

# WHY *DOBBS* IS NO ROADMAP FOR DECIDING STATE CONSTITUTIONAL ABORTION ISSUES

DANIEL A. SMALL \*

|                                                                                                                                                                                 |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Abstract .....                                                                                                                                                                  | 2  |
| Introduction .....                                                                                                                                                              | 3  |
| I. <i>Dobbs</i> Failed to Distinguish the Precedent That <i>Roe</i> and <i>Casey</i><br>Relied on to Recognize a Due Process Abortion Right.....                                | 8  |
| A. <i>Roe</i> and <i>Casey</i> 's Precedent Plainly Supports a Fourteenth<br>Amendment Abortion Right.....                                                                      | 8  |
| B. <i>Dobbs</i> Attempted to Distinguish Precedent on an Irrelevant<br>Ground .....                                                                                             | 11 |
| 1. <i>Roe</i> , <i>Casey</i> , and Their Progeny, Unlike <i>Dobbs</i> ,<br>Properly Confined Concerns for the Fetus to Their<br>Analysis of Governmental Interests .....        | 11 |
| 2. <i>Dobbs</i> Attempted to Distinguish Precedent on Moral<br>Grounds .....                                                                                                    | 14 |
| 3. <i>Dobbs</i> Failed to Follow Precedent Because It<br>Considered Its Moral Concerns in the Wrong Stage of<br>Judicial Review.....                                            | 15 |
| C. Unable to Distinguish the Precedent that <i>Roe</i> and <i>Casey</i><br>Relied on to Recognize an Abortion Right, <i>Dobbs</i> was<br>Bound to Adhere to That Precedent..... | 18 |
| II. A State Abortion Statute Provides Important Evidence of the<br>Strength of the State's Interest in Protecting the Fetus .....                                               | 23 |
| Conclusion.....                                                                                                                                                                 | 32 |
| Appendix .....                                                                                                                                                                  | 34 |

---

\* Daniel A. Small was a partner at Cohen Milstein Sellers & Toll PLLC, where he specialized in antitrust litigation until his retirement in 2022. He is grateful to Harrison McBride for his excellent research and editing assistance; to Lucy Child for her meticulous cite-checking; and to Kit A. Pierson, David P. Dean, Daniel S. Sommers, and Mark Schneider for their careful and insightful review of earlier drafts of this article.

## ABSTRACT

In deciding that Fourteenth Amendment “liberty” does not protect a woman’s decision to end her pregnancy, *Dobbs v. Jackson Women’s Health Organization* sought to distinguish the precedent that *Roe* and *Casey* relied on to recognize an abortion right. The *Dobbs* majority claimed that this precedent did not support a right to abortion because, in its view, destroying a fetus is more immoral than the conduct at issue in those earlier cases. However, moral concerns about fetal destruction shed no light on the nature or characteristics of a woman’s liberty interest in an abortion decision. These concerns, therefore, cannot show whether this interest is like or unlike liberty interests that the Court afforded constitutional protection in prior decisions. Rather, these concerns underlie the government’s interest in protecting the fetus. They can justify restrictions on abortion, but they cannot distinguish an abortion right from other liberty rights.

*Dobbs* also failed to see that the Supreme Court’s trilogy of contraception cases compels recognition of an abortion right. The specific liberty right recognized in these cases was the right to decide whether to bear or beget a child. If there is a right to avoid bearing a child through contraception, as the Supreme Court has repeatedly held, there must be a parallel (though narrower) right to avoid bearing a child through abortion.

After *Dobbs*, some states have prohibited abortions throughout pregnancy or from very early in pregnancy. Courts hearing challenges to these bans—if they are in a state with a constitution that provides an abortion right—will likely balance the woman’s liberty interest against the state’s interest in preserving fetal life. In gauging the strength of the state’s interest, courts should consider important evidence the Supreme Court has never considered: how the state has punished abortion. The jail time for abortion is a good and objective measure of the strength of the state’s interest in protecting the fetus.

A review of thirty-seven states’ punishment of abortion before *Roe* and after *Dobbs* reveals that most of these states have punished abortion relatively leniently, especially in early pregnancy. Nearly all have punished abortion much less harshly than they have punished first-degree murder (or murder in states without degrees of murder), implying that nearly all have not considered the fetus to be a human being. The way the thirty-seven states have punished abortion suggests that nearly all have had an interest in protecting the fetus that does not outweigh a woman’s liberty interest in deciding whether to end an early pregnancy.

## INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*,<sup>1</sup> the Supreme Court extinguished the federal constitutional abortion right that had existed for nearly fifty years, and claimed that it was “return[ing] the issue of abortion to the people’s elected representatives.”<sup>2</sup> However, the Court ignored that state lawmakers are subject to their state constitution, which may limit their power to ban abortion. After *Dobbs*, the abortion issue has also been addressed by state judges and state ballot initiatives, in addition to state legislators.<sup>3</sup> Through October 2025, sixteen states have interpreted or amended their constitutions to limit their legislature’s authority to ban abortion.<sup>4</sup>

Courts continue to review state abortion bans under their respective state constitutions.<sup>5</sup> In such litigation, it is important that courts are aware of a fundamental flaw in *Dobbs*’s logic—a flaw overlooked by *Dobbs*’s dissent and by many scholarly articles critiquing *Dobbs*.<sup>6</sup> This article explains the

---

1. 597 U.S. 215 (2022).

2. *Id.* at 232.

3. See generally *State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/state-constitutions-and-abortion-rights/> (last visited Oct. 31, 2025) (coding map of the fifty states based on status of state constitutional abortion right as decided by state’s highest court).

4. These states are Alaska, Arizona, California, Colorado, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New York, Ohio, and Vermont. See *id.*

5. E.g., Compl. at 14, *Reuss v. Arizona*, No. CV 2024-034624 (Ariz. Super. Ct., Maricopa Cnty. Dec. 3, 2024); Compl. at 38, *SisterSong Women of Color Reprod. Just. Collective v. Georgia*, No. 2022 CV 367796 (Ga. Super. Ct., Fulton Cnty. July 26, 2022); Compl. at 94, *Comprehensive Health of Planned Parenthood Great Plains v. Missouri*, No. 2416-CV-31931 (Mo. Cir. Ct., Jackson Cnty. Nov. 6, 2024); Compl. at 10-12, *Planned Parenthood of Montana v. Montana*, No. DV-25-2023-0000231 (Mont. Dist. Ct., Lewis & Clark Cnty. April 10, 2023); Compl. at 15-16, *Access Indep. Health Servs., Inc. v. Wrigley*, No. 08-2022-CV-01608 (N.D. Dist. Ct., Burleigh Cnty. July 6, 2022); Compl. at 22-26, *Preterm-Cleveland v. Yost*, No. A2203203 (Ohio C.P. Ct., Hamilton Cnty. Sep. 2, 2022); Compl. at 21, *Planned Parenthood Ass’n of Utah v. Utah*, No. 220903886 (Utah Dist. Ct., Salt Lake Cnty. June 25, 2022); Am. Compl. at 36, *Johnson v. Wyoming*, No. 18853 (Wyo. Dist. Ct., Teton Cnty. Mar. 21, 2023); see also *State and Federal Reproductive Rights and Abortion Litigation Tracker*, KFF (Sep. 12, 2025), <https://www.kff.org/womens-health-policy/status-of-abortion-litigation-in-state-courts/> (listing active abortion cases nationwide).

6. E.g., Reva B. Siegel & Mary Ziegler, *Abortion’s New Criminalization—A History-and-Tradition Right to Healthcare Access After Dobbs*, 111 VA. L. REV. 413, 487-88 (2025); Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV.

Supreme Court's illogic and concludes that this flaw deprives *Dobbs* of persuasive authority in litigation addressing state constitutional abortion issues.<sup>7</sup>

This article also discusses evidence that the Supreme Court has never considered, but that should be considered now in litigation challenging abortion restrictions in states with a constitutional abortion right.<sup>8</sup> In such litigation, the court likely will balance an abortion right against the state's interest in protecting the fetus.<sup>9</sup> In weighing the state's interest, the court should consider how the state has punished abortion. The length of the jail term for abortion is probative of the strength of the state's interest in protecting fetal life and enables the court to more objectively decide whether the state's interest is sufficient to justify a ban on abortion.<sup>10</sup>

In ruling that a woman's choice of whether to continue her pregnancy does not qualify as an exercise of the "liberty" protected by the Due Process

---

L. REV. 728, 806 (2024); Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J. FORUM 161, 189 (2023); Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. FORUM 99, 159 (2023); Aaron Tang, *Lessons from Lawrence: How 'History' Gave Us Dobbs — And How History Can Help Overrule It*, 133 YALE L.J. FORUM 65, 97-98 (2023); Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1911-12 (2023); Darren Lenard Hutchinson, *Thinly Rooted: Dobbs, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385, 429 (2023); Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1203-04 (2023); David Landau & Rosalind Dixon, *Dobbs, Democracy, and Dysfunction*, 2023 WIS. L. REV. 1569, 1612 (2023); Laurence H. Tribe, *Deconstructing Dobbs*, N.Y. REV. BOOKS (Sep. 22, 2022), [www.nybooks.com/articles/2022/09/22/deconstructing-dobbs-laurence-tribe/](http://www.nybooks.com/articles/2022/09/22/deconstructing-dobbs-laurence-tribe/).

7. See *infra* p. 32.

8. See *infra* Part II.

9. See, e.g., *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019) (balancing abortion right against state interests); *Armstrong v. Montana*, 989 P.2d 364, 380 (Mont. 1999) (same); *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968-71 (Alaska 1997) (same); *Women of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995) (same).

10. See *Quickening in Pregnancy*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/symptoms/22829-quickening-in-pregnancy> (last visited Jan. 31, 2025); see also Brief for Am. Hist. Ass'n & Org. of Am. Historians as Amici Curiae Supporting Respondents at 2, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392). This article focuses on the strength of the government's interest in banning *early* abortions. The points made in this article do not depend on a precise definition of early. However, this article considers early abortions to include at least those performed before quickening. Quickening is when a woman can feel her fetus's movements and usually begins sixteen to twenty weeks into pregnancy.

Clause of the Fourteenth Amendment, *Dobbs* did not follow the precedent that *Roe v. Wade*<sup>11</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>12</sup> relied on to protect that choice. Rather, *Dobbs* sought to distinguish this precedent based on the Court's view that destroying fetal life is more immoral than the conduct at issue in the precedent.<sup>13</sup> However, in recognizing an abortion right, *Roe* and *Casey* relied on this precedent because the liberty interests that the Court protected in these earlier cases are directly analogous to a woman's liberty interest in deciding whether to carry her pregnancy to term.<sup>14</sup> *Dobbs* did not explain how its moral concerns undercut this reliance—nor could it.

In *Roe* and *Casey*, the Supreme Court decided two separate questions. First, under the Due Process Clause, do women have a liberty right to decide whether to end their pregnancy?<sup>15</sup> Second, at what point in pregnancy are the government's interests strong enough to outweigh the woman's liberty interest and justify the government's restriction on abortion?<sup>16</sup> Protection of the fetus is a governmental interest. It is separate from—and sometimes in conflict with—a woman's liberty interest. These two interests conflict when protection of the fetus justifies a restriction on abortion or when a woman exercises her liberty to take—not protect—the life of her fetus.

Moral objections to killing the fetus, like those articulated by *Dobbs*, underlie the government's interest in protecting the fetus, not a woman's

11. 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215 (2022) (recognizing a federal abortion right).

12. 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S. 215 (2022) (reaffirming a Fourteenth Amendment abortion right).

13. *Dobbs*, 597 U.S. at 257 (“None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion.”).

14. *See infra* Part I.B.1. In this article, the term “liberty interest” is used in a non-legal, factual sense to refer to an interest in being free to do or say something. It seems clear that women, in fact, have a liberty interest in deciding whether to continue their pregnancy. This article uses the term “liberty right” to refer to a liberty interest that is legally protected. If a woman's liberty interest in deciding whether to continue her pregnancy is a form of liberty protected by the Fourteenth Amendment, then her liberty interest qualifies as a (federal) liberty right—sometimes referred to as an abortion right. Notably, as discussed below, the federal abortion right that existed before *Dobbs* was not absolute. Due process liberty protected a woman's decision to abort her fetus only if her liberty interest in that choice outweighed the government's interest in barring or otherwise restricting her choice. *See id.*

15. *See Casey*, 505 U.S. at 846-53; *Roe*, 410 U.S. at 152-55.

16. *See Casey*, 505 U.S. at 869-79 (deciding state's authority to regulate abortion based on state's interest in protecting fetus); *see also Roe*, 410 U.S. at 163-64 (weighing state interests against woman's liberty interest).

liberty interest in the abortion decision. The morality of abortion in no way defines, or describes any characteristic of, this liberty interest. For this reason, the morality of abortion cannot explain how this liberty interest is like or unlike other forms of due process liberty. Thus, *Dobbs* erroneously attempted to distinguish an abortion right from other, established liberty rights on an irrelevant ground.

Moreover, there simply is no legitimate ground on which to distinguish the precedent *Roe*<sup>17</sup> and *Casey*<sup>18</sup> relied on. This precedent plainly supports an abortion right. Indeed, the liberty right recognized in the Supreme Court's contraception cases—the right to decide whether to bear a child—is *precisely* the right that was at issue in *Dobbs*.<sup>19</sup> Some might consider abortion more immoral than contraception, which could justify greater government restrictions on abortion than on contraception. However, the same liberty interest that gives rise to a right to decide not to bear a child through contraception gives rise to a parallel (though narrower)<sup>20</sup> right to decide not to bear a child through abortion.<sup>21</sup>

Because the Court failed to follow controlling precedent, *Dobbs* did not reach the second stage of analysis—balancing the competing interests of women and the state. Had it reached this issue, the Court would have determined whether Mississippi's interest in its ban on abortions after fifteen weeks of gestation was “compelling,”<sup>22</sup> such that the state's interest would outweigh a woman's liberty interest in deciding to end her pregnancy later

17. See *Roe*, 410 U.S. at 152-53 (relying on *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

18. See *Casey*, 505 U.S. at 851-53 (relying on *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); *Eisenstadt*, 405 U.S. at 453; *Prince*, 321 U.S. at 166; *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

19. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 359 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (“*Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child.”).

20. An abortion right is narrower because it is subject to greater government regulation than is the contraception right. See *infra* note 44 (providing examples of Supreme Court permitting greater regulation of abortion than of contraception); see also *infra* note 45 (explaining another sense in which the abortion right is narrower).

21. See *infra* Part I.A. (explaining how Supreme Court contraception decisions compel recognition of abortion right).

22. The Mississippi statute reviewed in *Dobbs* banned abortion after fifteen weeks of gestational age, except in a medical emergency or in the case of a severe fetal abnormality. See *Dobbs*, 597 U.S. at 232 (quoting MISS. CODE ANN. § 41-41-191 (2018)).

than fifteen weeks.<sup>23</sup> In states with a constitution that provides an abortion right, a court reviewing a ban on abortions will face this balancing task if, like courts did in Fourteenth Amendment abortion litigation before *Dobbs*, it applies strict judicial scrutiny.<sup>24</sup> In performing this balancing, a court will find little analytical guidance in *Roe* and its progeny.<sup>25</sup> However, there is evidence the Supreme Court has never considered that can meaningfully and objectively inform a court's assessment of the strength of the state's interest in protecting fetal life: courts can consider how the state has punished abortion—both before *Roe* and after *Dobbs*.<sup>26</sup>

At least three aspects of such punishment constitute important evidence of the strength of a state's interest in protecting the fetus. In Part II, this article explores two of these aspects by examining pre-*Roe* punishments for abortion and other crimes in the thirty-seven states listed in *Dobbs*'s

23. See *Roe v. Wade*, 410 U.S. 113, 162-64 (1973) (deciding when during pregnancy state interests become compelling).

24. After *Roe* and before *Dobbs*, federal courts applied strict scrutiny to evaluate an abortion ban under the Fourteenth Amendment. See *Roe*, 410 U.S. at 155, 163-65. That remained the standard of review after *Casey*, which did not disturb *Roe*'s "central holding" that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992). That central holding resulted from *Roe*'s strict scrutiny of Texas's abortion ban. *Roe*, 410 U.S. at 163-65. The new standard *Casey* adopted—the "undue burden" standard—applied only to pre-viability regulation (not prohibition) of abortion. See *Casey*, 505 U.S. at 877.

25. See *Roe*, 410 U.S. at 163 (asserting simply that states' interest in potential life becomes compelling at viability because fetus "has the capability of meaningful life outside the mother's womb.").

26. This article does not address some important issues regarding how a court would apply a state constitutional abortion right to a state ban on early abortions. For example, this article assumes that courts would utilize the strict scrutiny standard. See, e.g., *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019); *Armstrong v. Montana*, 989 P.2d 364, 380 (Mont. 1999); *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968-71 (Alaska 1997); *Women of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995). However, some courts may use a less exacting standard. See, e.g., *Planned Parenthood S. Atl. v. South Carolina*, 892 S.E.2d 121, 132 (S.C. 2023); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. Iowa*, 975 N.W.2d 710, 740-42 (Iowa 2022). In states that conduct rational basis review, the state's interest in protecting fetal life may well be sufficient to uphold a ban on early abortions. See, e.g., *Planned Parenthood S. Atl.*, 892 S.E.2d at 135. In evaluating the state's interests, some courts might consider solely the legislative purposes and findings underlying the specific statute under review. See *id.* In some states, a court might be very deferential to the legislature's findings and purposes. See *id.* This article does not delve into the merits of these different approaches, but it does discuss the benefits of an approach that weighs the strength of a state's interest in fetal protection based on objective evidence of how the state has pursued this interest over many years. See *infra* Part II & Appendix.

Appendix A. Part II also looks at current punishment for abortion in these same states. These current and historical punishments show that most of the thirty-seven states have punished abortion relatively leniently, both absolutely and in comparison to other crimes.<sup>27</sup> Nearly all these states have punished abortion much less harshly than they have punished first-degree murder (or murder in states that have not designated degrees of murder), implying that they have not considered the fetus to be a human being. Part II's discussion of the third important aspect of abortion punishment is based on *Roe*'s observation that many states punished only the abortion provider and not the pregnant woman.<sup>28</sup> Even though the woman clearly is the abortionist's accomplice, many states accorded her impunity. These three indicia, individually and especially in combination, suggest that nearly all of the thirty-seven states have had an interest in preserving fetal life in early pregnancy that is not compelling and, thus, not strong enough under strict scrutiny to justify a ban on early abortions.

# I. *DOBBS* FAILED TO DISTINGUISH THE PRECEDENT THAT *ROE* AND *CASEY* RELIED ON TO RECOGNIZE A DUE PROCESS ABORTION RIGHT

## A. *Roe and Casey's Precedent Plainly Supports a Fourteenth Amendment Abortion Right*

While the first point of this article is that *Dobbs* attempted to distinguish the precedent on which *Roe* and *Casey* relied on an irrelevant ground, this point would have little significance if this precedent did not in fact support an abortion right. Then, *Dobbs* would have been correct to dismiss the precedent, albeit for the wrong reason. However, a review of the most relevant precedent—the Supreme Court's three contraception cases—shows that they not only support a federal abortion right, they compel the conclusion that the right exists.<sup>29</sup>

In 1965, in *Griswold v. Connecticut*,<sup>30</sup> the Supreme Court held that the Constitution protects married couples' choice to use contraception.<sup>31</sup> Seven

---

27. See *infra* Part II & Appendix.

28. *Roe*, 410 U.S. at 151.

29. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

30. 381 U.S. 479 (1965).

31. *Id.* at 485-86 (invalidating Connecticut law forbidding use of contraceptives). The Court struck down the Connecticut statutes at issue based on a right of privacy created by various amendments to the Constitution. *Id.* at 484-85. Later, in *Carey*, 431 U.S. at 678, the Court explained that this right of privacy was "one aspect of the 'liberty'



years later, in *Eisenstadt v. Baird*,<sup>32</sup> the Court struck down a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons, concluding that the statute violated the Equal Protection Clause.<sup>33</sup> The Court held that “[i]f, under *Griswold*, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.”<sup>34</sup> The Court described the right recognized in *Griswold* as “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as *the decision whether to bear or beget a child*.”<sup>35</sup>

Finally, in 1977, in *Carey v. Population Servs. Int’l*,<sup>36</sup> the Court upheld the right to use contraception against a criminal law that burdened, but did not prohibit, the use of contraception. In so ruling, *Carey* stated that “[t]he decision whether or not to beget or bear a child is at the very heart . . . of constitutionally protected choices.”<sup>37</sup> In addition, *Carey* stated that the right it was upholding was *not* a “‘right of access to contraceptives,’” but a broader “right of decision in matters of childbearing . . . .”<sup>38</sup> The Court explained that it protected access to contraception *only* because “such access is essential to exercise of the constitutionally protected right . . . .”<sup>39</sup> In other words, the existence of the broader right was the reason the Court upheld access to contraceptives. Recognition of the broader right thus was essential to the outcome and part of *Carey*’s holding. *Carey* also explained that the “right of decision in matters of childbearing . . . is the underlying foundation of the holdings,” not just of *Griswold* and *Eisenstadt*, but also of *Roe*.<sup>40</sup>

---

protected by the Due Process Clause of the Fourteenth Amendment . . . .” *Id.* at 684 (citing *Roe*, 410 U.S. at 152). Then, in *Casey*, the Court confirmed that the decision whether to use contraception was “central to the liberty protected by the Fourteenth Amendment.” 505 U.S. at 851.

32. 405 U.S. 438 (1972).

33. *Id.* at 446-55.

34. *Id.* at 453.

35. *Id.* (emphasis added and omitted).

36. 431 U.S. 678 (1977).

37. *Id.* at 685 (emphasis added).

38. *Id.* at 688. While the right recognized in *Carey* was the “right of decision in matters of childbearing,” this article occasionally refers to it as the “contraception right” for shorthand. The *Carey* Court stated that this right was part of the right of privacy, which in turn, was “one aspect” of Fourteenth Amendment liberty. *Id.* at 684.

39. *Id.*

40. *Id.* at 688-89; *see id.* at 685 (stating that the decision whether to beget or bear a

*Carey* understood that the same right was at issue in both the contraception and abortion contexts.

Fifteen years later, the Court in *Casey* confirmed this understanding. There, it noted that “in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection.”<sup>41</sup> These contraception cases, the Court stated, “support the reasoning in *Roe* relating to the woman’s liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.”<sup>42</sup> The Court added that the “deep, personal character” of views about contraception that informed the Court’s contraception decisions are the “same concerns” that apply “when the woman confronts the reality that . . . she has become pregnant.”<sup>43</sup>

In summary, in three cases involving the use of contraceptives (two decided before *Roe* and all three decided before *Casey*), the Supreme Court recognized a woman’s constitutional right to decide whether to bear or beget a child. While the decision not to bear a child was implemented through contraception in these cases and through abortion in *Dobbs*—which distinction may raise different moral concerns about potential life and, thus, may permit different degrees of government restriction<sup>44</sup>—the liberty interest

---

child “holds a particularly important place in the history of the right of privacy, a right . . . most prominently vindicated in recent years in the contexts of contraception and abortion.” (citations omitted)).

41. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 852 (1992).

42. *Id.* at 852-53.

43. *Id.* at 853.

44. In fact, even before *Dobbs*, the Court permitted greater restrictions on abortion than on contraception. For example, *Roe* upheld a ban on abortions after viability (except abortions to preserve the life or health of the mother). *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); see *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 360 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (summarizing *Roe*’s holding). And *Casey* permitted pre-viability abortion restrictions that did not unduly burden the abortion right—a less demanding standard than strict scrutiny. *Casey*, 505 U.S. at 874-78. In contrast, *Carey* applied strict scrutiny to strike down a statutory provision that only modestly burdened access to contraceptives. *Carey*, 431 U.S. at 686-91 (striking down statutory provision that allowed licensed pharmacists, but not others, to sell nonmedical contraceptives to adults). See *Dobbs*, 597 U.S. at 369 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment.”).

in deciding whether to bear a child is identical in all four cases.<sup>45</sup> Therefore, the liberty interest that underlies the thrice-recognized right to decide to avoid bearing a child through contraception requires recognition of a parallel (but narrower) right to decide to avoid bearing a child through abortion.<sup>46</sup> There is no valid ground on which *Dobbs* could have distinguished the contraception cases on the issue of whether due process liberty provides women with some degree of freedom to choose an abortion to avoid bearing a child.

*B. Dobbs Attempted to Distinguish Precedent on an Irrelevant Ground*

*1. Roe, Casey, and Their Progeny, Unlike Dobbs, Properly Confined Concerns for the Fetus to Their Analysis of Governmental Interests*

As discussed, *Dobbs*'s moral concerns about destroying the fetus cannot distinguish precedent on the issue of whether women have a liberty right in the abortion decision. And because such concerns address only the government's interest in protecting the fetus, they are not a relevant factor in any analysis of whether women have such a liberty right. Unlike in *Dobbs*, the Supreme Court in *Roe*, *Casey*, and their progeny only considered the morality of fetal destruction as a factor in its analysis of governmental interests. Before *Dobbs*, the Court decided whether women have an abortion right based on other, relevant considerations.

In *Roe*, the Supreme Court observed that its earlier cases had extended constitutional protection to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.<sup>47</sup> It held

---

45. To be sure, contraception not only prevents the bearing of a child, it also prevents pregnancy. While in this sense the liberty interest in contraception is broader than the liberty interest in abortion, the liberty interest in avoiding later-stage pregnancy, childbirth, and childrearing is the same for both measures. The liberty interest in choosing whether to end a pregnancy is completely within the liberty interest in deciding whether to prevent a pregnancy. Thus, the existence of the contraception right compels recognition of an abortion right, even though, in a sense, the contraception right is broader.

46. See *Hodgson v. Minnesota*, 497 U.S. 417, 434 (1990) (stating in an abortion case that "[a] woman's decision to beget or to bear a child is a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution.").

47. *Roe*, 410 U.S. at 152-53 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390 U.S. 390, 399 (1923)).

that the constitutional right recognized in these cases<sup>48</sup> was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>49</sup> Thus, based on the similarity of the liberty interest in the abortion decision to the liberty interests protected in earlier cases, the Court recognized an abortion right.

*Roe* then described the factual foundation of the abortion right. This foundation consisted of the potential harm to women if the state forced them to complete an unwanted pregnancy:

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>50</sup>

These potential harms were harms to the mother (and potentially other family members). These harms—not harm to the fetus—underlie the abortion right recognized in *Roe*.

Only after recognizing an abortion right did *Roe* address the state’s interest in protecting the fetus and the mother. The Court held that an abortion right “must be considered against important state interests . . . .”<sup>51</sup> When a state interest is “compelling,” the Court ruled, that interest overrides a woman’s liberty interest and permits the state to enforce the abortion restriction at issue.<sup>52</sup> The Court recognized that “it is reasonable and appropriate for a State to decide that at some point in [the pregnancy] another interest [beyond the woman’s liberty interest], that of health of the mother or that of potential human life, becomes significantly involved.”<sup>53</sup> *Roe* thus recognized the

---

48. *Roe*, 410 U.S. at 153 (referring to this right as the “right of privacy,” but believing it was “founded in the Fourteenth Amendment’s concept of personal liberty”).

49. *Id.* at 153.

50. *Id.*

51. *Id.* at 154.

52. *See id.* at 155 (stating that regulation of “‘fundamental rights’ . . . may be justified only by a ‘compelling state interest’” (quoting *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969))).

53. *Id.* at 159.

state's interest in preserving potential human life and protecting the mother's health. The Court then decided when during a pregnancy the state's interest becomes strong enough to outweigh the woman's liberty interest.<sup>54</sup>

Nineteen years later, in *Casey*, the Supreme Court again considered concerns for the fetus solely in its discussion of governmental interests, and relied on other, relevant considerations in deciding whether a federal abortion right existed. In upholding such a right, the Court observed:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Servs. Int'l.*, 431 U.S., at 685. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, *supra*, at 453 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.<sup>55</sup>

Like *Roe*, *Casey* upheld an abortion right based on the similarity of the liberty interests protected in the Court's precedent to a woman's liberty interest in deciding whether to terminate her pregnancy.

*Casey* also succinctly described the factual underpinnings of a pregnant woman's liberty interest: "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."<sup>56</sup> The Court concluded that "[h]er suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role . . . ."<sup>57</sup> Elaborating on the woman's liberty interest, the Court added that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."<sup>58</sup> Thus, as in *Roe*, the pregnant woman's pain, suffering, and burdens—and not

---

54. *Id.* at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point . . . is at approximately the end of the first trimester."); *id.* ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.").

55. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

56. *Id.* at 852.

57. *Id.*

58. *Id.*

concerns for fetal life—constituted the factual basis of the abortion right.

After reaffirming an abortion right, *Casey* observed that “States could act in some degree to further their own legitimate interests in protecting prenatal life.”<sup>59</sup> *Casey* then upheld *Roe*’s “central holding” that the state may not prohibit abortion before the fetus is viable outside the womb.<sup>60</sup> Later in the opinion, the Court added that any error in *Roe*’s central holding “would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman’s liberty. The latter aspect of the decision fits comfortably within the framework of the Court’s prior decisions . . . .”<sup>61</sup> The Court thus clearly recognized that two separate interests were addressed in *Roe*: women’s liberty interest in deciding whether to terminate their pregnancy and the state’s interest in protecting fetal life. And the Court confirmed the soundness of *Roe*’s holding on the former issue, concluding that the abortion right “fit[] comfortably within” precedent.

Like *Roe* and *Casey*, other abortion cases decided by the Supreme Court properly treated concerns for fetal life as a governmental interest and upheld an abortion right solely on other, relevant grounds.<sup>62</sup> Before *Dobbs*, no Supreme Court case considered the morality of destroying the fetus, or any other aspect of a governmental interest, in deciding whether the Constitution conferred an abortion right.

## 2. *Dobbs Attempted to Distinguish Precedent on Moral Grounds*

In an eighty-page opinion (not counting appendices), *Dobbs* devoted the following single paragraph to its effort to show that the precedent relied on in *Roe* and *Casey* did not support an abortion right:

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call “potential life” and what the law at issue in this case regards as the life of

---

59. *Id.* at 853; *see id.* at 871 (recognizing “the interest of the State in the protection of potential life”); *id.* at 876 (establishing “undue burden standard” to apply to pre-viability state regulation of abortion as “the appropriate means of reconciling the State’s interest [in potential life] with the woman’s constitutionally protected liberty.”).

60. *Id.* at 853, 870.

61. *Id.* at 858.

62. *See* *Hodgson v. Minnesota*, 497 U.S. 417, 434-35 (1990); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759-72 (1986); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426-31 (1983); *Harris v. McRae*, 448 U.S. 297, 312-13 (1980); *Maher v. Roe*, 432 U.S. 464, 471-74 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 60-61 (1976). All these cases properly distinguished governmental interests from the woman’s liberty interest.

an “unborn human being.” See *Roe*, 410 U.S., at 159 (abortion is “inherently different”); *Casey*, 505 U.S. at 852 (abortion is “a unique act”). None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.<sup>63</sup>

“None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion” because none of them involved abortion. But why does that make them “inapposite” on the issue of whether women have a liberty interest in deciding to avoid bearing a child through abortion? The Court does not explicitly say. However, it appears that the Court considered the precedent inapposite because it believed that destroying potential life presents greater—not just different—moral concerns than does the conduct addressed in the precedent.<sup>64</sup>

### 3. *Dobbs Failed to Follow Precedent Because It Considered Its Moral Concerns in the Wrong Stage of Judicial Review*

The “liberty” term of the Fourteenth Amendment’s Due Process Clause has long been interpreted to confer certain substantive liberty rights,<sup>65</sup> such as the right to marry a person of a different race,<sup>66</sup> the right to use

---

63. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 257 (2022). *Dobbs* briefly returned to its attempt to distinguish precedent in subsequent portions of its opinion but simply repeated the same point. *Id.* at 262 (“The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a ‘potential life,’ but an abortion has that effect.”); *id.* at 270 (criticizing *Roe* for “disregard[ing] the fundamental difference between the precedents on which it relied and the question before the Court”); *id.* at 273 (“none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed ‘potential life.’”); *id.* at 290 (“As even the *Casey* plurality recognized, ‘[a]bortion is a unique act’ because it terminates ‘life or potential life.’ (citations omitted)”; *id.* at 295 (“rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed ‘potential life.’”).

64. Perhaps *Dobbs* avoided saying explicitly that abortion is more immoral than, for example, contraception because it later disclaimed authority or expertise to resolve conflicting arguments about the status of the fetus, and it criticized *Casey* for its “speculations and weighing of the relative importance of the fetus and mother . . . .” *Dobbs*, 597 U.S. at 289. Claiming explicitly that abortion is more immoral than contraception would more clearly imply views about the status of the fetus and the relative moral worth of the fetus and conception.

65. See *Casey*, 505 U.S. at 846-48.

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

contraception,<sup>67</sup> the right to engage in sexual conduct with a person of the same gender,<sup>68</sup> and the right to marry someone of the same sex.<sup>69</sup> In a lawsuit claiming government infringement of a due process liberty right, where the existence of the right is in dispute, the court first decides whether the liberty right exists.<sup>70</sup> If the court answers this question in the affirmative, it next addresses whether the government has a “compelling” interest in its infringement of that right.<sup>71</sup> Only a government interest that is strong enough to be compelling justifies the infringement.<sup>72</sup> The Court has never held, or even suggested, that a compelling government interest can undo, in the second stage of analysis, what a court had concluded in the first stage—that the liberty right exists. The second stage decides only whether the government’s interest is strong enough to justify its infringement of the right.

Because the existence of the liberty right at issue in *Roe* and *Casey* was disputed, the Court first ruled whether due process liberty provided an abortion right.<sup>73</sup> The Court based its recognition of an abortion right on the similarity of women’s interest in deciding whether to accept the profound burdens and health risks of pregnancy, childbirth, and childrearing to liberty interests protected in earlier cases.<sup>74</sup> Then, in the second stage of analysis, *Roe* and *Casey* examined whether, and when in the course of a pregnancy, the state has a compelling interest in restricting abortion to protect fetal life

---

67. *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977).

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

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

70. *See, e.g., Casey*, 505 U.S. at 852 (“These considerations begin our analysis of the woman’s interest in terminating her pregnancy . . .”); *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) (“the identification of the constitutionally protected interest is merely the beginning of the analysis.”); *Carey*, 431 U.S. at 684-85; *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *cf. Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (first determining that the right to marry applies to prison inmates).

71. *See, e.g., Carey*, 431 U.S. at 685-86 (“Even a burdensome regulation may be validated by a sufficiently compelling state interest.”). Substantive due process cases can have two stages of analysis: (1) recognition of a liberty right, and (2) determination of whether the government interest is compelling.

72. *See, e.g., Carey*, 431 U.S. at 685-702; *Roe*, 410 U.S. at 162-64. The infringement must also be “narrowly drawn” to restrict the right no more than necessary to further the government’s interest. *Roe*, 410 U.S. at 155.

73. *See Roe*, 410 U.S. at 154 (concluding that the right of personal privacy applies to the abortion decision); *Casey*, 505 U.S. at 846 (“Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.”).

74. *Casey*, 505 U.S. at 851-53; *Roe*, 410 U.S. at 153.



or the pregnant woman's health.<sup>75</sup> The protection of the fetus was a government interest that was considered in these cases only in the second stage of analysis—to decide whether the government's restriction on women's liberty was justified.<sup>76</sup>

Thus, *Dobbs* erred in considering its moral aversion to abortion in the first stage of analysis. These moral concerns underlie the government's interest in protecting the fetus, and *Dobbs*, without explanation, departed from precedent by considering them in the first stage.

In doing so, *Dobbs* also defied logic. A state has a legitimate moral interest in protecting the fetus,<sup>77</sup> but moral concerns for fetal life plainly provide no information about the nature or characteristics of a woman's liberty interest in the abortion decision. A woman has a liberty interest in the abortion decision because she has an interest in deciding whether to accept the substantial burdens and risks of pregnancy, childbirth, and childrearing.<sup>78</sup> While moral concerns for prenatal life can justify restrictions on this liberty interest, they do not elucidate the nature of the liberty interest and cannot show that it is like or unlike other liberty interests. These concerns, therefore, cannot distinguish a liberty interest in the abortion decision from liberty interests protected in other cases.

Indeed, a woman's liberty interest in the abortion decision and the government's interest in the protection of fetal life are separate, distinct, and sometimes conflicting interests. When the government bans or otherwise restricts access to abortion, it infringes a woman's liberty to choose to end her pregnancy.<sup>79</sup> Conversely, choosing an abortion obviously does not

---

75. *Casey*, 505 U.S. at 853; *Roe*, 410 U.S. at 159.

76. To be sure, *Roe* characterized abortion as “inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education.” *Roe*, 410 U.S. at 159. However, the *Roe* Court did so to explain that the state has a significant interest in restricting abortion in later pregnancy. *Id.* Similarly, while *Casey* called abortion “a unique act,” it did so in noting the procedure’s “consequences for others,” which gave the state an interest in proscribing it. *Casey*, 505 U.S. at 852. *Dobbs* compounded its error by relying on these characterizations of abortion to attempt to distinguish precedent on a different issue—whether women have a liberty right to decide whether to end their pregnancy. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 257 (2022).

77. *See Casey*, 505 U.S. at 853 (recognizing that states have “legitimate interests in protecting prenatal life”).

78. *See Casey*, 505 U.S. at 852 (“The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.”); *Roe*, 410 U.S. at 153.

79. *See Roe*, 410 U.S. at 159.

protect the fetus, but rather ends its life.<sup>80</sup> The morality of abortion is simply irrelevant to any analysis of whether women have an abortion right.

For this reason, *Dobbs* failed to distinguish an abortion right from other liberty rights based on the Court's belief about the morality of abortion. *Dobbs*'s rejection of an abortion right resulted from flawed reasoning and the Court's consequent failure to follow precedent.

C. *Unable to Distinguish the Precedent that Roe and Casey Relied on to Recognize an Abortion Right, Dobbs was Bound to Adhere to That Precedent*

The Supreme Court generally must follow its own precedent.<sup>81</sup> The Court does have the option, if it can overcome *stare decisis*, to overrule its precedent instead of following it.<sup>82</sup> However, if the Court does not overrule precedent—and *Dobbs* emphatically disclaimed any intention to overrule the precedent on which *Roe* and *Casey* relied to recognize an abortion right<sup>83</sup>—the Court must adhere to its rulings in earlier cases.

Given *Dobbs*'s claim that it did not disturb the precedent *Roe* and *Casey* relied on, the binding nature of precedent required the Court to begin its analysis of whether an abortion right exists by examining that precedent. If, as this article concludes, this precedent answers whether an abortion right exists, that answer should have been the end of *Dobbs*'s analysis of that issue.

80. *See id.*

81. *See* *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455-56 (2015) (stating that Supreme Court must follow precedent absent a “special justification” “over and above the belief ‘that the precedent was wrongly decided.’” (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014))); *Casey*, 505 U.S. at 854 (referencing the “obligation to follow precedent” and stating that “respect for precedent is . . . indispensable” to the “continuity over time” required by “the rule of law”); *see also* *Moore v. Harper*, 600 U.S. 1, 26 (2023) (faulting dissent for ignoring Supreme Court precedent); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007) (criticizing dissent for “dismissing contrary holdings” and “alter[ing] . . . our well-established legal framework”); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 420 (1983) (*stare decisis* “is a doctrine that demands respect in a society governed by the rule of law”).

82. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command”).

83. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 257 (2022) (stating that *Dobbs* does not “undermine” the decisions cited by *Roe* and *Casey* “in any way.”); *id.* at 290 (“Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”); *id.* at 295 (“we have stated unequivocally that ‘[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.’”).

Moreover, in rejecting an abortion right, *Dobbs* applied a test not utilized in any of this precedent or in more recent Supreme Court substantive due process cases.<sup>84</sup> Without attempting to distinguish this long line of cases, the *Dobbs* Court decided whether an abortion right existed based on whether it was “‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’”<sup>85</sup>

This was a consequential departure from longstanding precedent. The test the *Dobbs* Court chose to apply dictated the result. Abortion clearly was not legally protected in 1868,<sup>86</sup> thereby precluding a federal constitutional abortion right under *Dobbs*’s test. Conversely, had *Dobbs* applied the test the Court had used in its abortion, contraception, and other substantive due process cases,<sup>87</sup> which compares the asserted right to rights recognized in earlier cases,<sup>88</sup> it would have been exceedingly difficult—if not impossible—

---

84. See *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015); *Lawrence v. Texas*, 539 U.S. 558, 564-79 (2003); *Casey*, 505 U.S. at 846-53; *Washington v. Harper*, 494 U.S. 210, 221-23 (1990); *Carey v. Population Servs., Int’l*, 431 U.S. 678, 684-85 (1977); *Moore v. E. Cleveland*, 431 U.S. 494, 499-506 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

85. *Dobbs*, 597 U.S. at 237-38 (quoting *Timbs v. Indiana*, 586 U.S. 146, 149 (2019); *McDonald v. Chicago*, 561 U.S. 742, 764, 767 (2010); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

86. This is the year that the Fourteenth Amendment was ratified. In deciding whether the Fourteenth Amendment conferred an abortion right, *Dobbs* gave great weight to the legal status of abortion in 1868 (while also examining earlier and later history). See *Dobbs*, 597 U.S. at 272 (“The most important historical fact [is] how the States regulated abortion when the Fourteenth Amendment was adopted”); *id.* at 248 (“By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.”); *id.* at 370-71 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.”).

87. Cases involving due process liberty rights are often referred to as “substantive due process” cases, to distinguish them from due process cases concerning the adequacy of procedural protections. See, e.g., *Casey*, 505 U.S. at 846 (“The [Due Process] Clause has been understood to contain a substantive component . . . ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’”).

88. See *Obergefell*, 576 U.S. at 663; *Lawrence*, 539 U.S. at 564-79; *Casey*, 505 U.S. at 846-53; *Washington*, 494 U.S. at 221-23; *Carey*, 431 U.S. at 684-85; *Moore*, 431 U.S. at 499-506; *Eisenstadt*, 405 U.S. at 453-54; *Loving*, 388 U.S. at 12; *Prince*, 321 U.S. at 165-66; *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-400.

for the Court to explain why *Roe* and *Casey* were “egregiously wrong”<sup>89</sup> in recognizing an abortion right. As discussed, the Court’s contraception cases compel recognition of an abortion right.<sup>90</sup>

In relying on a different line of precedent for its test, *Dobbs* ignored *Obergefell* and *Lawrence* and evaded *Casey*—substantive due process cases that specifically addressed and cabined the test applied by *Dobbs*. *Obergefell*, in establishing the right of same-sex couples to marry, explained that history’s role is to “guide and discipline” the identification of interests protected by due process liberty, but “not [to] set [the inquiry’s] outer boundaries.”<sup>91</sup> This limited role was appropriate because:

[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.<sup>92</sup>

*Obergefell* specifically addressed the test articulated in *Glucksberg*, on which *Dobbs* relied.<sup>93</sup> *Obergefell* described the *Glucksberg* test as defining due process liberty “in a most circumscribed manner, with central reference to specific historical practices.”<sup>94</sup> *Obergefell* concluded that this test “is inconsistent with the approach this Court has used in discussing other fundamental rights,” adding that “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification . . . .”<sup>95</sup>

Like *Obergefell*, *Casey* explicitly rejected the view that due process liberty protected “only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the

89. See *Dobbs*, 597 U.S. at 268 (“*Roe* was . . . egregiously wrong”).

90. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing right “to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.”); *Carey v. Populations Servs. Int’l*, 431 U.S. 678, 685 (1977) (“The decision whether or not to beget or bear a child is at the very heart . . . of constitutionally protected choices.”); see also *supra* Part I.A.

91. *Obergefell*, 576 U.S. at 664 (emphasis added); see also *Dobbs*, 597 U.S. at 375 & n.4 (Breyer, Sotomayor & Kagan, JJ., dissenting) (discussing *Obergefell* on this issue and concluding that “[t]he Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.”).

92. *Obergefell*, 576 U.S. at 664 (history’s limited role “respects our history and learns from it without allowing the past alone to rule the present.”).

93. See *id.* at 671 (addressing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

94. *Id.*

95. *Id.*

Fourteenth Amendment was ratified.”<sup>96</sup> *Casey* opposed “freezing ‘due process of law’ at some fixed stage of time or thought” so as not “‘to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges.’”<sup>97</sup> Similarly, *Lawrence v. Texas*, in recognizing the due process right of same-sex adults to engage in private consensual sexual conduct, observed that the framers and ratifiers of the Due Process Clause “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>98</sup>

In choosing a test that inexorably led to the rejection of an abortion right, *Dobbs*, with no valid explanation, spurned the unmistakable teaching of *Obergefell*, *Casey*, and *Lawrence*. *Dobbs* did attempt to explain why its standard was consistent with *Casey*, but its explanation was based on a spurious interpretation of one sentence in *Casey*. *Dobbs* asserted that it was “not necessary to dispute *Casey*’s claim . . . that ‘the specific practices of States at the time of the adoption of the Fourteenth Amendment’ do not ‘mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.’”<sup>99</sup> *Casey*’s claim could go unrefuted, *Dobbs* contended, because “[a]bortion is nothing new.”<sup>100</sup> While the relevance of this fact is somewhat murky,<sup>101</sup> it suggests that *Dobbs* understood *Casey*’s claim to apply only to practices that did not exist in 1868.<sup>102</sup> Under this interpretation, *Casey*’s claim would not apply to abortion because abortion is a practice that did exist in 1868. *Dobbs* thus was able to conclude that it was “not necessary to dispute *Casey*’s claim . . . .”<sup>103</sup>

However, *Dobbs* interpreted *Casey*’s reference to “the specific practices

96. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992).

97. *Id.* at 850 (quoting *Rochin v. California*, 342 U.S. 165, 171-72 (1952)).

98. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003); *see id.* at 577-78 (noting that “‘neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.’” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

99. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 257-58 (2022) (quoting *Casey*, 505 U.S. at 848).

100. *Id.* at 258.

101. *See id.* at 376 n.5 (Breyer, Sotomayor & Kagan, JJ., dissenting) (referring to this portion of the majority opinion as “perplexing”).

102. *See id.* (interpreting the majority’s “[a]bortion is nothing new” language to mean that “the Fourteenth Amendment might provide protection for things wholly unknown in the 19th century”).

103. *Id.* at 257-58 (quoting *Casey*, 505 U.S. at 848).

of the States” out of context. *Dobbs* ignored that the sentence at issue was a summary of the points *Casey* had made in the two immediately preceding paragraphs. In those paragraphs, *Casey* had rejected the view that due process liberty protects (1) only rights included in the Bill of Rights or (2) “only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.”<sup>104</sup> In other words, in these two paragraphs, the Court had explained that due process liberty could protect (1) rights not included in the Bill of Rights, and (2) practices that were not protected by other laws in 1868. Whatever ambiguity the sentence in question might have when read in isolation, it is clear in context that its phrase “practices of the States” refers to the practices of the States “that were protected against government interference by other rules of law,” as stated in the immediately preceding paragraph.<sup>105</sup> *Casey*’s point was that abortion, though not legally protected in 1868, could nonetheless be protected by due process liberty. Indeed, *Casey* ruled that due process liberty protected the abortion choice.<sup>106</sup>

*Dobbs*’s interpretation of *Casey*, in addition to ignoring context, is also implausible on its face. Why would *Casey*—a case about a practice that *did* exist in 1868—make the point that the Fourteenth Amendment could protect practices that did not exist then? There is no reason to believe that *Casey* stated an entirely irrelevant point of law.

In short, *Dobbs*’s attempt to evade *Casey* relied on a misinterpretation of the sentence in question. More importantly, whatever the meaning of this sentence, the immediately preceding paragraph—which *Dobbs* ignored—stated unambiguously that Fourteenth Amendment liberty could protect practices that were not protected by other laws in 1868. *Casey*, like *Obergefell* and *Lawrence*, teaches that the historical legal status of abortion cannot alone answer whether the abortion decision is protected by the Due Process Clause.

*Dobbs* exhibited a disturbing unwillingness to confront contrary precedent. *Dobbs* attempted to sidestep *Casey* on a bogus ground.<sup>107</sup> It disregarded both *Casey*’s clearer language and a fuller discussion of history’s role in *Obergefell* and *Lawrence*.<sup>108</sup> And it did not attempt to distinguish a

---

104. *Casey*, 505 U.S. at 847-48.

105. *Id.*

106. *Id.* at 846 (concluding that Fourteenth Amendment due process protects a woman’s decision to terminate her pregnancy).

107. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 257-58 (2022).

108. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847-48 (1992); *Obergefell v. Hodges*, 576 U.S. 644, 664, 671 (2015); *Lawrence v. Texas*, 539 U.S. 558, 577-79 (2003).

long line of substantive due process cases in which the Supreme Court did not consider an asserted right's legal status in 1868.<sup>109</sup>

Of course, the Supreme Court must follow its prior rulings only to the extent they apply to an issue in the case. There is nothing to follow if a prior case is distinguishable—i.e., if its holdings do not apply. As discussed, *Dobbs* attempted to distinguish the precedent relied on in *Roe* and *Casey* to recognize an abortion right, but it was unable to do so. Therefore, the Court was bound to follow that precedent, uphold an abortion right, and then balance the exercise of that right against Mississippi's interest in enforcing its fifteen-week abortion ban.

## II. A STATE ABORTION STATUTE PROVIDES IMPORTANT EVIDENCE OF THE STRENGTH OF THE STATE'S INTEREST IN PROTECTING THE FETUS

*Casey* acknowledged the criticism directed at *Roe*'s analysis of when, in the course of a pregnancy, a state's interest in protecting prenatal life becomes strong enough to justify a ban on abortion.<sup>110</sup> *Casey* added that "[t]he weight to be given this state interest, not the strength of the woman's interest, was the difficult question faced in *Roe*."<sup>111</sup>

While one can debate the merits of *Roe*'s viability line, less debatable is the paucity of analysis to support it.<sup>112</sup> A court can engage in more substantive analysis by considering how the state has punished abortion. This punishment, never considered by the Supreme Court in weighing the state's interest in preserving fetal life, directly relates to the strength of a state's interest.

A state's punishment of abortion is more objective evidence than evidence of, for example, a state's beliefs about the status of the fetus. This more objective approach would help counter the criticism, which *Dobbs* leveled against *Casey*, that courts are engaging in "speculations and weighing of the relative importance of the fetus and mother," and "'substitut[ing] their social

---

109. *Dobbs* could have attempted to distinguish this precedent on the ground that these cases applied the wrong test to determine whether a liberty right exists. However, *Dobbs* likely refrained to avoid more clearly overruling precedent that recognized rights—such as to marry a person of a different race or to use contraception—that were not legally protected in 1868. That, apparently, was a bridge too far.

110. *Casey*, 505 U.S. at 869.

111. *Id.* at 871; see also *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 274 (2022) (referring to *Roe*'s viability line as "[a]n even more glaring deficiency").

112. See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (lacking more substantive justification for viability line).

and economic beliefs for the judgment of legislative bodies.”<sup>113</sup> To be sure, the balancing of governmental and liberty interests involves substantial subjectivity. There is no metric for precisely weighing a woman’s liberty interest or a state’s interest in protecting fetal life. But the Supreme Court has often balanced unquantifiable interests to resolve matters before it.<sup>114</sup> And a court can reduce the amount of subjectivity by relying on more objective forms of evidence. Such evidence exists in the abortion context.

This evidence derives from state statutes that outlawed abortion before *Roe* and after *Dobbs*. These statutes quantify the state’s condemnation of abortion through their term of imprisonment. For any crime, longer jail time signifies a stronger state interest in condemning, punishing, and deterring the

---

113. *Dobbs*, 597 U.S. at 289 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963)). *Dobbs* was able to avoid balancing liberty and state interests by holding that a pregnant woman has no federal constitutional liberty right. Had the Court recognized a due process liberty right in the abortion choice, as precedent required, the Court would have been compelled to balance the competing interests of women and the state. There appears to be no other way to resolve a conflict between these opposing interests. See *Dobbs*, 597 U.S. at 256 (“*Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed ‘potential life.’”); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (describing the “balance” struck by *Casey*); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (“whether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.”) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

114. See, e.g., *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 226 (2023) (observing that “[i]n the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action.”); *id.* at 207 (identifying “two compelling interests that permit resort to race-based government action”: “remediating specific, identified instances of past [unlawful] discrimination” and “avoiding imminent and serious risks to human safety in prisons”); see also *Citizens United v. FEC*, 558 U.S. 310, 349-62 (2010) (holding that none of the proffered governmental interests justifies suppression of corporate political speech); *Locke v. Davey*, 540 U.S. 712, 725 (2004) (upholding under the Free Exercise Clause a state scholarship program, which prohibited scholarships from being used to pursue a devotional theology degree, because “[t]he State’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on [scholarship recipients].”); *Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 486 (1983) (“We believe the second physician requirement reasonably furthers the State’s compelling interest in protecting the lives of viable fetuses”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) (“The woman[’s] . . . awareness of the [abortion] decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.”).



criminal conduct.<sup>115</sup> In the abortion context, a longer prison term reflects a stronger state interest in protecting the fetus. And prison terms can be compared across crimes to see the relative degree of condemnation of a given crime.<sup>116</sup> In particular, the punishment for abortion can be compared to the punishment for first-degree murder, to see how states have treated premeditated fetal destruction (which abortion is) relative to premeditated killing of a human being (i.e., first-degree murder).<sup>117</sup> The length of incarceration for abortion, and how it compares to jail time for other crimes, are quantitative and objective forms of evidence, and are probative of the strength of a state's interest in prohibiting or otherwise restricting abortion. In addition, courts reviewing a state abortion ban under a state constitution would benefit from considering another feature of many abortion laws and their enforcement: these laws have targeted and punished the abortion provider, and often not the pregnant woman—even though the woman is clearly an accomplice.<sup>118</sup>

Because courts assess the strength of a state's interest in preserving fetal life to determine the scope of a constitutional abortion right, they would benefit from evidence that facilitates a more enduring construction of their state's constitution.<sup>119</sup> A state's punishment of abortion over many years gives a court a more enduring measure of the state's interest in fetal protection—free of fluctuations that may result from transitory and subjective views about the fetus within the state.<sup>120</sup>

---

115. See, e.g., *Ewing v. California*, 538 U.S. 11, 25 (2003) (identifying justifications for criminal sentence to include deterrence and retribution); see also Andrew von Hirsch, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION) 51 (1976) (stating that purpose of criminal punishment includes “expressing moral reprobation of the actor for the wrong.”); Francis A. Allen, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 66 (1981) (“the primary object of criminal sanctions is to punish culpable behavior...[T]he severity of the sanctions visited on the offender should be proportioned to the degree of his culpability.”); TEX. PENAL CODE art. 609 (1857) (“The jury, in every case of murder, will regulate the punishment according to a just estimate of the heinousness of the offence.”).

116. See *infra* pp. 27-31.

117. See *infra* pp. 27-29.

118. See *id.*

119. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“the very concept of the rule of law underlying our own Constitution requires . . . continuity over time . . .”).

120. See *id.* Given the “wide divergence of thinking on” when life begins, *Roe*, 410 U.S. at 160, there is substantial opportunity for subjective views on this and other abortion-related issues to change over time.

This article examines the first statute that punished abortion at all stages of pregnancy in each of the thirty-seven states comprising the United States in 1868. These are the statutes listed in *Dobbs*'s Appendix A. *Dobbs* relied on these statutes to show that, in 1868, most states outlawed abortion at all stages of pregnancy.<sup>121</sup> This article goes a step further and analyzes how strongly each of these thirty-seven states banned abortion through its statute listed in *Dobbs* Appendix A.

The first of these statutes (Missouri) was enacted in 1825 and the last (Mississippi) in 1952. Thirty-six of the thirty-seven states outlawed abortion (with exceptions) continuously until 1973, when *Roe* was decided.<sup>122</sup> The statutes in *Dobbs*'s Appendix A reflect views about abortion of a large number of states over many years.<sup>123</sup> They show that abortion at all stages of pregnancy, but especially before quickening, was not among the most heinous crimes.<sup>124</sup> In fact, in the large majority of the thirty-seven states, abortion before quickening was punished relatively leniently.<sup>125</sup> Similarly, today, most of the thirty-seven states punish early abortions relatively leniently or not at all.<sup>126</sup>

---

121. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 248-49 (2022).

122. In 1970, New York legalized abortions up to twenty-four weeks of gestation. N.Y. PENAL LAW § 125.05(3) (McKinney 1970). In some of the 37 states, the punishment for abortion changed by amendment or successor statute in later years. See Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 435-37 (1961) (Appendix I). Such changes are relevant evidence of the strength of states' interest in protecting the fetus. However, because this article does not seek to reach a definitive conclusion about the strength of any state's interest in fetal preservation, it does not analyze these changes.

123. Some states had separate punishments for intent to destroy the fetus and for actual destruction of the fetus. This article counts only the punishment for a successful abortion, given the effectiveness of modern abortion techniques. This article excludes enhanced punishments for when the mother died because the relevant issue here is the state's interest in protecting the fetus. Some states only punished the intent to cause a miscarriage. Because this is the punishment that would apply even when the abortion was successful, this article counts this punishment. Lastly, some states had a longer term of incarceration if served in a state prison rather than a county jail. In these instances, this article uses the longer term of imprisonment as the maximum possible term. See generally Quay, *supra* note 122, at Appendix I.

124. Georgia's punishment of *post*-quickening abortions was the one exception. Georgia punished by death or life imprisonment the killing of an unborn "quick" child by deliberate injury to the mother. GA. CODE ANN. § 4337(a) (1882). Notably, however, Georgia punished *pre*-quickening abortions much more leniently—by 2-10 years of imprisonment. *Id.* § 4337(b).

125. See *infra* pp. 28-29 & Appendix.

126. See *infra* Appendix.

This historical punishment of abortion in the thirty-seven states reveals their respective views about the fetus. It shows that all thirty-seven states, through their penal codes, protected fetal life much less than human life, and similarly to the protection of certain property against theft, injury, or destruction.<sup>127</sup>

If any of these thirty-seven states had considered the fetus to be a human being, abortion would have satisfied the state's definition of first-degree murder (or murder in states that did not designate degrees of murder),<sup>128</sup> and pregnant women who obtained an abortion would have been accomplices to murder. The element that distinguishes first-degree murder from other forms of homicide is premeditation, that is, planning or deliberation.<sup>129</sup> The very purpose of abortion is to kill the fetus, and the procedure is planned. And the pregnant woman, by requesting and cooperating with the procedure, is an accomplice.<sup>130</sup> However, the thirty-seven states (with the partial exception

---

127. It could be argued that states' relatively lenient punishment of abortion does not imply that states have a relatively weak interest in protecting the fetus. This argument posits that states have a strong interest in preserving fetal life, but moderated the punishment for abortion in recognition of women's countervailing liberty interest. This argument has some force as to the pregnant woman. It is entirely plausible that states have sympathized with the woman's desire to avoid the risks and burdens of pregnancy, childbirth, and childrearing, and thus have wanted to punish her relatively leniently. However, this argument has no force as to the abortionist, who, of course, does not bear the health risks and burdens endured by the woman. The woman's liberty interest gives states no reason to moderate the abortionist's punishment. It is significant, therefore, that state abortion laws have targeted the abortionist, not the woman. Such laws have made it a crime to "administer" a drug or "employ" or "use" any instrument to destroy the fetus. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, app. A-B (2022) (quoting pre-*Roe* state abortion laws). The abortionist, not the pregnant woman, is the one who administers a drug or employs or uses an instrument to perform an abortion. While states could prosecute the woman for aiding and abetting the abortionist, the wording of the abortion statutes, and the paucity of prosecutions against the woman, see *Roe v. Wade*, 410 U.S. 113, 151 (1973), make it quite likely that states were focused on the abortionist when they set the punishment for abortion. Thus, one can fairly conclude that the relatively lenient punishment of abortion reflects a relatively weak interest in protecting fetal life.

128. See, e.g., CODE OF VIRGINIA: *With the Declaration of Independence and Constitution of the United States; and the Declaration of Rights and Constitution of Virginia* (1849), ch. 191, § 1 (defining first-degree murder as "any wilful, deliberate and premeditated killing").

129. See, e.g., 18 U.S.C. § 1111 (2003) (defining first-degree murder as a "willful, deliberate, malicious, and premeditated" murder).

130. See, e.g., *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (stating that, to "aid and abet another in committing a crime," the defendant must "participate in [the crime] as in something that he wishes to bring about . . .").

of Georgia) punished abortion providers through the statutes listed in *Dobbs* Appendix A much more leniently than first-degree murderers (or murderers in the twelve states that did not designate degrees of murder),<sup>131</sup> and many of the fifty states did not punish the pregnant woman at all.<sup>132</sup> Currently, only three (eight percent) of the thirty-seven states punish abortion like murder (Alabama and Texas) or first-degree murder (North Carolina).<sup>133</sup>

Based on the penal code of each of the thirty-seven states at the time its statute appearing in *Dobbs*'s Appendix A was enacted, twenty-eight of the thirty-seven states punished first-degree murder (or murder in the twelve states that did not designate degrees of murder) by death, five states punished it by death or an alternative punishment, and four states punished it by life imprisonment.<sup>134</sup> In contrast, all thirty-seven states punished abortion or pre-quickening abortion at the time much more leniently.<sup>135</sup> Alabama punished abortion with a maximum jail term of six months.<sup>136</sup> Nine states (New York, Ohio, Indiana, Michigan, Virginia, New Hampshire, Iowa, Kansas, and Rhode Island) punished abortion or pre-quickening abortion with a maximum of one year in jail;<sup>137</sup> four (Illinois, Vermont, Pennsylvania, and Nebraska) with a maximum of three years;<sup>138</sup> nine (Maine, California, Connecticut, Nevada, West Virginia, Arkansas, North Carolina, Delaware,

---

131. See *infra* pp. 35-38, 41-44 (Appendix). New York, Indiana, Vermont, California, Texas, Louisiana, Rhode Island, Nebraska, Georgia, North Carolina, South Carolina and Kentucky punished murder without designating different degrees of murder.

132. See *Roe*, 410 U.S. at 15 ("In many States . . . by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.").

133. See *infra* pp. 34, 42, 44 (Appendix). Currently, Alabama punishes abortion before 22 weeks of gestation by life or 10-99 years of imprisonment, Texas by life or 5-99 years of imprisonment, and North Carolina by up to life imprisonment without parole.

134. See *infra* Appendix.

135. See *infra* pp. 36-37, 39, 41-43, 45 (Appendix). Ten of the thirty-seven states—New York, Ohio, Michigan, Virginia, New Hampshire, Kansas, Pennsylvania, Florida, Georgia and North Carolina—had both a statutory provision that applied specifically to post-quickening abortions and a provision that applied to abortions generally, i.e., at all stages of pregnancy. This article counts only the punishment in these states for abortion at all stages, as this article focuses on the state's interest in banning early abortions. That said, in all of these states except Georgia, even the stricter punishment for post-quickening abortion was much less harsh than their punishment for first-degree murder (or murder in New York, Georgia, and North Carolina).

136. See *infra* p. 34 (Appendix).

137. See *infra* pp. 37, 39, 41-43, 45 (Appendix).

138. See *infra* pp. 37, 41, 43-44 (Appendix).

and Tennessee) with a maximum of five years;<sup>139</sup> five (Missouri, Massachusetts, New Jersey, Wisconsin, and Florida) with a maximum of seven years;<sup>140</sup> five (Texas, Louisiana, Minnesota, Georgia, and Mississippi) with a maximum of ten years;<sup>141</sup> and four (Oregon, Maryland, South Carolina, and Kentucky) with more than a ten-year maximum.<sup>142</sup> The states that punished pre-quickening abortions the harshest were South Carolina (five to twenty years) and Kentucky (two to twenty-one years), while Maryland imposed a *minimum* sentence of three years.<sup>143</sup> However, even these states punished abortion (at all stages of pregnancy) far more leniently than first-degree murder (Maryland) or murder (South Carolina and Kentucky).<sup>144</sup>

The thirty-seven states' historical punishment of first-degree murder or murder contrasts starkly with their much lighter historical punishment of the abortion provider. This disparity in punishments—and the non-punishment of the pregnant woman in many of the fifty states—are substantial evidence that the thirty-seven states did not view the fetus as a human being. These states' respective interests in preserving fetal life were not nearly as strong as their interest in protecting human life.

Notwithstanding this evidence, which *Dobbs* did not address, *Dobbs* asserted that there is “ample evidence” that the pre-*Roe* state laws criminalizing abortion were motivated by “a sincere belief that abortion kills a human being,” citing nine nineteenth and early-twentieth century state court decisions.<sup>145</sup> These decisions, however, do not explain why states punished abortion providers far more leniently than first-degree murderers (or murderers in states without degrees of murder), nor why many states did not punish the woman at all. State actions—the relatively lenient jail terms they enacted to punish abortion providers and the impunity they granted

---

139. See *infra* pp. 34-35, 38, 41-42, 44-45 (Appendix).

140. See *infra* pp. 36, 39-40, 42, 46 (Appendix).

141. See *infra* pp. 36, 38-40, 44 (Appendix).

142. See *infra* pp. 38, 43 (Appendix).

143. See *infra* pp. 38, 43 (Appendix).

144. Texas is one of the states that did not designate degrees of murder. See TEX. PENAL CODE art. 612a, § 2 (1857). It had an unusual range of punishments for murder: from death to life imprisonment to 3-15 years of incarceration. TEX. PENAL CODE art. 612a, § 2 (1857). Presumably, premeditated murders were punished on the harsher end of this range, and much harsher than the maximum of ten years that applied then to abortion in Texas. Texas amended its penal code in 1858 to, among other things, adopt first and second degrees of murder and to make first-degree murder punishable by death. Amendments to TEX. PENAL CODE arts. 608, 612a, § 2 (1858).

145. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 254 (2022).

women—speak much louder than the handful of court opinions cited by *Dobbs*, especially given that the cited opinions are devoid of any relevant analysis of the language or legislative history of the abortion statute at issue.<sup>146</sup> One of these decisions even contradicts *Dobbs*’s claim that they “made th[e] point” that passage of state laws banning abortion was motivated by a belief that the fetus is a human being. The Oregon Supreme Court in *State v. Ausplund* relied on a New Jersey court decision in distinguishing the statutory abortion offense from the common law offense.<sup>147</sup> The Oregon court quoted a portion of the New Jersey opinion that stated that the common law offense was “‘against the life of the child,’” while the statutory offense was “‘largely to protect the health and life of the mother . . .’”<sup>148</sup>

Not only did all thirty-seven states punish abortion (or pre-quickening abortion in the case of Georgia) much more leniently than first-degree murder or murder, they also punished pre-quickening abortion (and, in most of these states, abortion at all stages) on the more lenient end of the full spectrum of criminal punishments. This can be seen in the fact that nearly two-thirds (twenty-three) of the thirty-six states punished providers of early abortions (and, in many of these states, abortions at any stage)<sup>149</sup> with five or fewer years of maximum incarceration, and over ninety percent (thirty-three) punished them with ten or fewer years of maximum imprisonment.<sup>150</sup>

The degree of condemnation of abortion, and the corresponding strength of the state’s interest in protecting the fetus, can also be seen by comparing abortion or pre-quickening abortion to crimes that, at the time, were punished by the same, nearly the same, or a longer term of incarceration. This comparison shows that abortion or early abortion was punished the same as,

---

146. *Dobbs* does not explain why it considers these opinions to be “ample evidence” of the motivation for passage of the abortion statutes (including the many statutes that were not even the subject of these nine opinions), while denying the significance of historical evidence that their enactment was influenced by concerns that abortions were reducing births by White Protestant women relative to births by Catholic women. See *Dobbs*, 597 U.S. at 253-54; Brief for Am. Hist. Ass’n & Org. of Am. Historians as Amici Curiae Supporting Respondents at 18-26, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) (describing major lobbying campaign by Dr. Horatio Storer, who “warned that foreign immigrants’ large families were poised to overwhelm the white Protestant ‘American’ population,” and by his ally, the American Medical Association).

147. 167 P. 1019 (1917).

148. *Id.* at 1023 (quoting *State v. Loomis*, 89 N.J.L. 8, 10-12 (1916)).

149. These are the thirty-seven states minus Maryland, which is excluded because of a lack of information about how Maryland courts applied the state’s three-year minimum sentence, namely, how far above the three years these courts went.

150. See *infra* Appendix.

very similarly to, or less harshly than crimes that are not particularly heinous.<sup>151</sup> For example, Michigan punished pre-quickening abortion the same as it punished cutting down another person's tree.<sup>152</sup> Vermont punished the burning of another person's stack of hay (maximum of five years) more harshly than abortion (one to three years).<sup>153</sup> Virginia punished the performance of a marriage ceremony without a license virtually the same as it punished pre-quickening abortion.<sup>154</sup> New Hampshire punished the injuring of another's tree virtually the same as it punished pre-quickening abortion.<sup>155</sup> New Jersey punished sodomy with a maximum jail term (twenty-one years) three times as long as its maximum incarceration for abortion (seven years).<sup>156</sup> Pennsylvania imposed the same maximum jail time for stealing a fixture off a building as it imposed for pre-quickening abortion.<sup>157</sup> Georgia punished providers of pre-quickening abortions the same as it punished public officers for illegally altering a public record.<sup>158</sup> Ohio set incarceration for stealing a horse or mule at three to fifteen years, compared to a maximum of one year for pre-quickening abortions.<sup>159</sup> Even Kentucky, with arguably the harshest jail term for early abortion of the thirty-seven states (two to twenty-one years), punished abortion providers nearly the same as they punished a person for forcing open another's safe containing money (two to twenty years).<sup>160</sup> These comparisons support the conclusion that abortion, at least before quickening, was not considered a particularly abhorrent crime in these thirty-seven states.

Appended to this article is an appendix that identifies for each of the thirty-seven states: (1) the jail term for pre-quickening abortions when the state began punishing such abortions;<sup>161</sup> (2) the punishment at the time for first-degree murder (or murder in the twelve states that did not have degrees of murder); (3) the jail term for a selection of crimes punished at the time by the same, very nearly the same, or more years of incarceration as pre-

---

151. *See id.*

152. *See infra* p. 39 (Appendix).

153. *See infra* p. 44 (Appendix).

154. *See infra* p. 45 (Appendix).

155. *See infra* p. 41 (Appendix).

156. *See infra* p. 42 (Appendix).

157. *See infra* p. 43 (Appendix).

158. *See infra* p. 36 (Appendix).

159. *See infra* p. 42 (Appendix).

160. *See infra* p. 38 (Appendix).

161. *See infra* Appendix. In the twenty-seven states that punished post-quickening abortions the same as pre-quickening abortions, this is the jail term for all abortions, not just pre-quickening abortions.

quickenings abortion;<sup>162</sup> and (4) the jail term—if any—as of September 18, 2025 for abortion before twenty-two weeks.<sup>163</sup>

This appendix identifies important, objective evidence of the strength of these states' respective interest in protecting early fetal life, both absolutely and in comparison to their interest in protecting human life and private and public property. This evidence shows that nearly all of these states have had an interest in protecting early fetal life that is not particularly strong. This evidence suggests that nearly all of these states have had an interest in fetal protection that is not compelling and that, under strict judicial scrutiny, would not override a woman's liberty interest in deciding whether to end an early pregnancy.

### CONCLUSION

As this article explains, *Dobbs* is a seriously flawed opinion. *Dobbs* sought to distinguish binding precedent on an irrelevant ground. It failed to see that the right established in the Supreme Court's contraception cases—the right to decide whether to bear a child—applies as well to abortion. And in applying its historical test, *Dobbs* disregarded both the explicit guidance of *Obergefell*, *Casey*, and *Lawrence*, and the wholly different test applied by the Supreme Court in a long line of substantive due process cases.

Yet, *Dobbs* is the law of the land—but only at the federal level. Courts are free to reject *Dobbs*'s analysis in interpreting their state's constitution. In deciding what persuasive authority to afford *Dobbs*, courts should be aware of its flaws. This article concludes that these flaws deprive *Dobbs* of any persuasive authority.

In states with both a statute that bans early abortions and a constitution that confers an abortion right, a court hearing a constitutional challenge to that statute would likely benefit from considering evidence that the U.S. Supreme Court has not considered: how the state punished abortion before *Roe* and how it punishes abortion after *Dobbs*, including how these punishments compare to those for first-degree murder and other crimes. Such evidence is quantitative and objective. Thus, it is important evidence in determining whether a state's interest in protecting the fetus is strong enough in early pregnancy to override a woman's liberty interest in deciding

---

162. In twenty-seven of the states, the punishment for post-quickenings abortions was the same as for pre-quickenings abortions. See *infra* Appendix.

163. Several of the states that generally ban abortion permit it under specified circumstances, such as to save the mother's life, and several states that permit abortion up to a certain point in the pregnancy permit later abortions under particular circumstances. The appendix omits these complexities because they are not important to the points made in this article.



whether to bear a child.

## APPENDIX

| STATE<br>(YEAR OF<br>STATUTE<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION <sup>1</sup> | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                                                                                   | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS <sup>2</sup> |
|--------------------------------------------|----------------------------------------------------------|--------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------|
| Alabama<br>(1841)                          | 3-6 months<br>imprisonment                               | Death or life<br>imprisonment <sup>3</sup>             | Injuring another's<br>ricks or stacks of hay,<br>fodder, pease, or<br>grain in sheaf (max. 6<br>months); <sup>4</sup><br>Cutting hair from<br>mane or tail of<br>another's horse or<br>mule to disfigure<br>animal (max. 6<br>months); <sup>5</sup><br>Cutting down wood<br>on another's land<br>(max. 6 months) <sup>6</sup> | Life or 10-99<br>years <sup>7</sup>                                      |
| Arkansas<br>(1875)                         | 1-5 years<br>imprisonment                                | Death <sup>8</sup>                                     | Stealing property<br>valued at more than<br>\$10 (1-5 years); <sup>9</sup><br>Stealing cattle (1-5<br>years); <sup>10</sup><br>Commissioner of<br>state lands failing to<br>distinctly and<br>publicly offer at<br>public sale certain<br>state lands to highest<br>bidder (1-5 years) <sup>11</sup>                          | Max. 10 years <sup>12</sup>                                              |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER                                                 | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                                   | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS |
|---------------------------------|---------------------------------------------|--------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------|
| California<br>(1850)            | 2-5 years<br>imprisonment                   | California did not<br>designate degrees<br>of murder. It<br>punished murder<br>by death. <sup>13</sup> | Crime against nature<br>with man or beast (5<br>years to life); <sup>14</sup><br>Branding another's<br>horse or other<br>enumerated animal<br>with intent to steal it<br>(1-5 years); <sup>15</sup><br>Public officer altering<br>public record (1-10<br>years) <sup>16</sup> | Legal until<br>viability <sup>17</sup>                      |
| Connecticut<br>(1860)           | 1-5 years<br>imprisonment                   | Death <sup>18</sup>                                                                                    | Stealing horse (2-5<br>years); <sup>19</sup><br>Engaging in prize<br>fight (max. 5 years) <sup>20</sup>                                                                                                                                                                       | Legal until<br>viability <sup>21</sup>                      |
| Delaware<br>(1883)              | 1-5 years<br>imprisonment                   | Death <sup>22</sup>                                                                                    | Stealing horse or<br>mule (max. 5<br>years); <sup>23</sup><br>Town treasurer<br>embezzling town<br>money (2-10 years); <sup>24</sup><br>Stealing money<br>received as agent (1-5<br>years) <sup>25</sup>                                                                      | Legal until<br>viability <sup>26</sup>                      |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER                                                                      | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                                                                              | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS                                          |
|---------------------------------|---------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|
| Florida<br>(1868)               | 1-7 years<br>imprisonment                   | Death <sup>27</sup>                                                                                                         | Forging public, legal,<br>or commercial record<br>with intent to defraud<br>(max. 10 years); <sup>28</sup><br>Bank employee<br>stealing bank's<br>money (max. 10<br>years); <sup>29</sup><br>Person unrelated by<br>blood or marriage<br>helping felon avoid<br>arrest (max. 7<br>years) <sup>30</sup>                   | After 6 weeks,<br>abortion<br>punishable by<br>max. 5 years <sup>31</sup>                            |
| Georgia<br>(1876)               | 2-10 years<br>imprisonment                  | Georgia did not<br>designate degrees<br>of murder. It<br>punished murder<br>by death or life<br>imprisonment. <sup>32</sup> | Stealing horse or<br>mule (4-20 years); <sup>33</sup><br>Bank officer<br>purchasing bill<br>evidencing bank's<br>debt for less than its<br>face value (4-10<br>years); <sup>34</sup><br>Public officer altering<br>record, process,<br>charter, gift, grant,<br>conveyance, or<br>contract (2-10<br>years) <sup>35</sup> | After fetus has<br>detectable<br>heartbeat,<br>abortion<br>punishable by<br>1-10 years <sup>36</sup> |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER                                              | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                     | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS                                                                              |
|---------------------------------|---------------------------------------------|-----------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|
| Illinois<br>(1827)              | Max. 3 years<br>imprisonment                | Death <sup>37</sup>                                                                                 | Burglary (max. 3<br>years); <sup>38</sup><br>Government<br>employee stealing<br>government property<br>(max. 3 years); <sup>39</sup><br>Forgery or<br>counterfeiting (max.<br>3 years) <sup>40</sup>                            | Legal until<br>viability <sup>41</sup>                                                                                                   |
| Indiana<br>(1835)               | Max. 1 year<br>imprisonment                 | Indiana did not<br>designate degrees<br>of murder. It<br>punished murder<br>by death. <sup>42</sup> | Stealing personal<br>goods valued at \$5 or<br>more (2-14 years); <sup>43</sup><br>Forgery (2-14<br>years) <sup>44</sup>                                                                                                        | 1-6 years <sup>45</sup>                                                                                                                  |
| Iowa<br>(1858)                  | Max. 1 year<br>imprisonment                 | Death <sup>46</sup>                                                                                 | Injuring another's<br>pile of wood (max. 5<br>years); <sup>47</sup><br>Killing another's<br>horse or cattle (max.<br>1 year); <sup>48</sup><br>Cutting down<br>another's tree, vine,<br>or shrub (max. 1<br>year) <sup>49</sup> | After fetus has<br>detectable<br>heartbeat<br>(about 6<br>weeks),<br>physician<br>subject to<br>professional<br>discipline <sup>50</sup> |
| Kansas<br>(1859)                | Max. 1 year<br>imprisonment                 | Death <sup>51</sup>                                                                                 | Stealing money or<br>property valued less<br>than \$20 (max. 1<br>year); <sup>52</sup><br>Misdemeanors with<br>no other specified<br>term of imprisonment<br>(max. 1 year) <sup>53</sup>                                        | Legal until 22<br>weeks <sup>54</sup>                                                                                                    |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER                                                        | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                 | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS |
|---------------------------------|---------------------------------------------|---------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------|
| Kentucky<br>(1910)              | 2-21 years<br>imprisonment                  | Kentucky did not designate degrees of murder. It punished murder by death or life imprisonment. <sup>55</sup> | Holding person for ransom (2-21 years); <sup>56</sup><br>Forcing open another's safe containing money or any other thing of value (2-20 years) <sup>57</sup>                                                                | 1-5 years <sup>58</sup>                                     |
| Louisiana<br>(1856)             | 1-10 years<br>imprisonment                  | Louisiana did not designate degrees of murder. It punished murder by death. <sup>59</sup>                     | Crime against nature committed with mankind or beast (life imprisonment); <sup>60</sup><br>Forging or counterfeiting public record with intent to defraud (2-14 years); <sup>61</sup><br>Perjury (5-10 years) <sup>62</sup> | 1-10 years <sup>63</sup>                                    |
| Maine<br>(1840)                 | Max. 5 years<br>imprisonment                | Death <sup>64</sup>                                                                                           | Detestable crime against nature committed with mankind or beast (max. 10 years); <sup>65</sup><br>Taking another's money by false pretense (max. 7 years) <sup>66</sup>                                                     | Legal until viability <sup>67</sup>                         |
| Maryland<br>(1868)              | Min. 3 years<br>imprisonment                | Death <sup>68</sup>                                                                                           | [Omitted because Maryland's historical maximum incarceration for abortion unknown]                                                                                                                                          | Legal until viability <sup>69</sup>                         |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                                                                                                                                                                                                                    | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS |
|---------------------------------|---------------------------------------------|--------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------|
| Massachusetts<br>(1845)         | 1-7 years<br>imprisonment                   | Death <sup>70</sup>                                    | Clerk of corporation<br>making false entry in<br>corporate books with<br>intent to defraud<br>(max. 10 years); <sup>71</sup><br>Ship owner making<br>false bill of lading for<br>property laden on<br>board with intent to<br>defraud insurer (max.<br>10 years); <sup>72</sup><br>Possessing fewer than<br>10 counterfeit gold or<br>silver coins, knowing<br>them to be<br>counterfeit, with<br>intent to pass them as<br>true (max. 10 years) <sup>73</sup> | Legal until 24<br>weeks <sup>74</sup>                       |
| Michigan<br>(1846)              | Max. 1 year<br>imprisonment                 | Life<br>imprisonment <sup>75</sup>                     | Burning another's<br>pile of wood (max. 5<br>years); <sup>76</sup><br>Killing another's<br>horse or cattle (max.<br>5 years); <sup>77</sup><br>Cutting down<br>another's tree (max. 1<br>year) <sup>78</sup>                                                                                                                                                                                                                                                   | Legal until<br>viability <sup>79</sup>                      |
| Minnesota<br>(1873)             | 3-10 years<br>imprisonment                  | Death <sup>80</sup>                                    | Burning insured<br>goods to injure<br>insurer (3-10 years); <sup>81</sup><br>Destroying ship to<br>injure owner (3-10<br>years) <sup>82</sup>                                                                                                                                                                                                                                                                                                                  | Legal (no<br>gestational<br>limit) <sup>83</sup>            |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                                                                                                    | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS                                                                                                                                 |
|---------------------------------|---------------------------------------------|--------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Mississippi<br>(1952)           | 1-10 years<br>imprisonment                  | Life<br>imprisonment <sup>84</sup>                     | With intent to<br>defraud, obtaining<br>money or personal<br>property valued at<br>\$500 or more from<br>person by false<br>pretense (max. 10<br>years); <sup>85</sup><br>Wittingly changing<br>public record (max.<br>10 years); <sup>86</sup><br>Crime against nature<br>committed with<br>mankind or beast<br>(max. 10 years) <sup>87</sup> | 1-10 years <sup>88</sup>                                                                                                                                                                    |
| Missouri<br>(1825)              | Max. 7 years<br>imprisonment                | Death <sup>89</sup>                                    | Burglary (max. 7<br>years); <sup>90</sup><br>Stealing, altering or<br>falsifying public<br>record (max. 7<br>years) <sup>91</sup>                                                                                                                                                                                                              | Several<br>abortion<br>restrictions<br>preliminarily<br>enjoined after<br>voter-approved<br>amendment to<br>Missouri<br>Constitution to<br>protect<br>reproductive<br>freedom <sup>92</sup> |



| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER                                               | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                  | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS                                                                                                               |
|---------------------------------|---------------------------------------------|------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Nebraska<br>(1866)              | Max. 3 years<br>imprisonment                | Nebraska did not<br>designate degrees<br>of murder. It<br>punished murder<br>by death. <sup>93</sup> | Altering brand of<br>another's horse worth<br>at least \$25 to steal it<br>(1-3 years); <sup>94</sup><br>Public official taking<br>public money and<br>depositing evidence<br>of public<br>indebtedness in lieu<br>of the money (1-3<br>years) <sup>95</sup> | 12-week<br>abortion ban<br>enforced<br>through<br>professional<br>discipline; <sup>96</sup><br>After 20 weeks,<br>abortion<br>punishable by<br>max. 2 years <sup>97</sup> |
| Nevada<br>(1861)                | 2-5 years<br>imprisonment                   | Death <sup>98</sup>                                                                                  | Fighting upon<br>agreement to fight (2-<br>5 years); <sup>99</sup><br>Crime against nature<br>with man or beast (5<br>years to life) <sup>100</sup>                                                                                                          | Legal until 24<br>weeks <sup>101</sup>                                                                                                                                    |
| New<br>Hampshire<br>(1849)      | Max. 1 year<br>imprisonment                 | Death <sup>102</sup>                                                                                 | Burning another's<br>stack of corn, hay,<br>grain or flax (1-3<br>years); <sup>103</sup><br>Stealing another's<br>property worth less<br>than \$20 (max. 1<br>year); <sup>104</sup><br>Injuring another's<br>tree (30 days to 1<br>year) <sup>105</sup>      | Legal until 24<br>weeks <sup>106</sup>                                                                                                                                    |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER                                                         | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                    | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS                                                                                                            |
|---------------------------------|---------------------------------------------|----------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| New Jersey<br>(1849)            | Max. 7 years<br>imprisonment                | Death <sup>107</sup>                                                                                           | Perjury (max. 7<br>years); <sup>108</sup><br>Sodomy committed<br>with mankind or<br>beast (max. 21<br>years); <sup>109</sup><br>Destroying<br>enumerated<br>commercial or legal<br>documents with<br>intent to injure person<br>(max. 10 years) <sup>110</sup> | Legal (no<br>gestational<br>limit) <sup>111</sup>                                                                                                                      |
| New York<br>(1828)              | Max. 1 year<br>imprisonment                 | New York did<br>not designate<br>degrees of<br>murder. It<br>punished murder<br>by death. <sup>112</sup>       | 4th degree forgery<br>(max. 2 years); <sup>113</sup><br>Poisoning horse,<br>cattle or sheep (max.<br>3 years) <sup>114</sup>                                                                                                                                   | Legal until 24<br>weeks <sup>115</sup>                                                                                                                                 |
| North<br>Carolina<br>(1881)     | 1-5 years<br>imprisonment                   | North Carolina<br>did not designate<br>degrees of<br>murder. It<br>punished murder<br>by death. <sup>116</sup> | Burning another's<br>stack of straw (4<br>months-5 years); <sup>117</sup><br>Defrauding another<br>of money or goods<br>(1-5 years); <sup>118</sup><br>Stealing horse or<br>mule (5-20 years) <sup>119</sup>                                                   | After 12 weeks,<br>ban enforceable<br>through<br>professional<br>discipline <sup>120</sup><br>and by up to<br>life<br>imprisonment<br>without<br>parole <sup>121</sup> |
| Ohio<br>(1834)                  | Max. 1 year<br>imprisonment                 | Death <sup>122</sup>                                                                                           | Stealing horse or<br>mule (3-15 years); <sup>123</sup><br>Gilding coin to<br>defraud (1-5 years) <sup>124</sup>                                                                                                                                                | Legal until<br>viability <sup>125</sup>                                                                                                                                |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER                                                                      | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                                                                                                                   | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS                                             |
|---------------------------------|---------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|
| Oregon<br>(1864)                | 1-15 years<br>imprisonment                  | Death <sup>126</sup>                                                                                                        | Public official<br>receiving bribe (5-15<br>years); <sup>127</sup><br>Assaulting prison<br>guard to aid escape of<br>prisoner in<br>penitentiary (5-15<br>years) <sup>128</sup>                                                                                                                                                                               | Legal (no<br>gestational<br>limit) <sup>129</sup>                                                       |
| Pennsylvania<br>(1860)          | Max. 3 years<br>imprisonment                | Death <sup>130</sup>                                                                                                        | Soliciting another to<br>commit sodomy<br>(max. 3 years); <sup>131</sup><br>Stealing fixture off<br>building (max. 3<br>years) <sup>132</sup>                                                                                                                                                                                                                 | Legal until 24<br>weeks <sup>133</sup>                                                                  |
| Rhode Island<br>(1861)          | Max. 1 year<br>imprisonment                 | Rhode Island did<br>not designate<br>degrees of<br>murder. It<br>punished murder<br>by life<br>imprisonment. <sup>134</sup> | Interrupting town<br>meeting or other<br>enumerated meetings<br>(max. 1 year); <sup>135</sup><br>Taking fruit valued<br>more than \$20 out of<br>another's orchard<br>without consent<br>(max. 1 year); <sup>136</sup><br>Inviting person to<br>visit room kept for<br>gambling with intent<br>for person to engage<br>in gambling (1<br>year) <sup>137</sup> | Legal until<br>viability <sup>138</sup>                                                                 |
| South<br>Carolina<br>(1883)     | 5-20 years<br>imprisonment                  | South Carolina<br>did not designate<br>degrees of<br>murder. It<br>punished murder<br>by death. <sup>139</sup>              | Injuring railroad in<br>manner that<br>endangers life (max.<br>20 years) <sup>140</sup>                                                                                                                                                                                                                                                                       | After fetus has<br>detectable<br>heartbeat,<br>abortion<br>punishable by<br>max. 2 years <sup>141</sup> |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER                                                                                     | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                                                                                     | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS |
|---------------------------------|---------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------|
| Tennessee<br>(1883)             | 1-5 years<br>imprisonment                   | Death <sup>142</sup>                                                                                                                       | Destroying corner<br>tree of another's land<br>(2-5 years); <sup>143</sup><br>Killing another's<br>horse or mule worth<br>\$10 or more (1-5<br>years); <sup>144</sup><br>Knowingly receiving<br>stolen goods worth<br>\$30 or less (1-5<br>years) <sup>145</sup>                                                                | 3-15 years <sup>146</sup>                                   |
| Texas<br>(1854)                 | Max. 10<br>years<br>imprisonment            | Texas did not<br>designate degrees<br>of murder. It<br>punished murder<br>by death, life<br>imprisonment, or<br>3-15 years. <sup>147</sup> | Impersonating<br>another to<br>authenticate written<br>instruments affecting<br>interest in property<br>(2-10 years); <sup>148</sup><br>Counterfeiting gold<br>or silver coin with<br>intent that it be<br>passed (5-10<br>years); <sup>149</sup><br>Custodian of public<br>money stealing it<br>(max. 10 years) <sup>150</sup> | Life or 5-99<br>years <sup>151</sup>                        |
| Vermont<br>(1846)               | 1-3 years<br>imprisonment                   | Vermont did not<br>designate degrees<br>of murder. It<br>punished murder<br>by death. <sup>152</sup>                                       | Burning stacks of hay<br>(max. 5 years); <sup>153</sup><br>Killing another's<br>horse (max. 5<br>years); <sup>154</sup><br>Injuring machinery of<br>water mill (max. 5<br>years) <sup>155</sup>                                                                                                                                 | Legal (no<br>gestational<br>limit) <sup>156</sup>           |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION                                                                          | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                                                                                        | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS          |
|---------------------------------|----------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------|
| Virginia<br>(1848)              | 1-12 months<br>imprisonment                                                                                          | Death <sup>157</sup>                                   | Performing marriage<br>ceremony without<br>license (max. 1<br>year); <sup>158</sup><br>Winning money by<br>cheating while<br>playing game or<br>betting (max. 1<br>year); <sup>159</sup><br>Maintaining in<br>speech or writing that<br>owners do not have<br>right of property in<br>their slaves (max. 1<br>year) <sup>160</sup> | Legal until<br>third trimester<br>(about 26<br>weeks) <sup>161</sup> |
| West Virginia<br>(1863)         | 1-5 years<br>imprisonment<br>(adopting<br>laws of<br>Virginia<br>when West<br>Virginia<br>became a<br>state in 1863) | Death or life<br>imprisonment <sup>162</sup>           | Burning pile of wood<br>valued at \$100 or<br>more (3-5 years); <sup>163</sup><br>Poisoning another's<br>horse or cattle (1-5<br>years); <sup>164</sup><br>Buggery committed<br>with mankind or<br>brute animal (1-5<br>years) <sup>165</sup>                                                                                      | Revocation of<br>medical<br>professional's<br>license <sup>166</sup> |

| STATE<br>(YEAR OF<br>ENACTMENT) | HISTORICAL<br>PUNISHMENT<br>FOR<br>ABORTION | HISTORICAL<br>PUNISHMENT FOR<br>FIRST-DEGREE<br>MURDER | HISTORICAL<br>PUNISHMENTS FOR<br>COMPARISON                                                                                                                                                                                                                                                                                                                                                  | CURRENT<br>PUNISHMENT<br>FOR ABORTION<br>BEFORE 22<br>WEEKS                   |
|---------------------------------|---------------------------------------------|--------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------|
| Wisconsin<br>(1858)             | 4-7 years<br>imprisonment                   | Life<br>imprisonment <sup>167</sup>                    | Bank register<br>violating law on<br>incorporation of<br>banking associations<br>(min. 5 years); <sup>168</sup><br>Counterfeiting state<br>bill of credit with<br>intent to defraud (3-7<br>years); <sup>169</sup><br>Corporate agent<br>signing, with intent to<br>issue, false certificate<br>of ownership of<br>shares of capital<br>stock of corporation<br>(1-10 years); <sup>170</sup> | After 20 weeks,<br>abortion<br>punishable by<br>max. 3.5 years <sup>171</sup> |

1. The punishments listed in this column are taken from the statutory provisions set out in Appendix A to the *Dobbs* majority opinion. *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, app. A (2022). Where more than one statutory section is quoted in *Dobbs*’s Appendix A for a particular state, this column contains the punishment that applies to abortion at all stages of pregnancy, and not specifically to post-quickening abortion. *See id.*

2. This column states current abortion law generally but does not include any ancillary restrictions or exceptions.

3. C.C. Clay, *Digest of the Laws of the State of Alabama: Containing All the Statutes of a Public and General Nature, in Force at the Close of the Session of the General Assembly, in February, 1843*, ch. III, § 1 (1843).

4. *Id.* ch. IV, § 5.

5. *Id.* § 6.

6. *Id.* § 8.

7. ALA. CODE §§ 26-23H-4, 26-23H-6(a), 13A-5-6(a)(1) (2024).

8. W.W. Mansfield, *A Digest of the Statutes of Arkansas Embracing All Laws of a*

---

*General and Permanent Character*, § 1530 (1884).

9. *Id.* § 1627.
10. *Id.* § 1628.
11. *Id.* §§ 1744-45.
12. ARK. CODE § 5-61-304(b) (2023).
13. CAL. PENAL CODE § 21 (Selucius Garfielde & Frederick Snyder eds., 1853).
14. *Id.* § 48.
15. *Id.* § 65.
16. *Id.* § 87.
17. CAL. HEALTH & SAFETY CODE § 123468(b) (West 2025).
18. General Statutes of the State of Connecticut, tit. 12, ch. 2, § 7 (1866).
19. *Id.* § 57.
20. *Id.* § 118.
21. CONN. GEN. STAT. § 19a-602(b) (2024).
22. DEL. CODE ANN. tit. 11, § 4697 (2024).
23. *Id.* § 4736.
24. *Id.* § 4752.
25. *Id.* § 4755.
26. DEL. CODE ANN. tit. 24, § 1790(a) (2024).
27. Allen H. Bush, *Digest of the Statute Law of Florida of a General and Public Character*, ch. 43, § 2 (1872).
28. *Id.* ch. 45, § 1.
29. *Id.* ch. 44, § 34.
30. *Id.* ch. 52, § 6.
31. FLA. STAT. §§ 390.0111(1), 390.0111(10)(a), 775.082(3)(e) (2024).
32. R.H. Clark, T.R.R. Cobb & D. Irwin, *Code of Georgia* (4th ed. 1882), § 4323.
33. *Id.* § 4396.
34. *Id.* § 4430.
35. *Id.* § 4471.
36. GA. CODE ANN. §§ 16-12-140(b), 16-12-141(b) (2024).
37. 1827 ILL. REVISED CODE OF LAWS, Crim. Code, div. 5, §§ 24, 127, 128.
38. *Id.* div. 6, § 60 at 134.
39. *Id.* div. 7, § 67 at 135.
40. *Id.* div. 8, § 73 at 136-37.
41. 775 ILL. COMP. STAT. 55/1-25(a) (2025).
42. REV. STAT. IND. ch. XXVI, § 2 (1838).
43. *Id.* § 6 at 207.
44. *Id.* § 9 at 208-09.
45. IND. CODE §§ 16-34-2-7(a), 35-50-2-6(b) (2024).

- 
46. IOWA CODE § 4192 (1860).
  47. *Id.* § 4228.
  48. *Id.* § 4318.
  49. *Id.* § 4322.
  50. IOWA CODE §§ 146C.2(2)(a), 146E.2(2)(a) (LexisNexis 2025); IOWA ADMIN. CODE r. 653-13.17(5) (2025).
  51. 1859 KAN. SESS. LAWS 231, 231-32.
  52. *Id.* § 74.
  53. *Id.* § 284.
  54. KAN. STAT. ANN. §§ 65-6724(a), (c)(2), 65-6723(f) (West 2024).
  55. John D. Carroll, *Kentucky Statutes: Containing All General Laws Not Included in the Codes of Practice with Full Notes of Decisions of the Court of Appeals to November 1914* (5th ed. 1915), § 1149.
  56. *Id.* § 1157a.
  57. *Id.* § 1159a.
  58. KY. REV. STAT. ANN. §§ 311.772(3), 532.060(2)(d) (2024).
  59. Ulrich B. Phillips, compiler, *Revised Statutes of Louisiana: Crimes and Offenses* § 1 (1856).
  60. *Id.* § 5.
  61. *Id.* § 38.
  62. *Id.* § 58.
  63. LA. REV. STAT. § 14:87.7(A), (C) (2025).
  64. ME. REV. STAT. ch. 154, § 2 (1841).
  65. *Id.* ch. 160, § 4.
  66. *Id.* ch. 161, § 1.
  67. ME. STAT. tit. 22, § 1598(1-B) (2025).
  68. Lewis Mayer et al., *Revised Code of the Public General Laws of the State of Maryland* art. 72, § 7 (1879).
  69. MD. CODE ANN., HEALTH-GEN. § 20-209(b)(1) (West 2025).
  70. GEN. STAT. OF MASS. ch. 160, § 4 (1859).
  71. *Id.* ch. 161, § 51.
  72. *Id.* § 78.
  73. *Id.* ch. 162, § 15.
  74. MASS. GEN. LAWS ch. 112, § 12M (2025).
  75. REV. STAT. MICH. ch. 153, § 1 (1846).
  76. *Id.* ch. 154, § 7.
  77. *Id.* § 45.
  78. *Id.* § 49.
  79. MICH. CONST. art. I, § 28(1).
  80. Arthur Harry Bissell, *Statutes at Large of the State of Minnesota*, ch. 54, § 19



---

(1873).

81. *Id.* § 77.
82. *Id.* § 104.
83. MINN. STAT. § 145.409(3) (2024).
84. MISS. CODE ANN. § 97-3-21(1) (2023).
85. *Id.* § 97-19-39(2).
86. *Id.* § 97-11-1.
87. *Id.* § 97-29-59.
88. MISS. CODE ANN. § 41-41-45(2), (4) (2024).
89. Mo. Rev. Stat. § 3 (1825).
90. *Id.* at § 20.
91. *Id.* at § 28.
92. Comprehensive Health of Planned Parenthood Great Plains v. State, No. 2416-CV31931, at \*7-20 (16th Cir. Ct., Jackson Cty. July 3, 2025) (Mo. Case Search) (enjoining various state abortion restrictions as unconstitutional after voters approved 2024 amendment to Missouri Constitution to protect reproductive freedom), *aff'd* 726 S.W.3d 716 (Mo. Ct. App., 2025).
93. E. Estabrook, *Revised Statutes of the Territory of Nebraska in Force July 1, 1866* (1866), Criminal Code § 20.
94. *Id.* § 64.
95. *Id.* § 83.
96. NEB. REV. STAT. §§ 71-6915(2)(b), 38-178(27), 38-193 (2023).
97. *Id.* §§ 28-3,106, 28-3,108, 28-105(1).
98. M.S. Bonnifield & T.W. Healy, *Compiled Laws of the State of Nevada: Embracing Statutes of 1861 to 1873, Inclusive* (1873), § 2323.
99. *Id.* § 2345.
100. *Id.* § 2351.
101. NEV. REV. STAT. § 442.250(1)(b) (2025).
102. *Compiled Statutes of the State of New Hampshire: To Which Are Prefixed the Constitutions of the United States and of the State of New Hampshire* (2d ed. 1854), ch. 227, § 3.
103. *Id.* ch. 229, § 5.
104. *Id.* § 15.
105. *Id.* § 19.
106. N.H. REV. STAT. § 329:44(II) (2024).
107. Lucius Q.C. Elmer, *A Digest of the Laws of New Jersey* (2d ed. 1855), ch. 162 § 5.
108. *Id.* § 23.
109. *Id.* § 9.
110. *Id.* § 69.
111. See N.J. REV. STAT. § 10:7-2(a) (2024).

- 
112. 1829 N.Y. REVISED STATUTES, pt. IV, ch. 1, tit. 1, §§ 1 at 656.
  113. *Id.* tit. III, § 42 at 675.
  114. *Id.* tit. V, § 16 at 689.
  115. N.Y. PUB. HEALTH LAW § 2599-BB (LexisNexis 2025).
  116. William T. Dortch, John Manning & John S. Henderson, *Code of North Carolina*, Enacted March 2, 1883 (1883), § 1057.
  117. *Id.* § 985(5).
  118. *Id.* § 1026.
  119. *Id.* § 1066.
  120. N.C. GEN. STAT. §§ 90-21.81B(2), 90-21.88A (2024).
  121. *Id.* §§ 14-23.2(a)(1), (b)(1), 14-44, 14-45.
  122. 1840 Ohio Statutes, ch. 35, First Class, § 1 at 229.
  123. *Id.* § 27 at 235.
  124. *Id.* § 30 at 236-37.
  125. OHIO CONST. art. I, § 22(B)(2).
  126. *Organic and Other General Laws of Oregon: Together with the National Constitution and Other Public Acts and Statutes of the United States, 1845-1864* (1866), Code of Criminal Procedure § 512.
  127. *Id.* § 602.
  128. *Id.* § 663.
  129. OR. REV. STAT. §§ 435.210, 435.240(1) (2023).
  130. John Purdon, *Digest of the Laws of Pennsylvania, from the Year One Thousand Seven Hundred to the Twenty-First Day of May, One Thousand Eight Hundred and Sixty-One* (1862), crimes, § 83.
  131. *Id.* § 35.
  132. *Id.* § 114.
  133. 18 PA. CONS. STAT. § 3211(a) (2025).
  134. *General Statutes of the State of Rhode Island and Providence Plantations: To Which Are Prefixed the Constitutions of the United States and of the State* (1872), ch. 228, § 1. However, Rhode Island punished murder committed by a person serving a life sentence by death. *Id.* § 2.
  135. *Id.* ch. 229, § 7.
  136. *Id.* ch. 230, § 21.
  137. *Id.* ch. 234, § 7.
  138. 23 R.I. GEN. LAWS § 4.13-2(d) (2025).
  139. *Revised Statutes of South Carolina* (1894), Criminal Law § 109.
  140. *Id.* § 180.
  141. S.C. CODE ANN. § 44-41-630(B) (2023).
  142. *Code of Tennessee: Being a Compilation of the Statute Laws of the State of Tennessee of a General Nature, in Force June 1, 1884*, § 5352 (1884).
  143. *Id.* § 5406.

- 
144. *Id.* § 5411.
  145. *Id.* § 5450.
  146. TENN. CODE ANN. §§ 39-15-213(b), 40-35-111(b)(3) (2024).
  147. TEX. PENAL CODE art. 612a (1857).
  148. *Id.* art. 450.
  149. *Id.* art. 454.
  150. *Id.* art. 235.
  151. TEX. HEALTH & SAFETY CODE §§ 170A.002, 170A.004(b) (2025); TEX. PENAL CODE § 12.32(a) (2025).
  152. Charles L. Williams, *Compiled Statutes of the State of Vermont. Being Such of the Revised Statutes, and of the Public Acts and Laws Passed Since, as Are Now in Force*, ch. 103, § 1 (1851).
  153. *Id.* ch. 104, § 3.
  154. *Id.* § 21.
  155. *Id.* § 22.
  156. 18 V.S.A. §§ 9493(b), 9497 (2024).
  157. VA. CODE ch. 191, § 2 (1849).
  158. *Id.* ch. 196, § 5.
  159. *Id.* ch. 198, § 9.
  160. *Id.* § 22.
  161. VA. CODE § 18.2-73 (2025).
  162. James H. Ferguson, *Code of West Virginia, Comprising Legislation to the Year 1870* (1870), ch. 144, § 2; *id.* ch. 159, § 19.
  163. *Id.* ch. 145, § 5.
  164. *Id.* ch. 146, § 25.
  165. James H. Ferguson, *Code of West Virginia, Comprising Legislation to the Year 1870* (1870), ch. 144, § 2; *id.* ch. 149, § 12.
  166. W. VA. CODE §§ 16-2R-3, 16-2R-7 (2025).
  167. 1858 WIS. SESS. LAWS 927, 928.
  168. *Id.* ch. 165, § 26.
  169. *Id.* ch. 166, § 3.
  170. *Id.* ch. 169, § 28.
  171. WIS. STAT. ANN. §§ 253.107(3)(a), 253.107(4), 939.50(3)(i) (West 2025).