

THE PRO-CHOICE CASE FOR OVERTURNING *ROE V. WADE*: A NEW CONSTITUTIONAL HOME FOR REPRODUCTIVE RIGHTS

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Abstract

Reproductive rights, despite their white-hot controversial nature in the last decades of American politics and their life-changing impact on those who are denied such rights, are a constitutional anomaly. More than any other right forced to take shelter with the right to privacy in the Fourteenth Amendment's cramped Due Process Clause, reproductive rights are in danger of losing their federal constitutional protection. This Note posits that pro-choice activists must abandon *Roe v. Wade* and its progeny—not because the cases are wrong, but simply because they are unlikely to survive much longer. Instead, the goal of preserving access to reproductive rights would be better served by playing by the rules of the originalist and textualist games that have come to dominate modern U.S. Supreme Court jurisprudence and by expending political capital on passing the Equal Rights Amendment. This Note presents arguments intended to serve as a template for more effective and productive pro-choice activism.

* *Editor's Note*: The Author's Note was researched and written prior to the June 24, 2022, decision in *Dobbs v. Jackson Women's Health Organization*. In a controversial move, the U.S. Supreme Court held in *Dobbs* that women have no constitutional right to an abortion. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). After *June Medical Services L.L.C. v. Russo* was decided and around the time the Author's Note was written, Justice Amy Coney Barrett was appointed to the U.S. Supreme Court following the death of Justice Ginsburg. Thus, when the Author's Note was written, the Court included Justices Barrett, Alito, Thomas, Gorsuch, Kavanaugh, Sotomayor, Kagan, and Breyer and Chief Justice Roberts. References in the Author's Note to the composition of "the current Court" or "today's Court" concern this list of Justices and do not include Justice Jackson. In *Dobbs*, Justice Barrett joined Justices Alito, Thomas, Gorsuch, and Kavanaugh in the majority opinion that nullified a woman's right to receive an abortion. Throughout the Author's Note, the case law overruled or abrogated by *Dobbs* is indicated by citation in accordance with *The Bluebook*, even though such cases were not overruled or abrogated at the time of writing. Despite *Dobbs* overturning *Roe v. Wade*, the arguments in this Note remain crucial for the future of reproductive rights. In a post-*Dobbs* world, finding a home for reproductive rights is now a necessity—rather than merely an alternative—for pro-choice advocates.

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INTRODUCTION

Reproductive rights are a constitutional anomaly because, unlike their cousins, they have no constitutional home. The rights of freedom of speech, religion, and the press all comfortably share the spacious mansion that is the First Amendment.¹ The various rights of the accused enjoy a cozy home in the Sixth Amendment.² The right to bear arms is protected by the Second Amendment, a spacious home that was renovated by modern U.S. Supreme Court jurisprudence.³ Reproductive rights,⁴ however, have no such safe harbor. Rather, they are forced to share an increasingly shrinking and temporary home in the Fourteenth Amendment, awkwardly rooming with the right to privacy incorporated by the Due Process Clause and the government's interest in preserving fetal life.⁵ The compromise between reproductive rights and the government's interest in preserving fetal life is not the kind of safe, permanent constitutional abode our other rights enjoy, particularly those concerning bodily autonomy and privacy. Since *Roe v. Wade*, the Supreme Court has tilted this fragile balance in favor of the state's interests consistently.⁶ With the appointment of Justice Amy Coney

1. U.S. CONST. amend. I.

2. U.S. CONST. amend. VI.

3. U.S. CONST. amend. II; see *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense").

4. For the purposes of this Note, "reproductive rights" means a person's right to choose when and how to reproduce and the right to adequate healthcare and resources to support these choices, regardless of that person's sex or gender.

5. *Roe v. Wade*, 410 U.S. 113, 154 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

6. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (recognizing a woman's right to have an abortion before fetal viability, so long as it may be obtained without "undue interference" from the state and weakening *Roe*'s trimester framework), *overruled by*

Barrett to the Supreme Court—cementing an originalist majority of Justices—the future of any reproductive rights finding a home in the Fourteenth Amendment, or anywhere in the current U.S. Constitution, is dubious at best. With the grim setting for the future of reproductive rights as a backdrop, this Note sets out an argument for what pro-choice advocates should argue to preserve reproductive rights against originalist judicial theorists.

This Note is divided into three parts. Part I details the compromise made by *Roe v. Wade* and explains that its protection of reproductive rights was doomed from the start. Part I briefly discusses the Supreme Court’s holding in *Roe v. Wade*, which laid the groundwork for the future erosion of reproductive rights and provides some examples of this erosion through *Roe v. Wade*’s progeny. Part I also suggests that pro-choice advocates should support overturning *Roe v. Wade* because of its unsustainable compromise and focus their efforts elsewhere.

Part II posits other potential constitutional homes for reproductive rights. In other words, Part II provides alternative provisions in the Constitution that, as is, could offer refuge for reproductive rights. Part II touches on additional arguments that have been made regarding reproductive rights, ultimately focusing on the potential of an Equal Protection Clause case for reproductive rights, as alluded to by the late Justice Ginsburg.⁷

Part III acknowledges the reality that the Constitution, as it currently stands, likely has no permanent home for reproductive rights. Part III analyzes what a constitution with a fully empowered Equal Rights Amendment (ERA) could provide for reproductive rights. Part III explains what impact the ERA would have on the status of reproductive rights in the United States and what an argument relying solely on the ERA’s text and an originalist understanding of the ERA would look like. Finally, Part III argues that the ERA would offer a home to reproductive rights as steadfast as many other civil rights enjoy and that this home would withstand scrutiny from even the strictest constitutional originalists.

I. THE INADEQUACY OF *ROE V. WADE*’S COMPROMISE

In *Roe v. Wade*, the Supreme Court considered a constitutional challenge to a longstanding Texas law that made it criminal to “procure

Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2242 (2022); see also *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (finding that a blanket ban on certain abortion procedures, regardless of fetal viability, is not an “undue burden” on a woman’s right to an abortion).

7. See *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”).

an abortion,” with the exception of such abortions procured on medical advice.⁸ Jane Roe, the plaintiff, brought many constitutional challenges to the abortion law, including challenges under the First, Fourth, and Ninth Amendments.⁹ The Supreme Court engaged in an analysis of the common law history regarding abortion that, while interesting, goes beyond the scope of this Note.¹⁰ The Supreme Court only entertained the Fourteenth Amendment argument, characterizing Roe’s argument as alleging that the Texas abortion law invaded her right to privacy.¹¹ The *Roe* majority acknowledged that the Constitution did not expressly mention a right to privacy and analyzed the shaky history of substantive due process rights protected by the Fourteenth Amendment’s Due Process Clause.¹² The Supreme Court failed to explicitly state whether it was recognizing this right to privacy as being protected by the Fourteenth Amendment or the Ninth Amendment.¹³

With this weak foundation, the Supreme Court then went on to strike a compromise that would provide only a temporary safe haven for reproductive rights: a woman’s¹⁴ right to an abortion, protected by her right to privacy, must be balanced against the state’s compelling interest in preserving viable fetal life.¹⁵ In the context of *Roe v. Wade*, that meant establishing a bright line rule. Once the fetus reaches viability, the state’s interest in protecting fetal life becomes too “compelling” to respect the woman’s right to privacy any longer, and a state may restrict abortions after that “compelling” point but not before it.¹⁶ While *Roe*’s holding no doubt must have felt like some victory for pro-choice advocates at the time—indeed, the Texas law in question was struck down as unconstitutional¹⁷—the rule gave reproductive rights a home in the Constitution that could not house them forever.

This rule was a short lease for reproductive rights in the Constitution’s cramped Fourteenth Amendment, to last only as long as medicine would allow. In 1973, the year *Roe v. Wade* was decided, medicine did not

8. *Roe*, 410 U.S. at 117–20.

9. *Id.* at 120.

10. *Id.* at 132–42.

11. *Id.* at 129.

12. *Id.* at 152.

13. *See id.* at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

14. This Note acknowledges that reproductive rights are important for all people with reproductive capability, including trans men and nonbinary individuals. But, for the sake of simplicity and its main argument, this Note will employ the binary gender terms used in Supreme Court jurisprudence.

15. *Roe*, 410 U.S. at 154.

16. *Id.* at 163–65.

17. *Id.* at 164.

consider a fetus to be viable until the third trimester mark, which is where *Roe* placed the “compelling” point on the interests it was balancing.¹⁸ It has been almost five decades since the *Roe* Court decided the point at which a fetus becomes viable, and medicine has only advanced. In fact, modern advances in neonatal care suggest that fetuses delivered as early as twenty-four weeks may be viable.¹⁹ While the science is unclear on whether this number may change, fetal anatomy places limits on survival before twenty-four weeks.²⁰ Regardless, it is not necessary to explore the nuances of neonatal medicine to understand the flaws of the *Roe* compromise. The true compelling point of fetal viability occurs a month earlier than the Court determined in *Roe*.²¹ In the 1992 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court noted that advances in neonatal medicine placed *Roe*’s compelling point at an earlier time during pregnancy.²² While *Casey* did not ultimately overrule *Roe*,²³ it still sent reproductive rights an eviction notice by making an unsustainable compromise. Under *Casey*, so long as science advances, and there is no reason to doubt it will, reproductive rights will effectively vanish because the right to privacy cannot defeat the state’s compelling interest once a fetus attains viability. With this kind of precedent, the Court need only take stock of neonatal medicine at any point in the future and, finding it satisfactorily advanced, further diminish reproductive rights by declaring medicine has shifted the balance further in the state’s favor.

It should also be noted that *Casey* imposed more restrictions on reproductive rights than *Roe*. In *Casey*, the Court replaced *Roe*’s trimester framework with the “undue burden” standard for evaluating restrictions on abortion before viability.²⁴ This standard strikes down an abortion law as unconstitutional “if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.”²⁵ The Court then went on to find that an informed consent provision requiring a person seeking an abortion to be informed about the nature of the procedure at least twenty-four hours before

18. *Id.* at 162–65.

19. *When Is It Safe to Deliver Your Baby?*, UNIV. OF UTAH HEALTH, <https://healthcare.utah.edu/womenshealth/pregnancy-birth/preterm-birth/when-is-it-safe-to-deliver.php> [https://perma.cc/95KN-BWQJ] (last visited Oct. 28, 2022).

20. Paul Recer, *Age of Fetal Viability Lowered by Full Month Since Roe vs. Wade*, AP NEWS (Apr. 22, 1989), <https://apnews.com/article/945ba725bfd4c77e65244f117e43e3e2>.

21. *Id.*

22. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

23. *Id.*

24. *Id.* at 837.

25. *Id.*

actually obtaining one was constitutional.²⁶ The Court also upheld the provision requiring a minor seeking an abortion to obtain consent from their parents.²⁷ The Court found that neither of these provisions, despite smacking of paternalism and presenting very real obstacles for women, were an undue burden.²⁸ Using the *Casey* standard, in *Gonzales v. Carhart*, the Court had no problem upholding a federal statute that issued a blanket ban on entire classes of abortion procedures and finding that an inability to receive these procedures was not an undue burden on a woman's access to an abortion, even though medical experts decided the procedures would be the safest ways to perform an abortion.²⁹ While the undue burden standard has rendered unconstitutional some egregious anti-abortion laws, such as admitting privileges laws which functioned to close half of Texas' abortion clinics, the standard has created short-lived victories at best for pro-choice advocates.³⁰

In *June Medical Services L.L.C. v. Russo*, where Louisiana modeled its abortion law on the Texas law deemed unconstitutional in *Whole Woman's Health*, the Court struck down the Louisiana law in a less-than-comforting plurality opinion, weaker than the majority opinion of *Whole Woman's Health*.³¹ In a concurring opinion, Chief Justice Roberts pointed out that while he dissented in *Whole Woman's Health*, the weight of stare decisis compelled him to concur in *Russo*.³² Pro-choice advocates should pay close attention to each of the four dissents by the Justices typically associated with the right wing of the Court. Each Justice dissented on their own grounds and argued either one, or some combination of, the following arguments: a law that shuts down half of all abortion clinics in a state is not an undue burden, the plaintiffs did not have standing to bring their claim, and the Constitution does not afford a home to reproductive rights in the first place.³³ Suffice it to say, the composition of the *Russo* Court reflected skepticism of a constitutional home for reproductive rights.

In light of the case law following *Roe*, it is no understatement to say the compromise of *Roe* has been weakened. There is reason to assume, as crafty legislatures cook up further burdens on abortions that are just shy of being undue, *Roe v. Wade* will be rendered toothless one day. As *Russo*'s varied opinions demonstrate, the undue burden standard wrested

26. *Id.* at 883.

27. *Id.* at 899.

28. *Casey*, 505 U.S. at 899.

29. *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007).

30. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310–11, 2313 (2016), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

31. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2112–13 (2020), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

32. *Id.* at 2133 (Roberts, C.J., concurring).

33. *Id.* at 2142–82.

from the corpse of *Roe* by the *Casey* Court indicates that the Court is but one conservative Justice away from allowing severely restrictive abortion laws, finding them a reasonable burden, and doing away with the current constitutional home for reproductive rights altogether. Despite this, many pro-choice advocates and political campaigns still urge for a return to *Roe*.³⁴ This is a losing strategy for preserving reproductive rights. To spend political capital and goodwill on maintaining what is a losing status quo is a fool's errand.

This Note's thesis should not be mistaken as a tantrum about the advancement of neonatal medicine. The advancement of medicine is always a good thing. Rather, this Note merely points out that pro-choice advocates need to abandon their support for *Roe*, because it and its progeny are an inadequate protection for reproductive rights. Instead, this Note urges pro-choice advocates to look closely at the analysis in Part II and Part III to understand that there are more effective ways to guarantee the protection of reproductive rights in the Constitution than clinging to the sinking ship—or short lease—of *Roe*.

II. OTHER CONSTITUTIONAL HOMES FOR REPRODUCTIVE RIGHTS

The best argument for another, more permanent constitutional home for reproductive rights was suggested by the late Justice Ginsburg in her *Gonzales* dissent, where she characterized legal challenges to abortion as not seeking to vindicate some privacy right, but to vindicate “a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.”³⁵ While Justice Ginsburg went on to analyze the abortion law at issue in *Gonzales* under the undue burden framework,³⁶ as *Casey* controlled at the time, her implication is clear. Justice Ginsburg was raising an Equal Protection Clause argument on the grounds that abortion laws, by their very nature, will always unfairly burden women in ways that men will never be burdened. Thus, no matter where the abortion restrictions fall under either *Roe*'s trimester framework or the *Casey* undue burden standard, they will violate the Equal Protection Clause of the Fourteenth Amendment and trigger stricter scrutiny and protection for reproductive rights than the balancing test.

Other authors have explored this argument for reproductive rights in greater detail.³⁷ If the argument were ever brought before the Supreme

34. Kate Smith, *Biden Pledged to Make Roe v. Wade the “Law of the Land.” Abortion-Rights Supporters Want More*, CBS NEWS (Oct. 6, 2020), <https://www.cbsnews.com/news/biden-roe-v-wade-law-land-supreme-court-supporters/> [<https://perma.cc/2LT4-F854>].

35. *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007).

36. *Id.*

37. Amelia Bailey, *Missed Opportunities: The Unrealized Equal Protection Framework in Maher v. Roe and Harris v. McRae*, 23 MICH. J. GENDER & L. 247, 265 (2016); Laurie A. Watson,

Court, the argument would not improve further than what those authors laid out. This Note takes a more pessimistic view of the success of the Equal Protection Clause argument, not based on the merits of the argument, but whether the Supreme Court would entertain such an argument in the first place. Even the most liberal Justices who entertain broad readings of the Equal Protection Clause have found that discrimination on the basis of gender merely triggers a heightened, intermediate scrutiny standard that falls short of strict scrutiny.³⁸ In other words, unlike the strict scrutiny that the Equal Protection Clause affords to discrimination on the basis of race, laws that discriminate on the basis of gender need only demonstrate an “exceedingly persuasive justification.”³⁹ While this may seem like a high bar for the government to meet, it is still lower than the strict scrutiny standard. As *Casey*’s chipping away at *Roe*’s stricter protection for reproductive rights indicates, the Court would likely find that the government’s interest in preserving fetal life is a powerful interest that should have no trouble withstanding intermediate scrutiny.

Further, some scholars criticize cases like *United States v. Virginia* for straying too far from the original meaning and purpose of the Equal Protection Clause.⁴⁰ This view is perhaps best summarized in the words of the late Justice Scalia, an originalist, who announced at a speech at Hastings College of Law that the Fourteenth Amendment does not ban sex discrimination because “[n]obody thought it was directed against sex discrimination.”⁴¹ In sum, pro-choice advocates should not hope that a Supreme Court with a right wing majority of originalists would be willing to provide shelter to reproductive rights under the Fourteenth Amendment’s Equal Protection Clause after evicting those rights from the Due Process Clause.

There are, of course, other constitutional arguments that can be made to support reproductive rights, but they are weaker than the two described above. For instance, in *Roe*, the plaintiff brought allegations that the abortion restriction at issue violated her First, Fourth, Fifth, Ninth, and Fourteenth Amendment rights, a smorgasbord of constitutional

Planned Parenthood v. Farmer: Equal Protection – A New Safeguard for Minors’ Abortion Rights, 33 U. TOL. L. REV. 481, 496 (2002).

38. See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (applying intermediate scrutiny and finding unconstitutional a ban on the ability of males aged eighteen to twenty to purchase light beer); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (applying heightened scrutiny and finding unconstitutional gender-based discrimination against women in jury service selection).

39. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

40. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 2–3 (2011).

41. *Id.* at 2 (internal quotations omitted) (brackets in original).

arguments.⁴² Although these arguments found some success in concurring opinions,⁴³ they were unable to carry the majority. There is nothing to suggest that today's Supreme Court, which takes a narrower view of constitutional rights,⁴⁴ would be willing to entertain these arguments. These arguments are even less likely to fare well with a Court lacking Justice Ginsburg, so this Note will not delve any further into them, as they would be, at best, an interesting practice question for a first-year Constitutional Law course and, at worse, an exercise in frustration. Rather, this Note urges pro-choice advocates to consider the constitutional argument laid out in Part III of this Note, which should satisfy even staunch originalists and provide a true home for reproductive rights.

III. THE EQUAL RIGHTS AMENDMENT

In April 2020, FX Networks launched its historical drama *Mrs. America* on Hulu.⁴⁵ The series tells the tumultuous tale of the 1970s movement to ratify the ERA—a ratification that came within a hair's breadth of success but was ultimately defeated by the rise of the Moral Majority, led by figures such as Phyllis Schlafly and President Ronald Reagan.⁴⁶ Befitting its controversial subject matter, the series was met with both critical acclaim and criticism from both sides of the political aisle.⁴⁷ More pertinent to this Note, the series reinvigorated public interest

42. *Roe v. Wade*, 410 U.S. 113, 120 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

43. *See Doe v. Bolton*, 410 U.S. 179, 211–12 (1973) (Douglas, J., concurring) (discussing the privacy rights protected by the First, Fourth, Fifth, and Ninth Amendments).

44. *Compare Roe*, 410 U.S. at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”), *with* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2112–13 (2020) (finding Louisiana’s abortion statute to be unconstitutional in a fractured plurality opinion), *abrogated by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022), and Anna North, *What Amy Coney Barrett on the Supreme Court Means for Abortion Rights*, *Vox* (Oct. 26, 2020), <https://www.vox.com/21456044/amy-coney-barrett-supreme-court-roe-abortion> [<https://perma.cc/GLN6-956P>] (explaining that, when Justice Barrett was first appointed, the Justice said that she did not “believe *Roe* will be overturned outright” but made clear that she is “open to reversing Supreme Court precedent if she thinks a previous decision goes against the Constitution”).

45. *Mrs. America* (FX Networks broadcast Apr. 15, 2020), <https://www.fxnetworks.com/shows/mrs-america> [<https://perma.cc/KH7J-BNHZ>] (last visited Jan. 31, 2021).

46. *Id.*

47. *Emmys 2020: List of Nominations*, *VARIETY* (July 28, 2020, 8:24 AM), <https://variety.com/2020/tv/news/emmys-2020-nominations-complete-list-1234715939/> [<https://perma.cc/2VPG-H83X>]; Eleanor Smeal & Gloria Steinem, *Why ‘Mrs. America’ Is Bad for American Women*, *L.A. TIMES* (July 30, 2020, 6:00 AM), <https://www.latimes.com/entertainment-arts/tv/story/2020-07-30/steinem-and-smeal-why-mrs-america-is-bad-for-american-women>

in the ERA at a crucial time in the amendment's history: a few short months after its ratification by Virginia, the thirty-eighth state to do so.⁴⁸

However, as of the writing of this Note, there is yet to be a Twenty-Eighth Amendment to the U.S. Constitution. This is due to the differing opinions on the legal impact of Virginia's ratification of the ERA and whether the ERA should be a valid amendment to the Constitution.⁴⁹ In brief, Congress set a deadline of 1982 for final ratification of the ERA, but proponents of the ERA argue that the deadline was not binding and the ERA should be part of the Constitution, while opponents argue the opposite.⁵⁰ A lawsuit was brought by three state attorneys general but was dismissed in 2021.⁵¹ The lawsuit goes beyond the scope of this Note. Rather, having discussed the difficulties currently facing the ERA, this Note offers an analysis of what safety the ERA may provide to reproductive rights and hopefully incentivizes its lawful recognition. Additionally, this Note proposes that pro-choice advocates should refocus their political capital from preserving *Roe* and instead on promoting the ratification of the ERA, which will provide the constitutional home for reproductive rights that pro-choice advocates desire.

The text of the ERA guarantees that equality shall not be abridged or denied by the United States or any state on the basis of sex.⁵² It also provides that Congress has the power to enforce the ERA by appropriate legislation.⁵³ The Fourteenth Amendment contains a similar enforcement provision in Section Five.⁵⁴ In the context of Fourteenth Amendment jurisprudence, the U.S. Supreme Court has found that Section Five fundamentally alters the relationship between the state and federal

[<https://perma.cc/33M2-NM2F>]; Ryan Hite, *Phyllis Schlafly Eagles Respond to FX's Mrs. America*, PHYLLIS SCHLAFLY EAGLES (Apr. 15, 2020), <https://www.phyllisschlafly.com/liberalism-and-conservatism/u-s-history/phyllis-schlafly-eagles-responds-to-fxs-mrs-america/> [<https://perma.cc/TA5R-4AY7>].

48. Bill Chappell, *Virginia Ratifies the Equal Rights Amendment, Decades After the Deadline*, NPR (Jan. 15, 2020, 3:36 PM), <https://www.npr.org/2020/01/15/796754345/virginia-ratifies-the-equal-rights-amendment-decades-after-deadline> [<https://perma.cc/VSS4-7ADW>].

49. Chappell, *supra* note 48.

50. Sarah Rankin, *Attorneys General Seek Summary Judgment in ERA Lawsuit*, NBC WASH. (Aug. 19, 2020, 8:49 PM), <https://www.nbcwashington.com/news/local/attorneys-general-seek-summary-judgment-in-era-lawsuit/2395447/> [<https://perma.cc/9LZC-UEMR>].

51. *Id.*; Michelle L. Price, *Judge Dismisses Lawsuit by Democratic AGs to Recognize ERA*, AP NEWS (Mar. 5, 2021), <https://apnews.com/article/constitutions-lawsuits-virginia-constitutional-amendments-united-states-b1211f0c6643e41a42d44970a114e6c4>.

52. *Frequently Asked Questions*, ERA, <https://www.equalrightsamendment.org/faqs> [<https://perma.cc/U7H2-SSL9>] (last visited Jan. 30, 2021).

53. *Id.*

54. U.S. CONST. amend. XIV, § 5.

government in the federalist system.⁵⁵ Section Five provides Congress with expansive powers that override traditional state interests in order to enforce the provisions of the Fourteenth Amendment.⁵⁶ In the universe of Fourteenth Amendment challenges, the Supreme Court has applied the strict scrutiny standard of judicial review only to classifications based on race because, as the originalist argument goes, the Fourteenth Amendment was passed in response to the Civil War, and both its writers and ratifiers only meant for it to apply to deprivations of rights on the basis of race.⁵⁷

Since the ERA includes a provision like Section Five of the Fourteenth Amendment,⁵⁸ under current Supreme Court precedent, the ERA would have the same impact on traditional state interests, giving Congress the power to override such interests so long as it is acting pursuant to Section One of the ERA. Accordingly, if the state's interest in preserving fetal life discriminates, either intentionally or inadvertently, on the basis of sex—and it will so discriminate, as cisgender women are the only class of people who are discriminated against by abortion laws—then that state interest can be overruled by federal legislation. However, this argument takes place within the *Roe* framework, still couched in the penumbras of privacy balanced against a state's interest.⁵⁹

If the ERA were ratified, such an argument would be unnecessary. Rather, the ERA's language and presence in the Constitution would provide an argument to satisfy even the strictest textualists and originalists, who are typically opposed to the substantive due process understanding of the Fourteenth Amendment. Accordingly, an argument along these lines—that the ERA legislates the balance of the state's interest in fetal life in favor of the woman's right to privacy—is not needed. To satisfy the current composition of the Supreme Court, a more direct originalist argument is required, and the ERA provides exactly that. This Note's argument now splits into a two-pronged attack with the ERA as its weapon, designed to satisfy the conservative Justices of the Supreme Court. This Note will propose a model originalist argument for reproductive rights under the ERA and then a model textualist argument for reproductive rights under the ERA.

55. See *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966) (recognizing that the Fourteenth Amendment granted Congress expanded federal powers to enforce the amendment).

56. *Id.*; U.S. CONST. amend. XIV, § 5.

57. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

58. *Frequently Asked Questions*, *supra* note 52.

59. *Roe v. Wade*, 410 U.S. 113, 152–54 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

A. *Originalism Model*

To provide a model of what a successful originalist argument for abortion rights under the ERA would look like, this Note examines a case where all Justices, both in the majority or dissent, claimed to write under the mantle of originalism: the famous *District of Columbia v. Heller*.⁶⁰ In *Heller*, the Court examined the question of whether a ban on the possession of handguns in the District of Columbia violated the Second Amendment.⁶¹ The crux of the alleged constitutional challenge was whether what Justice Scalia called the “prefatory clause” of the Second Amendment limited the constitutional protection of the right to bear arms, or gun ownership, to service in a militia.⁶² The District of Columbia contended that the Second Amendment limits the constitutional protection of gun ownership to guns owned in conjunction with militia service and so the prohibition on handgun possession in the home, unconnected to militia service, was not protected by the Second Amendment.⁶³ The plaintiff, a District of Columbia special police officer who kept a handgun in his home, argued that the Second Amendment’s prefatory clause does not limit the constitutional protection of gun ownership and merely “announces the purposes for which the right [of gun ownership] was codified,” meaning the clause stands on its own and provides a constitutional shield against any infringement of gun ownership.⁶⁴ Ultimately, the plaintiff’s argument prevailed, as indicated in the whopping sixty-three page majority opinion penned by Justice Scalia that provided an exhaustive originalist analysis of the original understanding of the Second Amendment.⁶⁵

The text of the Second Amendment, despite Justice Scalia’s neat deconstruction of it into prefatory and operative clauses, was unclear enough to fracture the opinions of the Supreme Court into dueling dissents and a majority opinion—all claiming to have the best reading of the amendment.⁶⁶ A text as clear as the Justices claimed it was would not generate such starkly contrasting understandings of its meanings. Fortunately for pro-choice advocates, the ERA suffers from no such ambiguity. The ERA’s prohibition on the denial of equality “on account of sex”⁶⁷ is unambiguous in comparison to the eighteenth-century grammar of the Second Amendment. What won Justice Scalia the votes of four other Justices, then, was his textualist analysis of the Second

60. 554 U.S. 570, 573 (2008).

61. *Id.*

62. *Id.* at 577.

63. *Id.* at 575–78.

64. *Id.* at 599.

65. *Id.* at 573–636.

66. *Heller*, 554 U.S. at 570.

67. *Frequently Asked Questions*, *supra* note 52.

Amendment—his originalist argument aided in understanding what the ambiguous text of the Second Amendment means.

Justice Scalia provided a sweeping analysis of history and legal authorities contemporary to the Second Amendment in the majority opinion of *Heller*.⁶⁸ He provided an array of secondary sources to decipher what the original meaning of the Second Amendment was at the time it was written. He looked at contemporary secondary sources' understandings of what a militia was, examining English legal history and colonial lawyers' writings on the then-nascent Constitution, and ultimately concluded that the Second Amendment was understood to confer an "individual right" to possess firearms, regardless of membership in a formal militia.⁶⁹ He perused a collection of state constitutions, written before the ratification of the U.S. Constitution, from states such as Pennsylvania and Vermont that explicitly adopted a right to own firearms for self-defense, reasoning the Second Amendment's constitutionalizing of this right must have included what the citizens and politicians of states like the aforementioned would have understood it to mean.⁷⁰ The final leg of his monumental originalist argument is what he called a collection of "postratification commentary."⁷¹ While Justice Scalia, the infamous textualist, often loathed to acknowledge any sort of legislative history when interpreting text (let alone post-enactment legislative history), he distinguished the constitutional provision at issue from the average statute and characterized his argument as an "examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification."⁷² He described this as a "critical tool" of constitutional interpretation and found that decades' worth of legal commentary on the Second Amendment revealed that "virtually all interpreters of the Second Amendment in the century after its enactment interpreted the Amendment as we [the majority] do."⁷³ In short, because the Founding Fathers who wrote the Second Amendment originally understood it to protect an individual right to firearm ownership, not tied to any militia service, the District of Columbia's handgun ban was unconstitutional.

An argument for reproductive rights using an original understanding of the ERA would play out much the same way as Justice Scalia's argument for gun ownership rights did in *Heller* and should carry the same compelling force on an originalist Supreme Court. The first version of the ERA arose in 1923, on the seventy-fifth anniversary of the Seneca

68. *Heller*, 554 U.S. at 605–35.

69. *Id.* at 592–96.

70. *Id.* at 601–02.

71. *Id.* at 605.

72. *Id.* (emphasis in original).

73. *Id.*

Falls Convention, and was proposed by the National Woman's Party leader, Alice Paul.⁷⁴ This version of the amendment, while similar in spirit to today's ERA, had a vastly different text that was ultimately rejected.⁷⁵ In 1943, Alice Paul proposed a modified version of the ERA, modeled on the wording of the Fifteenth and Nineteenth Amendments, that contained the same text as the current version of the ERA.⁷⁶ The final version of the ERA that was revised and passed by Congress in 1972 kept the same exact language as Alice Paul's 1943 version but added Sections Two and Three to ensure Congress would have the necessary constitutional authority to pass legislation to enforce the equality the ERA was meant to protect.⁷⁷

The addition of Sections Two and Three to the ERA is key to constructing an originalist argument that the public understanding of the ERA contemplated protection for reproductive rights. The 1943 version of the ERA modeled its language on the Fifteenth and Nineteenth Amendments—amendments that ensure the right to vote is not denied on the basis of race or sex, respectively.⁷⁸ The Supreme Court has interpreted the text of these amendments to trigger strict scrutiny,⁷⁹ and the ERA's adoption of similar language would suggest to an originalist that the writers of the ERA intended the same stringent constitutional protections to attach to the rights it protects. This is a much safer home than *Roe*.⁸⁰

Of course, the next hurdle to convince an originalist judge would be to establish that the text of the ERA was meant to encompass abortion rights. There is significant history to prove this—at least as reliable as the state constitutions and legal commentary Justice Scalia cited in *Heller*. One of the key issues of Phyllis Schlafly's successful anti-ERA campaign was exactly the understanding pro-choice advocates would argue before an originalist judge: the ERA constitutionalizes reproductive rights.⁸¹ Schlafly and her followers, as part of her anti-ERA campaign, fearmongered that the ERA would constitutionalize various women's rights, but most importantly for this Note's purposes, "abortion[s] on demand."⁸² The public understanding lens that Justice Scalia discussed in *Heller* as an originalist interpretation of a constitutional amendment,

74. *Equal Rights Amendments (1923-1972)*, HANOVER COLL., <https://history.hanover.edu/courses/excerpts/336era.html> [<https://perma.cc/UBQ4-FGTG>] (last visited Nov. 3, 2022).

75. *Id.*

76. *Id.*

77. *Id.*

78. U.S. CONST. amends. XV, XIX.

79. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

80. *See supra* Part I.

81. Lesley Kennedy, *How Phyllis Schlafly Derailed the Equal Rights Amendment*, HIST. CHANNEL (Mar. 19, 2020), <https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly> [<https://perma.cc/5V2S-U7QV>].

82. *Id.*

when applied to the ERA, demonstrates that the public understood the ERA would constitutionalize reproductive rights. It was exactly this understanding of the ERA that prevented the amendment's successful ratification by its initial 1979 deadline.⁸³

Proponents of the ERA did little to distance themselves from this understanding of the ERA, and contemporary legal commentary suggests this is because of the rights they were attempting to protect with the ERA. Emily Martin, general counsel for the National Woman's Law Center, told the Associated Press in January 2020 that the ERA would enable courts to rule that abortion restrictions "perpetuate gender inequality" and violate the Constitution.⁸⁴ The opponents of the ERA have remained consistent, too. The daughter of Phyllis Schlafly, Anne Schlafly Cori, stated that "[a]ny vote for the ERA is a vote for abortion."⁸⁵ Cori also described the revitalized interest in the ERA as a way to "shoehorn" abortion rights into the Constitution because of the threat that a conservative Supreme Court would pose to *Roe*.⁸⁶

There is abundant evidence that both the public and legal understanding of the ERA included that the amendment would protect a woman's right to an abortion. At the time of its revision and passage before Congress, the ERA contemplated a sanctuary for reproductive rights not found elsewhere in the law, and the public understanding of the ERA stretches across the political aisle.⁸⁷ Accordingly, an originalist approach to interpreting the ERA is the best guarantee for the future of reproductive rights.

B. *Textualism Model*

The originalist argument outlined above, of course, is only the first hurdle to convincing the Supreme Court. A textualist analysis of the ERA must establish that the statute, as written, protects reproductive rights. Fortunately, this is a simple argument with precedent suggesting that it does.

In *Doe v. Maher*, the Superior Court of Connecticut considered the constitutionality of a restriction to funding for abortions under

83. Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, BRENNAN CTR. FOR JUST. (Jan. 23, 2020), <https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained> [https://perma.cc/7E82-HKUA].

84. Sarah Rankin & David Crary, *Lawmakers Pledge ERA Will Pass in Virginia. Then What?*, AP NEWS (Jan. 1, 2020), <https://apnews.com/article/959a29cfbdc59029bba9e97887331f07> [https://perma.cc/QY2X-E47U].

85. *Id.* (internal quotations omitted).

86. *Id.*

87. Eleanor Mueller & Alice Miranda Ollstein, *How the Debate Over the ERA Became a Debate Over Abortion*, POLITICO (Feb. 11, 2020, 5:05 AM), <https://www.politico.com/news/2020/02/11/abortion-equal-rights-amendment-113505> [https://perma.cc/PA4F-NZSF].

Connecticut Medical Assistance Program (Connecticut Medicaid).⁸⁸ The Connecticut Constitution adopted an equal rights amendment (Connecticut ERA)⁸⁹ with similar text to the federal ERA. Its key language, “[n]o person shall be denied the equal protection of the law . . . because of . . . her sex,” was crucial to the *Maher* Court’s decision that abortion restrictions trigger strict scrutiny and that the restriction at issue did not pass scrutiny because the state restricted the funding for medically necessary abortions only to when a woman’s life was endangered.⁹⁰ The *Maher* Court reasoned that the abortion restriction discriminated on the basis of sex for three reasons: (1) under Connecticut Medicaid, all medical procedures for males were paid for, but abortions for females (not including the small class of abortions the restriction allowed for) were not, thereby discriminating against women who relied on Connecticut Medicaid to pay for their medical services; (2) all male medical treatments associated with reproductive health and “conditions unique to [the male] sex” are paid for by Connecticut Medicaid but not abortion procedures which are unique to women; and (3) “[s]ince only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex-oriented discrimination.”⁹¹

The *Maher* Court’s reasoning should apply equally well to the text of the ERA because all three arguments are true under the ERA, too. Focusing on the third argument, since only women require abortions, restrictions on access to those services would deny “equality of rights under law . . . on account of sex.”⁹² While the text of the Connecticut ERA uses the words “because of” and the ERA uses “on account of,”⁹³ there is not a significant enough difference for a textualist to arrive at different understandings of the ERA. Looking to one of Justice Scalia’s favorite interpretive tools, the dictionary reveals that “because” is defined as “for the reason that.”⁹⁴ “Account” is defined as “a reason for an action.”⁹⁵ These definitions essentially mean the same thing, and a textualist analysis of the ERA should play out no different than the Superior Court of Connecticut’s analysis of the Connecticut ERA text, including reproductive rights.

88. *Doe v. Maher*, 515 A.2d 134, 135 (Conn. Super. Ct. 1986).

89. CT. CONST. art. 1, § 20.

90. *Maher*, 515 A.2d at 158 n.50, 161.

91. *Id.* at 159.

92. *Frequently Asked Questions*, *supra* note 52.

93. *Id.*; CT. CONST. art. 1, § 20.

94. *Because*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/because?src=search-dict-box> [<https://perma.cc/AC4W-FNQU>] (last visited Nov. 3, 2022).

95. *Account*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/account> [<https://perma.cc/3TJV-MVVZ>] (last visited Nov. 3, 2022).

In addition to the strength that the ERA's modeling after the Fifteenth Amendment lends to the originalist argument for reproductive rights, it is also an important component of a textualist argument and defense of any pro-reproductive rights legislation that would be passed under the power of the ERA.⁹⁶ The Fifteenth Amendment contains only two brief sections: Section One forbids the denial of voting rights "on account of race" and Section Two grants Congress the power to enforce the Amendment's provisions by "appropriate legislation."⁹⁷

In the landmark Supreme Court case *South Carolina v. Katzenbach*, the Court examined a challenge to the language of the Fifteenth Amendment,⁹⁸ on which the ERA was modeled.⁹⁹ In *Katzenbach*, plaintiff challenged the Voting Rights Act of 1965 primarily "on the fundamental ground that [the provisions of the Act] exceed the powers of Congress and encroach on an area reserved to the States by the Constitution."¹⁰⁰ The Court's answer, speaking through Chief Justice Warren, was abundantly clear: because of the language of the Fifteenth Amendment, Congress could employ "any rational means" to effectuate the Fifteenth Amendment's prohibition against the denial of voting rights on account of race.¹⁰¹ The Court found, citing a mountain of precedent, that Section One of the Fifteenth Amendment's prohibition on the denial of voting rights on account of race was "self-executing" and "has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice."¹⁰² The Court recognized and did not overrule the long-standing principle that a state has "broad powers to determine the conditions under which the right of suffrage may be exercised," but explained that the Fifteenth Amendment simply "supersedes any contrary exertions of state power."¹⁰³

The *Katzenbach* Court went further than merely recognizing the self-executing power of the Fifteenth Amendment's prohibition on racial discrimination. Relying on well-established Supreme Court precedent, the Court explained that the Civil War Amendments shifted the balance of federal power to areas traditionally reserved to the states.¹⁰⁴ In short, Congress can do more than "forbid violations of the Fifteenth Amendment"—so long as Congress does so for a "rational" reason, it

96. *Equal Rights Amendments (1923-1972)*, *supra* note 74.

97. U.S. CONST. amend. XV.

98. *South Carolina v. Katzenbach*, 383 U.S. 301, 301 (1966).

99. *Equal Rights Amendments (1923-1972)*, *supra* note 74.

100. *Katzenbach*, 383 U.S. at 323.

101. *Id.* 324–29.

102. *Id.* at 325.

103. *Id.*

104. *Id.* at 327.

may pass appropriate legislation to enforce the provisions of the Fifteenth Amendment, beyond its self-executing prohibitions.¹⁰⁵

Following the mold of Chief Justice Warren's analysis, a textualist analysis of the ERA would provide two important victories for reproductive rights activists. One, the ERA would provide a self-executing prohibition against discrimination on account of sex that disrupts the balance between federal and state power by preventing states from exercising powers that were previously within their domain. Two, the ERA would grant Congress broad power to prevent discrimination on account of sex so long as it does so with a rational basis. Given the forgiving nature of the rational basis test,¹⁰⁶ this would be a potent power indeed.

The self-executing nature of the ERA is found in its language, which forbids "equality of rights under the law" being "denied or abridged" on "account of sex."¹⁰⁷ This language mirrors the prohibition on the denial of voting rights found in the Fifteenth Amendment.¹⁰⁸ While the *Katzenbach* Court did not elaborate on what exactly made the Fifteenth Amendment self-executing, it did provide examples of the Court recognizing it as such, reaching as far back as 1913.¹⁰⁹ There is nothing about the language or history of the ERA that suggests it should be read as anything but self-executing. Therefore, the ERA would serve as a new constitutional vehicle to challenge restrictions on reproductive rights. No longer would reproductive rights activists need to contend with the squishy and frugal *Casey* undue burden standard. The ERA, as a self-executing prohibition on discrimination on account of sex, would immediately present an obstacle for any state seeking to limit or eliminate reproductive rights. Any such restrictions would constitute de facto discrimination on account of sex, considering the disparate impact these restrictions have on a woman's control over her reproductive life compared to a man's control over his reproductive life. Abortion restrictions would be subject to the nearly insurmountable strict scrutiny test, which laws that violate the Fifteenth Amendment are also subjected to, and this protection is far greater than anything the undue burden standard could ever hope to offer.¹¹⁰

If the self-executing powers of the ERA prove to be insufficient, the ERA also offers another mechanism for reproductive rights protection.

105. *Id.*

106. See James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Perspective*, 55 SAN DIEGO L. REV. 751, 752–53 (2018) ("The rational basis test as applied by the Supreme Court is such a permissive level of review that it is effectively not judicial review at all.")

107. *Equal Rights Amendments (1923-1972)*, *supra* note 74.

108. *Id.*; U.S. CONST. amend. XV.

109. *Katzenbach*, 383 U.S. at 325.

110. *Dunn v. Blumstein*, 405 U.S. 330, 342–43 (1972).

Just as the Fifteenth Amendment's provisions grant Congress wide discretion to appropriately enforce the Fifteenth Amendment, the ERA would offer Congress broad powers to protect reproductive rights so long as Congress' enforcement is rational. As discussed above, the *Katzenbach* Court recognized that the Fifteenth Amendment, along with the other Civil War amendments, shifted the balance of federal and state power, granting the federal government the power to intervene in areas where previously the state had ruled as sole sovereign.¹¹¹ So too would the ERA grant the federal government the power to intervene in the protection of reproductive rights where, traditionally, states have enjoyed the discretion to regulate with a compelling government interest.¹¹²

Pro-choice activists, through political advocacy previously unavailable to them, could pressure Congress to provide protections for reproductive rights. A Constitution that included the ERA would severely limit the ability of states to regulate access to reproductive rights. While the societal pressures that gave birth to the ERA were far less disruptive than those that gave birth to the Civil War Amendments, the identical language of the Fifteenth Amendment and the ERA and the choice to model the ERA after the Fifteenth Amendment should demonstrate clear intent to upset the balance between the state and federal government once again. Additionally, history demonstrates that the drafters of the ERA intended to upset this balance in the context of regulating women's rights, including reproductive rights.¹¹³ Accordingly, the ERA's federal protection of reproductive rights through the legislature is another useful tool that should withstand a textualist or originalist attack.

CONCLUSION

This Note operates in a hypothetical future where the ERA can survive its current procedural challenges and go into effect. This Note admittedly presents an optimistic future for reproductive rights, and this Note also concedes that the ERA does not have a straightforward or easy path to being properly ratified. However, the analysis laid out in this Note should make it clear that if reproductive rights activists hope to succeed in a legal world turning to textualism and originalism as the dominant judicial theories, they cannot continue to focus their political capital on keeping *Roe*'s framework in place. The ERA offers the only reading of the Constitution that would satisfy textualists and originalists and would confer upon the federal government the tools to protect reproductive rights and set a baseline safety net that states could not erode in the same way they have under the *Casey* undue burden standard. *Roe* is only a

111. *Katzenbach*, 383 U.S. at 327.

112. *Roe v. Wade*, 410 U.S. 113, 154, 163–65 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

113. *See supra* Part III, Section A.

shaky roof over the head of reproductive rights, and its future is uncertain. Rather than fighting a losing battle, pro-choice activists should expend their political energy on pushing for the ratification of the ERA and building a stable, long-lasting home for reproductive rights.