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## **Situating Dobbs**

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## SITUATING *DOBBS*

Paula A. Monopoli\*

### I. INTRODUCTION

The U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* has been characterized as unique by commentators and activists. For example, the Center for Reproductive Rights noted that the Court abandoned fifty years of precedent in *Dobbs* and that the decision “marks the first time the Supreme Court has taken away a fundamental right.”<sup>1</sup> But that perspective depends on how we view what constitutes a right—in particular, those rights that matter most to women’s lived experience.<sup>2</sup> This paper argues that if we define women’s rights in a

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1. *U.S. Supreme Court Takes Away the Constitutional Right to Abortion*, CENTER FOR REPRODUCTIVE RIGHTS (June 24, 2022), <https://reproductiverights.org/supreme-court-takes-away-right-to-abortion/>.

2. I use “women” in this paper in an inclusive way to include all those who identify as women. I also use the concept of “rights” broadly—to include not only “rights” previously recognized by courts but other protections afforded women, de jure or de facto, as a consequence of statutes or constitutional amendments. Some of the rights I discuss are formal political rights/privileges like voting. Others are what I would characterize as quasi-positive rights like the right to be free from domestic violence and the right to a living wage. I would argue these protections or rights were understood by women at the time to be implicit in and extensions of state protective labor legislation or constitutional amendments like the Prohibition Amendment. A full discussion of what constitutes a right is beyond the scope of this paper. However, this paper presumes that there is a clear conceptual nexus between rights and protections, whether rights are viewed as against the state or as against other people. As one commentator notes, “The claim that rights are primarily protections against the state—as is the case in the modern formulation of human rights—will be controversial to some, especially social contractarians. Social contract theorists following in the steps of Hobbes and Locke view rights as protections against other people, some rights being transferred to the state in order to more efficiently protect against encroachment by those aggressing others.” James M. Donovan, *Rights as Fairness*, at 2, n1 (draft May 5, 2008), available at [https://works.bepress.com/james\\_donovan/47/](https://works.bepress.com/james_donovan/47/).

broader way, *Dobbs* looks less like an outlier and more like part of a pattern of eroding or erasing rights women once held.

In *Dobbs*, the Court holds that there is no right to abortion embedded in the Fourteenth Amendment nor any other provision of the U.S. Constitution. It overrules its own decisions in *Roe v. Wade*,<sup>3</sup> as modified by *Planned Parenthood v. Casey*,<sup>4</sup> and characterizes them as “egregiously wrong.”<sup>5</sup> And it requires a “history and tradition” test in order to recognize an unenumerated constitutional right.<sup>6</sup> In his majority opinion, Justice Alito writes that:

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”

The right to abortion does not fall within this category.<sup>7</sup>

Alternatively, the joint dissent written collectively by Justices Breyer, Sotomayor, and Kagan, criticizes the majority’s method of constitutional interpretation, and concludes that it yields an understanding of the Constitution which disregards women’s agency:

As a matter of constitutional substance, the majority’s opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command.<sup>8</sup>

The history invoked by the dissenting justices is more fulsome than that articulated by the majority.<sup>9</sup> One might say that the dissent invokes

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3. 410 U.S. 113 (1973).

4. 505 U.S. 833 (1992).

5. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_, 142 S. Ct. 2228, 2335 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

6. *Dobbs*, 142 S.Ct. at 2242 (majority opinion).

7. *Id.*

8. *Id.* at 2333 (dissent).

9. Note that Justice Alito cites to a number of male legal scholars, including some like Sir Matthew Hale, who were overtly misogynist. See *infra* note 69. I have written previously about Justice

a more comprehensive social and constitutional history than the majority. The dissent identifies the transition from the Court's view in *Hoyt v. Florida* in 1961 that women were the center of the home and family to the recognition in *Planned Parenthood v. Casey* that in 1992:

[t]he traditional view of a woman's role as only a wife and mother was "no longer consistent with our understanding of the family, the individual, or the Constitution." Under that charter, *Casey* understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions.<sup>10</sup>

Part II of this paper describes the concept of constitutional memory as developed by Reva Siegel in the context of feminist legal history. It connects that concept to the social movements led by women who were constitution-makers, albeit not in a formal, legislative sense. It restores that history so that the reader can understand how legal and constitutional protections that benefit women have often been subject to erosion, if not outright erasure.

Part III applies the concept of constitutional memory to the conversation around *Dobbs* and the dominant view that the case was unique in erasing a constitutional right. This section offers three examples—voting, Prohibition, and protective labor legislation—to illustrate how situating *Dobbs* within an expansive view of feminist legal history teaches us that it is not the only—just the most recent—example of the Court's eroding or erasing previously recognized legal protections or rights that had a positive impact on women's lives.

Part IV concludes that Congress, the Supreme Court, and the People themselves have been more likely to erase or erode a legal or constitutional "right" that has a disproportionately positive effect on women's lives. By adopting a broader view of constitutional history and what constitutes a "right," such retrenchment looks less unique than it first appeared in the wake of *Dobbs*. It concludes that we can both note *Dobbs*' outlier status and situate the decision in a historical continuum to correct the erasure of previous retrenchment in our constitutional memory. In so doing, we can more effectively respond to *Dobbs*' implications for reproductive self-determination.

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Alito's judicial rhetoric in the context of women's rights. It is a rhetoric which at best demonstrates a blind spot when it comes to women's lived experience. At worst, it demonstrates an underlying—albeit perhaps unconscious—misogyny. See Paula A. Monopoli, *In a Different Voice: Lessons from Ledbetter*, 34 J. COLL. & U.L. 555 (2008).

10. *Dobbs*, 142 S.Ct. at 2343 (dissent).

## II. *DOBBS* AND CONSTITUTIONAL MEMORY

Constitutional memory is not coextensive with history, and often excludes history, sometimes intentionally. The Constitution's interpreters are continuously producing constitutional memory as they make claims on the past to guide decisions about the future. . . . Judicial decisions are products of constitutional memory, and, at the same time, they are one of the many social institutions that produce constitutional memory.<sup>11</sup>

Considering *Dobbs* in light of Reva Siegel's theory of constitutional memory helps us understand why the public may see *Dobbs* as so unique.<sup>12</sup> The majority opinion in *Dobbs* is essentially devoid of women as legal authorities.<sup>13</sup> No constitutional activism—other than in the most negative description of abortion activism—appears in the Court's decision nor in much of its prior jurisprudence.<sup>14</sup> Not only do the justices not invoke these women-led constitutional movements, they do not acknowledge that the Court, Congress, and state legislatures have repeatedly erased or eroded legal and constitutional rights that benefitted women. It is hard for the public to see that pattern because we have been deprived of a feminist constitutional history. Women as constitution-makers have been excluded from our constitutional memory.

A feminist constitutional history is centered around a women's rights movement that gained traction in the nineteenth century and culminated in ratification of the Nineteenth Amendment in 1920. That amendment prohibited states from using sex to limit the "right" to vote, a right that was eroded by states who effectively denied it to women of color.<sup>15</sup> A

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11. Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J. L. & PUB. POL'Y 19, 21–22 (2022).

12. *Id.* at 46.

13. Note that this is in contrast to the *Dobbs* dissent which cites David Cohen, Greer Donley, and Rachel Rebouché's article, *The New Abortion Battleground*, 123 COLUM. L.REV. 1 (2023).

14. Siegel, *supra* note 11, at 46. Note that Justice Alito implies that the lack of law review scholarship preceding *Roe v. Wade* is a rationale for suggesting that abortion could not have been considered a traditional right. *Dobbs*, 142 S.Ct. at 2254–55. But women were not allowed into legal academia in any significant numbers until the enactment of Title IX in 1972—the same year *Roe* was decided. See Catherine J. Lanctot, *Women Law Professors: The First Century (1896-1996)*, 65 VILL. L. REV. 933, 964–67 (2021) ("In 1974 . . . law schools hired fifty-five women as tenure-track or tenured law professors. By comparison, in the fifty years from 1919 to 1969, only fifty-one women had ever received such positions.") The fact that there were so few women law professors (the group most likely to write law review articles arguing for a constitutional right to abortion) before *Roe v. Wade* was decided is an alternative historical explanation for the lack of such articles—one that ironically reflects discrimination against women.

15. Note that the Nineteenth Amendment does not confer a right to vote. It is a prohibition on states and the federal government about eligibility to vote. Black and Brown women were de facto disenfranchised—in essence having their right to vote erased or eroded, with eligibility barriers like

feminist constitutional history also includes the temperance movement, led by women, that culminated in the ratification of the Eighteenth Amendment in 1919 and which arguably represented a positive—albeit implicit—“right” to be free from domestic violence fueled by alcohol consumption. That legal protection was repealed in 1933 with the Twenty-First Amendment. And such a history includes a movement led, in part, by social feminists, that culminated in the Supreme Court’s recognition of a state’s authority to enact protective labor legislation for women. In *Muller v. Oregon* in 1908, the Court ensured protection for women from excessive working hours.<sup>16</sup> Subsequent judicial decisions validated what was arguably a positive—albeit implicit—right to a living wage.<sup>17</sup> One might characterize the Court’s subsequent decision in *Adkins v. Children’s Hospital* in 1923 as an erasure of that “right.”<sup>18</sup>

### III. ERASING AND ERODING WOMEN’S RIGHTS

#### A. Voting

The average American believes that women did not vote in this country until 1920, and that all women could vote after the Nineteenth Amendment was ratified.<sup>19</sup> In fact, women in New Jersey were voting long before 1920. As Linda Kerber explained, New Jersey interpreted its 1776 constitution to allow women to vote.<sup>20</sup> An election law subsequently enacted in 1797 made this practice explicit when it stated that “No person shall be entitled to vote in any other township or precinct, than in which *he or she* doth actually reside at the time of the election . . . Every voter

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poll taxes and literacy tests. PAULA A. MONOPOLI, *CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT* 44–47 (2020). Men also suffered a retrenchment in their voting rights. For example, alien suffrage was originally allowed in many states, but was eventually repealed. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 110–11 (2000). And the Fifteenth Amendment was a prohibition on the states and federal government on using race as a criterion for voting. Yet Black men were disenfranchised in the wake of that amendment as well. *See also* Paula A. Monopoli, *Gender, Voting Rights, and the Nineteenth Amendment*, 20 *GEO. J. L. & PUB. POL’Y* 91, 107–08 (2022), describing the different histories of the Fifteenth and the Nineteenth Amendments.

16. 208 U.S. 412 (1908).

17. *See infra* note 61 and accompanying text.

18. 261 U.S. 525 (1923).

19. But even after ratification, Black and Brown women were de facto disenfranchised until the enactment of the Voting Rights Act in 1965. Monopoli, *Gender, Voting Rights, and the Nineteenth Amendment*, *supra* note 15, at 92 n.2.

20. Linda Kerber, *Ourselves and Our Daughters Forever*, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* 60 (Marjorie Spruill ed., 2d ed. 2021).

shall openly, and in full view deliver *his or her* ballot. . . .”<sup>21</sup> By 1790, “women could participate in government elections in New Jersey, and by 1797 women voted in New Jersey in noticeable numbers.”<sup>22</sup> But the practice proved problematic both for the theory that women were subject to their husbands as a result of the legal regime of coverture and would vote accordingly, and due to local political infighting.<sup>23</sup> As a result, the state legislature withdrew the right to vote from its women citizens by enacting another piece of legislation in 1807 that “excluded women from the polls.”<sup>24</sup> Alexander Keyssar has characterized this as “retrenchment” and it is the first notable example in our constitutional history of such a political right being granted and then taken away from women.<sup>25</sup>

Most contemporary Americans have never been taught that women had this right for thirty years nor that it was actively eroded and then erased by the state legislature in 1807.<sup>26</sup> As Mary Sarah Bilder notes, women’s rights advocates in the 1860s still remembered, but “the knowledge that women had voted was not a significant part of the collective public memory.”<sup>27</sup> The Court has never referenced this history in its voting rights decisions. That erasure has yielded a truncated constitutional memory.

Women’s rights activists subsequently waged a significant campaign to include women in the Reconstruction Amendments to prohibit the states from conditioning voting on sex. The memory of women voting in New Jersey “lingered with suffrage advocates Caroline H. Dall and Lucy Stone in the 1860s” and as they lobbied Congress, they “recount[ed] the relevant laws and practices” that had allowed women to vote in New Jersey in the early days of the Republic.<sup>28</sup> Not only were they thwarted, but Congress inserted the word “male” in the Constitution for the first time when it enacted the Fourteenth Amendment, making explicit a view of citizenship that had always been grounded in masculine norms.<sup>29</sup>

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21. Kerber, *supra* note 20, at 60.

22. MARY SARAH BILDER, *FEMALE GENIUS: ELIZA HARRIOT AND GEORGE WASHINGTON AT THE DAWN OF THE CONSTITUTION 183* (2022).

23. Kerber, *supra* note 20, at 61.

24. *Id.*

25. KEYSSAR, *supra* note 15, at 44. Note that the 1807 legislation limited the right to “free, white male citizens” thus creating a similar retrenchment for those free Black citizens who might have previously been allowed to vote. *Id.* Keyssar details this “backsliding and sideslipping” of racial exclusion in more detail in the same chapter.

26. *Id.*

27. BILDER, *supra* note 22, at 249.

28. *Id.* at 183.

29. Monopoli, *Gender, Voting Rights*, *supra* note 15, at 107–08, 108 n.91 (citing LAURA E. FREE, *SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA*

Elizabeth Cady Stanton notably said, “if the word ‘male’ be inserted, it will take us a century at least to get it out.”<sup>30</sup> Congress adding the word “male” to the Constitution for the first time can be characterized as retrenchment in terms of women’s voting rights. Absent a new federal suffrage amendment, it shut the door to any possible future judicial interpretation of the Fourteenth Amendment or the Constitution itself as including woman suffrage.

Suffragists then turned to what was called “the New Departure” the woman suffrage movement’s more assertive campaign for the vote, following the inclusion of the word “male” in the U.S. Constitution for the very first time in section 2 of the Fourteenth Amendment, and following the failed campaign by women activists to be included in the Fifteenth Amendment.<sup>31</sup> As I have written previously, “[w]ithout understanding that women activists had waged a very public battle, especially in Washington, D.C., to be included in the Fourteenth and the Fifteenth Amendments, [we] are unlikely to see the link between” cases like the *Slaughter-house Cases* and *Bradwell v. Illinois*.<sup>32</sup> And we cannot see how women’s rights went backward with the insertion of the word “male” for the first time in the Constitution in 1868. As Tracy Thomas observed:

Women’s rights advocates decried the new insertion of the word male into the Constitution and the creation of what Elizabeth Cady Stanton called an “aristocracy of sex” in its hierarchy privileging men’s citizenship. Stanton felt so betrayed by her former colleagues that she left the abolition movement, and she and [Susan] Anthony formed their own National Woman Suffrage Association (“National Association”) in May 1869.<sup>33</sup>

Utah extended suffrage to women as early as 1870, when it was still a territory.<sup>34</sup> However, when it was negotiating with the United States government for statehood, Congress disenfranchised the women of Utah

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33–55 (2015); CATHLEEN CAHILL, RECASTING THE VOTE: HOW WOMEN OF COLOR TRANSFORMED THE SUFFRAGE MOVEMENT 192 (2020)).

30. TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 12–13 (2016). See also KEYSSAR, *supra* note 15, at 143.

31. GRETCHEN RITTER, THE CONSTITUTION AS SOCIAL DESIGN at 20–27 (2006).

32. Paula A. Monopoli, *Feminist Legal History and Legal Pedagogy*, 108 VA. L. REV. ONLINE 91, 99-100 (2022).

33. Tracy Thomas, *Reclaiming the Long History of the “Irrelevant” Nineteenth Amendment for Gender Equality*, 105 MINN. L. REV. 2623, 2634-35 (2021).

34. Marjorie J. Spruill, *How Women Won: The Long Road to the Nineteenth Amendment*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT 13 (Marjorie Spruill ed., 2d ed. 2021).



“in a curious step to rid the territory of polygamy.”<sup>35</sup> After it became a state, the legislature re-enfranchised Utah’s women citizens and restored the right to vote in 1896.<sup>36</sup> The U.S. Supreme Court implicitly endorsed this erasure of a previously granted right when it upheld the Edmunds-Tucker Act in 1890 in *Late Corporation of the Church of Latter Day Saints v. United States*.<sup>37</sup>

Finally, in 1920 a federal amendment to the U.S. Constitution was ratified by the requisite thirty-six states and prohibited all states from using sex as a criterion for voter eligibility. The Nineteenth Amendment was both a prohibition and a grant of authority, with its section two authorizing Congressional legislation to enforce the amendment.<sup>38</sup> There was only one female member of Congress who voted on an earlier version of the Nineteenth Amendment.<sup>39</sup> I have argued that we never learned “th[e] unique history around the Nineteenth’s ratification and constitutional development, and the consequent thin understanding of the Nineteenth” by the courts.<sup>40</sup> If we had any impression about the amendment, it was that the Nineteenth Amendment “only” concerned voting. But what we were never taught was that “voting was *the* central question” for nineteenth-century Americans and, “they knew what woman suffrage signified, even if its full significance to *them* is no longer legible to *us* today.”<sup>41</sup>

### B. Prohibition

“On 5 December 1933 an event occurred that was unprecedented in American history: an amendment to the U.S. Constitution was repealed. The Eighteenth (prohibition) Amendment was nullified by the enactment

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35. Keyssar, *supra* note 15, at 150.

36. *Id.*

37. 136 U.S. 1 (1890).

38. Section 1 of the Nineteenth Amendment to the U.S. Constitution provided, “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.” Section 2 provided, “Congress shall have power to enforce this article by appropriate legislation.”

39. See JAMES L. LOPACH & JEAN A. LUCKOWSKI, JEANNETTE RANKIN: A POLITICAL WOMAN 146 (2005).

40. Monopoli, *Gender, Voting Rights*, *supra* note 15, at 140 (citing Richard L. Hasen & Leah M. Litman, *Thick and Thin Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce It*, 108 GEO. L.J. 27 (2020)).

41. Monopoli, *Gender, Voting Rights*, *supra* note 15, at 111 (citing Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1045 (2002)).

of another amendment, The Twenty First.”<sup>42</sup> I would argue that it is not a coincidence that the only constitutional amendment to be repealed was an amendment engineered by a social movement led by women. The driving force behind enactment and ratification of the amendment were women like the white president of the Woman’s Christian Temperance Union (WCTU) Frances Willard, and Black abolitionist and temperance advocate, Frances Ellen Watkins Harper.<sup>43</sup> And the face of prohibition enforcement was female.<sup>44</sup> The U.S. Department of Justice tasked Assistant Attorney General Mabel Walker Willebrand with enforcing the Volstead Act.<sup>45</sup>

The implicit positive “right” that this constitutional amendment arguably embodied for women was the right to be free from domestic violence. “Willard understood the tremendous appeal that home protectionism had for American women . . . because of the grave physical and economic threat posed by the intemperate use of alcohol.”<sup>46</sup> She was successful in organizing “a membership that was larger by far than any other women’s organization of the Nineteenth Century.” And its predecessor, the Woman’s Crusade in 1873 “was the first mass women’s movement in the United States, and it sent a clear signal that many women were now seeing temperance as a ‘gender issue.’”<sup>47</sup> It was no wonder since “[f]or women the stakes were especially high. As late as 1850, wife beating ‘with a reasonable instrument’ was legal in nearly every state, with the consequence that if a woman found herself saddled with a drunken, abusive husband, she had few legal options with which to protect

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42. KENNETH D. ROSE, *AMERICAN WOMEN AND THE REPEAL OF PROHIBITION 1* (1996). Section 1 of the Eighteenth Amendment to the U.S. Constitution provided, “After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.” Section 1 of the Twenty-First Amendment to the U.S. Constitution provided, “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”

43. *Id.* at 22. See also Siegel, *supra* note 11, at 39 n.98 (citing Bettye Collier-Thomas, *Frances Ellen Watkins Harper, Abolitionist and Feminist Reformer, 1825-1911*, in *AFRICAN AMERICAN WOMEN AND THE VOTE, 1873-1965*, at 55–60 (Ann D. Gordon & Bettye Collier-Thomas eds., 1997) (“observing that Harper played a role in ‘the abolitionist, suffrage, temperance, peace, civil and woman’s rights movements.’”)).

44. ROSE, *supra* note 42, at 23.

45. DOROTHY M. BROWN, *MABEL WALKER WILLEBRANDT, A STUDY OF POWER, LOYALTY, AND LAW* (1984). Section 2 of the Eighteenth Amendment to the U.S. Constitution provided, “The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” In terms of feminist legal history, few Americans likely know that a woman lawyer led the fight to enforce the Eighteenth Amendment. It is not a part of American history included in most textbooks.

46. ROSE, *supra* note 42, at 22–23.

47. *Id.* at 16.

herself.”<sup>48</sup> Combined with other features of the legal regime of coverture, including the likelihood that her husband would be granted custody of her children should she leave him, it becomes clear why the government’s limiting access to alcohol could be seen as a right to be free from domestic violence. And it illuminates how one might characterize Prohibition’s repeal in 1933 as the erasure of a positive—albeit implicit—right. In a culture driven by a masculine norm of negative liberty in interpreting its constitutional rights, the intervention of the state in the private sphere of the family in a way that protected women simply could not withstand the backlash—individual, judicial, and corporate.<sup>49</sup>

There were a number of connections between the temperance movement and the woman suffrage movement, beginning with the fact that Elizabeth Cady Stanton and Susan B. Anthony were early supporters of temperance.<sup>50</sup> When Frances Willard was elected president of the WCTU in 1879 she tried to persuade its membership that woman suffrage and temperance were connected, “but it was not until 1881 that Willard was able to persuade the WCTU to declare for woman suffrage as a temperance issue.”<sup>51</sup>

That view of the federal government’s limited role in protecting women from violence within the home was reiterated decades later in *United States v. Morrison*, striking down the private right of action under the Violence Against Women Act (VAWA).<sup>52</sup> Situating *Dobbs* in a historical continuum in which the Supreme Court, Congress, and state legislatures have erased or eroded significant legal protections previously afforded to women supports the argument that is not appropriate to leave such issues to fifty different state legislatures. Just as states should not be allowed to limit eligibility for the ballot on account of sex, states should

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48. *Id.* at 12.

49. Much like there are many women who have been involved in the movement to overturn *Roe v. Wade*, there were, of course, multiple forces at work to repeal the Eighteenth Amendment. ROSE, *supra* note 42, at 52–59. These included a robust organization of women who had become disillusioned with how Prohibition had played out, led by Pauline Sabin and the Women’s Organization for National Prohibition Reform (WONPR). *Id.* at 52–59, 74–89.

50. *Id.* at 15–16.

51. *Id.* at 22.

52. In her foundational article, *She the People*, Reva Siegel uses *United States v. Morrison*, 529 U.S. 598 (2000), to illustrate the need for a synthetic reading of the Fourteenth and Nineteenth Amendments that gives Congress a basis for legislating violence within the family. She argues such a reading could dismantle the artificial barrier between federal and state authority over the private sphere of the family and the regulation of domestic relations. Siegel, *She the People*, *supra* note 41, at 1044 (arguing that if the Supreme Court were to adopt such a synthetic reading, “[u]nder Section Five of the Fourteenth Amendment, Congress would have the authority to enact federal laws that redress state regulation of the family that denies women “full citizenship stature” or that perpetuates the “legal, social, and economic inferiority of women.”)

not be allowed to limit women’s freedom from violence and reproductive self-determination. These are fundamental rights and such artificial separation does not reflect women’s lived experiences. This is one illustration of what is at stake in seeing *Dobbs* as part of a historical continuum rather than as an outlier. The women who fought for Prohibition were motivated by the same argument—that the federal government should have the constitutional authority to create social conditions that better protected women from violence within the family.<sup>53</sup> American women had arguably been implicitly granted that protection by constitutional amendment for more than a decade before the Prohibition amendment was repealed by Congress and state legislatures who ratified the Twenty-First Amendment in 1933.<sup>54</sup>

### C. *Protective Labor Legislation*

In 1908, the Supreme Court upheld the authority of a state to enact a statute ensuring women were protected from being forced to work excessive hours. While the Court did not enunciate an affirmative right for women in *Muller v. Oregon*,<sup>55</sup> it upheld the state’s authority under its police power to regulate the employer-employee relationship. The import of the Court’s decision was that the concept of “liberty of contract” under the Due Process Clause of the Fourteenth Amendment did not prohibit a state from regulating labor conditions when it came to women. A New York judge explained why such a “freedom” was illusory for women negotiating with an employer:

Women’s disadvantage had “compelled them to submit to conditions and terms of service which it cannot be assumed they would have freely chosen.” Judge Blackmar continued, “Their liberty to contract to sell their labor may be but another name for involuntary service created by existing industrial conditions. A law, which restrains the liberty to

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53. There is a significant body of scholarship that describes the multiple motivations and rhetorical arguments the women who engineered the Prohibition amendment deployed, including maternalist arguments about bettering society from a moral perspective. But clearly another significant motivation was the issue of domestic violence. One 1880 study found that in 85% of abuse cases the abuser had been drunk and such studies were used to support the need for prohibition. ROSE, *supra* note 42, at 160 n.66.

54. The Eighteenth Amendment to the U.S. Constitution (1919) was repealed by the Twenty-First Amendment (1933). One of the arguments for repeal (much as one of the arguments against a federal woman suffrage amendment) was states’ rights. While trying to persuade southerners in Charleston, South Carolina to support repeal in 1932, speakers like Maryland’s Senator Millard Tydings, “stressed states’ rights (‘give the states the power to regulate the [liquor] question as it exists in each individual state.’)” ROSE, *supra* note 42, at 98.

55. 208 U.S. 412 (1908).

contract, may tend to emancipate them by enabling them to act as they choose, and not as competitive conditions compel.”<sup>56</sup>

Like Judge Blackmar, one might view such cases as affording women a significant legal protection or “right”—even “emancipation,” given the asymmetry of power between employers and women employees. National Consumer League Chair, social feminist, and legal progressive Florence Kelley characterized protective labor legislation as representative of true equality. She said, “[l]et’s not begin with meaningless words. ‘Equality’ where there is no equality is a terrible a thing for the defenseless workers as the cry of ‘peace’ where there is no peace.”<sup>57</sup> Her view of substantive equality contrasted sharply with that of suffragist and National Woman’s Party founder Alice Paul, who opposed protective legislation, embraced formal equality, and quietly collaborated with the plaintiffs in *Adkins v. Children’s Hospital*.<sup>58</sup>

In the wake of *Muller*, states across the country enacted both maximum hours laws and minimum wage laws, both of which were seen as essential if women were to be protected in the workplace.<sup>59</sup> In 1917, the Supreme Court let stand an Oregon decision upholding that state’s minimum wage law.<sup>60</sup> But in 1923, the Court reversed course in *Adkins*. If one views protective labor legislation as a protection or right to a living wage that state legislatures and courts had afforded women, the Supreme Court arguably erased or eroded that right in *Adkins*.<sup>61</sup>

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56. NANCY WOLOCH, *A CLASS BY HERSELF* 89 (2015) (citing *People ex rel. Hoelderlin v. Kane*, 139 N.Y.S. 350 (1913)).

57. MONOPOLI, *CONSTITUTIONAL ORPHAN*, *supra* note 15, at 140 (citing Proceedings of the February 1921 National Woman’s Party Convention Transcript, Alice Paul Papers, 1785-1985; MC 399 box 2, folder 318 at 79, Schlesinger Library, Radcliffe Institute, Harvard University).

58. 261 U.S. 525 (1923). See MONOPOLI, *CONSTITUTIONAL ORPHAN*, *supra* note 15, at 201 n.49. Note that Kelley and Paul, former allies in advocating for the Nineteenth Amendment, became fierce opponents when Paul had an equal rights amendment introduced into Congress in 1923. The two held opposing visions of what constituted equality—a formal equality that refused to take into account the asymmetry of power held by women in the workplace or a substantive equality that tried to correct for the subordination of women. Kelley thought an equal rights amendment would be interpreted to authorize courts to strike down protective labor legislation for women. *Id.* at 133–36. After ratification of the Nineteenth Amendment, Florence Kelley led another constitutional movement comprised mostly of women, the effort to enact and ratify the Child Labor Amendment. Like the Equal Rights Amendment which fell short of ratification, the Child Labor Amendment also failed to be ratified. WOLOCH, *supra* note 56, at 126–27.

59. WOLOCH, *supra* note 56, at 104.

60. *Stettler v. O’Hara*, 243 U.S. 629 (1917).

61. The following year the Court let stand a restriction on night work just for women in *Radice v. New York*, 264 U.S. 292 (1924). Justice Sutherland wrote the opinion which distinguished between legislation limiting women’s ability to work at night from minimum wage legislation. The former implicated women’s physical health while the latter did not. *Id.* So one might say that the *Adkins*

*Adkins* was decided on due process grounds, but it used the Nineteenth Amendment as a constitutional reference point for women’s progress. Justice Sutherland wrote the opinion for the court. He invoked the Nineteenth Amendment, proclaiming that “[i]n view of the great—not to say revolutionary—changes which have taken place since [*Muller*], in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.”<sup>62</sup>

Despite acknowledging that physical differences between the sexes might justify upholding certain kinds of different legislative treatment, Justice Sutherland rejected the idea that women could be subjected to restrictions on their liberty to contract which were not imposed on men. This kind of minimum wage legislation would impinge on their freedom of contract. To find that the legislature had the power to interpose itself in women’s employer-employee relationships but not those of men, “would be to ignore all the implications to be drawn from the present-day trend of legislation” that “emancipates” women from special treatment.<sup>63</sup>

In 1908, the *Muller* court had included language which indicated it considered Oregon’s denial of suffrage to women relevant though not dispositive in upholding a maximum hour law for women only. Fifteen years after *Muller*, it is arguable that Justice Sutherland was embracing the logical extension of that language in *Muller*, i.e., that “[t]he government’s special protection of women was no longer warranted since women had become full citizens and could now vote to protect their own interests.”<sup>64</sup>

Florence Kelley characterized *Adkins* as “a new Dred Scott decision.”<sup>65</sup> The asymmetry of power and the illusory nature of the agency and equality the *Adkins* Court described women as having in the wake of the Nineteenth Amendment was in sharp contrast to the realities in the workplace in 1923. One hundred years later, in the wake of the initial leak of the draft in *Dobbs*, activists also “summoned another landmark case for

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Court eroded, rather than erased, protections or rights afforded women as a consequence of protective labor legislation.

62. MONOPOLI, CONSTITUTIONAL ORPHAN, *supra* note 15, at 139.

63. *Id.*

64. *Id.*

65. WOLOCH, *supra* note 56, at 128. Kelley’s response, as head of the National Consumer League, was to persuade the NCL board to “press for a bill to require seven Supreme Court justices to concur in pronouncing federal or state legislation unconstitutional.” *Id.* Note that the Supreme Court reversed *Adkins* in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which became a central part of the *Dobbs*’ Court’s analysis that it could overrule precedent.

comparison: *Dred Scott v. Sanford* (1857), which held that Black Americans could not be citizens of the United States, and that Congress could not legislate on the issue of slavery in the federal territories.<sup>66</sup> The link here is the definition and scope of citizenship. In *Dred Scott*, the Court made a formal declaration that a group of Americans were not citizens. The substantive effect of *Dobbs* is to relegate women to a second-class citizenship, even though the majority's opinion does not use those words.

It is notable that in *Adkins*, the Court found an unenumerated constitutional right—freedom of contract—used that right to find that state legislatures had no authority to regulate minimum wages, and rejected the idea that women were differently situated and needed state intervention to achieve fair pay. Yet the same Court one-hundred years later rejected that kind of *Lochnerian* substantive due process. In *Dobbs*, Justice Alito refused to find a constitutional right to abortion in the Due Process Clause of the Fourteenth Amendment, said that Equal Protection Clause of the Fourteenth Amendment does not apply in the context of pregnancy, and held that state legislatures were the proper place to decide the question. A conservative Supreme Court managed to erase or erode protections or rights for women both when it used substantive due process and when it rejected it.<sup>67</sup>

#### IV. CONCLUSION

What are the stakes involved in expanding our constitutional memory in the wake of *Dobbs*? And why does it matter if we view *Dobbs* not as an outlier but as part of a pattern whereby the Supreme Court, Congress, and state legislatures have been more willing to erode or erase rights that protect women as an identifiable group? If we do not insist that the Court, Congress, and state legislatures recognize and make visible the

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66. Rachel Shelden, Op., *What Dred Scott Teaches Us About the Draft Abortion Ruling*, WASH. POST, May 7, 2022.

67. While I posit for the purposes of this paper that the substantive view of equality embodied in protective labor legislation represented an implicit, positive right or protection for women, others might well argue such legislation was more harmful than helpful, given its grounding in women's difference. It is valid to argue that *Adkins*' neutral definition of formal gender equality better protected women since it invalidated class legislation based on gender stereotypes. Alice Paul and many members of the National Woman's Party supported the Equal Rights Amendment on that basis. While it is beyond the scope of this paper, the failure to ratify the Equal Rights Amendment after 100 years is another marker that rights or protections have been continually denied to women in the United States as a matter of constitutional history. For a comprehensive history of the Equal Rights Amendment, see generally Julie C. Suk, *We the Women: The Unstoppable Mothers of the Equal Rights Amendment* (2020).

role that women have played as constitution-makers since the Founding, judges bent on reifying women's subordination will be successful in obscuring a pattern of erosion and erasure of legal protections for women. The misogyny and devaluation of women's agency that engendered previous withdrawals of rights once granted will continue to hide behind very narrow conceptions of how constitutional and statutory interpretation based on original public meaning and legislative intent should operate.

Americans have no constitutional memory of women being constitution-makers. And a negative view of constitutional rights prevails in the nation's constitutional imaginary. The failure to tell the story of women as constitution-makers who fought for rights that made a positive difference in women's lives—a positive or substantive vision of constitutional rights—is palpable in this broader view of constitutional history. The constitutional memory shaped by men through judicial decisions has had the effect of keeping the federal Constitution out of the domestic sphere and the home. That is where women have historically been relegated. And it is in that sphere that their right to affirmative protection as citizens often manifests and matters most.

It is notable that a common way to describe the latter period of pregnancy in the past was to call it “confinement.”<sup>68</sup> That phrase resonates in the wake of *Dobbs*. Justice Alito's vision of the world, as reflected in the majority opinion, is grounded in the past. And the impact of the decision is to indeed confine women both literally and figuratively. He cites Sir Matthew Hale, a seventeenth-century lawyer and judge who believed that a charge of rape could not by definition be brought against a husband since it was inconsistent with the husband's rights to his wife's body conferred by marriage.<sup>69</sup> It is also consistent with seventeenth-

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68. J.R. Thorpe, *7 Creepy Ways Being A Pregnant Royal Now Is Different Than It Was In History*, BUSTLE, Oct. 25, 2018 (“The end of a pregnancy for medieval queens and princesses was a very boring time. Why? They'd be put in ‘confinement.’ This was pretty common for all pregnant women at the time, . . . Confinement could begin two weeks before the expected childbirth or earlier if the pregnancy was a difficult one.”); see also Elena Greene, *An Interesting Condition-Pregnancy and Childbirth During the Regency*, THE REGENCY PLUME NEWSLETTER (2006), <http://www.elenagreene.com/regencycb.html> (“This quote from . . . (1791) illustrates the change in terminology used to describe pregnancy and childbirth. . . . The evolution in terminology from the more robust “breeding” or “lying-in” to the more euphemistic “in the family way” and “confinement.”).

69. See Jill Elaine Hasday, Op., *On Roe, Alito Cites a Judge Who Treated Women as Witches and Property*, WASH. POST, May 9, 2022. Hasday notes that Sir Matthew Hale was a lawyer and judge in the seventeenth-century often cited by American judges over the succeeding centuries to support exempting rape within marriage from criminal prosecution. Hasday correctly points out the egregious misogyny of both Hale's legal analysis and that of the *Dobbs*' majority in its reliance on Hale in 2022. *Id.*



century ideas about husbands being the head of the household and the virtual representative of the wife in the public sphere. Thus, she did not need political rights like voting. This seems to be the fixed history and tradition Justice Alito would have the Court use to find an unenumerated right in the Constitution.

Unlike the majority, the dissent in *Dobbs* makes the link between reproductive self-determination and citizenship in the state:

Finally, the expectation of reproductive control is integral to many women’s identity and their place in the Nation. That expectation helps define a woman as an “equal citizen[],” with all the rights, privileges, and obligations that status entails. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government.<sup>70</sup>

Our collective discussion of *Dobbs* is shaping our constitutional memory. I understand the strategic value of emphasizing how significant it is to take away a previously recognized constitutional right. However, the downside of that strategy is that emphasizing *Dobbs*’ admittedly significant departure from prior Supreme Court decisions, we reify the misconception that women’s rights have progressed in a linear fashion in constitutional history. And it reinforces the view that women had no impact on that development and had no agency as constitution-makers. That, in turn, makes a new generation of women’s right advocates less equipped to restore the right American women lost in *Dobbs*.

It also makes judges who must apply “history and tradition” to find unenumerated rights after *Dobbs* less likely to find a substantive equality for women citizens in the Constitution. In that vein, consider that, in his opinion in *Bostock*, Justice Gorsuch repeated the partial origin story about Title VII—suggesting that its passage had simply been the result of a poison pill attempt by a white southern congressman to sabotage the Civil Rights Act.<sup>71</sup> As I have written previously, “[i]f a current justice of the Supreme Court misunderstands the history of an important statutory provision in such a fundamental way, what does that do to his ability to render a correct interpretation of that provision?”<sup>72</sup>

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70. *Dobbs*, 142 S. Ct. at 2345–46 (dissent).

71. *Bostock v. Clayton Cnty.*, 590 U.S. \_\_\_, 140 S. Ct. 1731, 1752 (2020) (“[T]he congressman may have . . . hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill.”). See also Rebecca Onion, *The Real Story Behind “Because of Sex,”* SLATE, June 16, 2020. Note that while I agree with the outcome in *Bostock*, I have concerns about the implications of Justice Gorsuch’s textualist methodology.

72. Monopoli, *Feminist Legal History*, *supra* note 32, at 105.

We *should* note with outrage that the *Dobbs* Court made a novel constitutional move in erasing a previously recognized constitutional right—one that, not unsurprisingly, primarily affects women.<sup>73</sup> But we should also add more historical context to that observation. Situating *Dobbs* as one step in a long line of judicial decisions, as well as federal and state legislation, that have eroded or erased rights previously afforded American women does much to backfill our constitutional memory. While “[t]he law has yet to recognize the significance of women in its development” it is “not surprising given the sticky nature of women’s social, legal, and economic subordination across societies and across millennia . . . in bringing a feminist perspective to bear on law and woman’s relationship to the state and to power, we are fighting thousands of years of deeply entrenched views about that relationship.”<sup>74</sup>

In my previous work, I have endorsed a feminist constitutionalism—one which asks which of multiple possible constitutional interpretations does the least harm to women.<sup>75</sup> The *Dobbs* decision engages in precisely the opposite interpretive approach. As the dissent notes:

The most striking feature of the [majority] is the absence of any serious discussion of how its ruling will affect women. By characterizing *Casey*’s reliance arguments as “generalized assertions about the national psyche,” it reveals how little it knows or cares about women’s lives or about the suffering its decision will cause.<sup>76</sup>

Perhaps it is time to acknowledge that it was never “our” Constitution in the first place, that the retrofitting we have done since 1789 has not worked to make it so, and that it is time for a new “New Departure” and a move toward a feminist constitutionalism.<sup>77</sup> The very design of the Constitution was gendered. It replicated the family as a unit of governance, with the Executive representing the nation to the outside

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73. While *Dobbs* disproportionately affects women, it affects all pregnant people.

74. Monopoli, *Feminist Legal History*, *supra* note 32, at 111.

75. Monopoli, *Gender, Voting Rights*, *supra* note 15, at 125 n.178 (citing Daphne Barak-Erez, *Her-meneutics Feminism and Interpretation*, in *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES* 85, 95 (Beverly Baines, Daphne Barak-Erez, & Tsvi Kahana eds., 2012)).

76. *Dobbs*, 142 S. Ct. at 2343 (dissent). Note too that the dissent does not much invoke women as constitution-makers either. There is little discussion (unlike Justice Ginsburg’s majority opinion in *United States v. Virginia*, 518 U.S. 515 (1996)), of the role women played in achieving ratification of the Nineteenth Amendment and full political rights in 1920. Nor does it provide much background about the role women played in moving abortion rights front and center as a political issue in the 1960s. As a result, it does not clearly convey the idea that the right to abortion was not “granted” to women by men in power at the time *Roe v. Wade* was decided in 1972, rather than being engineered by women’s own advocacy.

77. See *supra* text accompanying note 31, describing the “New Departure.”

world, much as the father was the sole representative of the family in the public sphere.<sup>78</sup>

It is important to note that voting rights and maximum hour/minimum wage protections for women were eventually restored. In the wake of a narrowing of rights like the 1807 New Jersey statute, women were eventually allowed to vote in some states even before Congress enacted what became the Nineteenth Amendment in 1920. While women of color were prevented from voting in many cases even after its ratification in 1920, the Voting Rights Act closed the gap for women of color in 1965. The *Adkins* decision was eventually overruled by *West Coast Hotel v. Parish* in 1937. So, there is hope that reproductive self-determination may follow the same historical path—as a protection or right that was recognized, then erased, and then restored.

In their political history of the woman suffrage movement, Carrie Chapman Catt and Nettie Rogers Shuler drew on records that were part of the National American Woman Suffrage Association archives.<sup>79</sup> They noted that, “[d]ocuments of this kind decline in interest for the general public as the movement they chronicle recedes into the past, but the facts and deductions drawn from them, and here assembled, should prove of significance to the advocates, perhaps especially the women advocates, of each recurring struggle in the evolution of democracy.”<sup>80</sup> Situating *Dobbs* as a point along a long arc of struggle is important just for the reasons Catt and Shuler identify—so that today’s “women advocates” can learn from those of a prior period. But we cannot learn from their political insights and experiences if they are not part of our constitutional memory, produced by social and political institutions that include the U.S. Supreme Court itself.

Recognizing that *Dobbs* is not unique in moving backwards when it comes to women’s rights, as a historical matter, is important if we are going to “produce judges and advocates well-equipped to find a substantive equality of citizenship in law.”<sup>81</sup> Reva Siegel has written that “constitutional memory excludes centuries of suffrage argument about liberty and equality in the family from our constitutional tradition.” Situating *Dobbs* in its proper historical continuum moves us closer to that “day [when constitutional memory] might yet come to include it.”<sup>82</sup> And

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78. Paula A. Monopoli, *Gender and Constitutional Design*, 115 YALE L.J. 2643, 2645 (2006).

79. CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE & POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT*, at ix (1923).

80. *Id.*

81. Monopoli, *Feminist Legal History*, *supra* note 32, at 111.

82. Siegel, *supra* note 11, at 23.

that, in turn, moves us closer to a day when our reproductive self-determination may be restored as a constitutional right.