ESSAY

A RIGHT TO MARITAL RAPE? THE IMMORALITY OF THE *DOBBS* APPROACH TO UNENUMERATED RIGHTS

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I. INTRODUCTION

Almost fifty years after establishing a right to pre-viability abortion in *Roe v. Wade*,[1] the Supreme Court reversed course. In *Dobbs v. Jackson Women's Health Organization*,[2] a five-justice majority subjected abortion rights to the *Glucksberg* test, which determines whether purported rights are fundamental by asking if they are "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[3] Ultimately, the majority concluded that "[t]he right to abortion does not fall within this category."[4] But how the Court reached that conclusion reveals the fundamental flaws underlying the *Glucksberg* test, at least as applied by the Court in *Dobbs*.

When analyzing the historical basis for a right to abortion, the *Dobbs* Court first concluded that no right to abortion existed at common law because the common law treated abortion as criminal or otherwise unlawful.[5] The Court then turned to the law of colonial America and discovered a similar tradition of criminalizing abortion.[6] Lastly, the Court looked to the 19th century—near the time of the Fourteenth Amendment's ratification—and found that "the vast majority of the States" at that time had "enacted statutes criminalizing abortion at all stages of pregnancy."[7] That history, according to the *Dobbs* majority, led to the "inescapable conclusion" that "the right to abortion is not deeply rooted in the Nation's history and traditions."[8] Based on that conclusion and a rejection of *stare decisis*, the Court held that abortion does not qualify for constitutional protection.[9]

However, the decision to adhere to a particular theory of constitutional interpretation is a normative choice that requires moral justification. Thus, the Court's choice to apply such a stringent version of the *Glucksberg* test (a methodology referred to herein as the "*Dobbs* approach") should be tolerated only if that approach yields sufficiently moral outcomes. But if it instead would produce intolerably evil outcomes, that would reveal a

1. 410 U.S. 113 (1973).
2. 142 S. Ct. 2228 (2022).
3. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
4. *Id.*
5. *Id.* at 2248–51.
6. *Id.* at 2251.
7. *Id.* at 2251–53.
8. *Id.* at 2253.
9. *Id.* at 2279.

fundamental flaw in the Court's approach and indicate that the approach should be discarded.[10]

This Essay argues that the *Dobbs* approach cannot withstand moral scrutiny and should therefore be rejected. To demonstrate this, the Essay presents two hypothetical scenarios in which there is only one morally acceptable outcome. In the first, the Supreme Court is asked to recognize a person's right to engage in marital rape. In the second, the Supreme Court is asked to recognize a right to defend oneself against marital rape. Given the history and traditions surrounding marital rape and conjugal rights,[11] it is plausible that the *Dobbs* approach would recognize a right to rape one's spouse.[12] And given that same history, it is almost certain that the *Dobbs* approach would not recognize the right to self-defense against marital rape.[13] Because faithful adherence to the *Dobbs* approach would lead to morally outrageous outcomes, it cannot be upheld on normative grounds. Therefore, the Court should modify its methodology or develop a new means for recognizing unenumerated fundamental rights. After it has done so, the Court should revisit the abortion question using a morally sound methodology.

II. THE *DOBBS* APPROACH

In *Dobbs*, the Court considered whether the Constitution permitted enforcement of a Mississippi law generally prohibiting abortions after the fifteenth week of pregnancy.[14] Sustaining the law required at least partial abrogation of the Court's prior decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, which cases generally affirmed a constitutional right to obtain pre-viability abortions without undue governmental interference.[15] Thus, to answer the question put before it, the majority deemed it necessary to consider whether the Fourteenth Amendment's Due Process Clause protects abortion rights.[16]

Deciding whether a substantive due process right exists is a multistep inquiry that begins with the text of the Constitution

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10. *See infra* notes 34–49 and accompanying text.

11. *See infra* notes 54–66 and accompanying text.

12. *See infra* notes 67–84 and accompanying text.

13. *See infra* notes 85–95 and accompanying text.

14. *Dobbs*, 142 S. Ct. at 2243.

15. *See generally* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). However, it would have been possible to issue a more limited decision upholding the Mississippi law while declining to overrule *Roe* and *Casey* altogether. *See Dobbs*, 142 S. Ct. at 2310–17 (Roberts, C.J., concurring).

16. *Dobbs*, 142 S. Ct. at 2242.

itself—if a right is specifically enumerated, then determining whether that right exists is a much simpler inquiry.[17] Unsurprisingly, the *Dobbs* Court determined that "[t]he Constitution makes no express reference to a right to obtain an abortion."[18]

Having found that a right to abortion is "not mentioned anywhere in the Constitution," the Court turned to the next step: determining whether abortion is a constitutionally-protected unenumerated right.[19] To answer that question, the Court employed a test adapted from *Glucksberg*, which asks "whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[20] Per *Dobbs*, "[h]istorical inquiries . . . are essential" to apply the *Glucksberg* test and to prevent the Court from ignoring "the 'appropriate limits' imposed by 'respect for the teachings of history.'"[21]

When conducting its historical inquiry into abortion rights, the Court began with the common law.[22] The common law treated abortion as "a crime at least after 'quickening'—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy."[23] In addition, the Court noted, the "'eminent common-law authorities' . . . *all* describe abortion after quickening as criminal."[24] Moreover, even if "a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*."[25] As evidence that the common law condemned even pre-quickening abortions, the Court described a "proto-felony-murder rule" proscribing that if a physician attempted to induce an abortion and the woman died as a result, the physician was guilty of murder because he had been acting "*unlawfully* to destroy her child within her."[26] Thus, there was no right to abortion, pre-viability or otherwise, at common law.[27]

The Court then turned to early American history and found that the "few cases available from the early colonial period corroborate that abortion was a crime," at least as to quickened fetuses.[28]

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17. *Id.* at 2244–45.
18. *Id.* at 2245.
19. *Id.* at 2247.
20. *Id.* at 2246.
21. *Id.* at 2247–48.
22. *Id.* at 2249.
23. *Id.*
24. *Id.*
25. *Id.* at 2250.
26. *Id.*
27. *Id.* at 2251.
28. *Id.*

However, the Court noted, "the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century," during which "three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening."[29] The trend toward criminalizing all abortion continued until, "[b]y the end of the 1950s, . . . statutes in all but four states and the District of Columbia prohibited abortion 'however and whenever performed, unless done to save or preserve the life of the mother.'"[30]

The Court's historical analysis led to an "inescapable conclusion" that "a right to abortion is not deeply rooted in the Nation's history and traditions."[31] Rather, "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[32] Moreover, the *Dobbs* Court rejected all arguments to the contrary as being unpersuasive or insufficiently based in historical evidence.[33]

III. THE NEED FOR MORAL JUSTIFICATION

Although the Supreme Court purports to be bound by the Constitution's original meaning,[34] the *Glucksberg* test and *Dobbs* approach are traditionalist, as opposed to originalist, inquiries.[35] Traditionalist methods interpret the Constitution "in accordance with the long-standing and evolving practices, experiences, and tradition of the nation."[36] In contrast, modern originalism seeks to

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29. *Id.* at 2252–53; *but see* Aaron Tang, *The Originalist Case for an Abortion Middle Ground* (Sept. 13, 2021), https://ssrn.com/abstract=3921358 (positing that at the time of the Fourteenth Amendment's ratification, 21 of 37 states recognized a right to pre-quickening abortion).

30. *Dobbs*, 142 S. Ct. at 2253.

31. *Id.*

32. *Id.* at 2253–54.

33. *Id.* at 2254 ("Respondents and their *amici* have no persuasive answer to this historical evidence."); *id.* at 2258 ("[A] broader right to autonomy and to define one's 'concept of existence' . . . could license fundamental rights to illicit drug use, prostitution, and the like," none of which "has any claim to being deeply rooted in history."); *id.* at 2259 ("The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a deeply rooted one, in this Nation's history and tradition." (cleaned up)).

34. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 353 (2010); South Carolina v. United States, 199 U.S. 437, 448 (1905) (overruled on other grounds as stated in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

35. *See* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1133 (1997); *but see* Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J. L. & PUB. POL'Y 1, 69 (2010) (positing that "the commitment to originalism" is "implicit in Glucksberg").

36. McConnell, *supra* note 35 at 1133.

understand the original public meaning of the Constitution.[37] "Traditionalism thus differs from originalism, which draws its normative authority not from historical practice but from a social contract theory of precommitment by the American People."[38] Traditionalism, as applied in *Glucksberg* and *Dobbs*, thus emphasizes historical tradition and practice (typically by state and local governments) rather than how the public would have interpreted the constitutional text.[39]

Critically, the Court's embrace of a traditionalist method of constitutional interpretation is not mandated by the Constitution's text or any other law. Rather, it is a subjective, normative choice. "To decide a constitutional question is inescapably a moral activity," and all "constitutional decision making" regarding interpretative methodologies require "full-fledged moral justification."[40] Therefore, the *Dobbs* approach can stand only if it is justified on moral grounds.

The Supreme Court appears to recognize the need to justify its traditionalist approach on a moral or normative basis. For example, *Glucksberg* justified its approach as a means of making the law more objective and "rein[ing] in the subjective elements that are necessarily present in due-process judicial review."[41] Along the same lines, the *Dobbs* majority criticized the dissenting opinion's more liberal approach to the *Glucksberg* test as imposing "no clear restraints on the . . . 'exercise of raw judicial power.'"[42] Thus, according to the *Dobbs* majority, strictly cabining its fundamental rights analysis to early American history is necessary to prevent activist judges from "usurp[ing] authority that the Constitution entrusts to the people's elected representatives."[43]

However, even assuming a stringent application of *Glucksberg* properly restrains the judiciary, that approach may still not

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37. *See generally* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

38. John C. Jeffries Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1241 (1998).

39. *See id.* Notably, the phrase "original meaning" appears only a single time in *Dobbs*, and it is in the dissenting opinion. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2324 (2022) (Breyer, Sotomayor, Kagan, J.J., dissenting) (criticizing the majority's reliance tradition because "post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text" (cleaned up)).

40. *See* R. George Wright, *Dependence and Hierarchy Among Constitutional Theories*, 70 BROOK. L. REV. 141, 196 (2004); *see also* Evan D. Bernick, *Eliminating Constitutional Law*, 67 S.D. L. REV. 1, 12 (2022).

41. Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

42. *Dobbs*, 142 S. Ct. at 2260.

43. *Id.* at 2247.

be justified if it leads to certain morally unacceptable outcomes. Indeed, that the Constitution must be interpreted to avoid certain outcomes is implicit in the Supreme Court's famous truism: "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."[44] As one scholar has said,

> [T]he choice of a constitutional theory has weighty practical implications. Anyone who would choose a theory without taking account of those implications would be . . . morally, politically, and legally reckless. It is not merely an affirmation of hope that 'the Constitution . . . is not a suicide pact.' The guarantee that the Constitution is not a suicide pact comes from social practices within which the Constitution is accepted as law and within which constitutional interpretation is constrained by public expectations and tolerance. From the perspective of judges and the public alike, any constitutional theory that turned the Constitution into a suicide pact would and should be deemed unacceptable on that ground.[45]

But an interpretive method need not result in something so existentially calamitous as a national suicide to warrant rejection. Consider, for example, the landmark decision of *Brown v. Board of Education*, in which the Supreme Court held that the Fourteenth Amendment does not permit racial segregation in public education.[46] As Professor Michael McConnell explained, "Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."[47] Thus, despite early criticisms that *Brown* was inconsistent with the Constitution's original meaning,[48] some originalist scholars sought diligently to demonstrate that originalism could produce the morally required result in *Brown*.[49]

Therefore, the moral constraints on constitutional interpretation demand avoidance of uniquely wrong outcomes, and if a theory of constitutional interpretation would yield the wrong result in such a case, then that approach must be modified or discarded.

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44. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–160 (1963).

45. Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 25–26 (2011) (cleaned up).

46. 347 U.S. 483 (1954).

47. Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995).

48. *Id.* at 950–52.

49. Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 494–96 (2013).

IV. THE *DOBBS* APPROACH TO MARITAL RAPE

As alluded to above, this Essay applies the *Dobbs* approach to two hypothetical questions. The first question is whether there is constitutional right to engage in marital rape. The second is whether there is a constitutional right to defend oneself against marital rape.

Morality dictates the correct answer to both questions. It is self-evident that rape, even between spouses, is a moral travesty.[50] Recognition of a right to rape one's spouse is so morally atrocious that any methodology finding such a right must be discarded. The same is true for denying an individual the right to defend against marital rape, as such a right is fundamental to a person's humanity.[51] The failure of an interpretive method to arrive at the correct

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50. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597–98 (1977) ("[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the 'ultimate violation of self.'" (cleaned up)); Josh Maggard, *Courting Disaster: Re-Evaluating Rape Shields in Light of* People v. Bryant, 66 OHIO ST. L.J., 1341, 1351 (2005) ("Rape is viewed as a crime vastly different from any other due to its unique nature and disturbing results; rape 'is an abomination not because it is an assault on innocence, but because it is an assault on freedom.'" (cleaned up)); Jennifer A. Bennice *et al.*, *Relative Effects of Intimate Partner Physical and sexual Violence on Post-Traumatic Stress disorder Symptomatology*, 18 VIOLENCE AND VICTIMS 87 (2003) (finding that sexual violence between intimate partners "significantly predicted PTSD" in victims even when "controlling for physical violence severity"); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L.R. 1621, 1628 (1998) (including "rape" among other "singular abominations" such as "child abuse, torture, genocide, [and] predatory murder and maiming" (cleaned up)); Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 115 (1994) ("The attitude that marital or date rape is a victimless crime, or a lesser crime, is to deny the woman who has been raped bodily integrity, autonomy, and equal protection before the law."); Michael D. A. Freeman, *"But If You Can't Rape Your Wife, Who[m] Can You Rape?": The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 9 (1981) ("Rape is the denial of self-determination, the rejection of the victim's physical autonomy: it symbolizes 'ultimate disrespect . . . the exercise of the power of consent over another person.'"); Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE 381 (1975) ("A sexual assault is an invasion of bodily integrity and a violation of freedom and self-determination wherever it happens to take place, in or out of the marriage bed.").

51. John Witte & Justin J. Latterell, *Christianity and Human Rights: Past Contributions and Future Challenges*, 30 J.L. & RELIGION 353, 380 (2015) ("To insist on the rights of self-defense and the protection and integrity of your body or that of your loved ones, or to bring private claims and support public prosecution of those who rape, batter, starve, abuse, torture, or kidnap you or your loved ones is, in part, an invitation for others to respect the divine image and 'temple of the Lord' that each person embodies." (cleaned up)); David B. Kopel, Paul Gallant, and Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. Pub. L. 43, 99 (2007) ("If all the human rights treaties in the world were repealed tomorrow, could a person still assert that she has a right to freedom of religion, a right not to be raped, a right to criticize government? We think that the answer is clearly 'yes'—that these rights have always been inherent; the human rights treaties of the twentieth century recognized these rights, but did not create them."); *see also* Carolyn M. Shafer & Marilyn Frye, *Rape*

answer to either question is at least as discrediting as would be the failure to reach the correct result in *Brown*.[52]

Before delving into either question using the *Dobbs* approach, however, it is necessary to have a better understanding of the history of spousal rape in the American legal tradition. Only then can we determine whether the *Dobbs* approach, with its focus on history and tradition, would reach the required answers.

A. Marital Rape in the American Legal Tradition

Any historical analysis of the American legal tradition or constitutional law must begin with the common law.[53] At common law, the concept of marital rape did not exist because women were considered "incapable of being raped by their husbands."[54] As explained by the common law jurist Sir Matthew Hale, "[t]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[55] In fact, there are multiple recorded instances of men defeating rape charges by relying on this so-called "marital rape exception."[56] But not only did the English common law fail to criminalize marital rape, it also recognized a husband's "legal right to use force against [his wife] in order to [e]nsure that she fulfilled her wifely obligations, which included consummation of the marriage, cohabitation, maintenance of conjugal rights, sexual fidelity, and general obedience and respect for his wishes."[57] Thus, the

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and Respect, FEMINISM AND PHILOSOPHY 333 (Mary Vetterling-Braggin *et al.* eds., 1977) (explaining that the evil of rape consists of disrespect for the victim's individual autonomy).

52. *See supra* notes 46–49 and accompanying text.

53. *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2249 (2022); *see also* Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozert After 20 Years*, 38 J.L. & EDUC. 83, 112 (2009) ("The English common law tradition was naturally extended into the colonies and remained predominant, even after our Nation's independence from Great Britain, for the first century-and-a-half."); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 566 (1997) (discussing "the common law heritage of the American legal tradition" and noting that America's "system of case-based constitutional law . . . owes a great deal to the common law heritage").

54. Graceann Carimico, Thuy Huynh, & Shallyn Wells, *Rape and Sexual Assault*, 17 GEO. J. GENDER & L. 359, 373 (2016).

55. Matthew Hale, PLEAS OF THE CROWN 629 (1847). It is worth noting that the majority opinion in *Dobbs* repeatedly cited Hale as an authority demonstrating the lack of a historical right to abortion. 142 S. Ct. at 2236, 2249–51, 2254, 2267.

56. *See, e.g.*, R. v. Miller, 2 QB 282 (1954); R. v. Caswell, Crim L.R. 111 (1984); R. v. Kowalski, 86 Crim. App. R 339 (1988); R. v. Sharples, Crim L.R. 198 (1990); R. v. J, 1 All E.R. 759 (1990).

57. Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 151 (1995).

right of husbands to engage in marital rape was explicitly recognized at common law.[58]

Denying women the right to defend against spousal rape was a necessary corollary of the common law's recognition of a right to engage in marital rape.[59] At common law, "homicide was a felony unless justified or excused," and a "woman killing in defence of chastity" typically "amounted to a justifiable defence."[60] However, a woman's right to self-defense against rape generally did not extend to spousal rape because the common law considered spousal rape a legal impossibility.[61] "So, although killing in defence against rape was part of the common law of self-defence, at least formally, it was not available to a wife who killed her husband in defence of rape."[62]

The common law traditions regarding marital rape found a place in America's own legal system. From the early 19th century until the mid-1970s, all fifty states recognized a version of the marital rape exception under which a man was not criminally liable for raping his wife.[63] Indeed, it took until 1993 for the last state to abolish the marital rape exception and recognize the legal possibility that one spouse could rape the other.[64] Thus, for most of the United States' history, one spouse raping the other was presumptively legal.

Moreover, a foundational aspect of the right to self-defense in American law is that one has a right to defend him- or herself only against *unlawful* force.[65] Thus, due to the historic legality of spousal rape, American law did not traditionally recognize a woman's right to defend against her husband's attempts at rape.[66]

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58. Alletta Brenner, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 HARV. J. L. & GENDER 503, 514–16 (2013).

59. Stella Tarrant, *Why Intimate Partner Violence Is Difficult to See as Grounds for Self-Defence: Old Common Law Legacies*, 29 NZULR 703, 710–21 (2021).

60. *Id.* at 710–11 (cleaned up).

61. *Id.* at 715–17.

62. *Id.* at 717.

63. Griffith, *supra* note 57, at 154; Ellen Waldmann & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J. L. & GENDER 285, 288 n.16 (2005).

64. *See* Carimico *et al.*, *supra* note 54, at 373.

65. *See* Model Penal Code § 3.04; Restatement (Third) of Torts: Inten. Torts to Persons § 23 (2020).

66. Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 LAW & SOC'Y REV. 75, 78 (1989) ("[U]ntil the mid-1970s, women who eventually killed their mates to protect themselves from harm or death found the traditional plea of self-defense unavailable."). That women lacked a right to defend themselves against technically legal rapes is also highlighted in the slavery context. For example, one enslaved woman, named Celia, was judicially

With that historical context, we are now prepared to apply the *Dobbs* approach to the hypothetical questions posited above.

B. A Right to Marital Rape

Imagine the following scenario: A man is convicted for raping his wife under state law. He appeals, arguing that he had a fundamental right to engage in sexual intercourse with his wife regardless of whether she consented—in other words, to rape his wife. The appeal works its way to the Supreme Court, which grants certiorari on the following question: "Does the Due Process Clause of the Fourteenth Amendment protect a fundamental right to engage in sexual intercourse with one's spouse regardless of whether the other spouse consents?"

Employing the *Dobbs* approach, the Court first looks to the constitutional text.[67] After concluding that a right to rape one's spouse is "not mentioned anywhere in the Constitution," the Court then asks, "whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[68]

As for history and tradition, the Court begins with the common law.[69] In doing so, the Court discovers that the common law not only failed to criminalize marital rape but also recognized a man's legal right to rape his wife.[70] Then the Court turns to early American history[71] and likewise finds that, from near the time of the Founding until the late 20th century, the law of every state permitted a man to rape his wife.[72] Based on this analysis, the Court reaches the "inescapable conclusion" that a right to engage in marital rape is "deeply rooted in the Nation's history and traditions."[73]

However, that may not end the Court's inquiry. The Supreme Court had previously held that an unenumerated right is constitutionally protected "if it is fundamental to our scheme of ordered

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executed for killing her owner when he attempted to rape her. *See* Christopher Griffin, *The Celia Doctrine: A New Defense Against the Criminalization of Rape Victims*, 43 J. LEGAL PROF. 251, 252–55 (2019).

67. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244–45 (2022).

68. *See id.* at 2246 (cleaned up).

69. *See id.* at 2249.

70. *See supra* notes 54–58 and accompanying text.

71. *See Dobbs*, 142 S. Ct. at 2251–53.

72. *See supra* notes 63–64 and accompanying text.

73. *See Dobbs*, 142 S. Ct. at 2253.

liberty *or* deeply rooted in this Nation's history and tradition."[74] But under the *Dobbs* approach, an unenumerated right must be "fundamental to our scheme of ordered liberty *and* deeply rooted in this Nation's history and traditions."[75] Thus, the fact that a purported right has strong historical support may not, by itself, sufficiently qualify a right as fundamental.

In the past, the Court has not fully explained how to determine whether a purported right is "fundamental to our scheme of ordered liberty" but has focused the brunt of its analysis on the historical deeply-rooted prong of the *Glucksberg* test. For example, in *Timbs v. Indiana*, the Court considered whether the Eighth Amendment's "[p]rotection against excessive punitive economic sanctions" was incorporated against the states via the Fourteenth Amendment.[76] Before answering that question in the affirmative, the Court traced the right back to the Magna Carta and wrote seven paragraphs of historical analysis.[77] Afterward, the Court wrote a single paragraph explaining the importance of the right but never expressly stated whether that discussion pertained to "scheme of ordered liberty" prong.[78]

In *Dobbs*, however, the Court closely tied the ordered-liberty prong to history. The Court noted that there are many different conceptions of liberty, privacy, and autonomy, and that "[l]icense to act on the basis of such beliefs may correspond to one of the many understandings of liberty, but it is certainly not ordered liberty."[79] Rather than strike a balance between the competing beliefs regarding abortion and the early stages of life, the Court considered it more appropriate that the question be left to the states.[80] But in reaching that conclusion, the Court did not, as in *Timbs*, analyze the supposed importance of the abortion right at issue. Instead, the Court noted that the "Nation's *historical understanding* of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."[81]

Thus, under the *Dobbs* approach, it is unclear what, if any, distinction there is between the deeply-rooted and ordered-liberty prongs of the *Glucksberg* test. If the two prongs are, in fact, a

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74. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (emphasis added) (otherwise cleaned up).

75. *See Dobbs*, 142 S. Ct. at 2246 (emphasis added) (otherwise cleaned up).

76. 139 S. Ct. at 689.

77. *Id.* at 687–89.

78. *Id.* at 689.

79. *See Dobbs*, 142 S. Ct. at 2257 (cleaned up).

80. *Id.*

81. *Id.* (emphasis added).

single prong, then the Court would have to conclude that a right to have forcible sexual relations with one's spouse is indeed fundamental based on its strong historical backing.[82] If the two prongs are separate, then how the Court would analyze the right's relation to the "historical understanding of ordered liberty" is unclear.[83] However, to the extent the two prongs are separate and the Court is guided by *Timbs*, analyzing the importance of the right to America's scheme of ordered liberty is a much more subjective analysis, and untethering that prong from history to any significant degree would undermine the *Dobbs* approach's normative justification of preventing judicial activism.[84]

In any event, it is plausible, if not guaranteed, that faithful application of the *Dobbs* approach would recognize a fundamental right to engage in spousal rape. That such an outcome is even plausible should give proponents of the *Dobbs* approach significant doubt as to soundness of the methodology's moral foundation.

C. A Right to Defend Against Marital Rape

Proceeding to the second hypothetical, imagine the following: A legislature wants to reaffirm the state's commitment to traditional family values. In furtherance of that goal, the legislature enacts a law bringing back the marital rape exception, meaning that spousal rape is no longer a criminal offense within the state. Thereafter, a man attempts to rape his wife, but the wife kills the man in self-defense. The woman is charged with murder. Her claim to self-defense is rejected because the husband's attempted rape did not constitute unlawful force under the new law. The woman appeals. Her case works its way to the Supreme Court, which grants certiorari on the following question: "Under the Due Process Clause of the Fourteenth Amendment, is there a fundamental right to defend oneself against marital rape?"

Again, the Court first looks to the constitutional text,[85] which fails to reveal a right to defend against spousal rape. So, the Court turns to "whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[86] Rather than revealing a right to defend oneself against marital rape, the Court's historical inquiry finds the

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82. *See supra* notes 54–58 and 63–64 and accompanying text.

83. *See Dobbs*, 142 S. Ct. at 2257.

84. *See supra* notes 41–43 and accompanying text; *see also Dobbs*, 142 S. Ct. at 2247 (noting that "[l]iberty is a capacious term" with various subjective meanings).

85. *See Dobbs*, 142 S. Ct. at 2244–45.

86. *See id.* at 2246 (cleaned up).

opposite. The early common law permitted marital rape, even by force.[87] Early American law likewise did not consider nonconsensual sex between spouses unlawful.[88] And not a single state recognized nonconsensual sex between spouses as rape until the mid-1970s.[89] More specifically still, the law explicitly denied women the right to defend themselves against spousal rape for most of American history.[90] Indeed, the common law considered such a killing a form of "petit treason," an especially "odious form of murder . . . committed by an inferior in a status-relationship" such as "a wife killing her husband."[91] From this history, the Court's "inescapable conclusion is that a right to [defend oneself against marital rape] is not deeply rooted in the Nation's history and traditions."[92]

Unlike recognizing a new affirmative right to engage in spousal rape,[93] it is not necessary to turn to whether a right to defend against marital rape is essential to America's scheme of ordered liberty. Under the *Dobbs* approach, the failure to satisfy either prong of the *Glucksberg* test definitively means that no such fundamental right exists: "[A] fundamental right *must* be 'objectively, deeply rooted in this Nation's history and tradition.'"[94] Because the historical record weighs so heavily against recognizing a right to defend against marital rape,[95] there is virtually no doubt that the *Dobbs* approach, if faithfully followed, would fail to recognize such a right. Thus, in this hypothetical, the Supreme Court would affirm the woman's conviction for murdering her would-be rapist husband.

D. Response to Objections

Some might object that the *Dobbs* approach would not necessarily yield the flagrantly immoral results described. For example, one might argue that the right to defend against marital rape can be found in a more generalized historical right, such as the right to bodily autonomy. But *Dobbs*' treatment of abortion squarely forecloses such a possibility:

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87. *See supra* notes 54–58 and accompanying text.
88. *See supra* note 63 and accompanying text.
89. *See supra* note 64 and accompanying text.
90. *See supra* notes 59–62 and 65–66 and accompanying text.
91. Tarrant, *supra* note 59, at 710 (cleaned up).
92. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022).
93. *See supra* notes 74–81 and accompanying text.
94. *Dobbs*, 142 S. Ct. at 2247 (emphasis added).
95. *Supra* notes 54–66 and accompanying text.

> [A]ttempts to justify abortion through appeals to a broader right to autonomy and to define one's concept of existence prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.[96]

As with abortion, there is no basis for appealing to a more generalized conceptual right as it pertains to defense against marital rape because the historical evidence specifically rejects the existence of such a right.[97]

Others might object that it is not enough to consider the marital rape questions under only the *Dobbs* approach because the morally right outcome could be reached via other parts of the Constitution, such as the Equal Protection Clause. Such a contention has surface-level appeal because, after all, the historical treatment of marital rape is heavily grounded in sexism and the subjugation of women.[98] However, the fact that a law has objectionable historical roots is not a basis for overturning the law if enforcement is far enough removed from the law's discriminatory past.[99]

On a similar note, although women were the legally disadvantaged party from a historical perspective, the *Dobbs* approach could, at least in theory, treat the sexes equally with regards to marital rape. For example, consider the common law tort of alienation of affections, which permits a plaintiff spouse to recover against a third party (typically the adulterous lover of the nonplaintiff spouse) for damages caused to the plaintiff's marriage. Historically, this cause of action was available only to husbands because it was premised on the assumption that "the wife is one of the husband's chattels, and that her companionship, her services and her affections are his property."[100] However, the tort's modern analogue "now extends to both spouses equally" and "is no longer based on the premise that either spouse constitutes the 'property' of the other, but on the premise that each spouse has a valuable interest in the marriage relationship, including its intimacy, companionship, support, duties, and affection."[101] Thus, because the tort now applies to the sexes equally, it does not pose the same

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96. *See Dobbs*, 142 S. Ct. at 2258 (cleaned up).

97. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

98. *See supra* notes 54–66 and accompanying text.

99. *See* McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987).

100. Moulin v. Monteleone, 115 So. 447, 450 (La. 1927).

101. Nelson v. Jacobsen, 669 P.2d 1207, 1215 (Utah 1983).

equal protection problems that its earlier counterparts would have.

The same could likewise be true with respect to either recognition of a right to engage in marital rape or denial of a right to defend against marital rape. Although the common law recognized only men as having the right to rape their spouse,[102] there is no reason that the right could not be reconceptualized as sex-neutral (i.e., affording both men *and* women the right to engage in marital rape). Likewise, both men and women would lack the right to defend against marital rape. Thus, both immoral outcomes could be sustained without any obvious equal protection problems.

V. CONCLUSION

As demonstrated above, faithful adherence to the *Dobbs* approach could plausibly recognize a right to engage in marital rape. Just as bad, the *Dobbs* approach would almost certainly fail to recognize a right to defend oneself against marital rape. This highlights a critical flaw in the *Dobbs* approach: it is entirely reliant on a history filled with traditions that are antithetical to modern conceptions of morality. That such outrageous outcomes could be reached via the *Dobbs* approach represents a damning indictment of the methodology's moral standing, and it strongly suggests that the Court needs a new vehicle by which to identify unenumerated rights.

Although it is beyond the scope of this Essay to identify the exact methodology the Court and its justices should adopt in identifying fundamental rights, various justices have suggested possible alternative approaches for recognizing unenumerated rights. For example, the dissent in *Dobbs* suggested a more liberal version of the *Glucksberg* test that "recognize[s] that the constitutional 'tradition' of this country is not captured whole at a single moment" but also "gains content from the long sweep of our history and from successive judicial precedents."[103] Similarly, in a concurring opinion to *Glucksberg*, Justice Souter offered an alternative test that would look to general principles derived from the constitutional text, precedent, and history.[104] Justice Harlan believed that the Court's due process jurisprudence should not be "reduced to any formula" and endorsed a common law approach to finding

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102. *See supra* notes 54–58 and accompanying text.

103. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2326 (2022) (Breyer, Sotomayor, and Kagan, J.J., dissenting).

104. *See* Washington v. Glucksberg, 521 U.S. 702, 764 (1997) (Souter, J., concurring).

fundamental rights.[105] In *Obergefell v. Hodges*, the Court looked to whether an alleged right was "central to individual dignity and autonomy."[106] At another time, the Court focused solely on whether an unenumerated right was "implicit in the concept of ordered liberty."[107] There are still other methodologies beyond those described here,[108] and likely many more may yet be formulated.

To be sure, although there are almost certainly multiple methods that could satisfy the baseline requirements of morality, the aforementioned methods are not necessarily equal to each other, and individual justices may prefer a particular approach for numerous reasons. The point, however, is that the Court should not feel hamstrung to the *Dobbs* approach when it has been shown to lack a credible moral foundation. There are numerous other methods available.

Although the above critique does not necessarily require a different outcome in *Dobbs*, it demonstrates that *Dobbs* reached its holding via an incorrect and unjustifiable methodology. When next called upon to identify whether an unenumerated right qualifies for constitutional protection, the Court should decline to use the *Dobbs* approach and instead select some other methodology or develop a new methodology altogether. In any event, it is incumbent on the Supreme Court to discard the immoral *Dobbs* approach as a vehicle for recognizing fundamental rights. Moreover, once the Court has selected a more suitable and morally acceptable methodology, it should revisit the abortion rights question using a proper analytical method.

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

106. 576 U.S. 644, 663 (2015).

107. Palko v. Connecticut, 302 U.S. 319, 324–35 (1937).

108. *See generally* David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J. L. & PUB. POL'Y 795 (1996).