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R.E.S.P.E.C.T.: The Court's Forgotten Virtue

CAMILLE POLLUTRO*

ABSTRACT

This Article recommends a shift in constitutional interpretation that requires the existence of respect for the class at issue when a fundamental right is being considered under the narrow, historical deeply rooted test of the Fourteenth Amendment. By focusing on *Dobbs v. Jackson Women's Health Organization*, this Article highlights that the class at issue—women—are having their fundamental rights decided for them by the legal sources of 1868. In applying this strict and narrow historical deeply rooted test, the Court fails to consider the lack of respect and autonomy that women had in 1868. To the Court, if twenty-eight out of thirty-seven states criminalized abortion in 1868, then their decision is clear today. This simple arithmetic as the means to determine the character of our constitutionally protected, fundamental rights is exactly what Justice Harlan warned us of in his dissent of *Poe v. Ullman*. In *Poe*, Justice Harlan explained how history and tradition is a "living thing," not a "formula." Inspired by Justice Harlan's dissent, this Article aims to course correct the formulaic process the Court has adopted. By implementing this Article's respect-conscious deeply rooted test, history can be considered as a means of interpretation without thwarting this Nation's growth.

* J.D., Cleveland State University College of Law. This Article's inception came from a conversation I had with my cousin and her wife at my wedding on June 25, 2022—only one day after the *Dobbs* decision. They reminded me of the opportunity and the duty I would have, as an attorney, to fight for equal rights and respect, for *every* person. I am grateful to *Cleveland State Law Review* for selecting, editing, and formatting this Article to take a step toward that fight for respect. I would also like to thank Professor Reginald Oh for all his guidance on this Article and for his mentorship. Finally, I would like to thank my parents and my sister for their constant support and love, my cousins—Danielle and Martha—for inspiring this Article, my friend—Kevin Curran—for his many proofreads of this Article, and my husband—Alex—for always being there to not only push me forward, but also remind me to take breaks and enjoy life.

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I. INTRODUCTION

Women across the United States woke up on June 24, 2022, with less than they had the day before: less opportunity, less choice, less protection. Because on June 24, 2022, the Supreme Court of the United States revoked a woman's fundamental and

constitutionally protected right to get an abortion.[1] In one day, it felt like respect for women and respect for the Court no longer existed. But after reading the *Dobbs v. Jackson Women's Health Organization*'s decision,[2] it was clear that respect for women's autonomy was gone long before June 24.

Under the fundamental rights test of the Fourteenth Amendment's substantive due process clause, a right is only fundamental if it is "'deeply rooted in this Nation's history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[3] With only a short paragraph dedicated to the ordered liberty test, the Court in *Dobbs* decided that a narrow deeply rooted test was sufficient.[4]

Using a narrow interpretation of the deeply rooted test, the Court in *Dobbs* overruled *Roe v. Wade*[5] and *Planned Parenthood v. Casey*,[6] relying almost entirely on legal sources from 1868.[7] Of these legal sources, the Court relied most heavily on the state laws criminalizing abortion in 1868.[8] Twenty-eight out of the thirty-seven states criminalized abortion in that year.[9] And for the Court, this statistic proved that the Fourteenth Amendment was never intended to protect a woman's right to choose.[10] Without questioning the status of or respect for women in 1868, the decision was made.

The Court's complete reliance on legal sources from 1868, without questioning the lack of respect that existed toward a woman's autonomy in social and legal doctrine, is dangerous.[11] As Justice John Marshall Harlan explained in his dissent of *Poe v. Ullman*,[12] it is the Court's constitutional duty to determine the character of constitutional provisions.[13] And, as he set forth, the balance of respect for the individual within the history and traditions of our Nation is the means to that end.[14]

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[2] *See id.*

[3] *Id.* at 2246 (quoting Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)).

[4] *Id.* at 2257.

[5] Roe v. Wade, 410 U.S. 113 (1973).

[6] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[7] *Dobbs*, 142 S. Ct. at 2242, 2252–54.

[8] *Id.* at 2252–53.

[9] *Id.*

[10] *Id.* at 2253–54.

[11] *Id.* at 2324–25 (Breyer. J., dissenting).

[12] Poe v. Ullman, 367 U.S. 497 (1961).

[13] *Id.* at 542.

[14] *Id.*

This Article recognizes the danger of conducting the deeply rooted test where respect for the individual is not considered and proposes an alternative test with *respect as a core value*.[15] When conducting the deeply rooted test relying solely on historical analysis, the Court must consider whether the party's individual autonomy was respected during the timeframe adopted by the Court for a narrow historical analysis.[16] By requiring an analysis with respect as a core value, the Court's deeply rooted test ensures the party at issue was given a fair process when determining the character of the constitutional provision.[17] But, if respect is absent, then we are unable to trust the Court's decisions for the party's rights.[18] Finally, where respect is absent, it is then the responsibility of the Court to conduct a fair and thorough analysis considering sources beyond legal doctrines of a narrow timeframe.[19] As opposed to the narrow deeply rooted test, applying this respectful deeply rooted test allows the parties to the dispute to leave knowing a fair process was carried out.[20]

To better understand this Article's proposed changes to the deeply rooted test, Parts II-V below provide the background,[21] context,[22] and application.[23] Part II begins by briefly discussing substantive due process within the Fourteenth Amendment.[24] Then Part II explains the deeply rooted test, along with this test's historical analysis and social importance analysis.[25] Part III then considers *Poe v. Ullman*, specifically focusing on Justice Harlan's dissent on constitutionality.[26] It is in Justice Harlan's dissent that the "respect requirement" in the deeply rooted test is first highlighted.[27] Part III then concludes by explaining the process the Court must adopt when conducting a respectful deeply rooted test.[28] Part IV follows with a critique of *Dobbs*, emphasizing the heightened value the Court placed on legal sources from 1868—while

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[15] *See infra* Section III.B.

[16] *See infra* Section III.B.

[17] *See infra* Section III.B.

[18] *See infra* Section III.B.

[19] *See infra* Section III.B.

[20] *See infra* Section III.B.

[21] *See infra* Part II.

[22] *See infra* Part IV.

[23] *See infra* Part IV.

[24] *See infra* Part II.

[25] *See infra* Part II.

[26] *See infra* Part III.

[27] *See infra* Part III.

[28] *See infra* Part III.

largely ignoring the ordered liberty test.[29] Finally, Part V concludes by applying the respectful deeply rooted test to *Dobbs*.[30]

II. THE CURRENT DEEPLY ROOTED TEST

A. The Fourteenth Amendment and Substantive Due Process

The Fourteenth Amendment is the home to one of the most controversial constitutional provisions: substantive due process.[31] Substantive due process is found in the Due Process Clause of the Fourteenth Amendment, which reads, "[n]o States shall . . . deprive any person of life, liberty, or property, without due process of the law."[32] In other words, substantive due process considers whether the "government's deprivation of a person's life, liberty, or property is justified by a sufficient purpose."[33] As for its controversy, substantive due process has great political import, as a state legislature's substantive jurisdiction can be restricted by its application.[34] Additionally, the rights protected by substantive due process are those most personal to an individual's autonomy,[35] resulting in heightened pressure as to the interpretation of the constitutional provision.[36]

The Supreme Court's application of substantive due process has varied, but the framework commonly consists of four key questions.[37] This includes: (1) what is the right at stake;[38] (2) is the right at stake fundamental;[39] (3) has the right been infringed

29 *See infra* Part IV.

30 *See infra* Part V.

31 Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999) (discussing the controversies associated with substantive due process).

32 U.S. CONST. amend. XIV, § 1.

33 Chemerinsky, *supra* note 31, at 1501.

34 THE. U.S. GOV'T PUBL'G OFF., FOURTEENTH AMENDMENT 1678 (2002), https://www.govinfo.gov/content/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-9-15.

35 Chemerinsky, *supra* note 31, at 1502.

36 Hon. Timothy M. Tymkovich et al., *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961, 1962 (2020).

37 Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 867 (1994).

38 *Id.*

39 *Id.*

or deprived;[40] and (4) is there a sufficient substantive justification for the infringement or deprivation.[41]

The second question of the substantive due process framework, whether the right at stake is fundamental, is where the Court has the most difficult analysis—specifically as it relates to unenumerated rights.[42] Within substantive due process' fundamental rights test, a right is held "fundamental" and worthy of heightened protection if it is "'deeply rooted in [our] history and tradition' and . . . essential to our Nation's 'scheme of ordered liberty.'"[43] Despite the fundamental rights test requiring that the Court apply the deeply rooted and ordered liberty tests, the recent Court has relied almost entirely on the deeply rooted test.[44]

B. The Deeply Rooted Test

When determining whether a right is fundamental under the Fourteenth Amendment, the deeply rooted test is popular[45] for its allegedly objective protection against broad, socially-driven judicial discretion. Under the deeply rooted test, the Court protects an unenumerated right as fundamental only if they are "objectively, deeply rooted in this Nation's history and tradition."[46] The Court asserted that this test provides "crucial guideposts for responsible decision-making" by the Justices and avoids transforming the liberty protected by the Due Process Clause from becoming "policy preferences of the . . . Court."[47]

When applying the deeply rooted test, the Court has conducted either a historical analysis[48] or a social importance analysis.[49]

The historical analysis uses legal sources to determine the fundamental nature of a disputed right. Legal sources, like statutes, case law, and legal treatises serve as the sole research outlet.[50] With these legal sources, the Court asks whether this disputed

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[40] *Id.*

[41] *Id.*

[42] *See* Michael W. McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. ILL. L. REV. 1985, 1985 (2013).

[43] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) (citing Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)).

[44] *See infra* Section II.B.

[45] John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY, 172, 178 (2009).

[46] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[47] *Id.* at 720.

[48] *See* Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

[49] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

[50] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 100 (6th ed. 2021).

right has been legally protected, or considered for protection, throughout American history.[51]

The use of legal sources within the historical analysis must be considered against a particular timeframe. For some, the timeframe is narrow and often tied to the provision's date of origin.[52] Within substantive due process issues, the timeframe is limited only to legal sources in 1868—when the Fourteenth Amendment was ratified.[53] By looking to 1868, it is thought that the legal sources will provide an understanding of whether the drafters of the Fourteenth Amendment would have intended the inclusion of the disputed right.[54] For others, the timeframe is broad, looking to the modern trends of legal sources throughout history.[55] Modern trends allow the Court to recognize the Nation's *entire* history to determine a right's fundamental nature, as opposed to considering just one year.[56]

The social importance test allows a disputed right to be found fundamental based on our Nation's social and cultural history. The Nation's social and cultural history considers how *important* the right at stake is to Americans,[57] as opposed to its outright existence in legal writing.[58]

Moore v. City of East Cleveland, Ohio[59] provides a clear example of the social importance test's application. In *Moore*, a grandmother living with her grandsons—from two of the grandmother's children—was found in violation of a zoning ordinance restricting dwellings to a single family.[60] This ordinance was held to be a violation of the Fourteenth Amendment's substantive due process protections.[61] In this holding, *Moore* focused on how American traditions valued the importance of living together as a family.[62] The Court recognized that extended families traditionally join together for mutual sustenance and support, including financial, physical, and emotional

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[51] *Id.* (highlighting Justice Scalia's focus on legal traditions of the past).

[52] *Id.*

[53] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2254 (2022).

[54] *Id.*

[55] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 505 (1977).

[56] *See* Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

[57] CHEMERINSKY, *supra* note 50.

[58] *See Michael H.*, 491 U.S. at 127.

[59] 431 U.S. at 505.

[60] *Id.* at 496.

[61] *Id.* at 506.

[62] *Id.* at 504–05.

support.[63] The social importance test, as demonstrated in *Moore*,[64] allows traditions not found in legal sources to meet the qualifications for constitutional protection.

Despite its prominence in the substantive due process fundamental rights test, the deeply rooted test does not come without criticism. Critics fear that the deeply rooted test, on its own, will impede social progress and prevent the Court from considering a "Living Constitution."[65] Legal sources rooted in tradition of the past fail to recognize members of society who have since gained legal existence and respect, like minorities, same-sex couples, and women.[66]

III. Adopting Justice Harlan's Dissent in *Poe v. Ullman*: The Recognition of Respect in the Deeply Rooted Test

Before the seminal case of *Griswold v. Connecticut*[67] gave the Nation the fundamental right to marital privacy against state restrictions on contraceptives, *Poe v. Ullman*[68] attempted the same feat. Like *Griswold*, *Poe* challenged the constitutionality of Connecticut's antibirth-control laws, which criminalized the use of any contraceptive drug or device by any person.[69] Despite its attempt to question the law's constitutionality, *Poe* dismissed the challenge from appellants based on a lack of standing because the appellants had not actually been prosecuted under the Connecticut law.[70] More specifically, the Court explained that "federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action."[71] In requiring both an invalid state law and direct injury on the plaintiff, the appellants representing Poe lacked the latter, and thus the case was dismissed.[72]

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63 *Id.* at 505.

64 *Id.*

65 *See* Toro, *supra* note 45, at 178 (discussing how the deeply rooted test "impede[s] moral progress" with its emphasis on tradition, which runs counter to the concept of a "Living Constitution," which evolves along with moral progress).

66 *Id.* at 185–86.

67 Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

68 Poe v. Ulman, 367 U.S. 497, 497 (1961).

69 *Id.* at 498.

70 *Id.* at 504.

71 *Id.*

72 *Id.* at 505.

A. *Justice Harlan's Dissent*

Justice Harlan's two-part dissent vehemently disagreed with the Court's justiciability holding and passionately provided recommendations on the constitutionality of Connecticut's statute.[73] In line with the focus of this Article, let's consider Justice Harlan's discussion of the statute's constitutionality in part two of his dissent.[74]

Justice Harlan provided the Court with a thorough, alternative holding in favor of *Poe*. Echoing *Griswold*[75] (or, really, the other way around), Justice Harlan's recommended holding as to constitutionality reads as follows: "I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[76] Justice Harlan roots this recommended holding in the Fourteenth Amendment.[77] But directly following that, he notes the failure by the Court to recognize the Fourteenth Amendment's scope beyond procedural due process.[78] More specifically, "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."[79] Instead, Justice Harlan insists the Fourteenth Amendment was destined to protect rights defined under "liberty," which represent an individual's most intimate decisions.[80] Justice Harlan argued that in failing to recognize the scope of "liberty" under the Fourteenth Amendment, the Court is also failing its constitutional duty to perceive the *character* of the constitutional provision.[81]

Justice Harlan's attempt to clarify the purpose of the Court's constitutional duty has set the stage for this Article's thesis. As the Court's constitutional duty applies to the due process clause and its reliance on history, Justice Harlan said:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the

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[73] *Id.* at 523–24.

[74] *Id.* at 539.

[75] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[76] *Poe*, 367 U.S. at 539 (Harlan J., dissenting).

[77] *Id.*

[78] *Id.* at 541–42.

[79] *Id.* at 543.

[80] *Id.* at 539.

[81] *Id.* at 542.

> supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[82]

As Justice Harlan explained, the Court's reliance on history in determining this Nation's fundamental rights must be balanced with the fourth factor of the Court's framework for substantive due process analysis: whether respect for the individual was present in that history.[83] As he wrote, the Court must "hav[e] regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."[84] In other words, there is history this Nation has chosen to keep, and there is history this Nation has chosen to break away from. At the center of those choices is whether respect for the individual rang true.

In balancing history, it is the Court's "constitutional duty" to admonish history that failed to respect people as autonomous human beings who were worthy of liberty.[85] And, as we know, that balance is not always so easy, nor as formulaic as Justice Harlan said.[86] After all, our Nation has not always respected individuals' liberties.[87] For African Americans,[88] women,[89] members of the LGBTQ+ community,[90] and plenty of other groups wrought with discrimination-filled pasts, history highlights the pain

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[82] *Id.* (emphasis added).

[83] *Id.* at 541.

[84] *Id.* at 542.

[85] *See id.* at 548.

[86] *See id.* at 542.

[87] *See Discrimination in America*, HARV. PUB. HEALTH, https://www.hsph.harvard.edu/magazine/magazine_article/discrimination-in-america/ (last visited Nov. 2, 2023) (providing statistics of group-based discrimination in America).

[88] *See, e.g.*, KHALIL G. MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010), *reprinted in* RACISM IN AMERICA 56, 56 (2020); AUGUSTUS A. WHITE III, M.D., SEEING PATIENTS: UNCONSCIOUS BIAS IN HEALTH CARE (2011), *reprinted in* RACISM IN AMERICA 70, 70 (2020).

[89] *See, e.g.*, Gillian K. Steelfisher et al., *Gender Discrimination in the United States: Experience of Women*, 54 HEALTH SERVS. RSCH. (2019).

[90] *See, e.g.*, Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Texas*, WILLIAMS INST. (Apr. 2017), https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-discrimination-tx/.

this Nation has caused. And Justice Harlan recognized this bleak reality of our past, especially as it related to the utilization of, and protections within, the Fourteenth Amendment.[91] Today, the Court has forgotten Justice Harlan's reminder that at the core of its constitutional duty is respect.

B. An Analysis with Respect as a Core Value

Relying on Justice Harlan's dissent and recognizing concerns for future decisions, this Article proposes a new approach to the deeply rooted test where respect is at the forefront.

When conducting the narrow, historical deeply rooted test, the Court must consider whether the party's individual autonomy was respected during the timeframe adopted. For example, was a woman's individual autonomy respected in 1868 by authors of legal treatises, state legislatures, and court decisions?[92]

By requiring an analysis with respect as a core value, the Court's deeply rooted test ensures the party at issue was given a fair process when determining the character of the constitutional provision. If the Court can affirmatively guarantee that the history on which it relies showed respect for the party's individual dignity and autonomy, then it can be trusted and relied on. So, if the Court relies on history where a woman's body, voice, and mind were respected, then their decision is sound in fairness.

But, if respect is absent, then we are unable to trust the Court's decision regarding the rights of the party at issue. By making a decision for women today while relying on history where women were without intellectual or bodily autonomy,[93] the Court has not fulfilled an honest review of the character of that constitutional provision. Instead, they have perpetuated history which this Nation has arguably broken away from.[94] And where respect is absent, it is then the responsibility of the Court to conduct a fair and thorough analysis considering sources beyond legal doctrines of a narrow timeframe.

With respect at the forefront of the deeply rooted test, the "losing party" before the Court can leave knowing that their fight for constitutional protection was fairly considered. They can at least know that the narrow-minded traditions of this Nation's past do not continue to haunt their autonomy today. But where respect is absent, the Court's values are forgotten, and the Nation's trust is broken.

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[91] *Poe*, 367 U.S. at 542.

[92] *Timeline of Legal History of Women in the United States,* NAT'L WOMEN'S HIST. ALL., https://nationalwomenshistoryalliance.org/resources/womens-rights-movement/detailed-timeline/ (last visited Nov. 2, 2023).

[93] *Id.*

[94] *See Poe*, 367 U.S. at 542.

IV. A CRITIQUE OF *DOBBS V. JACKSON*'S FUNDAMENTAL RIGHTS TEST: DEEPLY ROOTED WITH A DASH OF ORDERED LIBERTY

On June 24, 2022, the Court revoked a woman's fundamental and constitutionally protected right to obtain an abortion by overruling *Roe v. Wade*[95] and *Planned Parenthood v. Casey*.[96] In deciding this issue, the Court asked itself whether the right to abortion was "'deeply rooted in [this Nation's] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[97] Despite explicitly recognizing these two inquiries, the Court focused almost exclusively on an "analysis of the history of the right at hand."[98]

A. *The* Dobbs *Ordered Liberty "Analysis"*

The entirety of the *Dobbs*' ordered liberty test is summed up in one paragraph consisting of 114 words.[99] Within the ordered liberty test, the Court must determine whether the right at stake is central to one's individual dignity and autonomy.[100] This paragraph, despite being the ordered liberty test, still focused heavily on history and state regulatory authority.[101] The paragraph reads as follows:

> Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.[102]

Instead of focusing on the ordered liberty of the primary class affected by the revocation of the right at stake (i.e., women), the Court only showed concern for the

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95 Roe v. Wade, 410 U.S. 113, 166 (1971).

96 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

97 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022) (citing Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)).

98 *Id.*

99 *Id.* at 2257.

100 Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 222–24 (2007).

101 *Dobbs*, 142 S. Ct. at 2257.

102 *Id.*

state's elected representatives.[103] This is unsurprising, as the Court's entire opinion nearly ignored the implications it will have on women.[104] In the seventy-eight pages of the majority's opinion (not including the appendix), "woman" or "women," when not referenced as source materials, generated only *ten* independent hits.[105] Only *ten* times did the Court even refer to the class at issue.[106] And its consideration of the respect (or lack thereof) for women in 1868 did not fare any better.[107]

B. The Dobbs *Deeply Rooted Analysis*

In contrast to ordered liberty, the Court provided a multi-page analysis considering one's right to abortion in 1868 under the deeply rooted test. With its focus on 1868, the Court applied the narrow historical analysis, as opposed to the broader modern trends approach.[108] In fact, *Dobbs* appears to discourage recognizing the growth of modern trends when the Court negatively pointed out that "[u]ntil a few years before *Roe* was handed down, no federal or state court had recognized such a right [to abortion]."[109] The negative phrasing and connotation concerning the recency of the right's acceptance emphasize the narrow timeframe.

Within this timeframe, the Court considered legal sources including common law authority, legal treatises, and most importantly, state laws in 1868.[110] As to the common law doctrine, the Court determined that abortion was a crime at least after "quickening."[111] It should be noted that one of the sources to support this is "Gentleman's Magazine," despite the fact that the decision should primarily focus on sources coming from a woman's perspective.[112]

The Court then used legal treatises to highlight the lack of certainty that comes with relying on the quickening of the fetus.[113] After considering common law doctrine

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[103] *Id.* at 2305.

[104] *Id.* at 2239.

[105] *Id*. at 2228–85.

[106] *Id.*

[107] *See supra* Part III.B.

[108] *Dobbs*, 142 S. Ct. at 2248 (emphasizing the importance of guiding the analysis using history and tradition surrounding the Fourteenth Amendment's meaning of "liberty").

[109] *Id.* at 2235.

[110] *Id*. at 2258.

[111] *Id.* at 2249 (defining quickening as "the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy").

[112] *Id.* at 2250 (referring to a woman in 1732 who was convicted of "destroying the Fetus in the Womb" of another woman and "thereby causing her to miscarry").

[113] *Id.* at 2254.

and legal treatises, the Court saved its best for last: state laws in 1868.[114] Proudly, the Court counted the number of states that criminalized abortion[115]—twenty-eight out of thirty-seven states to be exact.[116] It was so important to the Court that the majority included a twenty-nine page appendix detailing each state law.[117] Outside of the unenumerated nature of the right to abortion, the headcount of state laws in 1868 and into the early-twentieth century served as the primary basis for overruling *Roe* and *Casey*.[118] The entire stake of a women's choice fell to the question: What did the state laws in 1868 say?

This counting of state laws to determine the constitutional protections afforded by the Fourteenth Amendment is exactly the type of formulaic judgment that Justice Harlan warned us of.[119] To reduce such a decision to mere counting is a failure on behalf of this Court to fulfill its constitutional duty; a duty that requires the balancing of history *with respect* for the liberty of the individual.[120] If deciding our constitutional protections could be reduced to such simple judgment methods, the Court would not require much expertise, and the Nation's constitutional doctrines would sit idle to state laws of yesterday. Nonetheless, it is important for the Court to refer to state laws for guidance—but it is the complete reliance on state laws that is dangerous. Especially in *Dobbs*, when the state laws of 1868 failed to respect women as autonomous beings.[121]

V. APPLYING THE RESPECTFUL DEEPLY ROOTED ANALYSIS TO *DOBBS V. JACKSON*

Dobbs' reliance on the history and legal sources of 1868, without questioning those sources' respect for women, is dangerous. As the proposed test sets forth above, the Court's deeply rooted analysis must consider whether the party's individual autonomy was respected during the timeframe adopted. Because *Dobbs* failed to satisfy this requirement, Subpart V.A below will consider various state laws, Court decisions, and social movements leading up to and after 1868 to determine whether women's autonomy was respected in this timeline.

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114 *Id.* ("[B]y 1868[,] the vast majority of States criminalized abortion at all stages of pregnancy.").

115 *Id.* at 2253.

116 *Id.*

117 *Id.* at 2285.

118 *Id.* at 2256.

119 Poe v. Ullman, 367 U.S. 497, 542 (1961).

120 *Id.*

121 *The Constitutional Right to Reproductive Autonomy: Realizing The Promise of The 14th Amendment*, CTR. FOR REPROD. RTS., 4–5 (July 26, 2022), https://reproductiverights.org/wp-content/uploads/2022/07/Final-14th-Amendment-Report-7.26.22.pdf.

A. Considering a Woman's "Place" in the Nineteenth and Twentieth Centuries

Women in the United States are still fighting for intellectual and bodily autonomy. With the recent *Dobbs* decision,[122] the fight for equal payment to male counterparts,[123] and the patriarchal traditions that still infiltrate many households,[124] women are still working to make new waves.

But the existence of autonomy and respect for women in the nineteenth and into much of the twentieth century was nearly nonexistent. Coverture, a term covering a married woman's legal independence under that of her husband's,[125] is a doctrine that this Article argues represented a woman's entire self throughout this era.

1. Coverture: A Doctrine Governing a Woman's Entire Legal and Social Status

a. Discriminatory Laws Against Women's Autonomy

i. A Woman's Lack of Bodily Autonomy

The lack of respect for women's dignity and autonomy is largely associated with the doctrine of coverture. William Blackstone, a source utilized in the *Dobbs* majority on numerous occasions, even recognized that "a woman had no individual dignity or autonomy."[126] This statement was largely tied to a legal doctrine, known as coverture.[127] Blackstone described coverture as follows:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a feme-covert. . . .[128]

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[122] *Dobbs*, 142 S. Ct. at 2284–85.

[123] *Equal Pay/Compensation Discrimination,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/equal-paycompensation-discrimination (last visited Nov. 2, 2023).

[124] *See* Zoe Marks & Erica Chenweth, *The Patriarchs' War on Women*, MS. (May 15, 2023), https://msmagazine.com/2022/04/29/patriarchy-war-on-women-lgbtq-reproductive-rights/.

[125] Sir William Blackstone, *Commentaries on the Laws of England, vol. 1 The Rights of Persons (1765) and vol. 2, The Rights of Things (1766)*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/sir-william-blackstone-commentaries-on-the-laws-of-england-vol-1-the-rights-of-persons-1765-and-vol-2-the-rights-of-things-1766 (last visited Nov. 2, 2023).

[126] Erika Hanson, *Lighting the Way Towards Liberty: The Right to Abortion After Obergefell and Whole Woman's Health*, 45 HASTINGS CONST. L.Q. 93, 102 (2017).

[127] Allison A. Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS, 99 (2016).

[128] *Id.* at 101.

More recently, Justice Kennedy reiterated by describing coverture as a legal doctrine where "a married man and woman were treated by the State as a single, male-dominated legal entity."[129] As a single, male-dominated legal entity, this meant that married women could not personally own property, enter into a contract, nor sue or be sued.[130]

Outside coverture's impact on women's economic and legal independence, coverture also denied women legal ownership of their physical bodies. Under coverture, a wife's consent to sexual activity was implied, giving her husband "an absolute right to sexual access."[131] And while a man could not beat his wife to death, he could still beat her.[132]

Coverture governed women throughout much of the nineteenth century, but slowly the enacting of Married Women's Property Acts provided a starting point for the demise of coverture.[133] In 1848, New York's passage of the first Married Women's Property Act was a model for the states that subsequently passed similar legislation.[134] Despite this early attempt for women's bodily autonomy, it was not until 1900 that every state passed legislation granting married women *some* control over their property and earnings.[135] In the same vein as the *Dobbs* majority, only sixteen states enacted Married Women's Property Acts and recognized a married woman's bodily autonomy in 1868.[136]

Even after the use and acceptance of coverture eroded around 1900, married women still lacked bodily autonomy in the face of discriminatory laws known as the "marital rape exemption." Like coverture, the marital rape exemption held that the marital contract resulted in a woman's implied consent to sexual relations under the notion that wives are the property of their husbands.[137] Until 1976, *every state* had a marital exemption allowing husbands to rape their wives without legal

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129 *Id.*

130 *Id.* at 109.

131 Catherine Allgor, *Coverture: The Word You Probably Don't Know But Should*, NAT'L WOMEN'S HIST. MUSEUM (Sept. 4, 2012), https://www.womenshistory.org/articles/coverture-word-you-probably-dont-know-should.

132 *Id.*

133 Shana Loudermelk, *Married Women's Property Act, 1870 and 1882*, TOWARDS EMANCIPATION, https://hist259.web.unc.edu/marriedwomenspropertyact/ (last visited Nov. 2, 2023).

134 Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE L.J. & FEM. 165, 214 (2014).

135 *Timeline of Legal History of Women in the United States*, *supra* note 93.

136 R. Richard Geddes & Sharon Tennyson, *Passage of the Married Women's Property Acts and Earning Acts in the United States*: *1850-1920*, 29 RSCH. ECON. HIST. 145, 153 (2013).

137 Anne Dailey, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1556 (1986).

consequences.[138] While this statistic goes far beyond the scope of women's legal autonomy surrounding 1868, the existence of such degrading laws into the late twentieth century speaks loudly for what views were like in the late-nineteenth century.

b. A Woman's Lack of Intellectual Autonomy

Respect for women's intellect was not only nonexistent, but it was largely prohibited by state regulatory authority and Supreme Court decisions.

Most notably, a woman's right to vote was not constitutionally protected until 1920,[139] but the fight for equal voting rights began much earlier. The famous inception of the women's rights movement at Seneca Falls in 1847 was the first meeting of the minds to make women's suffrage possible.[140] Despite this early start, women's suffrage was not heard by Congress nor the Court until much later. For example, the ratification of the Fourteenth Amendment in 1868 was discouraging to women, as the right to vote was not to be "denied to any of the male inhabitants of such State."[141] Shortly thereafter, the Court in *Minor v. Happersett*[142] in 1875 declared that, historically, women constituted a very special category of citizens whose inability to vote did not infringe on their rights as citizens.[143]

The cultural attitudes toward female voters further thwarted the suffrage movement's momentum near equal rights and respect. In 1851, *The Ladies Wreath* magazine exemplified those attitudes.[144] *The Ladies Wreath* offered a fifty-dollar prize to the woman who submitted the most convincing essay answering the following question: "How May An American Woman Best Show Her Patriotism?"[145] The winner, Ms. Elizabeth Wetherell, ironically asked her husband to answer the

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[138] Jennifer J. McMahon, Marital Rape Laws, 1976-2002: From Exemptions to Prohibitions, 8–9 (2005) (M.A. Thesis, University of Georgia) (on file with the University of Georgia Libraries), https://getd.libs.uga.edu/pdfs/mcmahon_jennifer_j_200505_ma.pdf.

[139] U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *see also 19th Amendment to the U.S. Constitution: Women's Right to Vote (1920)*, NAT'L. ARCHIVES, https://www.archives.gov/milestone-documents/19th-amendment (Feb. 8, 2022) (providing background on the fight for equal rights leading up to 1920).

[140] *Women's Suffrage Timeline*, AM. BAR ASS'N., https://www.americanbar.org/groups/public_education/programs/19th-amendment-centennial/toolkit/suffrage-timeline/ (last visited Nov. 2, 2023).

[141] U.S. CONST. amend. XIV, § 2.

[142] Minor v. Happersett, 88 U.S. 162 (1874).

[143] *Id.* at 176.

[144] Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AMER. Q. 151, 172 (1966).

[145] *Id.*

question.[146] Her husband's answer explained that "[v]oting was no asset [to women], since that would result only in 'a vast increase of confusion and expense without in the smallest degree affecting the result.'"[147] Furthermore, he explained, "'[m]ost women would follow the lead of their fathers and husbands,' and the few who would fly off on a tangent from the circle of home influence would cancel each other out.'"[148] In other words, a woman's intellect was not respected as it related to its abilities or its reach. A woman's brain was not capable, not respected enough to make decisions—let alone to make waves. And to those who attempted either in their voting habits were only seen as "semi-women, mental hermaphrodites."[149]

Outside of voting, the idea of women in powerful occupational positions was also legally prohibited. Myra Bradwell and her case before the Supreme Court, *Bradwell v. State*,[150] is the perfect example of this. In 1869, Bradwell became the first woman to pass the Illinois bar exam.[151] But, the Illinois Supreme Court denied her a license to practice because she was married and coverture still governed Bradwell's rights.[152] In 1873, Bradwell brought her case in front of the Supreme Court of the United States where the Court openly confirmed the lack of respect toward women's autonomy.[153] In an 8-1 decision, the Court held that Ms. Bradwell's right to practice law was not protected by the Constitution.[154] In *Bradwell*'s concurring opinion, Justice Joseph P. Bradley summarized the views of women's role in society when he said: "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother . . . ."[155]

The legal sources discussed show a sheer, explicit lack of respect that this Nation's state authorities and Court decisions associated with women and their rights as autonomous individuals.[156] The same men in power who criminalized abortion in 1868 are the same men who refused to remove coverture from their state legislatures.

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[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* at 173.

[150] Bradwell v. State, 83 U.S. 130 (1873).

[151] *In Re Lady Lawyers: The Rise of Women Attorneys and the Supreme Court*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/visiting/exhibitions/LadyLawyers/section1.aspx (last visited Nov. 2, 2023) [hereinafter *In Re Lady Lawyers*].

[152] *Id.*

[153] *Bradwell*, 83 U.S. at 141.

[154] *In Re Lady Lawyers*, *supra* note 152.

[155] *Bradwell*, 83 U.S. at 141.

[156] *See generally* U.S. CONST. amend. XIX; Minor v. Happersett, 88 U.S. 162 (1874); *Bradwell*, 83 U.S. 130.

Respect for women in legal sources was not just missing but blatantly opposed. Yet, it is these same men in power from 1868 who have decided the fate of women today because twenty-eight out of thirty-seven states said abortion was a crime.[157]

2. The Social Status of Women

a. Leading up to 1868: Piety, Purity, Submissiveness, and Domesticity

At the beginning of the nineteenth century, patriarchy and domestic dependency governed the social landscape of the United States. Upper- and middle-class women were tied to lives of domestic dependency either in the form of "marriage and motherhood, or spinsterhood."[158] The alternative to domestic dependency was "low wages, the absence of upward mobility, [and] depressing and unhealthy working conditions."[159] On top of these less-than-ideal working conditions, social standards found working women to be "unnatural."[160]

It was not until the 1820s that cultural attitudes had begun shifting away from a purely patriarchal society through a women's movement coined as "The Cult of True Womanhood."[161] Through this movement, women gained superiority over men within the home and in the context of virtue.[162] Furthermore, a True Woman's four pillars of virtue were "[p]iety, purity, submissiveness, and domesticity."[163] A lack of respect for women permeated each of these four pillars, as this Article will highlight below.[164]

Of the four pillars, piety was often considered the most important trait of a woman because where piety exists, the rest will follow.[165] Piety refers to "the quality of being religious or reverent."[166] And in a world where men were tasked with creating and expanding industrialized civilization, a "True Woman" was expected to protect

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157 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022).

158 Susan M. Cruea, *Changing Ideals of Womanhood During the Nineteenth-Century Woman Movement*, UNIV. WRITING PROGRAM FAC. PUBLN'S 187, 187 (2005).

159 *Id.*

160 *Id.*

161 Welter, *supra* note 144, at 151.

162 *Id.* at 152–53.

163 *Id.* at 152.

164 Cruea, *supra* note 158, at 187.

165 Welter, *supra* note 144, at 152.

166 Michael Taylor, *The Unique Vocabulary Found in "The Life of Christ" by Frederic William Farrar*, CHURCH OF JESUS CHRIST FACTS, https://church-of-jesus-christ-facts.net/vocabularyfarrar/ (last visited Nov. 2, 2023).

religion and civilized society.[167] One man, writing for the *Ladies Companion*, noted that "female irreligion is the most revolting feature in human character."[168]

The "piety" pillar can be argued as the primary refusal of respect for women's intellectual autonomy. For many today, it is believed that women were tasked as the protectresses of religion because this role did not take women far from their homes and allowed them to pray, instead of think.[169] The intention of keeping women docile is exemplified as they were "warned not to let their literary or intellectual pursuits take them away from God."[170] To think for oneself as a woman, beyond the scope of religion, was considered simply revolting.[171]

Purity, a natural extension of piety, considers the woman's virginity before marriage to be her greatest asset.[172] If a woman lacked purity, then she was a "fallen woman."[173] And a fallen woman was, in fact, no woman at all, but "a member of some lower order."[174] Purity was so important to a woman's status that the ideal of "a pure True Woman" was imprinted early on young girls.[175] Young girls were taught to value their virginity "as the 'pearl of great price' which was her greatest asset."[176] Clearly, the pearl of their existence was not their mind, not their self, but their virginity.

The "purity" pillar emphasizes the lack of bodily autonomy women had, as well as their responsibility to keep their bodies prepared for their future husbands and children.[177] Chastity was one of a woman's greatest responsibilities to prepare herself for her future husband.[178] A woman's virginity was so tied to men's benefit that Barbara Welter explained that "[t]he marriage night was the single great event of a woman's life, when she bestowed her greatest treasure upon her husband."[179]

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167 Cruea, *supra* note 158, at 188.

168 Welter, *supra* note 144, at 154; *see also* C.F. Daniels, *Female Irreligion*, LADIES COMPANION, July 1840, at 111, 112.

169 Welter, *supra* note 144, at 153.

170 *Id.* at 154.

171 *Id.*

172 Cruea, *supra* note 158, at 188.

173 Welter, *supra* note 144, at 154.

174 *Id.*

175 Cruea, *supra* note 158, at 188.

176 *Id.*

177 *Id.*

178 *Id.*

179 Welter, *supra* note 144, at 154–55.

Women's "greatest treasure" or "greatest asset" was solely tied to a body that women did not themselves own.[180]

The only time a woman's body was not owned by her husband was when it was owned by her child. *The Ladies' Wreath* magazine, in an article titled "Woman the Creature of God and the Manufacturer of Society," described purity as her greatest gift and chief means of discharging her duty to save the world,[181] likely referencing her ability to procreate. Procreation was a duty, not a choice, throughout the nineteenth century.[182] And to respect one's body as a woman meant to respect the desires and needs of man and child.[183]

Submissiveness, the role of being less than your husband, was considered to be the most "feminine" virtue.[184] While men were the movers, the doers, and the actors, women were the passive, submissive responders of the home.[185] It was important that women submit to their husbands for "the sake of good order."[186] If women were to tamper with this virtue, then they were told they were tampering "with the order of the universe."[187] Under the submissiveness virtue, women should feel "weak," "timid," and in need of a "protector" to be a true woman.[188]

Like coverture, submissiveness was an explicit reminder that a woman's life fell within her husband's existence and was not autonomous to him. A sensible woman was conscious of her dependence, her inferiority, and she was not to say otherwise.[189] For example, if one's husband "is abusive, you never retort."[190] Submission and inferiority were forced upon women,[191] and it was crucial that women did not stray from it.

Domesticity emphasizes a woman's prized role as wife and mother. While a woman's sense of self should revolve around her husband and his needs,[192] her

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180 Tait, s*upra* note 127, at 101.

181 Welter, *supra* note 144, at 157.

182 *See* Cruea, *supra* note 158, at 188.

183 *Id.*

184 Welter, *supra* note 144, at 158.

185 *Id.* at 159.

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.* at 161.

191 *Id.* at 162.

192 *Id.* at 170.

"usefulness and prestige" came from being a mother.[193] To really understand the importance of motherhood to the social norms of America in the nineteenth century, you only need one sentence: "A true woman naturally loved her child; to suggest otherwise was monstrous."[194]

The last pillar, domesticity, further highlighted the lack of autonomy in a woman's life path. To consider choosing another career was blasphemous. Even other women in the nineteenth century fell into this cultural attitude of female dependence. When asked whether they wanted the "wider sphere of interest" that nonwomen claimed, "wives and mothers" answered with a reassuring "No! Let the men take care of politics, we will take care of the children!"[195] The limiting nature that domesticity put on female voices and power highlights the lack of respect afforded to women during this era.

This social movement, "The Cult of Womanhood," provided the clearest example of the lack of mental, physical, and emotional autonomy granted to women leading up to 1868. Men—and even women—could not fathom a woman in politics, a sexually-active woman, an independent woman, or a woman without the gift of children.[196] The "growth" of the women's movement shifted from that of strict patriarchy to a woman's ownership of the home, virtue, and nothing more. Respect for women as something more than a wife or mother was seen as simply unnatural.[197]

b. After 1868: A Long, Hard Battle for Women

Despite many social and political efforts, women still lacked respect after 1868, as lamented by Anne Brown Adams in the 1880s. Adams was a daughter of the abolitionist John Brown, and she wrote to a friend about how the reform for women was "slow and did not necessarily change behaviors inside the home."[198] "In her letter, Adams [expressed] that the 'struggle for a married woman's rights [would] be a longer and a harder fought battle than any other that the world has ever known.'"[199] While that may be an overstatement considering the Nation's lasting battle with race-based discrimination, Adams's concerns came from experience within her own home. She explained that "men have been taught that they are the absolute monarchs in their families."[200] As expressed above during "The Cult of Womanhood" era, a woman

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193 *Id.* at 171.

194 *Id.*

195 *Id.* at 173.

196 Cruea, *supra* note 158, at 187.

197 *Id.*

198 *The Struggle for Married Women's Rights, Circa 1880s*, GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-resources/spotlight-primary-source/struggle-married-women's-rights-circa-1880s (last visited Nov. 2, 2023).

199 *Id.*

200 *Id.*

should never retort at the response of her husband's abuse.[201] Adams takes that a step further by enumerating the abuses that some women suffered when she wrote:

> Women are taught that their only hope of heaven, is to "endure to the end," That it is a religious duty to "submit themselves to their husbands in all things," I know a man who tells his wife "I own you, I have got a deed (marriage license and certificate) to you and got it recorded, I have a right to do what I please to you," And the law of a Christian land says she shall submit, to indecencies that would make a respectable devil blush for shame.[202]

The phrase "I own you" speaks volumes about the lack of respect for women's autonomy. As Adams explained, women in the 1880s are still largely at the hand of their spouses.[203] Despite changes surrounding cultural norms, women's social status—at least that of a married woman—continued to be less than that of a man.[204]

Dependency, ownership, and submission are all concepts that describe the lack of autonomy, respect, and choice that women had through the nineteenth and into the twentieth centuries; but, concerningly, *Dobbs* has returned the Nation back to much of that same rhetoric.

c. Did Respect for Women's Autonomy Exist in 1868?

As to the question of whether women's autonomy was respected in 1868, this Article confidently answers with "no." Women in the nineteenth and into the twentieth centuries were plagued with coverture governing their legal and social existence. A woman was owned entirely by another at every point in her life. And for those women who sought something more than "piety, purity, submissiveness, and domesticity," the social and legal landscape scorned them.[205]

No respect for women in 1868 means that the *Dobbs* decision, affecting women alone, relied on social and legal doctrines that did not even bother to respect women. The men who voted in the face of women's autonomy in 1868 have struck down the constitutional protection for women's choice today. By conducting this surface-level research, the Court's constitutional duty to determine the constitutional provision's character is replaced with a perpetuation of the past.

As a result, the Court in *Dobbs* failed to give the women of the United States a fair legal process. As Justice Harlan explained, it is the Court's constitutional duty to recognize the traditions this Nation chose to keep, as opposed to break away from, and balance that with respect for the liberty of the individual.[206] Instead, the *Dobbs* Court

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[201] Welter, *supra* note 144, at 161.

[202] *The Struggle for Married Women's Rights, Circa 1880s*, *supra* note 198.

[203] *See id.*

[204] *Id.*

[205] *See supra* text accompanying notes 150–54, 156.

[206] Poe v. Ullman, 367 U.S. 497, 542 (1961).

relied on the traditions and treatment of women in 1868 with no consideration for the respect for women as individuals.

The absence of respect has led to an increased distrust of the current Court. As of September 29, 2022, trust in the Supreme Court hit a record low with less than half of Americans saying they have trust in the Court.[207] And *Dobbs* is recognized as the main catalyst of this distrust.[208] The Court's interpretation of the character of constitutional provisions without considering the existence of respect, and its failure to go beyond the scope of the history it relied upon, has resulted in decisions that people fear. And judicial legitimacy is being questioned as a result.

By failing to consider the respect for individual autonomy in its decisions, the Court has created a Nation where women live under the rule of state legislators of 1868 and where citizens question the Justices' constitutional duty.

VI. Conclusion

With *Dobbs* as a searing example, the Court's failure to consider history's respect for the class at issue results in a failure of their constitutional duty and a cloud of doubt over their judicial abilities. In 1868, women were not even allowed autonomous existence, let alone choice.[209] And women's bodies and minds were subject to social, legislative, and judicial disrespect.[210] To expect any other outcome in *Dobbs*, with complete and utter reliance on legal sources surrounding 1868, is impossible. It is that impossibility that leaves Americans with doubt that the system is fair, just, and respectable.

To bring back trust in the Court, the deeply rooted test must be conducted under a lens focused on respect for the individual. If no such respect exists, it is the Court's responsibility to consider sources beyond a narrow history and timeline to allow each party a fair, just, and respectable process.

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[207] Chris Cillizza, *Trust in the Supreme Court is at a Record Low*, CNN, https://www.cnn.com/2022/09/29/politics/supreme-court-trust-gallup-poll (Sept. 29, 2022, 10:28 AM).

[208] Kathryn Haglin et al., *Americans Don't Trust the Supreme Court. That's Dangerous.*, Wash. Post (Oct. 10, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/10/10/supreme-court-public-opinion-legitimacy-crisis/.

[209] *See supra* text accompanying notes 157–58.

[210] *Id.*