020), <https://my.clevelandclinic.org/health/articles/7247-fetal-development-stages-of-growth> [<https://perma.cc/9PW4-5RGR>] (“Generally, [a developing fetus will be] called an embryo from conception until the eighth week of development.”).

90. *State v. Dunn*, 100 P. 258, 258 (1909); Or. Gen. Laws ch. 43, § 509 (1866) (punishing abortions administered on “any woman pregnant with a child”).

91. VA. CODE tit. 54, ch. 191, § 8 (1849); W. VA. CONST. of 1863, art. XI, § 8 (“[T]he laws of the State of Virginia as are in force within the boundaries of the State of West Virginia when this

bans, this language is susceptible to two interpretations: either it incorporated the common law’s quickening distinction, or it overwrote it.

Two pieces of evidence suggest the common-law quickening distinction survived. First, in 1856, an antiabortion physician from Chesterfield County, Virginia named R.H. Tatum wrote an essay in the *Virginia Medical Journal* in which he complained that only a “few states had enacted statutes” punishing prequickening abortion.<sup>92</sup> Notably absent from his list of states that had done so was Tatum’s home state of Virginia.<sup>93</sup>

That an antiabortion doctor would read Virginia’s 1849 law and understand it not to punish abortions performed before quickening is telling. And that conclusion is reinforced by another curious feature of the state’s law: its express abortion statute applied only to “free persons.” This did not mean that any and all abortions performed by slaves were lawful; Virginia law made clear that the common law would “continue in full force . . . and be the rule of decision, except in those respects wherein it is or shall be altered by the general assembly.”<sup>94</sup> But of course the universally recognized common law rule meant that slaves would have faced no punishment for performing prequickening abortions.<sup>95</sup> That, in turn, creates a strong inference that free persons were permitted to perform prequickening abortions under the 1849 law, too: it is highly unlikely Virginia imprisoned free persons for conduct that slaves could perform without punishment.

In three other states, *Dobbs*’s mistake is of a different kind: the laws at issue banned only certain, dangerous kinds of abortions while leaving safer procedures within the law. In Nebraska, the state’s 1866 law punished abortion only if it was performed via the administration of a “noxious or destructive” “poison, substance or liquid.”<sup>96</sup> As of the Fourteenth Amendment’s ratification, abortion via surgical instrument remained lawful in Nebraska—a fact that would not change for several years.<sup>97</sup> *Dobbs* makes the same error for Louisiana, counting it as banning all abortions even though the 1856 statute prohibited only the administration of a “drug” or “potion” for that purpose.<sup>98</sup> *Dobbs* also miscounts

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Constitution goes into operation . . . shall be and continue the law of this State until altered or repealed by the Legislature.”).

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

93. *Id.*

94. VA. CODE tit. 9, ch. 16, § 1 (1849).

95. See *supra* note 82 and accompanying text.

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

97. See NEB. GEN. STAT. ch. 58, § 39 (1873).

98. LA. REV. STAT. § 24 (1856). Recognizing the gap in the 1856 law’s coverage, Louisiana later amended its statute to punish the use of “any instrument or any other means whatsoever” to

New Jersey based on an 1849 abortion statute that punished anyone who “maliciously or without lawful justification” administered “any poison, drug, medicine or noxious thing,” or used “any instrument, or means whatever,” to procure a miscarriage.<sup>99</sup> New Jersey’s Supreme Court interpreted that law in 1858 in unambiguous language: “[t]he design of the statute was not to prevent the procuring of abortions.”<sup>100</sup> As that Court later clarified, the 1849 abortion statute “requires that the thing used to effect the miscarriage should be noxious—that is, hurtful.”<sup>101</sup> Abortions produced via safe, nonhurtful means remained permissible.

The foregoing examples are not exhaustive; a fuller description of *Dobbs*’s mistaken state law count can be read in previous work.<sup>102</sup> Suffice to say that the true number of states that banned abortion throughout pregnancy as of the Fourteenth Amendment’s ratification is not twenty-eight, but something fewer. The exact number is difficult to pin down; I have suggested as few as sixteen,<sup>103</sup> but that is a tentative conclusion that I would be open to adjusting in either direction as more historical evidence is uncovered.<sup>104</sup>

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procure an abortion. NEW CRIM. CODE art. 87, 1942 La. Acts No. 43, at 92-93, 137 (separate printing).

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

100. *State v. Murphy*, 27 N.J.L. 112, 114 (Sup. Ct. 1858).

101. *State v. Gedick*, 43 N.J.L. 86, 89 (Sup. Ct. 1881).

102. See Tang, *supra* note 19, at 1127 (finding that as many as twenty-one states permitted prequickening abortion, contrary to the nine identified by the *Dobbs* Court).

103. See *id.*

104. As to adjusting the count upward, I have previously confessed error in earlier work. See Aaron Tang, Author’s Notes to The Originalist Case for an Abortion Middle Ground (Sept. 1, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3921358](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921358) [<https://perma.cc/TVQ6-5RYV>] (describing my errors in miscounting Iowa and Massachusetts as permitting prequickening abortion).

As for adjusting the count downward, there is some evidence that New York’s abortion statute, which I’ve thought to prohibit *both* pre and postquickening abortions, might have been understood by some contemporary authorities to reach only the latter. Thus, the state’s 1845 abortion law imposed a two-tiered set of punishments: section one of the law punished an abortion administered on “any person pregnant with a quick child” as manslaughter, while section two punished a procedure performed on “any pregnant woman . . . with intent thereby to procure the miscarriage of any such woman” with a three-to-twelve month prison sentence. 1845 N.Y. Laws ch. 260 §§ 1-2. Given section one’s express reference to quickening, I have understood the *absence* of a reference to quickening in section two as an implicit indication that it applies to *pre*quickening procedures as well. But a New York judge apparently did not take the same view in an 1853 case, *Butler v. Wood*, 10 How. Pr. 222 (N.Y. Sup. Ct. 1853). In *Butler*, the judge cited the second section of New York’s law and wrote as follows: “By section 2 of ch. 260 of Sess. L. of 1845, any person who shall use any means whatever, with intent thereby to procure the miscarriage of any woman *pregnant with a quick child*, shall, upon conviction, be punished by imprisonment in a county jail, not less than three months, nor

For present purposes, though, the point is that *Dobbs*'s historical grounds are doubtful and overstated, much like they were in *Bowers*. Arguably, *Dobbs*'s historical errors are worse. *Bowers*'s error was to mischaracterize the motivation behind early sodomy bans: although they applied on their face to same-sex conduct, the reason they were enacted had to do with a general disdain for nonprocreative sex.<sup>105</sup> *Dobbs*'s error was to misrepresent the very state abortion laws on which the decision relied: far from banning the procedure, many of those laws in fact permitted abortion for much of early pregnancy. Whereas misrepresentation of motivation at least maintains fidelity to how behavior was regulated on paper, misrepresentation of what was actually on paper bespeaks a far greater distance from reality.

What is more, not only does the majority misrepresent the number of states in which abortion was banned throughout pregnancy in 1868, but it does so against a historical backdrop in which abortion was unquestionably permitted, throughout the nation, up through the moment of quickening. *Bowers*, in other words, pointed to a continuous history of laws banning sodomy both at the Founding and the Fourteenth Amendment's adoption.<sup>106</sup> For *Dobbs*, however, the opposite history and tradition existed as of the Founding: at that point in time, every single state respected what the majority called the "quickening rule,"<sup>107</sup> permitting abortion at any point before quickening.

The only way *Dobbs* could demonstrate a history and tradition permitting punishment of abortion early in pregnancy was thus to rely on its state law count in 1868—hence its characterization of that count as the "most important historical fact" in its analysis.<sup>108</sup> Yet if that "fact" is false and a majority of states actually permitted early term abortions in an unbroken tradition from before the Founding through the Fourteenth Amendment's ratification, one starts to doubt *Dobbs*'s contradictory bottom-line conclusion that "an unbroken tradition of

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more than one year." *Id.* at 224. In other words, the judge apparently read the statute—which applied to the procuring of a miscarriage on "any pregnant woman"—and assumed that it reached only a "miscarriage of any woman pregnant with a quick child." *Id.* Perhaps this reflects little more than an honest mistake by one state judge. But if it instead reflects a widely held understanding, the upshot could be significant. As many as eight additional states on the *Dobbs* majority's list might be at issue, insofar as New York was joined by seven other states in adopting a similar two-tiered approach to punishing abortion. See Tang, *supra* note 19, at 1145-46 n.298.

105. See *supra* note 40.

106. See *supra* notes 26-27.

107. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2252 (2022) (recognizing that the "quickening rule" persisted until "the 19th century"); see also Tang, *supra* note 19, at 1126-55 (canvassing states where quickening rule cabined reach of abortion bans).

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

prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.”<sup>109</sup>

## 2. Dobbs and the History of Nonenforcement

Now consider *Bowers*’s second mistake: its failure to grapple with a robust history of nonenforcement. *Lawrence* suggested that when determining whether a disputed practice is deeply rooted in our history and tradition, what matters is not only whether the practice might be said to violate some law on the books, but also whether prosecutors *actually enforced* the law against the practice at issue.<sup>110</sup> Thus, the absence of early reported cases punishing same-sex couples for private, consensual acts of intimacy led the *Lawrence* Court to question whether the historic criminal sodomy bans on the books actually reflected a societal willingness to punish such activity.<sup>111</sup>

The same nonenforcement history appears to be true of antebellum state law abortion bans. Historian Patricia Cline Cohen has performed the most exhaustive research into the history of publicly reported abortion prosecutions during this period.<sup>112</sup> By canvassing multiple newspaper databases for publicly reported abortion prosecutions taking place between 1820 and 1860, Cohen located reports detailing 225 distinct abortion events. “An approximate fetal age was usually part of the record” in these cases—a testimony to the significance of the quickening rule.<sup>113</sup> The fetal age for most fetuses was “in the range of 4 to 6 months,” or postquickening.<sup>114</sup> Moreover, Cohen has noted that after Massachusetts passed a new law banning prequickening abortion in 1845, she found no instances of a conviction in a case involving a prequickening procedure, and one case where a trial was halted midway by the judge.<sup>115</sup>

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<sup>109.</sup> *Id.* at 2253–54.

<sup>110.</sup> See *Lawrence v. Texas*, 539 U.S. 558, 569 (2003) (“Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.”).

<sup>111.</sup> See *id.* at 569–70 (arguing that the “infrequency” with which early sodomy laws were enforced “makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults”).

<sup>112.</sup> See Patricia Cline Cohen, *Married Women and Induced Abortion in the United States, 1820–1860* (Aug. 25, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4197554](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4197554) [<https://perma.cc/2DW5-NLB9>].

<sup>113.</sup> *Id.* at 3.

<sup>114.</sup> *Id.*

<sup>115.</sup> *Id.* at 7; see also email exchange with Patricia Cline Cohen (describing the 1850 case of Catherine Adams, whose abortion may have occurred postquickening, but where Adams died from the procedure and the provider’s trial terminated without a conviction in any case) (on file with author).

Indeed, in new, ongoing research, Professor Cohen has found that up through 1860, newspaper reports from around the nation provide evidence of just four clear cases in which prosecutors enforced state abortion bans to obtain a conviction for performing a prequickening procedure where the mother did not die.<sup>116</sup> All four of those cases were from New York.<sup>117</sup> The implications are potentially significant. Whereas the *Dobbs* majority claimed that twenty-eight states banned abortion throughout pregnancy as of the Fourteenth Amendment's ratification, Cohen's findings raise the prospect that, at least until 1860, just one state may have enforced its law to punish abortions performed before quickening where the mother was unharmed. Much like same-sex intimacy in *Lawrence*, in other words, prequickening abortion could well have gone largely unenforced across America.

Cohen's findings are consistent with my own. In prior work, I described the findings of a Westlaw search of reported court cases between 1861 and 1900 in three states that the *Dobbs* majority counts as having banned all abortions throughout pregnancy—California, Nevada, and Illinois.<sup>118</sup> I found no cases involving prosecutions or convictions of abortions performed prior to quickening.<sup>119</sup> Her findings are also consistent with contemporary anecdotes. One anti-abortion physician, Dr. Montrose A. Pallen, admitted in 1869 that despite the procedure's prevalence, “no one within my recollection has ever been punished for it.”<sup>120</sup> Similarly, a Massachusetts newspaper wrote in 1867 that “public sentiment in Hampden country does not deem abortion a crime at all . . . and possibly public sentiment is just about the same everywhere else as in Hampden County.”<sup>121</sup>

The seeming absence of reported prequickening abortion prosecutions in the years surrounding the Fourteenth Amendment's ratification suggests that the state abortion bans on the books might not have been enforced against early term

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116. See Patricia Cline Cohen Research Notes (on file with author). In cases where abortion providers are charged with, and ultimately convicted of, causing the death of the mother, the enforcement history does not shed light on whether society independently approved of “a rigorous and systematic punishment” of prequickening abortion in and of itself. *Lawrence*, 539 U.S. at 569-70.

117. See Cohen Research Notes, *supra* note 116.

118. Tang, *supra* note 19, at 1149 n.317. I focused on these states because I could find no direct evidence from court rulings as to whether the state abortion bans applied to prequickening procedures. In the absence of such evidence, it struck me as especially significant whether prosecutors ever brought criminal charges based on abortions performed prior to quickening.

119. Prosecutions tended instead to focus on cases involving postquickened pregnancies. See, e.g., *Scott v. People*, 30 N.E. 329, 332 (Ill. 1892) (considering a prosecution for abortion in a case where the “age of the foetus was seven months”).

120. Montrose A. Pallen, M.D., *Foeticide, or Criminal Abortion*, 3 MED. ARCHIVES 193, 203 (1869).

121. Springfield Daily Republican, Dec. 27, 1867, at 4.

procedures. And that makes sense given how difficult it was to know in the mid-nineteenth century whether a person was pregnant before quickening to begin with. As Professors Evan D. Bernick and Jill Wieber Lens have argued, “[t]he [in]ability to detect pregnancy prequickening didn’t just make enforcement of prequickening bans difficult, it made the bans unenforceable . . . .”<sup>122</sup> While it is important to be candid about the limitations of the existing research on this enforcement history,<sup>123</sup> *Lawrence* suggests that this evidence should matter in a history-and-tradition analysis – and *Dobbs* erred in altogether ignoring it.

### 3. *Dobbs* and the “Entirely Unknown” Right to Abortion

*Dobbs* made one more important historical mistake with no analog in *Bowers*. In arguing against the right to abortion, *Dobbs* supplemented its count of state abortion bans as of the Fourteenth Amendment’s ratification with a claim about the relative recency of the very idea that abortion might be a right. “Until the latter part of the 20th century,” the *Dobbs* majority asserted, the very notion of a “right to abortion” was “entirely unknown in American law.”<sup>124</sup> Much like the state law count, Justice Alito apparently thought this point so important as to be worth repeating: “Until the latter part of the 20th century,” Alito wrote six pages later, “there was no support” for any “right to obtain an abortion.”<sup>125</sup> And yet

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122. Evan D. Bernick & Jill Wieber Lens, *Abortion, Original Public Meaning, and the Ambiguities of Pregnancy* at 32 (Feb. 2, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4342905](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4342905) [<https://perma.cc/HEK2-3NAG>]. Indeed, Bernick and Lens’s important work suggests another potential parallel between *Dobbs* and *Bowers*. Where *Bowers* mistakenly assumed the category of a “homosexual” existed in 1868 when in truth that concept didn’t exist until the twentieth century, see D’EMILIO & FREEDMAN, *supra* note 40, *Dobbs* assumes the existence of a particularized interest in protecting early fetal life when in truth, the lived experience of early pregnancy in the mid-nineteenth century was loaded with ambiguity and uncertainty. See *id.* By ignoring the actual experience of the public during this period and focusing exclusively on its supposed state law count, *Dobbs*’s approach to history and tradition quite arguably takes the “public” out of the public meaning originalism.

123. For instance, Professor Patricia Cline Cohen’s newspaper searches extended only through 1860. It is possible, then, that states may have begun punishing prequickening procedures between 1860 and the Fourteenth Amendment’s ratification in 1868. My own search of reported legal decisions is even less comprehensive, both because I examined only a sample of three states and because some prosecutions may not have culminated in a reported court decision. Perhaps the most confident conclusion I can offer presently, then, is that further research into early abortion law’s enforcement history would be helpful to determine the extent to which society actually thought it appropriate to punish abortions that occurred early in gestation, before quickening.

124. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

125. *Id.* at 2248.

again later: there is “no support,” Alito claimed, “for the existence of an abortion right that predates the latter part of the 20th century.”<sup>126</sup>

The majority certainly had reason to belabor the point. If it were really true that *no one in America* thought of access to abortion as a right until the late twentieth century, that would seem to be an important argument against any claim that it was deeply rooted in our nation’s history and tradition as of a full century earlier, in 1868.<sup>127</sup> Except that it is not true.<sup>128</sup>

In 1854, a Dr. W.C. Lispernard published a widely circulated “private medical guide” that sought to “correct” the “pernicious teachings of foolish books and senseless lectures” on a range of spicy subjects, from venereal disease to masturbation and menstruation to abortion.<sup>129</sup> Lispernard left little doubt as to his personal views on the last topic. “Abortion is a violation of nature,” he wrote; it is an act that “has become a custom of shocking frequency, in the prevalent unnatural condition of society.”<sup>130</sup>

Yet surprisingly, Lispernard was just as definitive in his views about who should have the choice to obtain an abortion. “[I]t is exclusively the affair of the mother, and she should be left to judge for herself of the circumstances which may justify the act.”<sup>131</sup> Most critically, Lispernard did not take this position as a mere matter of public policy. He advocated it as a matter of *legal right*. “She alone

126. *Id.* at 2254.

127. One could also respond that by looking for nineteenth-century support for the right to abortion specifically, *Dobbs* was looking for rights at the wrong level of generality. Just as *Laurence v. Texas* asked whether there was a liberty interest in physical intimacy that is “one element in a personal bond that is more enduring” (rather than in same-sex intimacy in particular), 539 U.S. 558, 567 (2003), *Dobbs* could have asked about historical views concerning the right to make choices about childbearing or one’s family more generally.

128. There is some ambiguity here in what the *Dobbs* majority means when it harps on the absence of support for a “right to abortion.” One possibility is that the majority is referring to the historical absence of legal (and, in particular, constitutional) arguments advocating the right to abortion. That view, of course, would do little more than trade on the fact that women were the subject of rampant discrimination with respect to rights generally in the mid-nineteenth century. See Tang, *supra* note 19, at 1119 & nn.148-150. And in any event, such a view is historically debatable. See *infra* note 136 and accompanying text. Alternatively, the *Dobbs* majority might have been referring to the general absence of talk about abortion as a moral, rather than legal, right. But as shown below, that conclusion is belied by the historical record. See *infra* notes 129-135 and accompanying text.

129. W.C. LISPERNARD, DR. W.C. LISPERNARD’S PRACTICAL PRIVATE MEDICAL GUIDE 4 (Rochester, 1854). Dr. W.C. Lispernard was the alias used by one Ezra Reynolds, as shown by a later newspaper report recounting how Reynolds later pleaded guilty to violating the 1873 Comstock Act. See *United States v. Reynolds*, Buff. Com. Advertiser, Sept. 16, 1873, at 3 (W.D.N.Y. Sept. 16, 1873) (“U.S. v. Ezra J. Reynolds . . . the defendant is also known by the professional (?) name of Dr. Lispernard . . .”).

130. LISPERNARD, *supra* note 129, at 196.

131. *Id.*



has a right to decide whether she will continue the being of the child she has begun,” Lispernard announced.<sup>132</sup>

Dr. Lispernard’s writing is particularly significant because it represents the views of someone who apparently opposed abortion as a personal matter. If even an *antiabortion* writer was willing to publicly defend a woman’s *right* to choose — at a time when women could neither vote nor refuse unwanted sexual advances from their husbands, no less<sup>133</sup> — it is difficult to credit *Dobbs*’s portrayal of abortion rights as some modern, twentieth-century invention by legal scholars untethered from traditional viewpoints that were long-held in American society.<sup>134</sup>

And Lispernard was not alone. His writing reflects the influence of another popular writer in the 1850s named Thomas L. Nichols. Lispernard quoted extensively from an 1853 book in which Nichols argued that a pregnant mother “alone has the supreme right to decide” whether to have an abortion.<sup>135</sup> Or as Nichols put it in another work in 1854, “no woman ought to be compelled to bear a child against her wishes; and no principle is more clear and undeniable, than that every woman has the inherent and inalienable right to choose.”<sup>136</sup> “[A]ny law, or constitution, that denies, or violates this right,” Nichols concluded, “is a despotism and an outrage.”<sup>137</sup>

132. *Id.* at 194.

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

134. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022) (“[A]lthough law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.”).

135. T.L. NICHOLS, *ESOTERIC ANTHROPOLOGY: A COMPREHENSIVE AND CONFIDENTIAL TREATISE ON THE STRUCTURE, FUNCTIONS, PASSIONAL ATTRACTIONS AND PERVERSIONS, TRUE AND FALSE PHYSICAL AND SOCIAL CONDITIONS, AND THE MOST INTIMATE RELATIONS OF MEN AND WOMEN* 192 (Cincinnati, Valentine Nicholson & Co. 1853).

The ovum belongs to the mother — she alone has a right to decide whether it shall be impregnated. That decision must be based upon her mental and physical condition, her desire for offspring, her ability to take proper care of it, and her social relations. The mother, and she alone, has the right to decide whether she will continue the being of the child she has begun . . . [S]he alone has the supreme right to decide.

*Id.*; see also LISPENARD, *supra* note 129, at 194-96 (quoting Nichols, *supra*, at 191-92, extensively to explain the mechanism by which intercourse during pregnancy can induce abortion). Though Lispernard quotes Nichols extensively, Lispernard does not attribute the phrase “she alone has the supreme right to decide,” to Nichols. But Nichols’s influence is obvious: Lispernard’s extensive reference to Nichols comes just two paragraphs after that phrase. *Id.* at 195.

136. T.L. Nichols & M.S.G. Nichols, *A New Philosophical Dictionary*, NICHOLS’ J., Sept. 9, 1854, at 10, 11.

137. *Id.*

Thus, far from having its origins in the “latter part of the 20th century,” as Justice Alito claimed in *Dobbs*,<sup>138</sup> at least some prominent writings from the period indicate that public sentiment supporting a right to abortion was known in America as early as 1853—a decade and a half before the Fourteenth Amendment’s ratification.

### B. Using History to Overrule *Dobbs*

*Lawrence* teaches that an earlier decision’s mistaken historical premises can undermine it in two ways: by reducing the force of stare decisis and calling into question the underlying legal test. In view of the historical errors just described, both moves are available in a future challenge to *Dobbs*.

#### 1. Undercutting Stare Decisis

Much like the historical errors that pervaded *Bowers*,<sup>139</sup> the mistaken history in *Dobbs* undercuts its stare decisis force in any future challenge. But it does so for an additional reason beyond that which was true of *Bowers*. For unlike in *Bowers*, where the Court was deciding the question of a right to same-sex intimacy for the first time, *Dobbs* was decided against a backdrop in which the right to abortion had already been recognized in *Roe* and reaffirmed in *Casey*.<sup>140</sup> *Dobbs*’s burden to override stare decisis, in other words, was not just to show that access to abortion lacked roots in our history and tradition as a matter of first impression. Its burden was to show that any claim to abortion being rooted in history and tradition was “egregiously wrong.”<sup>141</sup> Given *Dobbs*’s dubious historical premises, it cannot satisfy that burden.

*Dobbs* claimed that *Roe* warranted overruling because “[i]t stood on exceptionally weak grounds,” pointing out in particular that *Roe* “said almost nothing” about “the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted.”<sup>142</sup> *Dobbs* accordingly acted as though it delivered an airtight argument when it pointed to the “overwhelming consensus of state laws in effect in 1868.”<sup>143</sup> *Roe* was egregiously wrong, in other words, because it ignored the fact that states overwhelmingly banned abortion throughout pregnancy when the Fourteenth Amendment was ratified.

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<sup>138.</sup> *Dobbs*, 142 S. Ct. at 2242, 2248, 2254.

<sup>139.</sup> See *supra* Section I.B.

<sup>140.</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>141.</sup> *Dobbs*, 142 S. Ct. at 2265–66.

<sup>142.</sup> *Id.* at 2266–67.

<sup>143.</sup> *Id.* at 2267.

As I have argued, though, this crucial “fact” that *Roe* supposedly missed is far from clear. What *Dobbs* needed to overrule *Roe* was an ironclad consensus of state laws punishing abortion throughout pregnancy, an actual history of enforcing those laws in just that way, and the utter absence of any public complaint that such laws violated a woman’s right to have an abortion. What actually exists is the opposite on every front. For all of America’s early history, from the colonial period through the Founding, *every single state* respected a woman’s right to choose an abortion early in pregnancy.<sup>144</sup> That understanding persisted until the Fourteenth Amendment’s ratification, at which point a majority of states continued to permit prequickening abortion; only a minority enacted laws punishing the practice. Importantly, even among those states whose laws ostensibly banned prequickening abortion by 1868, publicly reported enforcement history suggests that such early term procedures were rarely punished.<sup>145</sup> And this uncertain history of actually punishing prequickening abortion occurred against the backdrop of real public dialogue advocating a woman’s right to choose.<sup>146</sup> *Roe* may or may not have been rightly decided. But this much is certain: it was hardly egregiously wrong to describe early term abortion access as possessing strong roots in American history.<sup>147</sup>

## 2. *Grounding a New Right to Abortion*

If stare decisis poses little obstacle to revisiting *Dobbs*, the next question concerns which legal rule or test reproductive-justice advocates should rely on in efforts to re-enshrine a constitutional right to abortion. Here, I part ways somewhat with *Lawrence*’s teachings, though this portion of my argument is admittedly more tentative and less fully developed. Like that case, I believe advocates challenging *Dobbs* would do well to advance a legal test that is not exclusively wedded to a supposed state law consensus in 1868 because the history of abortion is far from conclusive. Unlike *Lawrence*, however, I would look further

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144. See *supra* note 107 and accompanying text.

145. See *supra* Section II.A.2.

146. See *supra* Section II.A.3.

147. See *Roe v. Wade*, 410 U.S. 113 (1973).

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy . . . the opportunity to make this choice was present in this country well into the 19th century.

*Id.* at 140-41.

afield. That is to say, advocates should not only raise substantive-due-process arguments that draw on society's evolving values,<sup>148</sup> but they should also rely on a neighboring constitutional provision – the Equal Protection Clause.

Start with what *Lawrence* gets right: uncertainty surrounding society's views of a given practice centuries ago is a good reason to look beyond history to ascertain the contours of a constitutional right. As *Lawrence* put it, “[h]istory and tradition are the starting point but not in all cases the ending point” of the constitutional analysis.<sup>149</sup> And as *Lawrence* exemplifies, history and tradition are particularly unsuited to serving as an “ending point” where those who oppose a constitutional right rely on historical claims that are “overstated” and “not without doubt.”<sup>150</sup> Insofar as the historical claims advanced by the *Dobbs* majority are also overstated and doubtful, that deeply uncertain history should no more end the debate over the right to abortion than the right to same-sex intimacy.

In making this observation, it is important to be clear about what this means for the stakes of abortion history – and what I am *not* arguing. The purpose of my correcting *Dobbs*'s historical premises is not to prove that advocates would prevail on the Court's current history-and-tradition approach to substantive due process.<sup>151</sup> It is to resist *Dobbs*'s attempt to demarcate the line between what is and is not constitutionally protected solely by reference to mid-nineteenth century history. The very idea of identifying a definitive, singular historical tradition that existed in America so long ago is a task that will often be riddled with uncertainty, historical ambiguity, and conflict. It is also an approach that threatens to erase the lived experiences of millions of Americans – including women and Black and Native peoples.<sup>152</sup> And the fact that there exist plausible arguments on both sides of the history-and-tradition test on an issue as prominent as the right to abortion suggests that maybe judges really ought to be looking elsewhere for guidance in substantive-due-process cases.

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

149. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *Cnty. of Sacramento v. Lewis*, 532 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

150. *Id.* at 571-72; see also *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (“History and tradition guide and discipline this inquiry but do not set its outer boundaries.” (citing *Lawrence*, 539 U.S. at 572)).

151. I have argued elsewhere that there exists a plausible argument for grounding a right to abortion in our nation's history and tradition even under the *Dobbs* test. See Tang, *supra* note 19; Tang, *supra* note 104. For present purposes, however, I want to use the existence of that argument not to *satisfy Dobbs*'s test, but to bury it.

152. See Siegel, *supra* note 4, at 1193, 1200-03; Goodwin, *supra* note 3.

But where else? When history was inconclusive concerning the right to same-sex intimacy, *Lawrence* looked to our nation’s “laws and traditions in the past half century” on the belief that they reflected “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>153</sup> That is certainly an outcome I agree with as a policy matter. Yet I have to confess that I think it is a problematic legal test on first principles, at least as applied to the right to abortion. Assessing emerging societal awareness about what is (or ought to be) a constitutionally protected liberty may be no more determinate than a backward-looking analysis of ambiguous historical traditions. Both will often yield plausible conflicting arguments precisely because our society is (and was) so pluralistic.

Where that is true, there is a real risk that judging will fall victim to motivated reasoning. Indeed, one thing *Dobbs* gets right is its worry about an approach to substantive due process that permits judges to “confuse what [the Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy.”<sup>154</sup> Ironically, this motivated reasoning is precisely the mistake that *Dobbs* succumbed to, only in the opposite direction: it is no coincidence that the five conservative justices in the *Dobbs* majority failed to find in the Fourteenth Amendment a right that they are each deeply opposed to on moral and policy grounds.<sup>155</sup> If five liberal justices in the future were to re-enshrine a substantive-due-process right to abortion on the *Lawrence*-style logic that it is consistent with an “emerging awareness” of what “liberty” means in modern times, they would be fairly susceptible to the same critique. Where history and modern societal values are both inconclusive, judges will find the tug of outcome-oriented reasoning difficult to resist.<sup>156</sup>

One might be tempted to argue in response that reproductive-justice advocates should simply look to a different clause in the Constitution that is determinate and neutral in grounding a right to abortion. Alas, I am afraid no such clause exists: any doctrinal source is likely to encounter reasonable arguments on both sides. Even the Equal Protection Clause approach – which I will ultimately defend below – is susceptible to credible conflicting arguments. Thus, Professors Serena Mayeri, Melissa Murray, and Reva B. Siegel have powerfully argued that

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153. *Lawrence*, 539 U.S. at 571.

154. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247 (2022).

155. See Siegel, *supra* note 4, at 1183 (“[T]he Justices in the *Dobbs* majority have turned to history and traditions to *express* – not to constrain – their moral views.”).

156. Of course, from a litigation strategy perspective, advocates have little choice but to raise substantive-due-process arguments in favor of a right to abortion, since that is the ground on which *Roe* and *Casey* relied. My point in this section is simply that there are powerful reasons to raise alternative arguments as well, in particular arguments rooted in equal-protection doctrine.

modern equal-protection precedent requires the state to surmount intermediate scrutiny when it discriminates on the basis of sex—including on the basis of pregnancy.<sup>157</sup> Crucially, Mayeri, Murray, and Siegel point out that under intermediate scrutiny, a state cannot justify its decision to criminally punish abortion when it has available less restrictive alternatives that would be as effective at reducing abortion rates, such as increasing access to contraception, expanding health care access for low-income pregnant persons, and increasing financial and other forms of support available to low-income parents.<sup>158</sup>

But antiabortion advocates may raise familiar counterarguments to suggest that recognizing an equal-protection right to abortion would amount to motivated reasoning, too. They may contend, for example, that the meaning of the Equal Protection Clause must be understood as it was enacted when it was ratified in the Fourteenth Amendment in 1868, a point at which even on my historical account, some meaningful number of states banned abortion throughout pregnancy.<sup>159</sup> Those state laws, they may argue, reflect an understanding of what the Equal Protection Clause *meant*: it did not forbid the states from banning abortion.

Reproductive-justice advocates can respond in turn that these early state abortion bans were rooted in mistaken factual beliefs about women’s proper “roles” in society,<sup>160</sup> beliefs that are not a part of the Fourteenth Amendment’s

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157. Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 61, 79 (2023); see also Brief of Equal Protection Constitutional Law Scholars, *supra* note 25, at 8-12 (explaining how modern equal-protection cases overrule *Geduldig v. Aiello*, 417 U.S. 484 (1974)); *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (holding that Congress acted permissibly under its Section 5 enforcement power to target “stereotypes about women’s domestic roles” as “mothers first” when it enacted the Family Medical Leave Act).

158. Siegel, Mayeri & Murray, *supra* note 157, at 84-90; see also AARON TANG, SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT – AND HOW WE CAN FIX IT 207-08 (2023) (discussing other ways in which pro-life groups could reduce the number of abortions); compare Diane Duke Williams, *Access to Free Birth Control Reduces Abortion Rates*, WASH. UNIV. SCH. MED. ST. LOUIS (Oct. 12, 2012), <https://medicine.wustl.edu/news/access-to-free-birth-control-reduces-abortion-rates> [<https://perma.cc/HW5Q-6VFM>] (finding that the provision of free birth control reduces abortion rates by “62 to 78 percent compared to the national rate”), and Laura S. Hussey, *Is Welfare Pro-Life? Assistance, Abortion, and the Moderating Role of States*, 85 SOC. SERV. REV. 75, 92. (2011) (finding that participation by low-income women in federal welfare benefits reduced abortion by 15.8 percent compared to similar women who did not receive such benefits), with Jonathan Bearak et al., *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990-2019*, 8 LANCET GLOB. HEALTH e1152, e1158-59 (2020) (finding that national abortion bans reduce abortion rates by roughly ten percent).

159. See *supra* Section II.A.1.

160. See *supra* note 4 and accompanying text.

communicative content.<sup>161</sup> Advocates can also argue that unlike in substantive-due-process cases, the Court's Equal Protection Clause jurisprudence has never turned on a survey of state law as of the Fourteenth Amendment's ratification. Indeed, such an approach would be irreconcilable with the Equal Protection Clause's interpretive North Star: *Brown v. Board of Education*.<sup>162</sup> Yet antiabortion groups may parry yet again, arguing that at least *some* lawmakers voted to ban abortion in the nineteenth century based on a desire to protect fetal life,<sup>163</sup> and suggesting that *Brown* is potentially consistent with 1868 understandings.<sup>164</sup>

The picture that emerges is one rife with plausible arguments on both sides of the equal-protection issue; arguments that reasonable jurists could find persuasive in either direction. I have no way of declaring one position stronger without succumbing to motivated reasoning myself. And where that is true, there is no reason to think antiabortion groups who lose on an equal-protection rationale in some future case would find such a ruling to be any more neutral than reproductive-justice advocates today believe to be true of *Dobbs*.

There is, however, one difference that weighs in favor of the equal-protection approach. One of the enduring features of the substantive-due-process abortion right recognized in *Roe* was how antiabortion groups received it as an all-or-nothing defeat: prior to fetal viability, there was simply nothing a state could do to ban abortion. Or as *Casey* put it, “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion.”<sup>165</sup> By comparison, striking down a state abortion ban as a violation of the Equal Protection Clause would be less all-or-nothing because it would leave open an option to antiabortion voters and lawmakers that was unavailable under *Casey* and *Roe*. Antiabortion states could potentially reinstate their bans after enacting all of the less restrictive alternatives that would reduce the demand for (and thus the incidence of) abortion: expanded access to government-funded contraception, health care, child care, and basic income support.

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161. See Solum, *supra* note 79, at 1666.

162. See Siegel, *supra* note 23.

163. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2256 (2022). *But see* Siegel, *supra* note 4, at 1185–86 (criticizing *Dobbs* for setting up a “false choice – either the laws were motivated by ‘hostility to Catholics and women’ or by ‘a sincere belief that abortion kills a human being’”).

164. See Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL’Y 457, 458 (1996).

165. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). In theory, a future Court that overrules *Dobbs* could announce a new substantive-due-process test that does not entail *Casey*’s undue burden standard. Such an outcome may be unlikely, however, given *Casey*’s rhetorical and magnetic pull in the realm of abortion and substantive due process. An equal-protection approach, by contrast, does not carry the same jurisprudential baggage.

I have elsewhere identified the virtues of this kind of approach to constitutional adjudication, one that decides hard cases by reference to the options that losing groups would retain to avoid the harms of an adverse ruling.<sup>166</sup> That approach, I have suggested, is attractive insofar as it avoids all-out losers. Groups who lose at the Court will be less likely to assail the Court (and our democracy) when they possess other options for redressing their defeats in the usual political process.

The equal-protection rationale for protecting abortion access is stronger on this metric than the substantive-due-process rationale precisely because it would permit an antiabortion state to re-enact a criminal ban once it has demonstrated that its interest is actually to protect fetal life (through its enactment of less restrictive pronatalist policies such as improving contraception access, health care, childcare, and financial support for low-income families) rather than to enforce outmoded sex stereotypes. To this point, it is significant that Professors Cary Franklin and Reva Siegel, who personally oppose the state's use of its carceral system to protect fetal life, have recognized that "others might question [their] exclusively noncoercive view and conclude that women's equal citizenship imposes a condition: that a jurisdiction must at least provide its citizens resources to avoid becoming pregnant and to navigate pregnancy in health and dignity *before* the state can adopt an abortion ban consistent with equal protection."<sup>167</sup> Moreover, it is worth mentioning that, on this view, the list of conditions that an antiabortion state would be required to meet before criminally punishing the procedure – access to contraception, health care, child care, and basic financial support for childcare – are crucial components of the broader reproductive-justice agenda.<sup>168</sup>

I will concede that I do not know if a world where abortion is accessible as of right, but where there is little access to contraception, basic income support, health care, and childcare, is better than a world where those social services are all available and abortion care is not. But requiring antiabortion lawmakers to choose between those two options is far preferable to the forced perpetuation of a nineteenth-century worldview in which pregnant people have access to *neither* abortion *nor* those crucial services. This last world, alas, is the one people inhabit today in antiabortion states across America. If we hope to change it, we can start

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166. See Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CALIF. L. REV. 1847, 1893-1901 (2021); Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. 971, 1026, 1029-30 (2023).

167. Franklin & Siegel, *supra* note 25, at 5.

168. See 2023 BLACK WOMEN'S REPRODUCTIVE JUSTICE AGENDA, RE-IMAGINING POLICY: IN PURSUIT OF BLACK REPRODUCTIVE JUSTICE 7 (2023), <https://blackrj.org/wp-content/uploads/2023/06/RJPolicyAgenda2023.pdf> [<https://perma.cc/U22Y-ADGT>] (identifying core values in the reproductive-justice agenda).



by turning to the teachings of *Lawrence*, to an accurate portrayal of abortion history, and to the logic of the Equal Protection Clause.

## CONCLUSION

It is fitting to conclude with one last lesson that *Lawrence* can teach advocates and other Americans concerned about the right to abortion. What permitted historical accuracy to triumph in *Lawrence*, and thus enabled the Court to overrule *Bowers*, was not the Court's sheer commitment to getting the history right, but rather the pressure exerted (and insights revealed) by public opinion and advocacy. Likewise, as I have noted already, the current Court is not likely to be swayed by simple appeals to the historical record; merely getting the history of abortion right will not be enough to overrule *Dobbs*. *Lawrence* thus demonstrates that what moves the needle is something that takes place outside of courts and historical archives: dramatic shifts in public opinion as brought about by thoughtful advocacy.

Indeed, when *Bowers* was decided, fifty-seven percent of Americans believed that intimate same-sex relations should be illegal; just thirty-two percent believed otherwise. By 2003, when *Lawrence* was decided, public opinion had flipped and a slim majority supported legalization of same-sex intimacy.<sup>169</sup> As Professor Michael J. Klarman has astutely observed, *Lawrence* “came in the wake of extraordinary changes in attitudes and practices regarding homosexuality.”<sup>170</sup>

What does that mean for efforts to overrule *Dobbs*? Unlike same-sex intimacy when *Bowers* was issued, a majority of Americans already supported access to abortion care at the time of *Dobbs*. Just one month before the ruling, fifty-three percent of respondents believed abortion should be legal under any or most circumstances, compared to forty-five percent who believed it should be legal only in a few or no circumstances.<sup>171</sup> From its inception, *Dobbs* was already counter-majoritarian. Destabilizing it will seemingly require even greater support for abortion rights than already exists.

That means the most important work that must be undertaken to bring about *Dobbs*'s downfall may not be lawyers' (or historians') work, but rather the

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169. *LGBTQ+ Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<https://perma.cc/476K-PRMN>] (reviewing survey responses from 1977 to 2021 to the question of whether “gay or lesbian relations between consenting adults should or should not be legal”).

170. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 443 (2005).

171. *Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> [<https://perma.cc/3529-D7NY>].

nitty-gritty effort of changing public opinion.<sup>172</sup> Fortunately, there is ample room for advocacy in that realm, and indeed, reproductive-justice advocates have made – and are making – remarkable progress on this front. Consider the coalition of forty pro-choice groups in Kansas whose organizers “knocked on tens of thousands of doors” and had countless face-to-face conversations with Democrat and Republican voters alike to win a post-*Dobbs* ballot initiative by eighteen points.<sup>173</sup> Painstaking organizing efforts led to similar, hard-fought victories in Montana, Kentucky, and Michigan in November 2022.<sup>174</sup> Every person persuaded in these conversations; every person who is moved by a gruesome story of a child rape victim or a pregnant person denied access to vital medical care due to restrictive abortion bans; every person who learns that someone they know has been personally affected by *Dobbs* – these are the individual events that can change the terrain of public opinion and pressure the Court to change course over time.

This, in the end, may be the greatest lesson *Lawrence* has to teach: the key to undoing *Dobbs* is not some lawyer’s historical argument. It is the painstaking work of movement-building – of changing still more hearts and minds about the dire importance of reproductive justice. It may not be the duty of lawyers and historians to complete this work. But neither are we free to neglect it.<sup>175</sup>

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172. See Klarman, *supra* note 170, at 445 (“[N]either *Brown* nor *Lawrence* created a new movement for social reform; both decisions supported movements that had already acquired significant momentum by the time their grievances had reached the Supreme Court.”); see also Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 300 (2001) (“[I]f judges have played the central role in articulating constitutional norms in the American tradition, their understanding of the Constitution has been deeply shaped by mobilized citizenry, acting through electoral processes, and outside of them.”).

173. Peter Slevin, *Blueprinting the Kansas Abortion-Rights Victory*, NEW YORKER (Aug. 7, 2022), <https://www.newyorker.com/news/news-desk/blueprinting-the-kansas-abortion-rights-victory> [<https://perma.cc/XCD9-8AWW>].

174. Veronica Stracqualursi et al., *Voters Deliver Ringing Endorsement of Abortion Rights on Midterm Ballot Initiatives*, CNN (Nov. 9, 2022), <https://www.cnn.com/2022/11/09/politics/abortion-rights-2022-midterms/index.html> [<https://perma.cc/68PZ-T8M9>].

175. See PIRKEI AVOT; THE ETHICS OF THE FATHERS 2:16 (Robert Young 1852) (“[Rabbi Tarphon] used to say, It is not [incumbent] on thee to finish the work, neither are thou to cease from it.”).