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The Weakening of the Voting Rights Act: A Proposal for Modernizing Preclearance

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DEFENDING THE CONSTITUTIONALITY OF ABORTION RIGHTS

Sydney Reil¹ and Cynthiana Desir²

I. INTRODUCTION

In 2018, the constitutionality of the Mississippi Gestational Act was called into question by the Jackson Women’s Health Organization. This act illegalized the majority of abortions after 15 weeks of pregnancy. Given the constitutional right to abortion granted by *Roe v. Wade*³ and upheld by *Planned Parenthood v. Casey*,⁴ both the U.S. District Court for the Southern District of Mississippi and the U.S. Court of Appeals for the Fifth Circuit deemed the Act unconstitutional as a violation of that right.⁵ The State of Mississippi brought the case under the review of the United States Supreme Court in 2021, seeking a Court opinion that would support and uphold the

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 - 3 *Roe v. Wade*, 410 U.S. 113 (1973).
 - 4 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).
 - 5 *Dobbs v. Jackson Women’s Health Org.*, No. 20-1392 (U.S. Jan. 22, 2021).

Mississippi Gestational Act. On June 24, 2022, such an opinion was granted; the Supreme Court issued the *Dobbs v. Jackson* decision, which not only overturned the rulings of the lower Mississippi courts but overturned *Roe* itself, thereby removing the federal protection of abortion rights and returning the regulation of abortion to state legislatures.

The Court's majority opinion in *Dobbs*, written by Justice Samuel Alito, stated that *Roe* was unconstitutionally decided and was based on a false record of the history of American abortion law. The opinion further impugned *Roe* for the country's current divisiveness on abortion, claiming that the 1973 decision set back the natural progression of many states toward more lenient abortion regulation.⁶ The allegations made by Justice Alito against *Roe* does not fully encapsulate the reality of abortion patterns, practices, and law in the United States. The majority rejected the notion of abortion as a constitutional right, relying on the fact that abortion is not directly and explicitly enumerated in the Constitution. However, former Courts have held that the Constitution protects multiple unstated rights including the right to interracial marriage⁷, the right to marriage between members of the same sex⁸, and the right to bodily autonomy⁹. Contrary to the information set forth in the majority opinion by Justice Alito, the legal history of the United States provides sufficient evidence for an American tradition of protecting and upholding abortion rights, as widespread state restrictions on abortion began developing in the mid-to-late-1800s,¹⁰ well after the writing and ratification of the U.S. Constitution. This history of abortion in the United States is but one of many factors that was either overlooked or obscured in the decision that overturned *Roe*. Due to the history of abortion in American law, the precedent and protections of the

6 *Id.*

7 *Loving v. Virginia*, 388 U.S. 1 (1967)

8 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

9 *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250 (1891).

10 Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (U.S. Dec. 4, 2020).

Fourteenth Amendment, and the realistic consequences of *Dobbs*, abortion should be considered and protected as a constitutional right.

This Comment will begin its defense of the constitutional right to abortion with a summary of the background of abortion law in the United States, from the finalization of the Constitution in 1778 to the present day. Next, it will discuss the constitutionality of *Roe*, *Casey*, and other cases defending the constitutionality of abortion rights based on the implicit right to privacy found in the Due Process clause of the Fourteenth Amendment. Finally, the Comment will examine both the real and potential consequences of the overturn of *Roe* via *Dobbs*; these consequences will be analyzed in the context of the “moral controversy” of abortion mentioned by Justice Alito.

II. BACKGROUND

A. American Abortion Law: 1778 – 1840

The history and tradition of United States abortion law has been utilized as support for both *Roe* and the linchpin in its downfall, *Dobbs*. These rulings present opposing views of this history; thus, it is essential to understand the controversial history of American abortion law and the precedent it sets for the United States today. As this Comment is dealing, in large part, with the constitutionality of abortion, it is essential to understand the social and cultural norms in which the U.S. Constitution was written and finalized. In 1778, British Common Law was the law of the land in the newly independent colonies.¹¹ Under British Common Law, abortion was only “illegal” (though it is arguable that no abortion, under Common Law, was officially illegal) once the fetus had “quickened”.¹² The term quickening refers to the woman’s perception of fetal movement, and it usually occurs around 20 weeks, or four months, into pregnancy.¹³ Thus, four months of development was the legal beginning

11 Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States* (Univ. of Cal. Press 1997).

12 *Id.*

13 *Id.*

of human life under British Common Law, and abortion was left to the pregnant woman's own understanding of her pregnancy. This is the context in which the Constitution was written and accepted by independent America.

The first American legislation officially restricting abortion was passed in Connecticut in 1821, a decision catalyzed by a New England scandal. In 1818, an Episcopal pastor named Ammi Rogers attempted an abortion on his mistress and congregant, Asenath Smith.¹⁴ Though the abortion was not successful, Asenath gave birth to a stillborn child. While the stillbirth could not be directly attributed to the abortion attempt, it nonetheless led to the prosecution of Rogers, who was ultimately convicted of sexual assault and sentenced to two years in prison in 1820.¹⁵ The charges brought against Rogers were not related to the botched abortion, but the case influenced the subsequent abortion legislation passed by the General Assembly of Connecticut. In May of 1821, the General Assembly revised the Connecticut crime and punishment law, adding new sections including Section 14¹⁶, which made the use of poison to "cause or procure the miscarriage" of a woman in the "quickened" period of pregnancy punishable by imprisonment.¹⁷ The inclusion of the quickened fetus doctrine, borrowed from British Common Law, in this statute, provides both the pregnant woman and physicians with flexibility and a period in which to perform legal abortions.¹⁸ Additionally, both the background and specific wording of this statute place the legal responsibility on the person performing or inducing the abortion rather than on the mother herself. This highlights the

14 Gillian Brockell, *How a Sex Scandal Led to the Nations First Abortion Law 200 Years Ago*, The Washington Post, (May 17, 2019), <https://www.washingtonpost.com/history/2019/05/16/how-sensational-sex-scandal-led-nations-first-abortion-law-years-ago/>

15 *Id.*

16 Connecticut, Act Revising the Crime and Punishment Law (May 1821), § 14.

17 James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* (Oxford University Press 1978).

18 *Id.*

general goal present in early abortion regulation, that mothers should be protected from dangerous abortion methods. This protection of maternal life, rather than limitation of bodily autonomy and protection of fetal rights, seems to be the likely intent of this early regulation.

Following Connecticut, other states began passing similar abortion regulations. The majority of these early regulations simply codified British Common Law, protecting a woman's right to abort her pregnancy before quickening. One reason for the codification of these regulations was, as in the 1821 Connecticut legislation, the protection of the mother from dangerous methods of abortion.¹⁹

The adoption of the Act Prohibiting Importation of Slaves in the 9th Congress²⁰ was another reason for abortion regulation codification. In 1808, this act outlawed the importation of enslaved peoples, halting the legal transatlantic slave trade to the North American continent.²¹ Since enslaved peoples could no longer be imported to the States from elsewhere, slavery could only be perpetuated through slaves already on the North American continent. This made the childbearing abilities of enslaved women increasingly valuable, based on the legal doctrine of *partus sequitur ventrem*, meaning that those born to women slaves were born into slavery, to those states that continued to use slavery as their central labor force. Thus, written restriction of abortion would motivate enslaved women to carry to term.²² This sentiment, particularly in southern states, paired with the abortion legislation being passed in New England, led to ever-increasing restrictions on abortion and contraceptive rights.²³

In 1829, New York passed a law making abortion post-quickening a felony and pre-quickening abortion a misdemeanor.²⁴ Still,

19 Connecticut, Act Revising the Crime and Punishment Law, May 1821 Conn. Acts 1821, ch. 25.

20 Act Prohibiting Importation of Slaves, ch. 28, 1 Stat. 104 (1807).

21 Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 Harv. L. Rev. 1894 (2021).

22 *Id.*

23 *Id.*

24 Samuel W. Buell. *Criminal Abortion Revisited*. (1991).

the majority of states that passed statutes used these first abortion statutes to uphold British Common Law.²⁵ By 1839, only eight states regulated abortion by statute, with the other eighteen states maintaining British Common Law without additional legislation. It was not until the sensationalism of botched abortions, the development of vocalized anti-abortion sentiments from obstetricians and gynecologists, and increased sentiment on the immorality of abortion largely beginning in the 1840s that abortion faced widespread state restrictions.²⁶

B. American Abortion Law: 1850 - Roe v. Wade (1973)

In the 1840's, the "horror stories" of maternal infections, permanent deformities, and deaths from abortion procedures impacted abortion laws disparately in each state, but this disparate treatment did not massively increase the restrictiveness of most state laws.²⁷ By 1859, only 12 of 33 states adopted abortion restrictions beyond British Common Law.²⁸ Fifteen states officially adhered to British Common Law, ten of which did not punish abortion at any stage of pregnancy and the other five made abortion punishable only after quickening.²⁹ The remaining six had no official statutes, but generally adhered to British Common Law principles. It was not until the 1860s that states began to adopt more stringent statutes that both limited the timeframe in which abortion is legal and intensified the punitive consequences of illegal abortion.³⁰ However, in these stricter statutes, the blame for criminal abortions was still directed

25 *Id.*

26 *Id.*

27 Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (U.S. Dec. 4, 2020).

28 *Id.*

29 *Id.*

30 Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (University of California Press 1997).

largely at the physician or facilitator of the procedure rather than the woman aborting the fetus, and as abortion procedures remained risky for the mother, these laws were seen as intended to preserve the life of the pregnant woman.³¹

The increased restriction of abortion in many American states in the mid-1800s can be largely attributed to the emergence of medical morality considerations. As abortions became more safely attainable, abortion legislation focused on the morals of abortion as opposed to maternal life preservation. Gynecologist Horatio Storer was a particularly influential figure in abortion restriction.³² He led a campaign regarding the immorality of abortion at any stage, with the support of the American Medical Association (notably composed of only male members), Storer's campaigning greatly impacted legislation against abortion all over the country. However, even in states that prohibited abortion at any stage of pregnancy, the public attitude formed under Common Law persisted.³³ In terms of the new, Storer-driven legislation, legal blame shifted to include the woman soliciting an abortion as well as the physician performing it, and, in some states, sentences for women who underwent abortions at any stage was 10-20 years in prison.³⁴ Nonetheless, the social stigma around abortion across the country remained tied to the quickening doctrine rather than to the actual legality of abortion under the new legislation. Given this prevailing opinion, abortions were seldom prosecuted.³⁵ This was the state of American abortion law and regulation until the 1870s.

31 *Id.*

32 James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* (Oxford University Press 1978).

33 Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (U.S. Dec. 4, 2020).

34 Patricia Cline Cohen, *The Dobbs Decision Looks to History to Rescind Roe*, *The Washington Post*, <https://www.washingtonpost.com/outlook/2022/06/24/dobbs-decision-looks-history-rescind-roe/>

35 Samuel W. Buell. *Criminal Abortion Revisited*. (1991).

In 1873, Anthony Comstock and the New York Society for the Suppression of Vice put forth the Comstock laws, which outlawed anything “lewd” or “lascivious”.³⁶ Among these lewd, lascivious things was the information surrounding birth control and abortion. Prohibitions similar to the Comstock laws were passed in 24 of the 47 states in the 1880s.³⁷ By the turn of the century, abortion law and social stigma had changed very little from Comstock’s “reformation” in 1873. Any changes or reforms were largely cosmetic. Nonetheless, although abortion was considered a felony in most states, doctors continued to perform abortions at considerably high rates.³⁸ In the 1960s and 1970s came second-wave feminism and the still-restrictive abortion statutes were no longer socially acceptable; the statutes were not protective of the woman, which was their original purpose back in the early 1800s, and criminal abortions were still occurring in spite of criminalization.³⁹ In 1965, *Griswold v. Connecticut* led to the reversal of some Comstock laws and similarly restrictive laws of the 1870s and beyond, allowing married couples access to contraceptives.⁴⁰ *Eisenstadt v. Baird*⁴¹ gave similar rights to unmarried people in 1972. In the 1960s, Hawaii and New York decriminalized all abortions, though stated in their statutes that only a licensed physician may perform abortions. Many other states followed suit, to varying degrees and with varying statutes.⁴² It was within this period of social reformation and renewed acceptance of abortion that the *Roe* decision was made.

36 De Robigne Mortimer Bennett, *The Champions of the Church: Their Crimes and Persecutions*, (1878).

37 *Id.*

38 Samuel W. Buell, *Criminal Abortion Revisited*. (1991).

39 *Id.*

40 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

41 *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

42 Samuel W. Buell, *Criminal Abortion Revisited*. (1991).

C. An American Tradition of Abortion

One of the central arguments of the recent *Dobbs*⁴³ decision is that the United States does not have a tradition of abortion rights, and this, in part, prevents this right from inclusion as an implicit right under constitutional protection. This Comment intends to refute this claim, both by sufficiently revealing such a tradition and by exposing the contradictions and inconsistencies of this qualification.

As previously noted in this Comment, the history of American abortion rights began with the British Common Law, which contained no explicit bans on abortion until fetal quickening. Abortion went through periods of legal restrictions on a state-by-state basis, though remained largely liberalized and socially acceptable until the late 1800's, when Horatio Storer, the American Medical Association, and the Comstock laws created more restrictions, social and legal, on abortion than ever before. These widespread restrictions remained until the second-wave feminist movements of the 1960's and 1970's, which caused anti-abortion sentiments and restrictions to liberalize, culminating in *Roe*⁴⁴. This is the basic trend of American abortion rights as outlined in the prior two sections of this Comment. Though it is impossible to understand the true cultural attitudes toward abortion from the Constitution to the present, the codified laws and historical sources available seem to support an "American tradition" of abortion, a tradition found in the near century of quickening doctrine adoption and codification, and public sentiment in support of this doctrine.

However, what sufficiently qualifies as a tradition is subjective; perhaps it is the lack of federal abortion protection over the course of American history that the *Dobbs* majority views as a lack of tradition. Such a stance, however, would be wholly inconsistent with other lines of legal cases. For example, the right to interracial marriage went without federal protections until *Loving v. Virginia*⁴⁵ in 1967, where the anti-miscegenation statutes of states were found

43 *Dobbs v. Jackson Women's Health Org.*, 594 U.S. ____ (2021).

44 Samuel W. Buell. *Criminal Abortion Revisited*. (1991).

45 *Loving v. Virginia*, 388 U.S. 1 (1967).

to violate both Due Process and Equal Protection. Similarly, same-sex marriage was not protected in every state until 2015 with the *Obergefell v. Hodges*⁴⁶ decision. These constitutional rights are evidence that a history of federal protection and/or regulation is not a prerequisite for a right to be provided for in the Constitution. Furthermore, abortion rights have been supported, or at least upheld, by more states and over more of United States history than both the right to interracial marriage and to same-sex marriage, in addition to numerous other currently upheld constitutional rights. Thus, it would seem, there are constitutional rights that have a paucity of American tradition, and instead appear to be a reflection of changing sentiments alone. Therefore, the “American tradition” argument should not be applied to the examination of the constitutionality of abortion rights, as it has not been a factor for many other constitutional rights. Removing this “American Tradition” argument leaves *Dobbs* relying then on the argument of moral controversy, which will be discussed in the following sections of this Comment.

D. Roe v. Wade (1973) and Dobbs v. Jackson (2022)

Roe was the linchpin in American abortion law, providing constitutional protection for abortion. A Texas resident under the pseudonym Jane Roe was denied a legal abortion under Texas criminal abortion law, which stipulated that abortion was only legal if the pregnancy threatened the life of the mother.⁴⁷ Jane Roe’s life was not in danger and she could not afford to travel to another jurisdiction to abort her pregnancy. *Roe* claimed that the criminalization of abortion under the Texas State Penal Code was violating her right to personal privacy, implicit in Amendments 1, 4, 5, 9, and 14. *Roe* argued that the Texas Penal Code improperly invaded a right possessed by the pregnant woman to end her pregnancy, thereby violating her personal liberty under the Due Process clause of the 14th Amendment.⁴⁸ The Due Process Clause has been interpreted to

46 *Obergefell v. Hodges*, 576 U.S. ___ (2015).

47 Texas Penal Code Ann. art. 1191-1194 (1973).

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

include both procedural due process, which enforces the legal procedures that must take place in state proceedings, and substantive due process, which is based on the principle of fundamental fairness and determines whether a law can be applied by states or must be applied at the federal level⁴⁹. In terms of *Roe*, it is the substantive due process that was violated by the Texas State Penal Code, based on the argument that abortion requires federal regulation and protection as a matter of fundamental fairness.⁵⁰ These Texas statutes were also claimed to violate the personal, marital, and sexual privacy protected by the Bill of Rights.

Samuel Warren's and Louis Brandeis's 1890 Harvard Law Review article titled "The Right to Privacy" states that the implicit right to privacy, which has been largely applied to intellectual property and publishing, forms no new principle in extending its protections to "personal appearance, sayings, acts, and to personal relation, domestic or otherwise."⁵¹ The right to privacy applied to the contents and products of one's mind violates no existing principles when it is similarly applied to one's body and intimate relations, a category under which abortion arguably falls. In the *Roe* decision, written by Justice Blackmun, the Supreme Court affirmed that, despite the lack of extensive explicit privacy rights in the Constitution, the Court has recognized the right to personal and bodily privacy going back to *Union Pacific Railroad v. Botsford*.⁵² Since *Botsford*, this controversial right has been extended to marriage-related activities,⁵³ procreation,⁵⁴ contraception,⁵⁵ family relationships,⁵⁶

49 U.S. Const. amend. XIV, § 1.

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

51 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

52 *Union Pacific R.R. v. Botsford*, 141 U.S. 250 (1891).

53 *Loving v. Virginia*, 388 U.S. 1 (1967).

54 *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

55 *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

56 *Prince v. Massachusetts*, 321 U.S. 158 (1944).

and child-rearing and education.⁵⁷ The case of *Griswold*⁵⁸ was particularly pivotal in establishing the right to privacy as a stark, significant, and broadly applicable right. This decision cites the dissenting opinion of Justice Harlan in *Poe v. Ullman*⁵⁹, which states that the safeguarding of the home and family, a right explicitly protected by multiple penumbras of the Constitution, can and should be extended to the marital relations between man and wife. This decision, by protecting the privacy of marriage and marital intimacy, gave invaluable support to the validity and unstated breadth of implicit privacy rights. Thus, the right to privacy, having been broadly applied pre-*Roe* to cases of marital, familial, and intimate relations, is broad enough to include abortion, as a definite facet of such relations.

There have been numerous cases since *Roe* that have limited the scope of *Roe* on both the federal and state level. One of the most significant and impactful of these cases was *Casey*⁶⁰, in which the issue of the constitutionality of *Roe* was placed under scrutiny. The primary holding of the *Casey* decision is that *Roe* was correctly decided, however, it granted states the ability to prohibit abortion of a viable fetus under any circumstances other than protecting maternal health and life. Thus, once the fetus is viable outside the womb, the state's interest in protecting unborn life may take precedence over the privacy and autonomy rights of the mother without violating any constitutional provisions under *Roe*. This case limited the scope of *Roe* on the federal level; at the state level, legislation and abortion facility availability further undermined this scope. However, while *Roe* has been limited and undermined, it remained an underlying, ever-present protection for women in each and every American state until 2022, when the landmark 1973 decision was overturned by *Dobbs*. This recent decision states that the U.S. Constitution makes no reference to abortion nor is it implicitly protected by any constitutional provision. Furthermore, it states that the Due Process Clause

57 *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

58 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

59 *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

60 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

of the Fourteenth Amendment does protect certain unwritten rights, particularly those rights which are deeply rooted in the nation's traditions and history, but does not extend to abortion. This decision is claimed to be "not inherently sex-based," thus, it does not violate the Equal Protection Clause. Finally, the decision mentions the moral controversy of abortion, and thus, the necessity to return this decision to the people. As it is not provided for in the Constitution, the citizens and legislators of each individual state will now regulate abortion on their own terms.

Dobbs' overturn of *Roe* is largely based on fundamentally incorrect information, however, it did provide us with the framework used by the today's Supreme Court for determining constitutionality. For a decision to be constitutionally sound, it must be based in U.S. tradition (an argument addressed in the previous section) and be morally unambiguous. This Comment has begun to and will continue discussing how the right to abortion fulfills these requirements in full, how the history of abortion rights and the protections granted under the Fourteenth amendment support the constitutional nature of the right to an abortion, and how the moral controversy stressed in the *Dobbs* decision is, similar to the American tradition argument, null and void.

III. PROOF OF CLAIM

A. The 14th Amendment: the Due Process Clause, the Equal Protection Clause, and the Implicit Right to Privacy

The Fourteenth Amendment's ratification began the reconstruction of American society after the Civil War. This amendment endowed formerly enslaved African Americans and other individuals who were emancipated with citizenship and equal protection under the law, thereby encompassing them under the expansive phraseology "all persons born or naturalized in the United States."⁶¹ Despite its original intent to safeguard newly free African Americans, the Fourteenth Amendment has served as a powerful legal

61 U.S. Const. amend. XIV, § 1.

force for ensuring that crucial individual rights essential to freedom, self-respect, and self-governance are safeguarded for all persons throughout the United States. In regards to the abortion issue, *Roe* stated and *Casey* reaffirmed that the 14th amendment's concepts of personal liberty and privacy protected individual decision making related to marriage, procreation, contraception, family relationships, and child rearing and education, and that this is extensive enough to include a woman's decision of whether or not to terminate her pregnancy.⁶² While the interpretation of the Fourteenth Amendment's protections has been controversial, it has played a crucial role in securing fundamental American rights.

B. The 14th Amendment and Abortion

Given the introduction of *Roe v. Wade* in the Background of this Comment, it is imperative to delve deeper into its legal foundations regarding the 14th Amendment of the Constitution, a provision that formerly recognized abortion as a constitutional right and served as a pivotal element in the *Roe* ruling. To briefly restate the central holding of this decision, the 1973 Supreme Court found that the right to an elective abortion up to the point of fetal viability is covered by the implicit right to privacy found in the Due Process Clause of the Fourteenth Amendment.⁶³ The right to privacy and the right to an elective abortion are not explicitly outlined in the Due Process clause; it is this ambiguity that lies at the heart of the ongoing controversy. However, as stated by Justice Harlan in his dissenting opinion in *Poe v. Ullman*, a decision which upheld a Connecticut law banning contraceptives, "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."⁶⁴ This was the logic behind *Roe v. Wade*'s landmark ruling, which established that the right to elective abortion is implicitly covered by

62 *Dobbs v. Jackson Women's Health Organization*, 598 U.S. ____ (2021) (Sotomayor, Kagan, & Breyer, JJ., dissenting).

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

64 *Poe v. Ullman*, 367 U.S. 497 (1961).

the Due Process Clause of the Fourteenth Amendment. The Court arrived at this conclusion by examining precedents dealing with bodily autonomy and familial relationships, which consistently recognized the right to privacy as a fundamental value safeguarded by the First, Fourth, Fifth, and Ninth Amendments.⁶⁵ Thus, the right to privacy is well established and unarguably a component of the Fourteenth Amendment. The *Dobbs* decision does not dispute this point; the controversy lies in the question of whether this right to privacy, as well as the right to liberty established in this Amendment, does in fact cover the abortion rights of American women.

Roe held that abortion is a private matter that should be decided within personal and interpersonal contexts, and therefore is safeguarded by the Due Process Clause of the Fourteenth Amendment. This implicit right is based on the “liberty” interest enshrined in the Due Process Clause. Furthermore, the term “people” in the Amendment does not automatically include unborn fetuses, as they are not considered legal persons under the Constitution. As such, the Court held that the right to elective abortion is a fundamental right protected by the Constitution.⁶⁶ Abortion is a private decision on par with sexual relations,⁶⁷ ⁶⁸ ⁶⁹ child-rearing,⁷⁰ and interpersonal relationships.⁷¹ These rights are covered by the Fourteenth Amendment, particularly those pertaining to reproductive and sexual autonomy, suggesting that abortion should be similarly protected.

The constitutional rights afforded under *Griswold*⁷² and *Eisenstadt*,⁷³ which were specifically surrounding the use of contra-

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

66 *Id.*

67 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

69 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

70 *Meyer v. Nebraska*, 262 U.S. 390 (1923).

71 *Loving v. Virginia*, 388 U.S. 1 (1967).

72 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

73 *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

captives but nonetheless uphold the underlying right to choose the means and timing of child production, feed directly into *Roe*, which once offered this same underlying right through the protection of elective abortion. The fact that abortion is no longer considered a constitutional right under *Dobbs* places the right to determine *any* familial or interpersonal affairs privately at significant risk. In addition, *Roe* explains the term “people” stated in the Fourteenth Amendment. People implies life and personhood, the determination of which is remarkably unclear and controversial. As a morally controversial topic, no aspect of the legal system should base law and policy on one singular and extreme definition of life. The law should allow all extremes and opinions of life’s genesis to exist in unison in each state; this is the logic used by *Dobbs* to remove federal protection of abortion; however, it is through this removal that the space for differing and contradicting opinions is lost. Given the history of abortion discussed in the Background and the fairly liberal abortion regulation in effect in most states at the time this Amendment was made in 1866, it is fair to say that the term “people” did not originally apply to the unborn, nor should it automatically apply to the unborn today.

Through *Roe*, the coverage of the Due Process clause of the Fourteenth Amendment expanded to include abortion. There have been numerous cases post-*Roe* that uphold this coverage and expand upon its bounds. *Doe v. Bolton*,⁷⁴ decided the same day as *Roe*, held, like *Roe*, that a strict abortion statute in Georgia violated the implicit privacy rights highlighted in the Fourteenth Amendment. This statute required examinations by multiple physicians to assess the medical need of women seeking abortions, which *Doe* states violates the right to take care of one’s own “health and person and to seek out a physician of one’s own choice.”⁷⁵ Thus, these privacy laws were applied not only to abortion up to fetal viability, but also to one’s interactions with doctors and medical personnel. The *Planned Parenthood v. Danforth*⁷⁶ decision upheld *Roe* in full and further stipulated that

74 *Doe v. Bolton*, 410 U.S. 179 (1973).

75 *Id.*

76 *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

the spouse of persons seeking abortion may not legally prevent those persons from procuring an abortion. Thus, another facet of the right to an abortion was unveiled. *Bellotti v. Baird*⁷⁷ revealed that the right to an abortion is expanded to minors, who must not attain parental consent to legally acquire an abortion. As stated in the *In re Gault*⁷⁸ decision, “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,” and abortion, protected under this Amendment, should not be bound by different rules. These cases are not alone in their expansion and elucidation of Fourteenth Amendment abortion rights.

It cannot be said that the rights to contraceptive access and abortion are not without limitations and regulations as well; *Roe* states that the right to abortion “must be considered against important state interests in regulation.”⁷⁹ Thus, *Roe* itself protects elective abortions only until fetal viability, allowing individual states to regulate abortion beyond this point to varying degrees of restriction⁸⁰ without violating Due Process. Numerous cases post-*Roe* have added further boundaries to the scope of abortion rights, including *Maher v. Roe*.⁸¹ which upheld the Connecticut Welfare Department’s regulations that limited state Medicaid benefits to abortions that are “medically necessary”. This particular case upheld *Roe*, clarifying that the right to an elective abortion is protected, but that this protection does not include forcing a state to pay for the procedure under any and all circumstances. The *Maher* decision was further supported by the Hyde Amendment,⁸² a legislative provision adopted in 1980. This provision barred the use of federal funds to pay for abortions sought outside the contexts of preserving maternal health and/or of rape and/or incest. Elective abortions are protected under the Fourteenth Amendment in both *Maher* and the Hyde Amendment, but

77 *Bellotti v. Baird*, 443 U.S. 622 (1979).

78 *In re Gault*, 387 U.S. 1 (1967).

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

80 *Id.*

81 *Maher v. Roe*, 432 U.S. 464 (1977).

82 Pub. L. No. 96-536, § 209, 94 Stat. 3166, 3200 (1980).

certain boundaries, including limiting the governmental funding of abortion, do not violate this right. Under *H.L. v. Matheson*,⁸³ a Utah statute requiring doctors to report abortions acquired by minors to the minors' parents (if possible) was upheld. However, *Bellotti v. Baird*⁸⁴ was upheld in *H.L. v. Matheson*; the parents of minors must be notified of the abortion under the Utah statute, but their permission is not required for the procedure. Thus, the scope of the right to privacy under Due Process is further revealed; states may require parental notification of an abortion acquired by a minor. Finally, *Casey*,⁸⁵ as discussed in the Background, further limited this scope by allowing states to fully prohibit abortion of a viable fetus under any circumstances other than to protect maternal health. These cases collectively reveal the true protection of abortion rights under the Fourteenth Amendment; these rights are subject to some level of regulation, allowing some level of autonomy at the state level to regulate abortion in various ways. *Roe* did not protect all abortions under all circumstances, rather, showed that abortion, as personal, private decision, and as a branch of that, a woman's autonomy over her own body, is protected to some degree under the United States Constitution and the legitimate privacy rights it contains.

Under *Roe*, the Fourteenth Amendment protected abortion up until fetal viability; this right is individual to the pregnant women and extended to pregnant minors as well, though does not require governmental provision of an abortion, nor does it prevent any and all abortion regulation. The argument that abortion is a constitutional right under the right to privacy implicit in the Due Process clause of the Fourteenth Amendment is not a new one, as shown by the consistent upholding of this idea in numerous cases over the past five decades. However, given that *Dobbs* has recently upended this argument, it is important to reemphasize this central point. The right to privacy covers the right to an elective abortion. This right allows the autonomy of all women in every state to be protected at a basic level.

83 *H.L. v. Matheson*, 450 U.S. 398 (1981).

84 *Bellotti v. Baird*, 443 U.S. 622 (1979).

85 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

C. The Consequences of Restrictive Abortion Regulation: the Disparity Between Moral Arguments and Actuality

Before the *Dobbs* decision was made official in June of 2022, over a dozen states, including Tennessee, Utah, Idaho, Wyoming, Indiana, North Dakota, and Texas, imposed trigger bans on abortion.⁸⁶ In essence, these states created restrictive abortion laws that would be automatically enforced after, and thus were contingent upon, the fall of *Roe*. In some cases, the trigger ban was enforced immediately after the *Dobbs* decision was made public, in other States, there was a 30-day period preceding trigger ban enforcement to allow officials to confirm that *Dobbs* had in fact overturned *Roe*, but nonetheless, the mere consideration of *Roe* being overturned put abortion rights in numerous states under threat. After the overturn was official, the trigger bans went from contingencies to actual abortion restrictions in the majority of trigger ban-holding states. The restrictive effects of *Dobbs* on abortion rights, premeditated through trigger laws, have been immediate.

Bans and limitations on abortion have not only been immediate, but widespread and varied. Some states have banned abortion entirely, others have outlined exceptional cases, and some simply offer no official protections for the procuring of an abortion. Tennessee's House Bill 1029 (a trigger ban enforced in August of 2022) prohibits all elective abortions with the exception of those in the context of rape, incest, and for the preservation of maternal life.⁸⁷ Idaho's ban makes similar exceptions, and states that the punishment for a criminal abortion under the ban is 2-5 years imprisonment for the procurer of the procedure and a license suspension for a minimum of 6 months for the responsible physician.⁸⁸ As one of the more reproductively conservative States, Alabama's recently adopted ban, House Bill 314, does not make exceptions for rape or incest provided for in Tennessee and Idaho, limiting exceptional abortions exclusively to

86 *Dobbs v. Jackson Women's Health Organization*, 593 U.S. ____ (2022).

87 Tenn. House Bill 1029, 112th Gen. Assemb., Reg. Sess. (2021).

88 Idaho Code Ann. §§ 18-601 to 18-608 (West 2021).

those done for the preservation maternal life⁸⁹. This bill states that any unexceptional elective abortion is a felony offense.⁹⁰ It must also be stated that many state legislatures, such as those in California and New York, have voted to protect abortion rights, some even granting expanded access to abortion that was not possible under the stipulations of *Roe*.

There is variability between states, this much is clear, with some leaning towards even more liberalized abortion policy and others doubling down on abortion regulation and restriction since the overturn of *Roe*. The problem is not, therefore, that abortion restriction is universal and all-encompassing, it is not that every state is facing extreme abortion regulation, but that the right to an abortion is no longer equitably afforded to all American women. It is contingent on the state in which one resides, not considering, as stated by Justice Alito, the “sharply conflicting views” of Americans in each and every state.⁹¹ The pro-choice minority in Alabama, Idaho, Tennessee, and so on must therefore suffer the consequences of these bans, whereas, under the protections of *Roe*, no such consequences were imposed on individuals who are morally opposed to abortion. Under *Roe*, one could choose to terminate their pregnancy or choose to refrain from such practices, but, at least in principle, neither option was forced upon the individual and neither option was so grossly restricted. The infraction of rights, including the aforementioned rights to privacy, to bodily autonomy, and to equal opportunity, has only been imposed by these state abortion bans.

The argument in support of restrictive abortion policy is not without legitimate merit. The argument has been made countless times, and was reemphasized by Justice Alito in *Dobbs*, that States should have a right to take an interest in the protection of “potential life.”⁹² This is the genesis of the “profound moral question” of abortion, namely, when does potential life become life? When should

89 Ala. House Bill 314, Reg. Sess. (2019).

90 *Id.*

91 *Dobbs v. Jackson Women’s Health Org.*, No. 20-1392 (U.S. Jan. 22, 2021).

92 *Dobbs v. Jackson Women’s Health Organization*, 593 U.S. ____ (2022).

that potential life be afforded legal rights and protections? With these questions in mind, the restriction of rights under abortion bans becomes more nuanced, the rights of the unborn and the rights of the mother come into conflict, and it becomes a matter of whose life, whose rights, should be protected by law. Those with pro-choice sentiments tend to state the mother as the more deserving entity of such protection, while those supporting pro-life ideals believe the fetus, the potential life, to be deserving of such human rights, at the very least, the right to life. Resolving this fundamental and controversial argument is beyond the scope of this Comment and may well be beyond the scope of the American legal system. However, perhaps, in terms of realistic consequences, the moral controversy heavily pressed in the *Dobbs* majority opinion does not matter.

The opinion of Justice O'Connor in the 1984 *Lynch v. Donnelly* decision explained that both the objective meaning of a government policy and the subjective intent of said policy must be considered when deciding if the action violates some established law or practice.⁹³ The new State abortion policies, regulations, and bans must be examined by this metric. *Dobbs* states that the desire of a state to preserve life is not in violation of the Constitution.⁹⁴ This is the oft given and now Supreme Court supported reasoning for the instatement of abortion bans, thus, it is fair to conclude that the subjective intent of many of the recent bans and regulations is to protect fetal life. However, the objective effects of these bans are quite opposite from this constitutionally supported intent. Bearak et al. (2020) conducted a series of model-based studies on 195 countries, comparing their average yearly abortion rates between 1990 and 2019 to the nature of each country's abortion policies.⁹⁵ Uncertainty and data accuracy considered, the study found no significant difference between abortion rates in countries where abortion is "broadly

93 *Lynch v. Donnelly*, 465 U.S. 668 (1984).

94 *Dobbs v. Jackson Women's Health Organization*, 593 U.S. ____ (2022).

95 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, 93 *Lancet Global Health* 150-60 (2015).

legal” versus countries where abortion is “prohibited altogether.”⁹⁶ They found also that the rate of unintended pregnancy is generally higher in countries with more restrictive abortion regulation, and that in spite of these regulations, about half of all unintended pregnancies worldwide end in abortion.^{97 98} Thus, the objective effect of restrictive abortion laws, according to this study, is disjointed from the intent to preserve life; in fact the effects of such restriction are remarkably similar to the effects of liberalized abortion regulation.

Numerous studies support the findings of Bearak. Rafu (2002) and Adinma (2011) examined abortion practices in Nigeria, a country where abortion is largely prohibited (with the exception of preserving maternal life).^{99 100} In 2002, unsafe abortion practices accounted for 20,000 maternal deaths in Nigeria, and 72% of teen (19 years old and younger) deaths.¹⁰¹ By 2011, 760,000 abortions were being performed each year, largely illegal and unsafe¹⁰², and from 2019, well over a million abortions were being performed yearly in Nigeria.¹⁰³ Additionally, in each year, the number of abortions has been roughly half of all unintended pregnancies.¹⁰⁴ Using Nigeria as a case study,

96 *Id.*

97 Jonathan Marc Bearak, Sarah E. Baum, Anna Popinchalk, Gilda Sedgh, and Bela Ganatra, Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990–2019, 26 Guttmacher Policy Review 54 (2021).

98 World Health Organization, Fact Sheet: Abortion, <https://www.who.int/news-room/fact-sheets/detail/abortion>

99 Abiodun Raufu, Unsafe Abortions Cause 20,000 Deaths a Year in Nigeria, 349 BMJ (2002).

100 E. Adinma, Unsafe abortion and its ethical, sexual and reproductive rights implications, 6 Afr J Reprod Health 13-22 (2002).

101 Abiodun Raufu, Unsafe Abortions Cause 20,000 Deaths a Year in Nigeria, 349 BMJ (2002).

102 E. Adinma, Unsafe abortion and its ethical, sexual and reproductive rights implications, 6 Afr J Reprod Health 13-22 (2002).

103 Guttmacher Institute, Nigeria, <https://www.guttmacher.org/regions/africa/nigeria> (last visited Feb. 28, 2023).

104 *Id.*

it would seem that, in spite of restrictive abortion laws, the rate of abortion did not change, and in fact, both the number of unintended pregnancies and the total number of abortions increased, doubling between 2011 and 2019. Additionally, the restrictions and accompanying social stigma lead to more widespread unsafe abortion practices leading to increased maternal mortality and morbidity rates. The World Health Organization corroborates these findings in Nigeria, stating that when safe abortions are not accessible, women often turn to unsafe practices, leading to 45% of all abortions worldwide being performed in unsafe, unofficial environments.¹⁰⁵

The subjective intent of *Dobbs* may well be to offer states constitutional protection of the right to protect and preserve life. This may well be the subjective intent of the bans and restrictions in Alabama,¹⁰⁶ Idaho,¹⁰⁷ Tennessee,¹⁰⁸ and all other states with extreme abortion restrictions. This is a significant part of the subjective intent and moral argument stated in pro-life narratives across the United States. But nonetheless, the objective meaning, and more significantly, the objective *effects* of these laws do not support the subjective intentions. This is why the moral argument is largely null and void, or, at the very least, should have no significant place in abortion policy; restricting abortion on the grounds of subjective morality does not preserve life. If life is truly to be preserved, as is desired by supporters of the pro-life narrative, the more realistic solution is to liberalize abortion laws, thereby curbing the loss of both maternal and fetal life. Liberalized abortion laws not only preserve life to a greater extent, based on global trends, than restrictive abortion laws, they also consolidate both sides of the moral spectrum on the issue.

The “moral controversy” used by the *Dobbs* majority decision as reasoning to exclude abortion from the spectrum of constitutional rights is based on the subjective intent of federal abortion protection rather than the aforementioned objective effects. However, examining

105 World Health Organization, Abortion, <https://www.who.int/news-room/fact-sheets/detail/abortion> (last visited Feb. 28, 2023).

106 Ala. House Bill 314, Reg. Sess. (2019).

107 Idaho Code Ann. §§ 18-601 to 18-608 (West 2021).

108 Tenn. House Bill 1029, 112th Gen. Assemb., Reg. Sess. (2021).

the objective effects of state-by-state abortion bans as restrictions as opposed to its being a federally protected right, the moral controversy is of no matter. The trends throughout American history and through the observation of other nations shows that liberalized abortion laws and access to safe abortions is the best policy for preserving life. Thus, this exclusionary argument was incorrectly applied to *Roe* in *Dobbs*.

IV. CONCLUSION

The absence of respect for privacy laws, disregard for and selective utilization of American legal history, and the interference of personal morals in law pose a threat to safe and accessible abortion practices, which was under *Roe*, and should continue to be, protected by the U.S. Constitution. The time for rectification is now; less than a year since the repeal of *Roe* and already state laws are rapidly being developed that restrict the accessibility of abortion for those within their respective states. These laws are not without significant consequences to American women nationwide. The courts should consider, at a minimum, the tremendous negative impacts of the overturn of *Roe*, and, these consequences and the precedent set by U.S. legal history and preceding Fourteenth Amendment cases, the matter of the constitutionality of abortion rights should be revisited.