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## Deeply Rooted or Deeply Flawed? A Constitutional Criticism of Dobbs and Roe's Potential Resurrection

Julian Whitley

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# DEEPLY ROOTED OR DEEPLY FLAWED? A CONSTITUTIONAL CRITICISM OF *DOBBS* AND *ROE*'S POTENTIAL RESURRECTION

JULIAN WHITLEY\*

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## I. PREFACE

This Article is intended to address only the substantive legal defects in the Court's rationale in *Dobbs*. None of the points are to be interpreted as advocating for or against abortion as a policy. Furthermore, this Article is the sole opinion of the author.

## II. INTRODUCTION

Abortion has been a divisive issue in this country for decades. Some believe that abortion should be illegal under any circumstance, others believe

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that abortion under certain circumstances should be legal, and still others believe that abortion should be legal in all circumstances.<sup>1</sup> The issue of abortion was initially decided by the Court in 1973 under *Roe v. Wade*, where the Court devised a trimester approach.<sup>2</sup> The Court later overruled this approach in *Planned Parenthood v. Casey*, opting instead for a viability approach. The viability approach was preferable because, with advances in science and medicine, the two most important points in pregnancy—detection, and viability—move earlier and earlier.<sup>3</sup> Conceivably, as science advances, women would know they are pregnant at an earlier stage, and viability would move backwards to an earlier point in pregnancy.<sup>4</sup> This, of course, assumes that women are provided with ready access to these early detection devices, which is in itself a contentious issue and beyond the scope of this Article. The viability approach offered an ingenious framework where trends over time appear to demonstrate women are less likely to seek abortions<sup>5</sup> because detection and viability would come increasingly earlier. In other words, the Court announced a framework that attempted to strike an

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

2. See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

3. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

4. See *The Thin Blue Line, the History of the Pregnancy Test*, NAT’L INST. OF HEALTH, <https://history.nih.gov/display/history/Pregnancy+Test+Timeline> (last visited July 17, 2022) (In 1350 BCE, the Egyptians had a process where a pregnant woman “could urinate on wheat and barley seeds over the course of several days” to detect pregnancy, which had a seventy percent success rate. In 1552, the urine of a pregnant woman was said to be a “clear pale lemon color leaning toward off-white, having a cloud on its surface.” In the 1800s, “the best method for diagnosing pregnancy remained careful observation of [the woman’s] own physical signs and symptoms (such as morning sickness).” In the 1920s, scientists discovered a hormone which is found almost exclusively in women who are pregnant. Progesterone was isolated in 1934—a hormone commonly associated with pregnancy. In the 1970s, a two-hour pregnancy test which could be taken as early as four days after the first missed period was developed. In 2003, the FDA approved the first digital pregnancy test.); see also Greg Stohr, *Fetal Viability and the Fate of Abortion Laws in U.S.*, BLOOMBERG (Dec. 2, 2021, 3:19 PM), <https://www.bloomberg.com/news/articles/2021-12-02/fetal-viability-and-the-fate-of-abortion-laws-in-u-s-quicktake> (“The most premature baby known to have survived was born [] at 21 weeks, 2 days in 2020, but doctors say fetal viability generally occurs a bit later than that. In the 1992 *Planned Parenthood v. Casey* case, the Supreme Court said viability tended to be around 23 to 24 weeks but could shift toward an earlier date as medical technology improved.”).

5. See *U.S. Abortion Statistics by Year (1973-Current)*, CHRISTIAN LIFE RES. (June 2022), <https://christianliferesources.com/2021/01/19/u-s-abortion-statistics-by-year-1973-current/> (noting that the peak number of abortions in the United States was in 1990 with 1,608,600, which has trended down to 930,160 in 2020).

appropriate balance to satisfy competing interests.<sup>6</sup> This can be seen in abortion statistics, where the number of abortions has gone down over time.<sup>7</sup>

The issue of abortion rights has become a centerpiece in Supreme Court confirmation proceedings. In fact, every Justice in the *Dobbs* majority has been queried on the matter, and many of them responded that the issue of abortion should be respected under *stare decisis*.<sup>8</sup>

On June 24, 2022, the United States Supreme Court decided *Dobbs v. Jackson Women's Health Organization*.<sup>9</sup> Interestingly, before the Court issued its opinion, for the first time in the history of the Court, a draft opinion was publicly leaked by Politico.<sup>10</sup> National debate has been focused on this case since the leak.<sup>11</sup>

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6. There are, of course, the remaining issues of rape, incest, and the health and life of the mother.

7. See CHRISTIAN LIFE RES., *supra* note 5.

8. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 109–58, 145 (statement of John G. Roberts, Jr.) (“Well, beyond that, [*Roe v. Wade* is] settled as a precedent of the Court, entitled to respect under principles of *stare decisis*. And those principles, applied in the *Casey* case, explain when cases should be revisited and when they should not. And it is settled as a precedent of the Court . . . .”); Becky Sullivan, *What Conservative Justices Said—and Didn’t say—About Roe at Their Confirmations*, NPR (June 24, 2022, 3:44 PM), <https://www.npr.org/2022/05/03/1096108319/roe-v-wade-alito-conservative-justices-confirmation-hearings> (last visited July 18, 2022) (J. Alito, “*Roe v. Wade* is an important precedent of the Supreme Court. It was decided in 1973, so it has been on the books for a long time. . . . It is a precedent that has now been on the books for several decades. It has been challenged. It has been reaffirmed. But it is an issue that is involved in litigation now at all levels . . . .”; J. Gorsuch, “I would tell you that *Roe v. Wade*, decided in 1973, is a precedent of the United States Supreme Court. It has been reaffirmed . . . [a] good judge will consider it as precedent of the U.S. Supreme Court worthy as treatment of precedent like any other.” When asked if a fetus is a person under the Fourteenth Amendment, Gorsuch stated, “[t]hat is the law of the land. I accept the law of the land . . . .”; J. Kavanaugh, “[*Roe*] is settled as a precedent of the Supreme Court, entitled to the respect under principles of *stare decisis* . . . . The Supreme Court has recognized the right to abortion since the 1973 *Roe v. Wade* case. It has reaffirmed it many times.”; J. Barrett, “*Roe* is not a super-precedent because calls for its overruling have never ceased. But that doesn’t mean that *Roe* should be overruled. It just means that it doesn’t fall in the small handful of cases like *Marbury v. Madison* and *Brown v. Board* that no one questions anymore.”).

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

10. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

11. See, e.g., Richard Reinsh, *Dobbs Opinion, If It Stands, Rights Supreme Court’s*

The *Dobbs* decision, authored by Justice Alito, overturned the two most prominent abortion decisions of the Court, *Roe* and *Casey*.<sup>12</sup> The opinion states: “[w]e hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”<sup>13</sup> The Court further explained that to be protected under the Due Process Clause of the Fourteenth Amendment, such a right “must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”<sup>14</sup>

In a concise yet derisive sentence, *Roe* and *Casey* were disposed of because: “[t]he right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three-quarters of the States made abortion a crime at all stages of pregnancy.”<sup>15</sup>

This latter sentence sets Justice Alito and the majority up for a foreseeable fall from [logical] grace, yet, it is for this primary reason that the Court justified its departure from long-standing precedent. Because the majority makes no reference to the property-like status of women when the Fourteenth and Nineteenth Amendments were adopted, there is a considerable logical hole in its reasoning.

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*Wrong*, HERITAGE (May 5, 2022), <https://www.heritage.org/life/commentary/dobbs-opinion-if-it-stands-rights-supreme-courts-wrong>; Chloe Reichel, *The Leaked Dobbs Opinion, Explained*, HARV. BILL OF HEALTH (May 24, 2022), <https://blog.petrieflom.law.harvard.edu/2022/05/24/the-leaked-dobbs-opinion-explained/>; M. Veritas, *A Summary of the Dobbs (Draft) Opinion*, CATH. ESQUIRE (May 3, 2022), <https://catholicesquire.org/summary-dobbs-draft-opinion/>; James Freeman, *Opinion, Dobbs and the Economy*, WALL ST. J. (July 11, 2022, 6:52 PM), <https://www.wsj.com/articles/dobbs-and-the-economy-11657579959>; Marjorie Dannenfelser, *Opinion: Supreme Court Abortion Ruling Puts Fight for Life in New Dobbs Era*, FOX NEWS, (July 6, 2022, 7:00 AM), <https://www.foxnews.com/opinion/supreme-court-abortion-ruling-puts-fight-life-dobbs-era>; Patricia Cline Cohen, *Opinion, What the Dobbs Decision Got Wrong About the History of Abortion Laws Before Roe*, HOUS. CHRON. (June 24, 2022), <https://www.houstonchronicle.com/opinion/outlook/article/Opinion-What-the-Dobbs-decision-got-wrong-about-17263678.php>; Christopher M. Richardson, *Opinion, Dobbs Isn’t the First Time the Supreme Court Took Away Key Rights*, L.A. TIMES (July 15, 2022, 3:00 AM), <https://www.latimes.com/opinion/story/2022-07-15/supreme-court-abortion-civil-rights>.

12. *Dobbs*, 142 S. Ct. at 2240, 2242.

13. *Id.* at 2242.

14. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 720, 721 (1997)).

15. *Id.* at 2242–43.

The dissent does attack this “deeply rooted” concept in *Dobbs*, though the criticism is ultimately a glancing show because it does not address the underlying implications. While the dissent is correct, it ultimately falls short of addressing the “deeply rooted” issue: “[t]he majority’s core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did . . . But of course, ‘people’ did not ratify the Fourteenth Amendment. Men did.”<sup>16</sup>

The underlying implication is that women had no say in how laws would affect them and would not for some time. The dissent also notes that the Court has a rich history of interpreting the Constitution as a living document.<sup>17</sup> Additionally, the dissent poignantly encapsulates the majority’s false dichotomy that one must either accept the original applications of the Fourteenth Amendment and no others or surrender to judges’ “own ardent views,” ungrounded in law, about the “liberty that Americans should enjoy.”<sup>18</sup>

The Nineteenth Amendment, providing only the right to vote to women, nevertheless augments (or should augment) preexisting interpretations of the Constitution. The Nineteenth Amendment, though adopted after the Fourteenth Amendment, necessarily informs the Fourteenth. The Fourteenth Amendment’s Remedial Clause under Section 5 is a prime example of this: it permits Congress to *enforce* provisions of the Fourteenth Amendment rather than a new source of unencumbered power.<sup>19</sup> However, when Congress attempted to use this newfound power as a textual basis for additional plenary powers outside of Article I of the Constitution, the Court stepped in repeatedly in an effort to prevent such an expansion of Congressional powers.<sup>20</sup> The Court noted that only Article I provides Congress with plenary powers and that the remedial clause did not grant new plenary powers, lest the remedial clause subsumes Article I.<sup>21</sup> In other words, the Court looked at the two sources of power and was tasked with reconciling them in a logical way. This can be seen in *City of Boerne v. Flores*, where a Texas town interfered with expanding a church by refusing

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16. *Id.* at 2324 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

17. *Dobbs*, 142 S. Ct. at 2325 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

18. *Id.* at 2326 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

19. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 522 (1997).

20. *See id.* at 524–25 (detailing the scope of remedial clause); *see also United States v. Morrison*, 529 U.S. 598, 619 (2000) (holding that the Remedial Power under Section 5 of the Fourteenth Amendment could not serve as a basis for Congress to enact the Violence Against Women Act).

21. *See City of Boerne*, 521 U.S. at 619.

to issue a building permit.<sup>22</sup> Flores claimed that the Religious Freedom Restoration Act, passed by Congress pursuant to the Fourteenth Amendment's Enforcement Clause, prevented the town from interfering with the church's expansion.<sup>23</sup> The Court held that Congress does not have the power to determine constitutional violations, only to enforce via legislation protections related thereto.<sup>24</sup> Rather, it was the province of the courts to determine constitutional violations; the power under that provision of the Fourteenth Amendment was remedial, not plenary.<sup>25</sup> Just as the Fourteenth Amendment's remedial clause was interpreted in connection with Congress' Article I powers, so too should the Nineteenth Amendment inform the *interpretation* of the Fourteenth Amendment's substantive due process clause.

Abortion is completely unlike any other civil rights issue. Voting rights,<sup>26</sup> property rights,<sup>27</sup> the right to travel,<sup>28</sup> gun ownership,<sup>29</sup> inheritance,<sup>30</sup> parental rights,<sup>31</sup> warrant requirements,<sup>32</sup> and the right to counsel in criminal proceedings<sup>33</sup> are neither gender specific nor racially specific. In fact, all of these rights can be traced back to men who enshrined these rights. Therefore, it was easier to conceive how minority groups would (or should) enjoy those rights when the Fourteenth Amendment was adopted because there were prior civil rights that already existed. But because abortion only affects

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22. *Id.* at 511–12.

23. *Id.* at 511, 516.

24. *Id.* at 519, 536.

25. *Id.* at 522.

26. *See* *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (holding that denying citizens the right to vote deprives them of a fundamental right).

27. *See id.* at 341 (enumerating certain property rights).

28. *See id.* (stating that the right to travel is burdened by a Tennessee durational residence requirements).

29. *See* *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (holding that the Second Amendment conferred the individual right to keep and bear arms).

30. *See* *Trimble v. Gordon*, 430 U.S. 762, 764–65, 776 (1977) (holding that an act which permitted inheritance only through a child's mother, if the mother gave birth out of wedlock, violates the Fourteenth Amendment's Equal Protection Clause).

31. *See* *Meyer v. Nebraska*, 262 U.S. 390, 400–01, 403 (1923) (striking a statute that forbids the teaching of any language except English before the eighth grade as unconstitutional under the Fourteenth Amendment).

32. *See* *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“It is a ‘basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.’”(citation omitted)).

33. *See* *Powell v. Alabama*, 287 U.S. 55, 57–58 (1932) (requiring the appointment of counsel during all critical phases of proceedings against a defendant).

women,<sup>34</sup> and women were not previously afforded a seat at the table, let alone entry into the same room when the Constitution was ratified and the Fourteenth Amendment was adopted, it was not on the minds of the men crafting these monumental pieces of law. Thus, a one-size-fits-all approach, like the “deeply rooted” analysis, begins to break down under the abortion context because issues like abortion are unique to women, and women were not “people” in legal reasoning until the twentieth century. Therefore, the Court could have and should have adopted a new legal test building off the “deeply rooted” analysis rather than applying it strictly to an entirely different context. After all, the Court has a history of crafting constitutional tests and reviewing the Constitution and Amendments as a whole rather than in isolation by working to present a consistent framework for the country.<sup>35</sup>

This Article begins by discussing the Court’s philosophical interpretations of different constitutional provisions and how the applications of those provisions have been crafted by the Court.<sup>36</sup> Then, it considers constitutional and legal history with respect to the representation of women in various government positions.<sup>37</sup> Next, it examines the pitfalls in the Court’s decision in *Dobbs*, namely its failure to address the full context of abortion in the legal application of its judicial philosophy.<sup>38</sup> Finally, the Article concludes by discussing a slight revision to *Glucksberg*—the framework relied upon by the Court in *Dobbs*.<sup>39</sup>

It should also be noted that this Article is not advocating for a full-fledged “unwritten” Constitution; rather, this Article explores the Fourteenth and Nineteenth Amendments.<sup>40</sup>

Context stands as the border between philosophy and application.  
—Frank Papa, DO, PhD<sup>41</sup>

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34. For brevity’s sake, this Article will use “woman” or “women” to include those with the capacity to become pregnant, regardless of their identity.

35. *See infra* Section III.

36. *See infra* Section IV.

37. *See infra* Section V.

38. *See infra* Section VI.

39. *See infra* Section VII.

40. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012).

41. Frank Papa, DO, PhD is the father-in-law of the Author. While drafting this Article, Dr. Papa articulated this concept; one resulting from over forty years of research in the area of concept formation and decision making.



### III. THE UNITED STATES SUPREME COURT'S JURISPRUDENTIAL TESTS

The United States Constitution and its associated Amendments are very short.<sup>42</sup> Nowhere in the text of either appears an explicit legal reference that directs a court on how to apply the Constitution.<sup>43</sup> In fact, nowhere in the Constitution itself is there a reference to judicial review—that legal doctrine that permits courts to review laws or governmental actions to determine their constitutionality.<sup>44</sup> Because of the brevity of the document, the United States Supreme Court has developed tests of its own when it exercises its power of judicial review. The Court has made up these tests when a new constitutional issue arises. These tests are generally well-reasoned, as they (1) attempt to reconcile various competing portions of the Constitution as necessary, (2) make logical sense under the circumstances of the particular case where the test was divined, and (3) continue to make sense as the area of law is developed over time with additional cases.<sup>45</sup> In fact, even the test utilized by the Court in determining that abortion is not a protected right under the Constitution is not even in the Constitution.<sup>46</sup> Each of these tests are assessed in context and in conjunction with the Court's philosophies and their application to a particular case. To demonstrate the ad hoc nature of these constitutional tests, consider the following cases.

The Commerce Clause under Article I of the United States Constitution has been interpreted differently over the years<sup>47</sup> but can trace its present interpretations back to *Wickard v. Filburn*.<sup>48</sup> *Wickard* concerned a farmer

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42. See generally U.S. CONST. (The approximate word count for the entire document is 7,448 words, which is fewer words than the word count of this article including footnotes. While the word count of this article is devoted to a singular topic, the Constitution and the amendments are designed to set up a governmental framework, with varying relationships between the federal government, the states, and the people.)

43. See *id.* at art. III.

44. See *id.*; see also *Marbury v. Madison*, 5 U.S. 137, 167 (1803) (establishing judicial review by the Supreme Court in cases and controversies).

45. Cf. *infra* Section II; Section III.

46. Compare U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty or property, without due process of law . . .”), with *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (discussing the terms of liberty in the Fourteenth Amendment as not fully clarified).

47. Compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that child labor could not be regulated by Congress through the Commerce Clause), with *United States v. Darby*, 312 U.S. 100, 116 (1941) (holding that child labor could be regulated by Congress through the Commerce Clause).

48. *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942) (holding that an activity may be regulated under the Commerce Clause if it exerts substantial economic effect).

during the Great Depression growing a crop of wheat.<sup>49</sup> During that time, farmers were subject to strict quotas on crops. Filburn grew his quota of wheat but also grew extra for his family. The federal government fined him. Filburn brought suit, alleging that the federal government could not regulate his own private farming for personal use.<sup>50</sup> However, the Supreme Court said that the federal government could regulate the crops because if Filburn was growing his own wheat, then he would not be participating in the interstate market.<sup>51</sup> Nowhere in the Constitution does it mention a comprehensive definition of interstate commerce, yet, the Court held that if an entity's actions in the *aggregate* impacted interstate commerce, then Congress could regulate it.<sup>52</sup> The current interpretation of the Commerce Clause attempts to reconcile federal power with state power, which makes sense in the context of a nation increasingly reliant on interstate commerce and continues to be refined as the area of law further develops.

In *Korematsu v. United States*, the Court pronounced for the first time what would become the civil rights framework—strict scrutiny. The Court, before holding that Japanese-Americans could be legally sent to internment camps, stated:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.<sup>53</sup>

Ultimately, the Court held that the federal government had the authority to round up Japanese Americans and place them in camps throughout the war.<sup>54</sup> While the conclusion in *Korematsu* is indisputably wrong, the strict scrutiny test nevertheless makes sense in light of other constitutional provisions. The framework, not the conclusion, made sense in *Korematsu*<sup>55</sup> and continues to be cogent in subsequent iterations of the area of law.

In a separation of powers case, *Youngstown Sheet & Tube Co. v. Sawyer*, the Court was faced with executive action when President Truman sought to

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49. *Id.* at 113.

50. *Id.* at 113–14.

51. *Id.* at 128, 130.

52. *See id.* at 123–24, 128–29 (holding that Congress can regulate actions that have substantial effect on interstate commerce).

53. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

54. *See id.* at 219 (upholding the executive order providing for the incarceration of Japanese Americans).

55. *Cf. Bernal v. Fainter*, 467 U.S. 215, 219–20 (1984) (holding Texas law prohibiting aliens from being notaries failed strict scrutiny review).

nationalize the country's steel mills.<sup>56</sup> In what has become known as the "Jackson Concurrence," which has been interpreted as the controlling authority of this case, the Court held that there are three levels of power when the President exercises authority.<sup>57</sup> First, when the President exercises authority in conjunction with Congress; second when the President exercises authority when Congress has not acted; and third when the President exercises authority contrary to the will of Congress.<sup>58</sup> The Court reasoned that when acting *with* Congress, the President's authority is at its strongest.<sup>59</sup> When the President acts when Congress has taken no action, the President's authority occupies a middle ground.<sup>60</sup> And finally, when the President acts contrary to the will of Congress, the President's authority is at its weakest.<sup>61</sup> Again, the Court created this framework out of whole cloth.<sup>62</sup> This general framework makes sense when addressing the competing Article I and Article II powers; it made sense in *Youngstown*, and it continues to work.<sup>63</sup>

Additionally, the Fourteenth Amendment tests were made up by the Court. In *United States v. Virginia*, the Court held that for gender-based distinctions to pass constitutional muster, a rule or law's justification must be exceedingly persuasive.<sup>64</sup> In other words, a governmental entity must meet intermediate scrutiny.<sup>65</sup> Again, there is no textual support for this test in the

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56. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952) (President Truman issued an order to keep the country's steel mills open because of a union strike).

57. See *id.* at 634–35 (discussing the practical situation in which a President may exercise his power and others might challenge his powers).

58. *Id.* at 635–38.

59. *Id.* at 635–36.

60. *Id.* at 637.

61. *Id.* at 637–38.

62. Compare U.S. CONST. art. I, § 7; U.S. CONST. art. II, § 3, with *Youngstown*, 343 U.S. at 634–35 (highlighting the undefined nature of presidential power and that the art of governing is not based solely on isolated articles).

63. See, e.g., *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (applying the Jackson Concurrence where a separation of powers issue arose when petitioner asked that he be issued a passport with Israel as his birthplace. Congress passed a statute requiring passports use Israel when born in Jerusalem. However, the President, under the office's recognition power, refused to do so. The Court ultimately held that the State Department could issue passports and refuse to place Israel under place of birth.).

64. See *United States v. Virginia*, 518 U.S. 515, 531 (1996).

65. *Id.* (holding that governmental entities held to scrutiny because of a long history of governmental gender-based discrimination).

Constitution.<sup>66</sup> The heightened scrutiny framework made sense when reconciling the Nineteenth and Fourteenth Amendments in *Virginia*, and holds fast today.

Finally, *Washington v. Glucksberg*, a case cited extensively by the majority in *Dobbs*, was ordained not by any constitutional provision, but by the Court itself. *Glucksberg* concerned a patient seeking assisted suicide despite Washington state's prohibition of the practice.<sup>67</sup> The patient argued that under the Fourteenth Amendment's substantive due process clause, there was a right to assisted suicide.<sup>68</sup> However, because assisted suicide was not a longstanding part of American legal history, the Court held that there was no "right to die."<sup>69</sup> The term "deeply rooted" was used to justify the Court's holding, yet it appears nowhere in the Fourteenth Amendment, nor does any analogous language.<sup>70</sup> Just as the above tests, *Glucksberg* made sense when the Court sought to cabin judicial activism under the Fourteenth Amendment and generally continues to work when there are understood analogous rights which preexisted the Fourteenth Amendment. This "deeply rooted" test does not make sense in the context of abortion. However, to say it alone is sufficient justification to support the conclusion in *Dobbs* fails to recognize the unique circumstances of women in this country's history.

While the Court ordinarily does not shy away from creating new constitutional tests when needed, it strongarmed *Glucksberg* into resolving *Dobbs* even though such application violates all three precepts discussed above (reconciliation of competing constitutional provisions, applicability to the particular case at bar, and continued pertinence as subsequent cases arise). In *Dobbs*, the Court failed to reconcile competing provisions of the Constitution and related history.<sup>71</sup> Furthermore, the logical framework of *Glucksberg* is not conducive to assessing abortion because abortion is completely unlike any other legal issue vying for constitutional status; it is

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66. See U.S. CONST. amend. XIV, § 1 (there is no textual provision for a strict scrutiny test).

67. See *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997) (holding that Washington state's prohibition of assisted suicide did not violate the Fourteenth Amendment).

68. *Id.* at 708 ("The plaintiff asserted 'the existence of a liberty interest protected by the Fourteenth Amendment which extends to personal choice by a mentally competent, terminally ill adult to commit physician assisted suicide.'"(citation omitted)).

69. *Id.* at 710 (examining American legal history and finding in almost every state assisting suicide was a crime).

70. See U.S. CONST. amend. XIV.

71. *Dobbs*, 142 S. Ct. at 2325–26 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

unique because there is no prior legal cognate from which to draw.<sup>72</sup> As a result, the continued application of *Glucksberg* in abortion cases will prevent them from being logically sound. But, just because abortion does not fit into *Glucksberg*'s framework does not mean the qualified right to abortion is nonexistent.

To be sure, the Court should provide legal frameworks in interpreting the Constitution. The notion that the Constitution says what it says and requires no interpretation beyond the four corners of the document is a lofty ideal—there will always be a need to interpret the Constitution. But it also incumbent on the Court to devise tests and frameworks which will present a cohesive and internally consistent body of law. When a court interprets any law, the interpretation itself amounts to creating law. While the Supreme Court is wary of creating law, it is sometimes required and involves the use of judicial restraint.<sup>73</sup>

#### IV. THE HISTORY

Every law student, lawyer, and judge understands that case law rises and falls upon how a particular case is distinct from or similar to cases which precede it.<sup>74</sup> *Roe* and *Casey* are no different. Justice Alito's opinion is scathing of *Roe* and *Casey* because abortion is not "deeply rooted" in American legal history.<sup>75</sup> Even assuming this is true, it does not make the Court's decision any more sound, standing on its own.

Judges, especially Justices of the United States Supreme Court, have an obligation of the highest order to logically and methodically lay out the basis for their decisions.<sup>76</sup> If a decision has analytical gaps in taking the reader from A to Z, or if a missing predicate belies the ultimate conclusion, it cannot be logically sound—Justice Alito succumbed to this pitfall in *Dobbs*.<sup>77</sup> Justice Alito's opinion may appear on its face to take a reader from A to Z,

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72. See *supra* notes 67–71.

73. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. at 2326 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (describing the false dichotomy of judge-made law running rampant).

74. See *Case Law*, THE L. DICTIONARY, <https://thelawdictionary.org/case-law/> (last visited July 17, 2022) ("A professional name for the aggregate of reported cases as forming a *body* of jurisprudence; or for the law of a particular subject as evidenced or formed by the adjudged cases; in distinction to statutes and other sources of law.") (emphasis added).

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

76. See, e.g., *Opinions*, SUP. CT., <https://www.supremecourt.gov/opinions/opinions.aspx> (last visited July 22, 2022) ("Each [opinion] sets out the Court's judgment and its *reasoning*.") (emphasis added).

77. See *Dobbs*, 142 S. Ct. at 2281.

but there is a large analytical gap in the decision.

#### A. *Constitutional Convention*

The Constitutional Convention, which produced the United States Constitution, was convened in May of 1787.<sup>78</sup> There were 55 delegates in attendance.<sup>79</sup> Each of these delegates had at least one thing in common—all of them were men.<sup>80</sup> When it came time for the states to ratify the United States Constitution, all members of the individual state legislatures were men.<sup>81</sup> Because of this, it makes little sense to consider abortion laws prior to the ratification of the Nineteenth Amendment when women finally were franchised.

#### B. *Amendments to the Constitution*

The Fourteenth Amendment was adopted on July 9, 1868, as part of Reconstruction after the Civil War.<sup>82</sup> Just like the United States Constitution, the Fourteenth Amendment was drafted by men and adopted by state legislatures populated entirely by men.<sup>83</sup>

In fact, prior to 1917, no woman ever sat in the United States Congress.<sup>84</sup> Similarly, prior to 1895, no woman had been a member of a state legislature.<sup>85</sup> No woman had been a state's governor before 1925.<sup>86</sup> And prior to 1928, no woman had ever been a federal judge.<sup>87</sup> To this day, all of

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78. *The Founding Fathers Delegates to the Constitutional Convention*, UMKC, <http://law2.umkc.edu/faculty/projects/FTrials/conlaw/marryff.html> (last visited Sept. 20, 2022).

79. *Id.*

80. *Id.*

81. *See id.*

82. U.S. CONST. amend. XIV, § 2.

83. *See generally First Women to Serve in State and Territorial Legislatures*, NAT'L CONF. STATE LEGIS. (Mar. 6, 2019), <https://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/first-women-in-state-legislatures.aspx>.

84. *The Swearing-In of the First Woman Elected to Congress, Representative Jeannette Rankin of Montana*, U.S. HOUSE OF REPS.: HISTORY, ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1901-1950/The-swearing-in-of-the-first-woman-elected-to-Congress,-Representative-Jeannette-Rankin-of-Montana/> (last visited Sept. 20, 2022).

85. NAT'L CONF. STATE LEGIS., *supra* note 83.

86. *History of Women Governors*, RUTGERS, <https://cawp.rutgers.edu/facts/levels-office/statewide-elective-executive/history-women-governors> (last visited Sept. 15, 2022) (Nellie Tayloe Ross of Wyoming from 1925 – 1926, inaugurated fifteen days before Miriam “Ma” Ferguson; Ma Ferguson of Texas from 1925 – 1927, 1933 – 1924).

87. *Women's History Month*, U.S. COURTS, <https://www.uscourts.gov/about-federal->

these governmental bodies are dominated by men.<sup>88</sup>

To be sure, this illustration is not made to tee-up a case for abortion to be decided on equal protection grounds. The purpose of this illustration is intended to cast light on the Court's flawed logic in deciding *Dobbs*. The Court may be correct that abortion is not deeply rooted in this country's legal history—because women were treated like *property* in this country until very recently, at least as far as their sex was concerned.<sup>89</sup> Considering the classification of women as property, it becomes readily apparent why abortion does not share the same history as some of the other fundamental rights the people currently enjoy.<sup>90</sup> After all, people have rights and property does not.<sup>91</sup> In essence, the abortion laws from the eighteenth and nineteenth centuries can be viewed as people (at the time, men) enacting laws to protect their interests in property (women).<sup>92</sup>

### C. *The Nineteenth Amendment and Beyond*

It was not until 1920 that the Nineteenth Amendment took effect.<sup>93</sup> By that time, the United States was approaching 150 years old and it had been 132 years since the Constitution was ratified. While some may point out that women received the right to vote—and thus the right to participate in political discourse—well before *Roe* as an explanation that even in the intervening years, abortion was not deeply rooted in our country's history,

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courts/educational-resources/annual-observances/womens-history-month (last visited July 16, 2022) (listing Genevieve Rose Cline as the first woman named to the federal bench).

88. Ethan Cohen, *117th Congress: Breaking Down the Historic Numbers*, CNN, <https://www.cnn.com/2021/01/03/politics/117th-congress-historic-numbers/index.html> (last updated Jan. 3, 2021) (118 of 435 members of the House of Representatives were women and 26 of 100 Senators were women); Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, NAT'L CONF. STATE LEGIS. (Dec. 1, 2015), <https://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx> (in 2015, women made up twenty-five percent of state house chambers and twenty-two percent of state senate chambers).

89. *See generally Roe*, 410 U.S. at 135.

90. *See id.* at 138 (providing historical context of American law concerning abortion starting in 1821).

91. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (“[P]roperty does not have rights, people have rights.”).

92. *See id.*; *Postwar Gender Roles and Women in American Politics*, U.S. HOUSE OF REPS.: HISTORY, ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/Changing-Guard/Identity/> (last visited July 17, 2022).

93. U.S. CONST. amend. XIX.

this approach would also be flawed and incomplete. The Nineteenth Amendment provided only the right to vote for women, but it is certainly a better reference point than 1868 or 1789.

When Black men received the right to vote and citizenship in the 1860s through the adoption of the Thirteenth and Fifteenth Amendments, Black men did not obtain their rights—free from interference—until much later,<sup>94</sup> in the 1960s and 1970s.<sup>95</sup> In between Reconstruction and the Civil Rights Movement, Black individuals were faced with lingering oppression for over a century. From the adoption of Jim Crow laws, literacy tests, grandfather clauses, and sharecropping, Black men had rights *de jure*, but not *de facto*.<sup>96</sup> The framers of the Nineteenth Amendment would have been cognizant of this fact as well. It follows then, that the framers of the Nineteenth Amendment similarly would have been aware that women would be in similar circumstances—that a true equal status would not be achieved immediately.

When women obtained the right to vote, the country did not change overnight in the day-to-day treatment of women. For example, if women wanted to obtain a loan or other line of credit, they needed a man to sign off.<sup>97</sup> Women were still expected to stay at home and perform domestic duties, while men predominated the public sphere.<sup>98</sup> The concept of female domesticity still had a firm grasp over the nation and did not begin to falter until the late 1960s and 1970s.<sup>99</sup> While there were isolated instances of

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94. It can be readily argued that they still have yet to enjoy the unfettered rights that white men enjoy.

95. *The Modern Civil Rights Movement, 1954-1964*, NAT'L PARK SERV., <https://www.nps.gov/subjects/civilrights/modern-civil-rights-movement.htm> (last updated Apr. 7, 2016).

96. *Jim Crow Laws*, NAT'L PARK SERV., [https://www.nps.gov/malu/learn/education/jim\\_crow\\_laws.htm](https://www.nps.gov/malu/learn/education/jim_crow_laws.htm) (last updated Apr. 17, 2018); Sam Levine, *Literacy Tests are Gone, but Voter Suppression Isn't: 'Shut Out,' Episode 1*, HUFFPOST (Dec. 17, 2018, 9:18 AM), [https://www.huffpost.com/entry/shut-out-episode-1-black-voter-suppression-literacy-tests\\_n\\_5c1519bce4b009b8aea7b29e](https://www.huffpost.com/entry/shut-out-episode-1-black-voter-suppression-literacy-tests_n_5c1519bce4b009b8aea7b29e); Alan Greenblatt, *The Racial History of the 'Grandfather Clause'*, CODE SWITCH (July 17, 2022, 9:44 AM), <https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause>; *Sharecropping*, PBS: SLAVERY BY ANOTHER NAME, <https://www.pbs.org/tpt/slavery-by-another-name/themes/sharecropping/> (last visited July 17, 2022).

97. Rose Eveleth, *Forty Years Ago, Women Had a Hard Time Getting Credit Cards*, SMITHSONIAN MAG. (Jan. 8, 2014), <https://www.smithsonianmag.com/smart-news/forty-years-ago-women-had-a-hard-time-getting-credit-cards-180949289/>.

98. See U.S. HOUSE OF REPS.: HISTORY, ART & ARCHIVES, *supra* note 92.

99. See generally U.S. HOUSE OF REPS.: HISTORY, ART & ARCHIVES, *supra* note 92 (“Consequently, the women’s rights movement and the sexual revolution of the 1960s



women exercising their rights to a fuller extent than others, these remained for the most part the exception to the predominant rule of domesticity.<sup>100</sup> In the great state of Texas, Miriam “Ma” Ferguson was elected as the 29th Governor of Texas and the first woman governor of the state.<sup>101</sup> She took office in 1925—in large part due to her campaign strategy.<sup>102</sup> Her husband, James Ferguson, was the governor from 1915 to 1917, but was removed from office and barred from running again.<sup>103</sup> When Ma Ferguson ran, her slogan was “two governors for the price of one.”<sup>104</sup> This thinly veiled work-around to James Ferguson holding office worked and the intent was apparent from the slogan. Would Ma Ferguson have won the gubernatorial race if her husband had not been governor? Perhaps. But what is clear is that Ma Ferguson intentionally clothed herself in her husband’s prior political experience.<sup>105</sup> The same can be said of the first all-woman state supreme court, also a Texas claim.<sup>106</sup> In 1924, the Texas Supreme Court’s justices needed to recuse themselves from a case because they were members of a fraternal organization which was a party to a case before the court.<sup>107</sup> Governor Pat Neff appointed Ruth Brazzil, Hattie Henenberg, and Hortense Ward to stand in place of the normal composition of the court, for just that particular case.<sup>108</sup> If it were practical for men to fill the judges’ robes, then women would not have been afforded the opportunity.<sup>109</sup> No woman would be a justice on the Texas Supreme Court again until 1982.<sup>110</sup> Even though women have participated in politics for over a century now, women were not

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challenged many of the traditional notions of motherhood and marriage . . . By the 1970s, many marriages involved two careers, as both the husband and the wife worked and increasingly shared family duties . . . Throughout this period, more young women pursued careers in male-dominated fields, such as law, medicine, and business, loosening their traditional bonds to home and hearth and preparing the way for a new and larger generation of women in state and national politics.”).

100. U.S. HOUSE OF REPS.: HISTORY, ART & ARCHIVES, *supra* note 92.

101. Tiffany E. Dalpe, *Miriam Ferguson*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Miriam-Ferguson> (last visited Apr. 20, 2023).

102. *Id.*

103. *Id.*

104. John D. Huddleston, *Miriam A. Ferguson*, THE TEX. POL. PROJECT, <http://teaspolitics.utexas.edu/archive/html/exec/governors/15.html> (last visited Apr. 20, 2023).

105. *Id.*

106. *The Texas All-Woman Supreme Court*, TEX. WOMEN’S FOUND., <https://txwf.org/the-texas-all-woman-supreme-court/> (last visited Apr. 4, 2023).

107. *Id.*

108. *Id.*

109. *See generally id.* (creating a court of women only when men could not).

110. *Id.*

able to exercise true agency or receive earnest respect until more recently.

It was not until 1973 when the United States Supreme Court decided *Roe v. Wade* that abortion became a constitutional right.<sup>111</sup> The Court, comprised solely of men, recognized that there was a fundamental shift occurring in the country—that women were demanding to control their own destinies.<sup>112</sup> Just as the Civil Rights Movement saw great strides in this country toward achieving racial harmony, particularly through the judiciary, the Feminist Movement also saw great strides through that branch of government.

The Court cites to many historical sources in its opinion in *Dobbs*.<sup>113</sup> Some sources go back past the founding of this nation.<sup>114</sup> The Court proffers these points in an effort to support its ultimate conclusion that there is not a deeply rooted legal history of abortion. But these sources actually belie the Court's point. Again, these points ground the Court in a legal narrative which existed at a time when women were but property. To typify this, take the crime of rape.

Rape at common law was not viewed as a crime against a person, it was viewed as a property crime.<sup>115</sup> Damages were for the injuries caused to the

111. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

112. *Id.* at 169 (quoting Justice Frankfurter that, “Great concepts like . . . liberty . . . were purposely left to gather meaning from experience. For they relate to the whole domain and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.” (citation omitted)).

113. *See generally* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2285–300 (2022) (appendix referring to state laws in existence prior to the Nineteenth Amendment).

114. *Id.* at 2249 (citing to Henry de Bracton’s treatise and to thirteenth century English case law).

115. *See, e.g.,* *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (“The other traditional justifications for the marital exemption were the common-law doctrines that a woman was the property of her husband and that the legal existence of the woman was ‘incorporated and consolidated into that of the husband.’ Both these doctrines, of course, have long been rejected in this State. Indeed, ‘[n]owhere in the common-law world—[or] in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.” (citations omitted)); *Shunn v. State*, 742 P.2d 775, 777 (Wyo. 1987) (“Sir Matthew Hale, an English jurist of the 17th Century, author of a treatise on English law, is regarded as the source for the spousal exception to rape. He has stated, ‘But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.’ With the adoption of the English common law, this rule was followed in this country for almost 200 years. . . . [T]he woman was considered to be the property of her husband or father. Under this premise, the early rape laws sought compensation for the husband or father, rather than the victim, for the

woman and for destroying the woman's "purity" in the eyes of men, particularly their father and/or husband.<sup>116</sup> What is more, spousal rape was not criminalized anywhere in this country until 1976, when the state of Nebraska outlawed the "practice."<sup>117</sup> It was not until 1993—thirty years ago—that all states criminalized it.<sup>118</sup> Before then, a spouse *legally* could not "rape" the other. Even the Federal Rules of Evidence permitted using a woman's sexual history and "predispositions" as evidence in court until 1978 when Rule 412 was enacted.<sup>119</sup>

Rather than supporting the Court's justifications, these points actually undermine them. Women prior to the Nineteenth Amendment never enjoyed the same rights as men. Even after the Nineteenth Amendment, women still did not enjoy the same rights, as evidenced by the property-like nature of sex crimes and even the Federal Rules of Evidence. Women, just as Black men, may have enjoyed constitutional protections in law, but not in fact. For Justice Alito to say that abortion is not deeply rooted in our nation's history, he states the obvious, but it is not particularly profound; this is because women had no participation in drafting the Constitution or the Fourteenth Amendment and for most of this country's history, they were denied the effective right of legal personhood.

#### V. THE COURT'S GRAVEYARD DECISIONS

The Court is not immune from mistakes. Justice Robert Jackson noted that the Justices of the United States Supreme Court "are not final because we are infallible, but we are infallible only because we are final."<sup>120</sup> When the Court has gotten it wrong, the Court will usually try and correct course

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damages incurred to the 'property.'" (citations omitted)); *State v. Baby*, 946 A.2d 463, 479 (Md. 2008) ("The gravamen of the distinction . . . in this case lies in the historical importance that the intermediate appellate court placed on the notions of virginity, the harm of deflowering a virgin, and the importance of penetration to the crime of rape . . . English common law was based upon the 'cultural mores' of the laws of the Old Testament and the Middle Assyrian Laws of Mesopotamia 'which undergird[ed] the notion that the crime of rape was complete upon penetration' and which characterized the rape of a virgin as 'an illegal trespass upon the father's property.'" (citations omitted)).

116. See, e.g., *Baby*, 946 A.2d at 479.

117. See Kyla Bishop, *A Reflection on the History of Sexual Assault Laws in the United States*, ARK. J. SOC. CHANGE & PUB. SERV. (Apr. 15, 2018), <https://ualr.edu/socialchange/2018/04/15/reflection-history-sexual-assault-laws-united-states/>.

118. See *id.*

119. See FED. R. EVID. 412.

120. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

upon further review.<sup>121</sup> But the Court has *never* rolled back enunciated civil rights afforded directly to the people before *Dobbs*. To understand this point of fallibility and later correction, an individual need only look at five cases: *Dred Scott*, *Plessy*, *Darby*, *Korematsu*, and now *Dobbs*.

*Dred Scott* is an early decision from the Court.<sup>122</sup> Chief Justice Roger Taney, writing for the majority, held that Dred Scott and his family, who were brought from Missouri (a slave state) to Illinois (a free state) and the Wisconsin Territory (a free territory), did not obtain their emancipation.<sup>123</sup> Taney, in a sickeningly misguided attempt to avert the upcoming Civil War, drafted an opinion holding that slaves who entered free states or territories were not emancipated, nor could they ever be citizens of the United States. This opinion hinged, in part, on Taney's obsession with the word "territory" of Article IV, Section 3 of the Constitution which states that Congress has the power to regulate the "Territory or other Property belonging to the United States . . . ."<sup>124</sup> Because the territories that were subject to the Great Compromise were not possessions of the federal government when the Constitution was ratified, Congress did not have the authority to regulate what were "free" or "slave" territories.<sup>125</sup> This decision was overturned by the Thirteenth and Fifteenth Amendments.<sup>126</sup> Of course, if this country still employed the scourge that is systematic bondage, *Dred Scott* would have been overruled under the Court's current interstate commerce line of decisions.<sup>127</sup> This is not to say, however, that slavery should exist today or ever have existed in this country. Rather, the illustration is that there are

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121. Compare *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (deeming the plaintiff's inferiority argument around enforced separation of races as solely something the plaintiff is choosing to believe), with *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (holding that *Plessy v. Ferguson*'s "separate but equal" doctrine violates the Fourteenth Amendment); compare *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (establishing that legal restrictions which curtail the civil rights of a single racial group are not per se unconstitutional but must be subject to strict scrutiny), with *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (noting that *Korematsu v. United States* was "gravely wrong the day it was decided").

122. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

123. See *id.* at 394, 452.

124. See *id.* at 510 (noting that Article IV, Section 3 of the Constitution suggests that "whatever rules and regulations respecting territory Congress may constitutionally make are supreme").

125. See generally *id.* at 434–35.

126. See U.S. CONST. amends. XIII (abolishing slavery), XV (establishing the right to vote to citizens regardless of race).

127. See *United States v. Darby*, 312 U.S. 100 (1941) (holding that child labor could be regulated by Congress through the Commerce Clause).

many other constitutional levers at play, many of which have also changed overtime.

Many conservative jurists subscribe to the theories of originalism and textualism—legal theories that only the text and surrounding circumstances in place at the time a law was enacted are the primary, and sometimes only, reference points.<sup>128</sup> However, as any law student can point out, the Commerce Clause is a prime example of a constitutional provision which has changed frameworks over time, and drastically to boot.<sup>129</sup> The Court held that child labor could not be regulated at the federal level under the Commerce Clause.<sup>130</sup> There was even a proposed constitutional amendment on the matter which ultimately failed.<sup>131</sup> However, the Court later reversed course on child labor and greatly expanded the ambit of the Commerce Clause, making it what it is today.<sup>132</sup> Why then, did the Court refuse to consider altering Fourteenth Amendment jurisprudence when there is a compelling reason to do so—just as the Commerce Clause?

*Plessy*, another decision from the Court, ushered in a civil-rights dark age for minorities, particularly Black people.<sup>133</sup> There, the Court, similar to *Dobbs*, eschewed its duties to the law and to the people, by allowing an age of separate but (anything but) equal controlled by the states.<sup>134</sup> Of course,

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128. See *Who is Justice Samuel A. Alito? Supreme Court Justice Who Wrote Opinion Overturning Roe v. Wade*, USA TODAY (Apr. 20, 2022), <https://www.usatoday.com/story/news/politics/2022/04/20/scotus-associate-justice-samuel-alito-facts/7005937001/> (arguing that Justice Alito “adhere[s] to textualism, or emphasizing the words of a law as written” and “subscribes to an originalist judicial philosophy, in which the words of the Constitution are interpreted to have the same meaning as they would have been understood by the framers”).

129. Compare *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (holding that child labor could not be regulated by Congress through the Commerce Clause), with *United States v. Darby*, 312 U.S. 100 (1941) (holding that child labor could be regulated by Congress through the Commerce Clause).

130. See *Hammer*, 247 U.S. at 276–77 (holding that the regulation of child labor is a purely state authority that exceeds the constitutional authority of Congress).

131. See *Keating-Owen Child Labor Act (1916)*, ARCHIVES, <https://www.archives.gov/milestone-documents/keating-owen-child-labor-act> (last visited July 16, 2022) (discussing the proposed Child Labor Amendment, which stalled in the 1920s).

132. See *Wickard v. Filburn*, 317 U.S. 111, 120, 128–29 (1942) (ushering in the aggregate-effects test under the Commerce Clause).

133. See *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (holding that separate but equal facilities, such as train cars, for different races were constitutionally permissible).

134. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate by equal’ has no place. Separate educational facilities are inherently unequal.”).

*Plessy* has been overruled.<sup>135</sup>

*Korematsu* permitted the United States government to systematically incarcerate Japanese-Americans in camps throughout World War II.<sup>136</sup> This case was not explicitly overturned by the Supreme Court until 2018.<sup>137</sup> In fact, *Korematsu* was the first case in which the Court used its strict scrutiny analysis—yet, the Court nevertheless got the result wrong, as it has now recognized.<sup>138</sup> This illustrates that even when an analytical lens is used, the Court still, from time to time, gets it wrong. In fact, the strict scrutiny framework has been reworked and has been better articulated with additional nuance.<sup>139</sup>

*Dobbs* is a unique iteration of this concept. Assuming for a moment that *Korematsu* is analogous to *Roe*, in that they both had faults, later cases like *Dobbs* present a contemporary opportunity to account for such nuance. The faulty conclusion in *Korematsu* is orders of magnitude worse than omitting a key premise in *Roe*. Yet, the Court failed to even attempt reconciling *Roe*'s alleged faults in *Dobbs*.

#### VI. THE COURT'S CONVENIENT CONCLUSIONS

The Court's decision in *Dobbs* clearly began as a conclusion which the Court then sought out a basis to support its assumptions. This can also be gleaned from Justice Thomas' concurrence where he expresses the desire to revisit *Lawrence*, *Obergefell*, and *Hodges*.<sup>140</sup> Without having a case before the Court and thus having a record, nor an occasion to scrutinize American

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135. See *id.* (holding that *Plessy v. Ferguson*'s rationale is invalid and that "segregation is a denial of the equal protection laws").

136. See generally *Korematsu v. United States*, 323 U.S. 214, 216, 223–24 (1944).

137. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history.>").

138. See *Korematsu*, 323 U.S. at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] must [be subject] to the most rigid scrutiny.>").

139. Compare *id.* (establishing that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," though are not necessarily unconstitutional), with *Bernal v. Fainter*, 467 U.S. 215, 219–20 (1984) (stating that "a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny" by "advanc[ing] a compelling state interest by the least restrictive means available.>").

140. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2301 (June 24, 2022) (Thomas, J., concurring) (stating that "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.>").

history for that matter, Thomas, as they say, “says the quiet part out loud.”<sup>141</sup> Article III of the Constitution permits federal courts to hear only cases and controversies, not provide advisory opinions.<sup>142</sup> Thomas’s desire to review these decisions, by public invitation no less, indicates at least one Justice has already made up his mind.

The Court’s Appendices A and B which provide state criminal laws on abortion aren’t indicative of women’s rights.<sup>143</sup> Every single one of those laws except one were passed prior to the Nineteenth Amendment, or prior to any recognition as women as legal “people.”

Additionally, the Court states that it “has become increasingly apparent in the intervening years, *Casey* did not achieve that goal of ending the national division on the question of abortion.”<sup>144</sup> Yet the issue in *Dobbs* is the same issue that has come up time, and time and time again in abortion law. What is interesting about this is that even the brief submitted by the appellant in *Dobbs* presented no new arguments on the question of abortion. This of course begs the question—what is the national division which the majority spoke of? Is it the constitutionality of abortion itself, or is it that one side of the division refused to settle the issue and instead opted to adopt slightly different laws despite having clear guidance from the Court? Generally, as far as the Court is concerned, it is the latter. The brief for the petitioner in *Dobbs* is illuminating. The question presented was: “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional.”<sup>145</sup>

What is interesting is that the question of pre-viability restrictions had been answered.<sup>146</sup> While there were certainly practical restrictions which weren’t contemplated in the petitioner’s brief (such as requiring doctors to possess hospital admitting privileges before proceeding with an abortion),

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141. See *id.*; see also David Wilton, *Quiet Part (Out) Loud*, WORDORIGINS.ORG, <https://www.wordorigins.org/big-list-entries/quiet-part-out-loud> (last visited July 16, 2022) (when an individual does not “feel the need to be coy about their motivations....”).

142. See generally U.S. CONST. art. III, sec. II.

143. See *Dobbs*, 142 S. Ct. at 2285–300 (discussing state statutes criminalizing abortion at all stages of pregnancy during a period of time or in each of the territories or states listed).

144. *Id.* at 2242.

145. Brief for Petitioner at 3, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2021) (No. 19-1392) (asserting that the “previability laws that protect women’s psychological well-being (health), the dignity of ‘infant life’ in the womb, and the integrity of the medical profession and society constitutional”).

146. See *Planned Parenthood v. Casey*, 505 S. Ct. 833, 846 (1992) (“Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”).

the general question of whether a state can regulate abortions pre-viability was well-established and well-understood.<sup>147</sup> Put simply, this is not a circumstance where federal courts have been unable to articulate a workable legal standard. Rather, abortion bans, like the Mississippi law at issue in *Dobbs*, are at best designed to probe the contours of *Roe* and *Casey*, or at worst, are designed to keep a steady flow of abortion cases to the highest court in the land in the hopes that the Court would someday change its mind.

Even if *Dobbs* were an instance where the entire framework is not entirely workable—as evidenced by high litigation rates—if a legal standard needs modification, that is not a basis (on its own) to cast aside decades of jurisprudence. After all, other constitutional issues still are regularly litigated. Just because an area of law sees consistent litigation does not mean that the area of law is unworkable.<sup>148</sup>

At bottom, no matter which side of the issue a reader falls on, the decision in *Dobbs* is concerning. For those who identify as pro-choice, *Dobbs* represents a stark departure from fifty years of constitutional understanding. For those who identify as pro-life, *Dobbs* represents an aberrant decision because it makes the same mistake the majority in *Dobbs* alleges doomed *Roe* and *Casey*—that they were ill-reasoned and had deeply-flawed constitutional interpretations.

#### VII. THE ALTERNATIVE CONCLUSION

The *Dobbs* Court appears to have drawn a conclusion first, then worked its way backwards to the starting point. Courts are supposed to start from the various premises and work towards a conclusion.<sup>149</sup> The issue with the Court's tactics here is that, when starting from the conclusion and working backwards, it is exceedingly easy to find premises to justify the conclusion.

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147. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2292 (2016) (involving a Texas statute that required abortion providers to have admitting privileges at a hospital within thirty miles of the facility); see also *Casey*, 505 U.S. at 846 (“*Roe v. Wade* should be retained and once again reaffirmed.”).

148. See, e.g., *California v. Texas*, 141 S. Ct. 2104, 2112 (2021) (analyzing whether the Commerce Clause or the Tax Clause permit Congress to enact the Affordable Care Act, almost 233 years after the Constitution was ratified.).

149. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297, n.247 (1995) (“[T]he historical evidence points strongly toward the conclusion that, at least by 1868 even if not in 1791, any state legislature voting to ratify a constitutional rule banning government deprivations of ‘life, liberty, or property, without due process of law’ would have understood that ban as having substantive as well as procedural content, given that era’s premise that, to qualify as ‘law,’ and enactment would have to meet substantive requirements of rationality, non-oppressiveness, and evenhandedness.”).



Doing the reverse is much more difficult and can even lead courts to decisions that judges may disagree with.<sup>150</sup>

The Court's decision in *Dobbs* makes at least two flawed presumptions: (1) that the deeply rooted legal history which developed without representation of women in the past may properly inform decisions related to women today; and (2) that when women in the past finally obtained rights, either through the Constitution or other laws, they, through what can only be explained as a form of legal transubstantiation, are now and have always been on the same equal footing as those who have always enjoyed unfettered rights.<sup>151</sup> Both presumptions are wrong.

Instead, the Court should have recognized that women were legally second-class citizens until the Nineteenth Amendment, but were in fact, second-class citizens well beyond. The wheels of justice turn slowly. When the Court is faced with new issues regarding civil rights, it can stick to the current iteration of jurisprudence or revise it to comport with new legal concepts and understanding. Many times, the Court has opted for the latter.<sup>152</sup> Yet, here the Court chose not to (or even attempt to) make up for *Roe's* and *Casey's* alleged shortcomings and fell victim to the same logical gap. To shy away from this when the issue was squarely presented to the Court is a dereliction of duty to the Constitution, to the law, and to the people. It is rare that legal concepts can be designed in such a way that they can truly be a one-size-fits-all approach. If it were easy, then there wouldn't be a need for the Court, or the various courts of appeal across the country. Indeed, many district courts could theoretically resolve issues summarily. But this is not the case—because constitutional issues are heavily nuanced. Yet, quizzically, the Court refused to recognize the nuance of this very issue.

The Court should have instead crafted a test which looks not back to the 18th and 19th centuries but one which looks to the Nineteenth Amendment forward—to do otherwise renders the decision devoid of distinctions, and, most importantly, a true and correct understanding of American history. The Court is supposed to be made up of the greatest legal minds of their time. To hold that adhering to the *Glucksberg* framework is the only way that the

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150. See *Kahler v. Kansas*, 140 S. Ct. 1021, 1033 (2020) (decrying the dissent's alleged practice of "cherry-picking" to support its conclusions).

151. *Dobbs*, 142 S. Ct. at 2324–26 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

152. See, e.g., *Bernal v. Fainter*, 467 U.S. 215, 219–20 (1984) (noting that when a state law discriminates against noncitizens, the law can only stand if it meets strict scrutiny, and that there is an *exception* to this rule under the "political function" exception, which exists when a law excludes noncitizens from "positions intimately related to the process of democratic self-government," but found that notaries do not fall within this exception).

Court can address this issue, lest the doors swing open for judicial activism, is unfounded. To claim a false dichotomy such as this, without recognizing the very real need for a newly crafted test that acknowledges *Glucksberg* in the context of abortion is a willful abdication of duty.

There is a way to reconcile both concerns.<sup>153</sup> There is a middle ground that would permit the Court to revise the constitutional framework surrounding abortion. That middle ground starts with *Glucksberg*, a test endorsed by the Court in *Dobbs*. Adding onto *Glucksberg* an additional lens by recognizing its inherent failure to substantively address *all* civil rights issues, the test would look as follows: (1) Is the sought-after right deeply rooted in this nation’s history, particularly at a point in time when women began to enjoy rights in fact, not just in law, and (2) does it aid in ordered liberty from the Nineteenth Amendment forward?<sup>154</sup>

This test permits this issue to be addressed while also understanding and recognizing the checkered history of this great nation. Women were held back for most of this nation’s history;<sup>155</sup> to now use that same history to justify a major constitutional decision is a legal “gotcha.” The civil rights issues of Black men in this country that were still present in 1920 would have informed the drafters of the Nineteenth Amendment that it would take at least decades before women could truly enjoy the fruits of their equality.

Every single sitting Justice of the Court obtained their law degree from an Ivy League or otherwise elite institution.<sup>156</sup> They should be able to either come up with a workable system under the *Roe* line of cases or make *Dobbs* work in concert with the rest of the Constitution. But *Dobbs* does not quite work for the reasons discussed above. After all, because issues concerning only women deserve a second look by the Court, a slight modification to the *Glucksberg* test would achieve the Court’s desire to limit judge-made law while permitting the judiciary to examine these issues in the proper light—context and all.

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153. See *Dobbs*, 142 S. Ct. at 2326. (Breyer, Sotomayor, and Kagan, JJ., dissenting).

154. While the *Glucksberg* test is strictly backwards-looking from the Fourteenth Amendment, this test would permit a slight “forward-looking” buffer. This is because the framers of the Nineteenth Amendment would have been cognizant of the strife suffered by Black men even after the Thirteenth, Fourteenth, and Fifteenth Amendments and would likely still continue into the foreseeable future.

155. See *supra* Section IV.

156. *Current Members*, <https://www.supremecourt.gov/about/biographies.aspx> (last visited July 17, 2022) (Roberts, Harvard; Thomas, Yale; Sotomayor, Yale; Kagan, Harvard; Gorsuch, Harvard; Kavanaugh, Yale; Barrett, Notre Dame; Jackson, Harvard); *Samuel Alito*, BIOGRAPHY.COM, <https://www.biography.com/law-figure/samuel-alito> (last visited July 17, 2022) (Alito, Yale).