

JUSTICE ALITO'S QUESTION

STEPHANIE NICOLE MILLER AND MARY KAY BACALLAO

Justice Alito’s Question:

“Can it be said that the right to abortion is deeply rooted in the history and traditions of the American people?”
Corpus linguistic evidence suggests the answer is “No.”

By:

Stephanie Nicole Miller, J.D. (December 2022)
Mary Kay Bacallao, Ed. D, J.D.¹

I. THE QUESTION

During oral argument in *Dobbs v. Jackson Women’s Health*² on December 1, 2021, Justice Samuel Alito asked this question of Julie Rikelman, counsel for Jackson Women’s Health: “[C]an it be said that the right to abortion is deeply rooted in the history and traditions of the American people?”³ He received this answer: “Yes, it can, Your Honor. [A]t the founding, women were able to end their pregnancy under the common law [A]t the time of the founding and well into the 1800s, women had the ability to end a pregnancy.”⁴ A similar historical claim was made in response to a question from Chief Justice Roberts by the U.S. Solicitor General, Elizabeth Prelogar: “at the time of the founding and for most of early American history, women had an ability to access abortion in the early stages of pregnancy.”⁵

¹ Both authors completed a [course on linguistic analysis of legal texts](#) at the [Georgia State University College of Law](#) taught by [Professor Clark D. Cunningham](#). As part of that course, Mary Kay Bacallao wrote a paper on whether the original meaning of “person” in the 14th amendment could have included an unborn human being and Stephanie Nicole Miller wrote about how the meaning of “right of privacy” developed and changed in 19th and 20th century American discourse. (These papers can be obtained by contacting the authors: MaryKayBacallao@hotmail.com and Stephanie@babykinzbooks.com.) Subsequently prompted by Justice Alito’s question at the *Dobbs* oral argument, they undertook independent research under Professor Cunningham’s supervision on the original public meaning of abortion in the Founding Era on which this essay is based.

² Transcript of Oral Argument, *Dobbs v. Jackson Women’s Health Organization* 141 S. Ct. 2619 (2021) (No. 19-1392), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf.

³ *Id.* at 75 (cleaned up).

⁴ *Id.* at 75–76.

⁵ *Id.* at 102–03.

In her answer to Justice Alito, Rikelman specifically referenced an *amicus* brief filed by the American Historical Association (AHA) and the Organization of American Historians (“AHA Brief”).⁶ The AHA Brief claims: “As we understand now better than ever before, American history and tradition regarding abortion under the common law undergirds *Roe v. Wade*’s holding that women have a constitutional right to decide for themselves whether to choose to terminate a pregnancy”⁷ because “under the common law, a woman could terminate a pregnancy at her discretion prior to physically feeling the fetus move.”⁸ The AHA Brief infers this right of a woman from the principle stated in a number of treatises and court cases from the 18th and 19th centuries that “at common law no indictment will lie for attempts to procure abortion with the consent of the mother until she is quick with child,” quoting a mid-19th century case, *Commonwealth v. Parker*.⁹ However, the AHA Brief goes beyond evidence from legal treatises and court cases to say, “ample historical evidence demonstrates that Americans knew of and followed the common law, which allowed extensive decision-making by a pregnant woman.”¹⁰ The AHA Brief further states: “As contemporaneous sources demonstrate, ordinary citizens continued to believe that not all abortions were criminal and that women held the power to determine whether to terminate a pregnancy.”¹¹

II. THE CORPUS LINGUISTIC RESEARCH

⁶ *Id.* at 76 (“There’s also a brief on behalf of several key American historian associations that goes through that history in detail”) (referencing Brief for American Historical Association and Organization of American Historians as Amicus Curiae Supporting of Respondents, *Dobbs v. Jackson Women’s Health Organization* 141 S. Ct. 2619 (2021) (No. 19-1392), 2021 WL 4341742 at 4 [hereinafter “AHA Brief”]).

⁷ AHA Brief at 4.

⁸ *Id.* at 7.

⁹ *Id.* (quoting 50 Mass. 263, 265–66 (1845)). “Nineteenth century sources used ‘quick’ and ‘quickenings’ consistently to mean the woman’s perception of fetal movement.” *Id.* at 6 n.2.

¹⁰ *Id.* at 14.

¹¹ *Id.* at 20.

Did Americans in the Founding Era express in writing the view that American women “had a right to abortion”? Our empirical research using the methods of corpus linguistics¹² not only failed to find any such writing but further produced persuasive evidence that Founding Era Americans would not have written of “a right to abortion” because at that time “abortion” had not developed today’s meaning of a woman’s voluntary choice to end pregnancy but instead was generally used in the same way we use “miscarriage” today, to refer to an involuntary termination of pregnancy.

For our research we used the Corpus of Founding Era American English (COFEA)—a digitized, online database that covers the time period starting with the reign of King George III, and ending with the death of George Washington (1760–1799). COFEA contains documents written and read by ordinary people of the day, including letters, diaries, newspapers, non-fiction books, fiction, sermons, public papers of seven major figures of the Founding Era,¹³ and legal materials. COFEA primarily obtains these texts from seven sources: the National Archive Founders Online; the HeinOnline legal database; Evans Early American Imprints; Farrand’s Records of the Constitutional Convention; Elliot’s Debates (state convention debates on ratification); Harvard’s Caselaw Access Project;¹⁴ and the U.S. Statutes-at-Large from the first

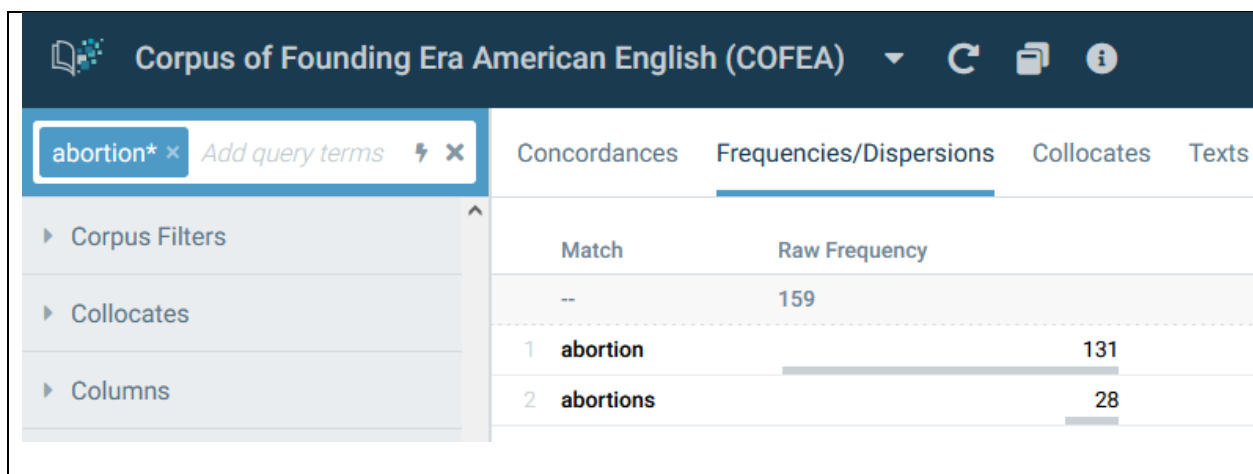
¹² See Clark D. Cunningham & Jesse Egbert, *Using Empirical Data to Investigate the Original Meaning of 'Emolument' in the Constitution*, 36 GA. ST. U. L. REV. 465, 473–75 (2020) (describing how corpus linguistic research meets scientific standards of generalizability, reliability, and validity), available at <https://readingroom.law.gsu.edu/gsulr/vol36/iss5/6> and also published on the Social Science Research Network at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460735. <https://ssrn.com/abstract=3460735>. See also William N. Eskridge Jr., Brian G. Slocum, & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1509 (2021) (corpus linguistics has potential to help judges make better, empirically based judgments about how words are used, both today and historically).

¹³ These “founders” are George Washington, Benjamin Franklin, John Adams, Thomas Jefferson, Alexander Hamilton, John Jay, and James Madison. “About Founders Online,” <https://founders.archives.gov/about>.

¹⁴ The Caselaw Access Project includes all official, book-published state and federal United States case law; the earliest case is from 1658. <https://case.law/about/>

five Congresses.¹⁵ The entire COFEA database currently houses 126,393 texts from the Founding Era totaling 136,915,894 words.¹⁶

COFEA allows users to search for all versions of a given word by placing an asterisk after the root term. Entering “abortion*” in the “query box” produces an initial search result of 131 uses of “abortion” and 28 uses of “abortions” for a total of 159 “hits.”¹⁷ (Henceforth we will italicize *abortion* to indicate both the singular and plural forms.)



Corpus of Founding Era American English (COFEA)	
Match	Raw Frequency
--	159
1 abortion	131
2 abortions	28

The majority of these initial search results, 123, came from a component of the COFEA database downloaded from Evans Early American Imprints Online, which contains over 3,000 books, pamphlets, and other written materials published in America between 1760 and 1799.¹⁸

¹⁵ *Corpus of Founding Era American English: About the Corpus* (BYU Law), <https://lawcorpus.byu.edu/cofea/showCorpusInfo=true/concordances>.

¹⁶ *Id.* Corpus linguistic methods should meet the scientific standard of reliability: a different researcher applying the same methods should duplicate the same outcome, note 12, *supra*. After free registration using a Google-based identification (e.g. Gmail address), anyone can access the COFEA data base online at: <https://lawcorpus.byu.edu/cofea/concordances>. In this essay we provide exact details of how we used COFEA’s online tools and provide our resulting data analyses in an online [Appendix](#) so readers can evaluate our results against the readers’ own use of COFEA.

¹⁷ Our COFEA search found no texts using “abortionist.”

¹⁸ Cunningham & Egbert, *supra* note 12, at 474.

Twenty hits came from Founders Online. Thirteen were found in Hein Online, which represents primarily legal texts. Three hits came from the Caselaw Access Project.¹⁹ We exported these results to an Excel spreadsheet, including 100 words to the left and right of each use of *abortion*.²⁰

The screenshot displays the 'Corpus of Founding Era American English (COFEA)' search interface. The search term 'abortion*' is entered in the search bar. The interface shows a list of concordance results, with the word 'abortion' highlighted in blue in each entry. The results are numbered 1 through 13. The interface also includes a sidebar with filters and options, such as 'Corpus Filters', 'Collocates', 'Columns', 'Sort', 'Additional Options', and 'Export'.

Concordance
1 the most powerful agent in bringing it on, is some taint left since a former abortion , which increases in proportion to the number of abortions. When
2 a was very alarming. She gave every symptom of a painful and dangerous abortion being at hand. It is now a fortnight since she was first confined to
3 for recovering which a legal remedy had been prosecuted, is rendered an abortion by some event posterior to institution of the demand, the court of
4 most alarming and dangerous floodings. 7. Lastly, With a view to prevent abortion in cases of habitual predisposition, in plethoric habits, or in those
5 the duty on tea, the attempt to obtrude that article upon the Americans, the abortion of this project, the Boston Port Bill, the alteration of the charter of
6 anent with the temporary question. If they do I think it will end in either an abortion of both or in a decision of the former in favor of the Delaware. I h
7 motion of the foetus, its kicking or strugglings. 4. A habitual disposition to abortion . III. The death of the foetus; which many be occasioned from, 1.
8 or that often proves hurtful to a woman with child; and sometimes causes abortion . Nor is the north wind much less hurtful, or less to be avoided, as
9 ale, and it will do her abundance of good; but if notwithstanding, signs of abortion or miscarriage appear, let her lay a toast dipped in tent (in case m
10 er ij. to v. or more alive; or in powder. from ij. gr. to xv. MISCARRIAGE. See Abortion . MITHRIDATE. Alexipharmi, anodyne, from j. scruple to a drachm
11 and mystery marked the conception , birth , and parentage of this lump of abortion and deformity . - The president received the treaty in January , wh
12 pleurisies, peripneumonies, or quinsies, after being much weakened by an abortion , or a flooding. The same complaints have likewise been brought
13 of fatal Epidemics.* The earthquakes and the insects have been noticed. Abortions were among the remarkable precursors of this malady. The same

We then manually reviewed each set of 201 words to analyze the context of usage. This review revealed that some search results represented the same text found in different sources; for example, a letter from John Adams to Thomas Jefferson might appear in both the Adams papers and the Jefferson papers. After removing these duplicates, we were left with 134 uses of *abortion*,²¹ to which we added one more example excluded from the initial search because “abortion” appeared in the text as “abor-tion.”²²

¹⁹ The search did not find any uses of *abortion* in Farrand’s Records, Elliot’s Debates, or the early Statutes at Large.

²⁰ This spreadsheet appears as “[Abortion-COFEA-OriginalResults](http://www.clarkcunningham.org/L2/Miller-Bacallao.html)” in the online [Appendix](#), <http://www.clarkcunningham.org/L2/Miller-Bacallao.html>

²¹ The [Appendix](#) contains a spreadsheet titled “[Abortion-17May2022-ByNumber](#)” assigning a specific number to each unduplicated use that is retained in future analyses for reference

²² See text accompanying note 49, *infra*.

III. THE FINDINGS

Our review of these 135 occurrences of *abortion* revealed that 98 clearly referred to the termination of a woman’s pregnancy; the other 37 usages appeared to use the word metaphorically, generally to refer to a misshapen or monstrous living thing or to an unfortunate occurrence.²³ Of the 98 usages referring to pregnancy, 85 of the uses were in the context of involuntary termination of pregnancy,²⁴ using *abortion* as the word “miscarriage” would be used today, as illustrated by the following examples:

“[T]he situation of my wife was very alarming. She gave every symptom of a painful and dangerous abortion being at hand. It is now a fortnight since she was first confined to her room, and every appearance grows more and more critical. It is almost certain, that the foetus, now about six months old, is dead. Altho’ I know your readiness to sympathize with me, I should not have troubled you with this detail, were it not for a wish, that the outlines of it should be conveyed to the ears of the president.”²⁵

“Abortion (to prevent). Use daily a Decoction of Lignum Gualacum.”²⁶

“On my return to Sheffield . . . I found a number of the inhabitants . . . afflicted with a fever . . . The number affected with the fever, in all other parts of town, did not, I believe exceed thirty. Of these, three died: one an aged woman: the other two, pregnant women; of whom one died in the fever, the other suffered an abortion, and died some months after, dropsical.”²⁷

²³ This comment in a letter by George Washington combined both metaphoric uses of *abortion*: “The resolutions which were published for consideration, vesting Congress with powers to regulate the Commerce of the Union, have I hope been acceded to. If the States individually were to attempt this, an abortion, or a many headed monster would be the issue.” “From George Washington to David Stuart, 30 November 1785,” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Washington/04-03-02-0359> (emphasis added). [Original source: *The Papers of George Washington*, Confederation Series, vol. 3, 19 May 1785–31 March 1786, ed. W. W. Abbot. Charlottesville: University Press of Virginia, 1994, pp. 423–424.]

²⁴ For one example, example 54 (line 99) in “[Abortion-17May2022-ByNumber](#),” we were uncertain whether the termination was voluntary or involuntary.

²⁵ *To James Madison from Edmund Randolph, 15 March 1790*, *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/01-13-02-0076>. [Original source: *THE PAPERS OF JAMES MADISON*, vol. 13, 20 January 1790–31 March 1791, ed. Charles F. Hobson and Robert A. Rutland. Charlottesville: University Press of Virginia, 1981, pp. 107–108.]

²⁶ The Rev. John Wesley, *PRIMITIVE PHYSICK: OR, AN EASY AND NATURAL METHOD OF CURING MOST DISEASES: ABORTION* (Philadelphia 1764), available at Evans Early American Imprints, <http://name.umd.umich.edu/N07727.0001.001>.

²⁷ *Letter of William Buel, Physician at Sheffield, to E.H. Smith, Physician of New York* (1795), in Noah Webster, *A COLLECTION OF PAPERS ON THE SUBJECT OF BILIOUS FEVERS, PREVALENT IN THE UNITED STATES FOR A FEW YEARS*

We noticed that some sources appeared repeatedly in our research results. Sorting the spreadsheet by the “Text ID” provided by COFEA enabled us to determine that 19 different sources appeared at least twice.²⁸ Ten of these sources were medical texts. In a number of the medical texts, variations of the word “miscarriage” (hereinafter *miscarriage* will refer to all such variations) appeared in the same contexts as *abortion*. Generally, the context indicated that *miscarriage* and *abortion* were being used interchangeably to refer to the same event. For example:

“Some sanguine robust Women are very liable to miscarry at a certain Time, or Stage, of their Pregnancy. This may be obviated, by their bleeding some Days before that time approaches. . . . But this Method would avail very little for delicate Citizens, who miscarry from a very different Cause; and whose Abortions are to be prevented by a very different treatment.”²⁹

“Where the abortion is owing to habit . . . Opium is always useful, and I have seen instances, where by the use of it women retained children, of which they would otherwise have miscarried.”³⁰

By far the most recurrent source was Hamilton’s *Outlines of the Theory and Practice of Midwifery*, producing 19 different occurrences of *abortion*.³¹ Hamilton provided a very precise definition of abortion: “The premature delivery of the foetus; which comprehends every period

PAST 56 (New York 1796) available at Evans Early American Imprints, <http://name.umdl.umich.edu/N23882.0001.001>.

²⁸ A spreadsheet listing the unduplicated results by Text ID (bringing together results from the same source) appears in the [Appendix](#) as “[Abortion-COFEA-17May2022-ByTextID](#)”.

²⁹ James Kilpatrick, ADVICE TO THE PEOPLE IN GENERAL, WITH REGARD TO THEIR HEALTH: BUT PARTICULARLY CALCULATED FOR THOSE, WHO ARE THE MOST UNLIKELY TO BE PROVIDED IN TIME WITH THE BEST ASSISTANCE, IN ACUTE DISEASES, OR UPON ANY SUDDEN INWARD OR OUTWARD ACCIDENT 186 (Philadelphia 1771), available at Evans Early American Imprints, <http://name.umdl.umich.edu/N09616.0001.001>.

³⁰ William Cullen, LECTURES ON THE MATERIA MEDICA: ON THE VIRTUES OF MEDICINES 348 (Philadelphia 1775), available at Evans Early American Imprints, <http://name.umdl.umich.edu/N11048.0001.001>

³¹ Alexander Hamilton, OUTLINES OF THE THEORY AND PRACTICE OF MIDWIFERY (Philadelphia 1790), available at Evans Early American Imprints, <http://name.umdl.umich.edu/N17435.0001.001>. Hamilton was Professor of Midwifery in the University of Edinburgh (Scotland) and a member of the Royal College of Surgeons. [A section from the book, entitled “Abortion,”](#) appears in the [Appendix](#).

before the evolution of its system be sufficiently complete to enable the child to exist after the connection with the parent is dissolved.”³²

Although Hamilton himself used *abortion* to refer generally to termination of pregnancy, he noted: “Some authors still make the following distinction. When the ovum is expelled in the early months, they call it an abortion; and, if the foetus be delivered at any period between the fifth month and the full time, a miscarriage.”³³ We did not find this distinction between *abortion* and *miscarriage* anywhere else in our results. For example, when Edmund Randolph—at the time U.S. Attorney General—wrote to James Madison that his wife was giving “every symptom of a painful and dangerous abortion” he mentioned that “it is almost certain that the foetus [is] now about six months old.”³⁴

In Dr. John Elliot’s “Medical Pocketbook,”³⁵ arranged “into alphabetical order,” the first entry is:

ABORTION:

SYMPTOMS. Pain in the back, loins, and lower part of the belly ... Most commonly happens between the second and fourth months of pregnancy, though it may occur later. It may be occasioned by frights, falls, strong emetics or cathartics, or by any violent commotion of body or mind.

TREATMENT. . . . the patient should be kept very still and quiet in bed. If, nevertheless, abortion follow . . . give . . . medicines . . . as after child-birth.

When the reader gets to “M” in the Medical Pocketbook, the following simple entry appears:

³² *Id.* at 143.

³³ *Id.*

³⁴ Randolph, *supra* note 23.

³⁵ John Elliot, THE MEDICAL POCKET-BOOK; FOR THOSE WHO ARE, AND FOR ALL WHO WISH, TO BE, PHYSICIANS. : CONTAINING A SHORT BUT PLAIN ACCOUNT OF THE SYMPTOMS, CAUSES, AND METHODS OF CURE, OF THE DISEASES INCIDENT TO THE HUMAN BODY: INCLUDING SUCH AS REQUIRE SURGICAL TREATMENT: TOGETHER WITH THE VIRTUES, AND DOSES, OF MEDICINAL COMPOSITIONS, AND SIMPLES. EXTRACTED FROM THE BEST AUTHORS, AND DIGESTED INTO ALPHABETICAL ORDER (Philadelphia 1784). The [full section in the Medical Pocket Book on “Abortion”](#) is reproduced in the [Appendix](#).

MISCARRIAGE. See Abortion.

We did find “hits” in COFEA written by ten different authors (totaling twelve examples) in which the use of *abortion* showed awareness by the writer that a woman might voluntarily choose to terminate pregnancy.³⁶ (The two writers who each provided two such uses of *abortion* were Thomas Jefferson and John Adams.) We did not, however, interpret these examples as indicating that the word *abortion*, standing by itself, had two different meanings in the Founding Era: (1) involuntary termination of pregnancy or (2) voluntary termination of pregnancy. Rather, we observed in these twelve examples that the concept of voluntary termination of pregnancy—modern day “abortion”—was communicated by combining *abortion* with a verb indicating human agency. For example, nine of the eleven authors used the phrase “procure abortion” to indicate that pregnancy was not terminated by medical misfortune but caused by human choice.³⁷

To explore whether there was a larger pattern in 18th century English, beyond what we discovered in COFEA, of using the phrase *procure abortion* to refer to voluntary termination of pregnancy, we used a second data base that overlaps the period covered by COFEA: The BYU-Corpus of Early Modern English (hereinafter “COEME”). COEME allowed us to search back to 1700 (COFEA begins with 1760) and to search texts from Great Britain as well as America.³⁸ We searched for uses of “procure *abortion*” by searching for “abort*” within six words of “procure*”:

³⁶ The [Appendix](#) contains a spreadsheet titled “[Abortion-COFEA-17May2022-ByCategory](#)” that sorts the 135 unduplicated research results into three categories: Involuntary [termination of pregnancy], Voluntary [termination of pregnancy], and Other. Also, downloaded lines where some version of “miscarriage” also appears are highlighted in yellow.

³⁷ The phrases used by the other two authors were “the art of producing abortions” and “take a potion to make an abortion.” We interpreted these phrases as also indicating human agency. See text accompanying notes 52 and 58, *infra*.

³⁸ COEME covers the period 1475–1800 based on 40,299 texts drawn from Eighteenth Century Collections Online, Early English Books Online, and Evans Early American Imprints, totaling more than 1.2 million words. BYU-COEME, About the Corpus, <https://lawcorpus.byu.edu/byucoeme;showCorpusInfo=true/concordances>.

The screenshot shows the BYU-Corpus of Early Modern English (BYU-COEME) interface. The search term is 'abort*' and the results are displayed in the 'Concordances' view. The interface includes filters for Corpus Filters (Year: 1700-1800) and Collocates (Scope Left: 6, Scope Right: 6). The search results show the following concordances:

Concordance	Procure	Abortion
1. law of God. Aristotle Politic. l. 7. c. 16. teaches it to be lawful to procure an	abortion	before that which is conceived hath Life and Sense. Diogenes Laertius
2. g their offspring, the wolmen, in some parts of America, procure frequent	abortions	by the use of certain herbs, and extinguish the first sparks of that life
3. or, because they are old and pait labour, and for a woman either to procure	abortion	, or to throw her child into the next river, because the will go with her hu
4. licy; that of suffering, or rather obliging, their women, to procure frequent	abortions	, by the use of a certain herb; that they may, in some measure, be ease
5. reduced fertility; but as fertility was not their wish, they learned to procure	abortions	, that their pleasures might suffer the less interruption; at last, jaded ev
6. that commerce, use every mean to avoid conception, and even to procure	abortion	. By such practices they are incapacitated to bear children when they
7. age of forty, and females, if pregnant before the age of thirty-fix, have an	abortion	procured by order of the magiftrate, who employs a violence that enda
8. and, rage giving place to delpair, fought for the potion that was to procure	abortion	, and fwallowed it with a wifh that it might detroy me, at the fame time
9. and, rage giving place to despair, sought for the potion that was to procure	abortion	, and swallowed it with a wish that it might destroy me, at the same tin

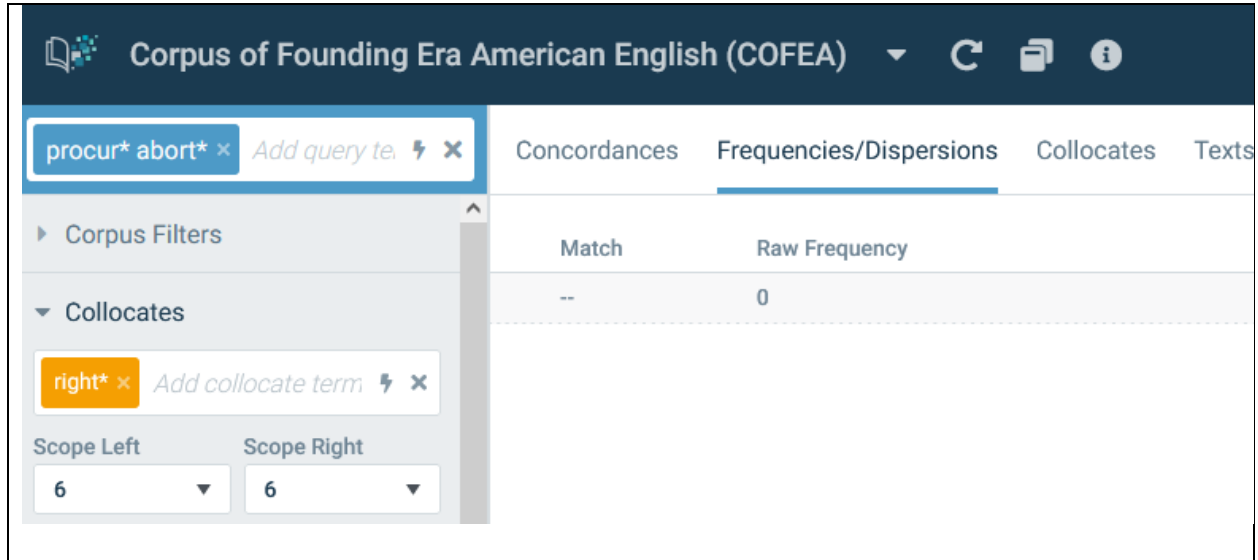
After eliminating duplicate hits and examples that also appeared in our COFEA search, we found a total of 27 hits in COEME using the phrase *procure abortion*.³⁹ All of these hits indeed referred to voluntary termination of pregnancy.

COFEA has a feature that allows a search for words which appear within a defined proximity of a target term by using the “Collocates” function. Using this feature to search for the words “right” or “privilege” within six words to the right or left of *abortion* produced no occurrences. (The same result was returned searching for collocates of *miscarriage*.) Upon a cross-check for the top 100 collocates of *abortion* using the “Collocates” view in COFEA,⁴⁰ neither right nor privilege appeared—nor did variations of those words. Having found evidence that, unlike the word *abortion* by itself, the phrase *procure abortion* was used with some frequency in the 18th

³⁹ The research results from the COEME search supported in an interesting way the idea that *procure abortion* was used in the 18th century to refer to modern day “abortion.” A number of examples included sentences that read out of context might actually seem to support the assertion in the AHA brief that a “right to abortion” was an accepted social practice at the time of founding. For example, one author wrote that “[Aristotle teaches it to be lawful to procure abortion before that which is conceived hath Life and Sense.](#)” John Milner, AN ACCOUNT OF MR. LOCK’S RELIGION 137 (London 1700), available at Early English Books, <http://name.umdl.umich.edu/A50867.0001.001>. (But the preceding sentence in that text makes clear the writer’s disapproval of Aristotle’s teaching: “the Opinions of the Philosophers among the Heathens concerning Vertue and Vice . . . were not the same with the Opinions of those who judged of them by the Rule of the Law of God.” *Id.*) For other examples from COEME in which “procure abortion” is used to describe a social practice of voluntary termination of pregnancy which is then rejected or reviled by the author, see [COEME Examples](#) in the [Appendix](#).

⁴⁰ See note 45 for an explanation of the “Collocates” view in COFEA.

century to indicate that pregnancy had been voluntarily terminated, we did the same collocation testing of that phrase. The following screen shot shows that “right*” is not a collocate of *procure abortion*:



We also found no examples in which *procure abortion* was a collocate of “privilege.”

Then we selected the “Collocates” view in COFEA to find the words that appear with statistically significant frequency with *procure abortion*:⁴¹

⁴¹ We searched for collocates that appear within six words to the right or left of *procure abortion*. We set the “Max Hits” at 100 and the “Minimum Mutual Information” score to 3. (“Mutual information score is a statistical association measure that helps to inform the strength of relationship between two collocates. When using mutual information score to help filter through meaningful results, it is common practice to set a minimum mutual information score of 3.” [COFEA Help Docs](#).)

Collocate	Collocational Frequency
--	72
1 learned	4
2 use	4
3 practice	3
4 enlarge	1

None of the collocates were “right” or “privilege” or variations of those words.⁴²

Looking in depth at each of the twelve examples referring to voluntary termination of pregnancy from COFEA we concluded that none would support a claim that “a right of abortion” was understood in the Founding Era as “deeply rooted in the history and traditions of the American people.” Nine of these twelve usages referred to social practices of other cultures:

- Thomas Jefferson provides two examples in a passage describing Native American women. “[T]hey have learned the practice of procuring abortion by the use of some vegetable; and that it even extends to prevent conception for a considerable time after.”⁴³

A few sentences later in the same paragraph Jefferson refers to this practice as “voluntary

⁴² We also reviewed dictionaries and thesauruses available in the Founding Era or published soon thereafter to look for other words and phrases used in that period to refer to voluntary termination of pregnancy. We found the phrases “destroy foetus” and “destroy the embryo in the womb” but the uses of these phrases when read in context did not support a claim that a “right to abortion” was understood in the Founding Era as “deeply rooted in the history and traditions of the American people.” See [18th Century Dictionaries](#) in the [Appendix](#).

⁴³ [Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA](#) 92 (1787) (emphasis added). Full original context in [Appendix](#).

abortion.” “To the obstacles then of want and hazard . . . those of labour and of voluntary abortion are added with the Indian. No wonder then if they multiply less than we do.”⁴⁴

- The Rev. John Wesley, the founder of Methodism, wrote the following based on his missionary work in what was then the colony of Georgia: “Of the Georgian Indians in general it may be observed . . . [t]hey are implacable, unmerciful: murderers of fathers, murderers of mothers, murderers of their own children: it being a common thing for a son to shoot his father or mother, because they are old and past labour; and for a woman either to procure abor-tion, or to throw her child into the next river, because she will go with her husband to the war.”⁴⁵
- A third author also used the phrase *procure abortion* to describe social practices of Native American women.⁴⁶
- Another two uses come from a passage by John Adams recounting a story from ancient Greek history.⁴⁷

⁴⁴ *Id.*

⁴⁵ John Wesley, AN EXTRACT OF THE REV. MR. JOHN WESLEY'S JOURNALS, VOLUME I 88–89 (Philadelphia 1795), available at Evan Early American Imprints, <http://name.umdl.umich.edu/N22587.0001.001>.

⁴⁶ William Robertson, THE HISTORY OF AMERICA, Book IV 329 (New York 1798) (“The distresses and hardships of the savage life . . . must be fatal to those of more tender age. Afraid of undertaking a task so laborious, and of such long duration, as that of rearing their offspring, the women, in some parts of America, procure frequent abortions by the use of certain herbs”), available at Evans Early American Imprints, <http://name.umdl.umich.edu/N25924.0001.001>. Yet another author, Williams Smith, provided a similar description of social practices among Native Americans, using the phrase “destroy the foetus in the womb.” For more detail, see 18th Century Dictionaries in the Appendix.

⁴⁷ John Adams, *A Defence of the Constitutions of Government of the United States of America* 250 (1787): “Lycurgus [of Sparta] . . . succeeded his brother Polidectes but [was] told his brother’s widow was with child. . . . The ambitious princess . . . offered to marry [Lycurgus], and remove out of his way the only competitor by procuring an abortion.” (emphasis added). Full original text in [Appendix](#).

- An “Essay on the character, manners, and genius of women in different ages” said of ancient Rome: “Debauchery reduced fertility. They learned to cheat nature. The art of producing abortions completed the detestable practice.”⁴⁸
- Another author described the Romans with similar language: “Debauchery reduced fertility; but as fertility was not their wish, they learned to procure abortions, that their pleasures might suffer the less interruption.”⁴⁹
- A sermon about “vile and immoral” heathens said they violated the commandment “not to kill” “by procuring the abortion of children [and] by exposing new-born infants.”⁵⁰

The tenth use appears in a novel by Mary Wollstonecraft, an English writer considered a pioneer of feminism,⁵¹ in which the narrator, a servant raped by her master, finds herself pregnant and describes “procuring abortion” in terms of suicide: “rage giving place to despair, [I] sought for the potion that was to procure abortion, and swallowed it with a wish that it might destroy me, at the same time that it stopped the sensations of new-born life.”⁵²

Dr. William Cullen, a Professor of Medicine at the University of Edinburgh in Scotland, in the eleventh example, referred to “unprescribed” use by women of “fossile oils” and mentioned

⁴⁸ William Russell, *ESSAY ON THE CHARACTER, MANNERS, AND GENIUS OF WOMEN IN DIFFERENT AGES. ENLARGED FROM THE FRENCH OF M. THOMAS* 40 (Philadelphia 1774), available at Evans Early American Imprints, <http://name.umdl.umich.edu/N10774.0001.001>.

⁴⁹ William Alexander, *THE HISTORY OF WOMEN, FROM THE EARLIEST ANTIQUITY, TO THE PRESENT TIME; GIVING AN ACCOUNT OF ALMOST EVERY INTERESTING PARTICULAR CONCERNING THAT SEX, AMONG ALL NATIONS, ANCIENT AND MODERN* 258 (Philadelphia 1796), available at Evans Early American Imprints, <http://name.umdl.umich.edu/N22674.0001.001>.

⁵⁰ Benjamin Bennet, *THE TRUTH, INSPIRATION AND USEFULNESS OF THE SCRIPTURE ASSERTED AND PROVED* 31 (New Brunswick, N.J. 1795), available at Evans Early American Imprints, <http://name.umdl.umich.edu/N21501.0001.001>.

⁵¹ *Mary Wollstonecraft, English author*, BRITANNICA (2022) (author of *A VINDICATION OF THE RIGHTS OF WOMAN* (1792), considered a classic of feminism; mother of Mary Wollstonecraft Shelley, author of *FRANKENSTEIN*), <https://www.britannica.com/biography/Mary-Wollstonecraft>.

⁵² *MARIA: OR THE WRONGS OF WOMAN. A POSTHUMOUS FRAGMENT* 74 (Philadelphia 1799), available at Evans Early American Imprints, <http://name.umdl.umich.edu/N26724.0001.001>.

that he has known of cases when women have taken them “to procure abortion,” but that even in very large doses doing so is not effective and only “disturb[s] the system.”⁵³

The twelfth use appears in a manual for the use of justices of the peace, which says that if a woman takes “any potion to make an abortion” that would “be a great crime.”⁵⁴

IV. CONCLUSION

Our empirical research indicates that *abortion* was overwhelmingly used in the Founding Era to describe a medical misfortune to be prevented if possible. We found only 12 examples in which *abortion* was used in reference to voluntary termination of pregnancy—most frequently as the phrase *procure abortion*. We searched for evidence that *procure abortion* was used in contexts indicating that this practice was a right or privilege, and we found no such evidence. Finally, close examination of each of the twelve examples referring to voluntary termination of pregnancy led us to the conclusion that none of those texts would support a claim that “a right of abortion” was understood in the Founding Era as “deeply rooted in the history and traditions of the American people.”

⁵³ Cullen, *supra* note 28, at 364.

⁵⁴ [James Parker, THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR](#) 67 (New York 1794). The full context is: “If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy the child within her; and therefore he that gives her a potion to this end, must take the hazard, and if he kills the mother, it is murder. If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, tho’ it be a great crime, yet it is not murder nor manslaughter by the laws of England, because it is not yet in *rerum natura*, nor can it legally be known, where it were killed or now.” According to Black’s Law Dictionary, not “in *rerum natura*” can mean not “in the realm of actuality, in existence,” <https://thelawdictionary.org/in-rerum-natura/>. The original page from Parker appears in the [Appendix](#).