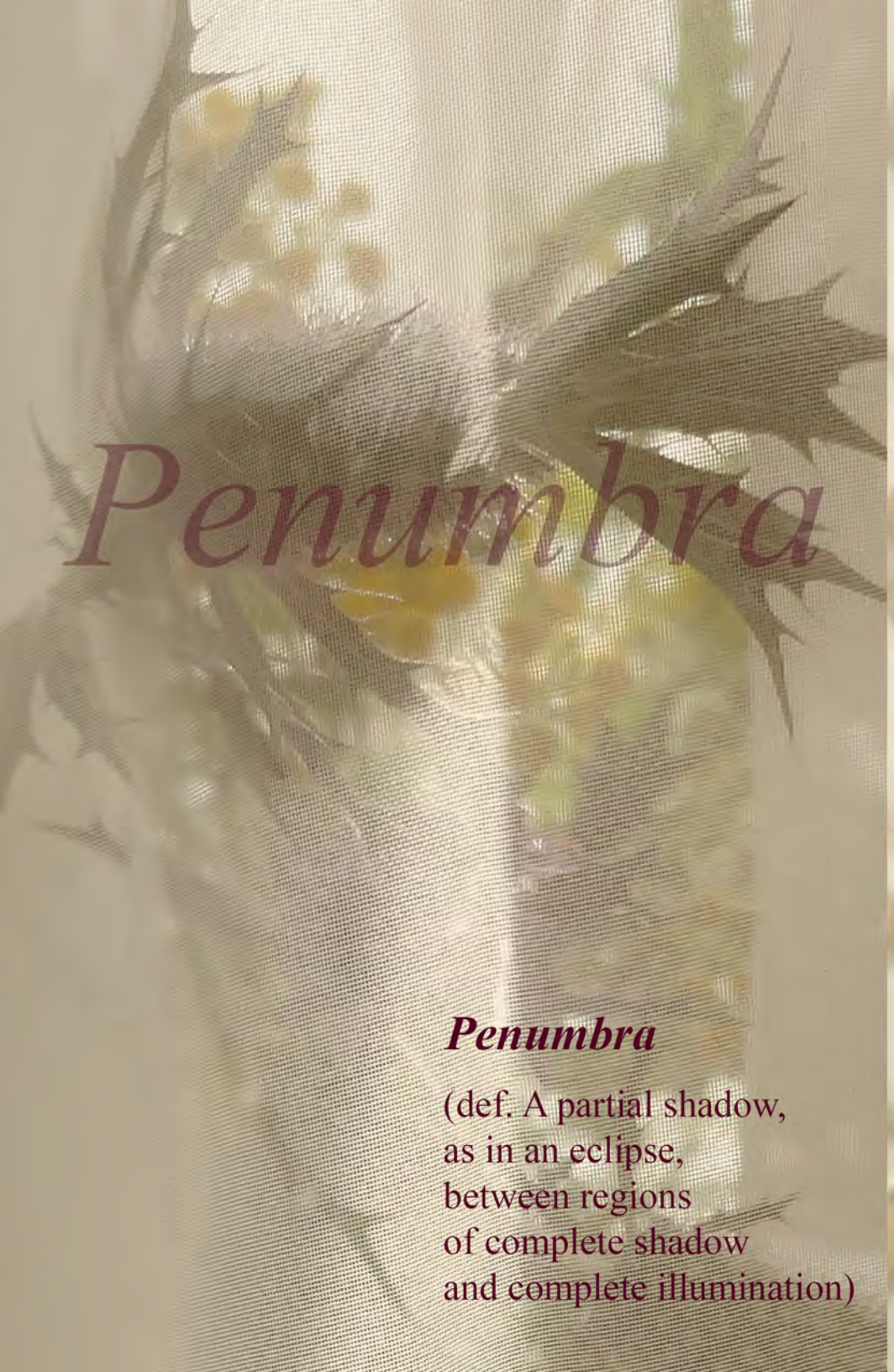

Penumbra

(def. A partial shadow,
as in an eclipse,
between regions
of complete shadow
and complete illumination)

Penumbra
Maureen Connor and Jason Leggett

Picturing the Constitution
The Old Stone House
October 22, 2023 – January 14, 2024
curated by Katherine Gressel

Penumbra (def. A partial shadow, as in an eclipse, between regions of complete shadow and complete illumination) is a project and installation that challenges the constitutionality of Dobbs v. Jackson, a decision by the U.S. Supreme Court, June 24, 2022, in which the court held that the Constitution of the US does not confer a right to abortion. In the Constitution, the **penumbra** includes a group of rights implied from other explicitly protected rights in constitutional provisions. Found in the 1791 Bill of Rights, Ninth Amendment, the term first gained attention in 1965, when the *Griswold v. Connecticut* decision cited it to identify a right to privacy that would allow married couples to use contraception.

When the Dobbs decision calls attention to the phrase '(not) deeply rooted in our history and tradition' to explain why abortion was not a right granted in the Constitution, we ask 'whose history….whose tradition?' Our answer is abortion history is women's history as we draw attention to the millennia-long legacy of women using herbs for abortion and contraception, a 'birthright' that is part of a deeply hidden, repressed and often destroyed global practice. Here we juxtapose selections from Dobbs, placed on a background of images of groups of 'men making serious decisions' in relation to selections from Roe, placed on a background of women taking care of other women, all against a background of herbs used for abortion and contraception.

Black Cohosh, *Actaea racemose/Cimicifuga racemosa* , Ranunculaceae (buttercup family); Blue Vervain, *verbena hastata*, Lamiaceae (mint family); **Fennell**, *Foeniculum Vulgare,* Umbelliferae /Apiaceae (carrot family); **Goldenrod**, *Solidago*, Asteraceae (daisy family); **Milk Thistle**, *Silybum marianum,* Asteraceae (daisy family) **Mugwort**, *Artemisia vulgaris*, Asteraceae (daisy family); **Rue,** *Ruta graveolens*, Rutaceae (rue or citrus family); **Sage**, *Salvia officinalis*, Lamiaceae (mint family); **Tansy**, *Tanacetum vulgare,* Asteraceae (daisy family); **Wild Carrot** (Queen Ann's Lace) *Daucus carota,* Apiaceae/Umbelliferae (carrot family); **Wormwood**, *Artemisia absinthium,* Asteraceae (daisy family); **Yarrow**, *Achillea millefolium,* Asteraceae (daisy family).

With support from the Old Stone House and SPCUNY

Roe v. Wade

Deeply Rooted in Our History and Tradition?

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

Birth of the Virgin (detail), Giovanni da Milano, 1370, Rinuccini Chapel, Santa Croce, Florence, Italy.

Dobbs v. Jackson

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Constitutional analysis must begin with the language of the instrument, *Gibbons v. Ogden, 9 Wheat. 1, 186-189.* The Constitution makes no express reference to a right to an abortion.

In deciding whether a right falls into either of these [14th Am.] categories, the Court has long asked whether the right is "deeply rooted in our history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." *Timbs v. Indiana, 586 U.S. _ , _ (2019) (Slip op., at 3); McDonald, 561 U.S., at 764, 767; Glucksberg, 521 U.S., at 721.* In interpreting what is meant by the 14th Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. The clear answer is that the 14th Amendment does not protect the right to an abortion.

Founding of the American Medical Association, painting by Robert A. Thom, 1847
Caption: Improvement of public service, of medical knowledge, of medical education and medical ethics, were aims of The American Medical Association, organized May 7, 1847 at the Academy of Natural Sciences in Philadelphia.

1. Ancient attitudes. These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished. We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era, and that 'it was resorted to without scruple'. The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable. Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.

Birth of Mary (detail), Pietro Lorenzetti, 1342, Museo dell'Opera del Duomo, Siena, Italy.

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages, and thus, as one court put it in 1872: "[U]ntil the period of quickening there is no evidence of life; and whatever may be said of the feotus, the law has fixed upon this period of gestation as the time when the child is endowed with life" because "foetal movements are the first clearly marked and well defined evidences of life." Evans v. People, 49 N.Y. 86, 90 (emphasis added); Cooper, 22 N.J.L., at 56 ("In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it" (emphasis added)).

Cover of the Journal of the American Medical Association, Vol. 193, No 6, August 9, 1965

https://wayback.archive-it.org/16107/20210314013557/http://blog.wellcomelibrary.org/2012/03/online-resource-journal-of-the-american-medical-association-all-back-issues-now-available/

2. The Hippocratic Oath. What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B.C.), who has been described as the Father of Medicine, the 'wisest and the greatest practitioner of his art,' and the 'most important and most complete medical personality of antiquity,' who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past? The Oath varies somewhat according to the particular translation, but in any translation the content is clear:

"I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion," or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."

Leaf from Loftie Hours: Five Wounds of Christ, 1440-50, The Walters Art Museum, Baltimore, Maryland.

Many have also argued the wounds represent a sort of gender-fluidity of Christ as the embodiment of the human race.

Because the dissent cannot argue that the abortion right is rooted in this Nation's history and tradition, it contends that the "constitutional tradition" is "not captured whole at a single moment," and that its "meaning gains content from the long sweep of our history and from successive judicial precedents." As the Court has reiterated time and time again, adherence to precedent is not an "inexorable command." *Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 455 (2015).*

As Justice White later explained, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.

Justices of the Supreme Court of the United States

Front row, left to right: Associate Justice Sonia Sotomayor, b.1954, appt. 2009; Associate Justice Clarence Thomas b.1948, appt. 1991; Chief Justice John G. Roberts, Jr. b.1955, appt. 2005; Associate Justice Samuel A. Alito, Jr., b.1950, appt. 2006 and Associate Justice Elena Kagan, b.1960, appt. 2010. Back row, left to right: Associate Justice Amy Coney Barrett, b.1972, appt. 2020; Associate Justice Neil M. Gorsuch, b.1967, appt. 2017; Associate Justice Brett M. Kavanaugh, b.1965, appt. 2018 and Associate Justice Ketanji Brown Jackson, b.1970, appt. 2022.

Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, …

But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Phthagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth."

The Annunciation and Two Saints, 1333, Simone Martini and Lippo Memmi, Uffizi Gallery, Florence, Italy.

Roe's reasoning is exceedingly weak.

Any intangible form of reliance depends on an empirical question that is hard for anyone - and in particular, for a court - to assess, namely, the effect of the abortion right on society and in particular on the lives of women.

Traditional stare decisis do not weigh in favor of retaining Roe or Casey; Court cannot by dictating a settlement and telling people to move on. We do not pretend to know how our political system of society will respond to today's decision overruling Roe and Casey.

The board of The Washington Post, Katherine Graham, President,1963-1991

3. The Common Law. It is undisputed that at common law, abortion performed before "quickening"- the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy was not an indictable offense.

Whether abortion of a quick fetus was a felony at common law or even a lesser crime is still disputed.

4. The American Law. In this country the law in effect in all but a few states until the mid-19th century was the pre-existing English common law.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect.

Bleeding wound on Cloth held by two kneeling angels, Book of Hours (Cistercian) Manuscript W. 218, fol. 28, 1440, Walters Art Museum, Baltimore, Maryland.

The female reproductive organs were often associated with the hellmouth (or the jaws of hell) and some even viewed the original sin as being transmitted through the vagina.

"Appendix"

Roe featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included. For example, multiple paragraphs were devoted to an account of the views and practices of ancient civilizations where infanticide was widely accepted. When it came to the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted—the Court said almost nothing. It allowed that States had tightened their abortion laws "in the middle and late 19th century," but it implied that these laws might have been enacted not to protect fetal life but to further "a Victorian social concern" about "illicit sexual conduct."
("[I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus"). This erroneous understanding appears to have played an important part in the Court's thinking because the opinion cited "the lenity of the common law" as one of the four factors that informed its decision.

Declaration of Independence, John Trumball, 1819
Signed August 6, 1776 at the Pennsylvania State House, Philadelphia.