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The History of History and Tradition: The Roots of *Dobbs*'s Method (and Originalism) in the Defense of Segregation

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ABSTRACT. In *Dobbs v. Jackson Women's Health Organization*, the Roberts Court claimed authority to overturn *Roe v. Wade* by comparing itself to the Warren Court in *Brown v. Board of Education* overturning *Plessy v. Ferguson*. This Essay challenges the claim that *Dobbs* is like *Brown* by recovering history the Court omitted in *Dobbs*—history that ties *Dobbs*'s history-and-tradition method to the defense of segregation.

Dobbs interpreted the Constitution's liberty guarantee by counting state laws criminalizing abortion at the time of the Fourteenth Amendment's ratification. In so doing, *Dobbs* was employing modes of reasoning that were popularized by those who *opposed Brown*. They defended *Plessy* as properly interpreting the Constitution's equality guarantee by counting states whose laws segregated education in 1868—the majority of which were states of the former Confederacy that were resisting Reconstruction. *Brown* repudiated this backward-facing method of interpreting the Amendment and called upon the nation to change its practices to conform to its constitutional ideals. In so doing, *Brown* recognized that application of the Constitution's guarantees evolves in history—the approach in the Court's substantive due process cases that *Dobbs repudiated* when it counted states that criminalized abortion in 1868 to justify reversing *Roe*.

This Essay traces the rise and spread of an interpretive method—counting state laws in 1868—that finds the Constitution's meaning fixed in the deep past, tied to the expectations, intentions, and practices of the Constitution's ratifiers. It shows how this method—and forms of originalism and traditionalism that limit the Fourteenth Amendment's meaning to its ratifiers' expectations, intentions, and practices—arose in opposition to methods of interpreting the Amendment that recognize that application of its guarantees evolves in history. These debates spread from conflict over segregation to substantive due process cases including *Roe*, *Bowers*, *Casey*, *Glucksberg*, *Lawrence*, and *Obergefell*, and they continue today, often as arguments about the "levels of generality" at which judges should interpret the Constitution's requirements. In tracing the argument that state laws in 1868 are proxies for the expectations and intent of the Fourteenth Amendment's ratifiers, this Essay shows how early forms of originalism and *Dobbs*'s history-and-tradition method emerged out of resistance to *Brown* and backlash to decisions of the Warren and Burger Courts. This history connects interpretive debates of the 1950s, the 1980s, and the 1990s to controversies about interpretive method that arise in the present day—as Americans argue about *Dobbs*'s legitimacy and ask how, if at all, *Dobbs* should guide federal and state courts in interpreting liberty and equality guarantees.

Examining interpretive methods in the political conflicts in which they grew helps us think critically about the justifications *Dobbs* offered for its method of interpreting the Fourteenth Amendment. *Dobbs* argued that its use of state-counting in 1868 to enforce the Fourteenth Amendment's liberty guarantee provided an impersonal standard that prevented interpreters from reasoning from their values and so protected democracy in the states. The history this Essay examines refutes each of these claims, demonstrating how *Dobbs*'s method conceals dynamic forms of interpretation and enforces disempowering forms of democracy.

Counting states that segregated education (or banned abortion) in 1868 was not a neutral measure of the Constitution's meaning, but instead perpetuated political inequalities of the past into the future. The democracy *Dobbs* supported was a thin majoritarianism, democracy without rights to protect the participation of those historically excluded from the democratic process. Race and gender conflicts over the abortion bans *Dobbs* authorized in Mississippi illustrate how the liberty and democracy *Dobbs* protects entrench political inequalities of 1868. Examining justifications for interpretive methods in political context makes vivid how in debates over abortion and gay rights, as in the debate over segregation, a backward-looking standard that appeared to fix the Constitution's meaning in the past in fact vindicated the interpreters' values and functioned as a veiled form of conservative living constitutionalism.

This Essay refutes the claim that *Dobbs* is like *Brown* on terms that contribute to contemporary debates in constitutional law and theory. Critically examining claims on the constitutional memory of *Brown* is a practice of fidelity to *Brown* as we commemorate its seventieth anniversary.

INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*,[1] the Supreme Court plays memory games,[2] employing stories about the past to legitimate its decision overturning a half-century of women's rights. To justify reversing *Roe v. Wade*,[3] *Dobbs* declared *Roe*, like "[t]he infamous decision in *Plessy v. Ferguson*," "'egregiously wrong' on the day it was decided,"[4] and argued that *Roe* lacked grounding in the nation's history and traditions of banning abortion.[5] The Roberts Court was asserting that in overturning *Roe*, it was acting as the Warren Court had in overturning *Plessy*—that *Dobbs* was like *Brown v. Board of Education*.[6] Justice Alito evoked this comparison multiple times,[7] suggesting that his opinion in

1. 142 S. Ct. 2228 (2022).

2. *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1180-93 (2023).

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

4. *Dobbs*, 142 S. Ct. at 2265 (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020)).

5. *Id.* at 2267 ("*Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong.").

6. 347 U.S. 483 (1954).

7. *See infra* note 50 and accompanying text.

Dobbs liberated the nation from pernicious judicial lawmaking and restored democratic values that had been abrogated by activist judges in the past.[8]

Constitutional memory has a politics.[9] *Dobbs* determined that the liberty *Roe* protected was not part of the nation's history and traditions by counting the number of states that criminalized abortion at the time of the Fourteenth Amendment's ratification.[10] In so doing, as this Essay shows, *Dobbs* employed a method of interpreting the Fourteenth Amendment that *Plessy*'s defenders had used when they counted states that segregated education at the time of the Amendment's ratification,[11] and that was carried into abortion jurisprudence by Justice Rehnquist in his *Roe* dissent—a dissent authored just over a year after his confirmation, where debate focused on Rehnquist's support for *Plessy* while clerking for Justice Robert Jackson during the arguments in *Brown*.[12]

Excavating this history serves several critical ends. First, it demonstrates the workings of constitutional memory. Imagine if the *Dobbs* Court had said: We reject the modes of determining history and tradition employed in prior substantive due process cases and find our authority to reverse *Roe* in the method of interpreting the Fourteenth Amendment that segregationists employed to defend *Plessy* in the *Southern Manifesto*.[13] That too would state *Dobbs*'s relation to

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8. *Dobbs*, 142 S. Ct. at 2265 ("The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*."); *see also infra* note 216 (demonstrating that *Dobbs* repeatedly argued that overturning *Roe* promoted democracy).

9. *See* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 23-24 (2022) ("It is the role of constitutional memory to legitimate the exercise of authority; but constitutional memory plays a special role in legitimating the exercise of authority when constitutional memory systematically diverges from constitutional history.").

10. *Dobbs*, 142 S. Ct. at 2252 ("In this country, during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. See Appendix A, *infra* (listing state statutory provisions in chronological order).").

11. *See infra* Section I.A.

12. *See infra* Sections I.B-I.C; Evan Stewart, *Did William Rehnquist Lie to Become a Justice, and then Chief Justice?*, FED. BAR COUNCIL Q. 14, 15-20 (Mar./Apr./May 2018); Adam Liptak, *The Memo that Rehnquist Wrote and Had to Disown*, N.Y. TIMES (Sept. 11, 2005), https://www.nytimes.com/2005/09/11/weekinreview/the-memo-that-rehnquist-wrote-and-had-to-disown.html [https://perma.cc/8BXF-VGKE].

13. The Southern Congressional delegation's declaration in the *Southern Manifesto* is the most famous expression of resistance to *Brown*. *See* JOHN KYLE DAY, THE SOUTHERN MANIFESTO: MASSIVE RESISTANCE AND THE FIGHT TO PRESERVE SEGREGATION 3 (2014) (recounting that "[o]n March 13, 1956, ninety-nine members of the Eighty-Fourth United States Congress promulgated the Declaration of Constitutional Principles, popularly known as the Southern Manifesto"). John Kyle Day provides an in-depth study of how the *Southern Manifesto* helped to mobilize massive resistance at the state and federal level. *See id.* at 5 ("This statement allowed the white South to dictate the interpretation of *Brown II*, setting the slothfully circumspect timetable for the implementation of public school desegregation . . . . It provided the

Brown, but for most Americans it would *discredit* the Court's decision, rather than imbue it with authority.[14] This counterfactual demonstrates how the exercise of public power can be legitimated by appeals to the past—through historical claims that are true or false, or selective, as many of *Dobbs*'s claims about the past are.[15] A first aim of the history this Essay recovers is to counter *Dobbs*'s legitimating constitutional memory claim by demonstrating the many ways *Dobbs* resembles *Plessy*, not *Brown*.[16]

As importantly, recovering this history connects debate over the Court's recent decisions with some of the great constitutional controversies of the last three-quarters of a century. Americans have repeatedly struggled over the question whether application of the Constitution's guarantees should conform to particular expectations and practices in the deep past or evolve in intergenerational debate. It is striking and perhaps even grotesque that *Dobbs* counted the same number of states banning abortion in 1868 as the *Southern Manifesto* counted states segregating schools in 1868.[17] However important it is to revisit this history—both to correct errors in *Dobbs*'s count[18] and to examine the Court's

Southern Congressional Delegation with the means to effectively delay federal civil rights legislation for years to come."). The *Southern Manifesto* popularized the use of state-counting in 1868 as evidence of original intent. *See infra* notes 91-96, 99 and accompanying text.

14. The *Southern Manifesto* and *Plessy* represent honored authority for Americans committed to White Supremacy, but the Court presents itself as opposed to open expressions of these beliefs. *See* Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 25 (2022) ("[T]he Court provides a remedy to people of color seeking relief from racially burdensome laws and policies only when the racism embedded in the challenged law or policy is so closely tied to white supremacy that it would be embarrassing for the Court to do nothing. The Roberts Court's racial common sense is a tactic that allows the Court to do no more than the absolute bare minimum and, in so doing, maintain a modicum of legitimacy.").

15. On the politics of memory claims in law, see Siegel, *supra* note 9. On *Dobbs*'s selectivity, see Reva B. Siegel, Dobbs*, the Politics of Constitutional Memory, and the Future of Reproductive Justice*, BALKANIZATION (Jan. 22, 2023) [hereinafter Siegel, *Constitutional Memory and the Future of Reproductive Justice*], https://balkin.blogspot.com/2023/01/dobbs-politics-of-constitutional-memory.html [https://perma.cc/A79P-UND3]; and Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 906-07 (2023) [hereinafter Siegel, *How "History and Tradition" Perpetuates Inequality*].

16. *See infra* Section I.A, Part III & Conclusion.

17. *See infra* note 100 and accompanying text.

18. Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F. 65, 67 (2023) ("[T]he Court . . . miscounted the number of states that banned abortion altogether. *Dobbs*'s assertion that twenty-eight out of thirty-seven states banned all abortion as of the Fourteenth Amendment's adoption—a claim *Dobbs* calls the 'most important historical fact' in its analysis—rests on a series of historical errors." (footnote omitted) (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2267 (2022))).

constitutionally significant omissions[19]—it is just as important to ask *why* the Court interpreted the Fourteenth Amendment by counting state practice in 1868, and to examine the reasons the Court gave for turning to history as it did.

Counting states can serve different ends. It can support or restrict the evolving application of constitutional guarantees and it can expand the authority of the national government or the states. In *Dobbs*, the Court counted states banning abortion in 1868 to limit the Fourteenth Amendment's meaning to the expectations and practices of lawmakers in the mid-nineteenth century, and to return power to local majorities in the states. *Dobbs* appeals to different structural values than the practices of state-counting that the Court has employed to justify *expanding* federal constitutional rights[20]—for example, in decisions that incorporate federal rights against the states[21] or appeal to evolving contemporary understandings as a reason to build out the scope of federal rights.[22] These practices of state-counting seek to identify an emerging consensus that can support the exercise of federal power.[23] In *Dobbs*, by contrast, counting state practice at the time of the Fourteenth Amendment's ratification serves to restrict the application of the Fourteenth Amendment's guarantees to the particular expectations, intentions, and actions of legislators who ratified it and thus to insulate a wide range of practices from federal constitutional review.

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19. *See* Siegel, *supra* note 2, at 1184-93; Siegel, *Constitutional Memory and the Future of Reproductive Justice*, *supra* note 15; Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 15, at 920-32; Tang, *supra* note 18.

20. For commentary distinguishing between state-counting "as a *source* of national law" that justifies expanded federal rights on the grounds of national consensus and "as a *limit* on national law" that preserves state prerogatives, see Roderick M. Hills, *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 18 (2009). *Cf.* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 13 (2008) (counting rights protected in state constitutions as of 1868 to support consensus for expanding federal constitutional rights).

21. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) (incorporating the Eighth Amendment's Excessive Fines Clause, noting that at the time the Fourteenth Amendment was ratified "the constitutions of 35 out of 37 States . . . expressly prohibited excessive fines"); McDonald v. City of Chicago, 561 U.S. 742, 770 (2010) (incorporating the Second Amendment, noting that Second Amendment analogues were adopted by four states before ratification of the Bill of Rights and another nine "immediately following").

22. State-counting plays an important role in the expansion of Eighth Amendment rights, with the Supreme Court using state practices to identify "our society's evolving standards of decency." *See* Roper v. Simmons, 543 U.S. 551, 563-64 (2005).

23. *Id.* For further discussion of how courts count states to identify evolving standards in a variety of contexts, see Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 52 UCLA L. REV. 365, 368-69 (2009).

In determining the Fourteenth Amendment's meaning through its ratifiers' practices and expectations, *Dobbs* employed a method used by *Plessy*'s defenders in arguments that *Brown* refused to accept.[24] The Warren Court rejected claims that the Fourteenth Amendment's meaning resided in these expectations, intentions, and practices, and in methods of interpretation that would entrench the South's prior practice against constitutional challenge.[25] It understood that a nation lives through its commitments and values as well as its practices and would not allow past practice alone to define what America's Constitution means.

Brown reasoned that equal protection prohibited racial segregation, because separating children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[26] Instead of limiting the Constitution's meaning to the particular expectations, intentions, and practices of its ratifiers, the Warren Court interpreted the Fourteenth Amendment's guarantees at a higher level of generality, taking into account the experience and perspectives of subsequent generations. Instead of deferring to local majorities in ways that would perpetuate the Constitution's democratic deficits, the Warren Court interpreted the Fourteenth Amendment to protect the equal participation of those originally locked out of the political process.[27] *Brown* is renowned because it demonstrated how fidelity to the rule of law can be transformative. For generations *Brown* has exemplified the living Constitution.[28] In the wake of *Brown*, it was widely

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24. *See infra* Section I.A.

25. *See infra* notes 89-90 and accompanying text.

26. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

27. *See infra* notes 224-225 and accompanying text.

28. Living constitutionalism refers to modes of interpreting the Constitution that allow its meaning to evolve in history. For a prominent statement of the view that the Constitution's meaning evolves in history, see Justice William J. Brennan, Jr., Address to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 17 (The Federalist Society, ed., 1986) ("[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.") In these remarks Justice Brennan drew on his dissent in a recent case, *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the Court interpreted the Establishment Clause through the practices of the Founders rather than prevailing case law. *Id.* at 14-15. In his *Marsh* dissent, Brennan wrote that the Court "ha[s] recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee." *Marsh*, 463 U.S. at 816 (Brennan, J., dissenting). For support, he cites *Brown v. Board of Education*, 347 U.S. 483 (1954); his opinion in *Frontiero v. Richardson,* 411 U.S. 677 (1973) (plurality opinion), extending equal-protection scrutiny to gender discrimination; as well as cases incorporating rights to a jury trial, against cruel and unusual punishment, and against search and seizure. *Marsh*,

understood that the Equal Protection Clause should be interpreted at this higher level of generality, as forward-looking, not backward-looking, and not appropriately interpreted by appeals to history and tradition.[29]

This debate over interpretation in *Brown*—whether to limit the meaning of the equal protection guarantee to the particular expectations, understandings, and practices of its ratifiers or to read the guarantee as applying to practices that might not have been contemplated by its ratifiers—sheds light on the conflicts now engulfing substantive due process law. Justice Rehnquist counted state practice in 1868 to interpret the liberty guarantee in his *Roe* dissent, the Reagan Administration employed the method in a brief calling for *Roe*'s overruling, and a majority of the Supreme Court employed the method to define protections for intimate and family relations in *Bowers v. Hardwick*,[30] prompting conflict that led the Court to reverse the decision.[31] Not only *Roe*, but *Planned Parenthood v. Casey*,[32] *Lawrence v. Texas*,[33] and *Obergefell v. Hodges*[34] emerged from a debate over whether courts applying the Constitution's liberty guarantee should look for guidance to the nation's traditions understood at a high level of generality—or fixed by practice at the time of the Fourteenth Amendment's ratification.[35] In *Casey*, *Lawrence*, and *Obergefell*, the majority refused to tie the Constitution to particulars of past practice and appealed to equality in defending an evolving application of the Constitution's liberty guarantees.[36]

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463 U.S. at 816 n.35 (Brennan, J., dissenting). In refusing to confirm Judge Robert Bork to the Supreme Court in 1987, the Senate Judiciary Committee, led by then-Senator Joseph R. Biden Jr., invoked the understanding that traditions are living as recognized in key substantive due process decisions. *See infra* note 162 and accompanying text.

29. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. (forthcoming Aug. 13, 2023) (manuscript at 12 & n.52), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366019 [https://perma.cc/SXG4-K7UC]; Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988) (reporting the understanding that the Due Process Clause looks backward, following past practice "described at the appropriate level of generality," while the Equal Protection Clause "looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure").

30. 478 U.S. 186 (1986). For a discussion, see *infra* notes 127-131 and accompanying text.

31. *See infra* Section I.B.

32. 505 U.S. 833, 856 (1992).

33. 539 U.S. 558, 572 (2003).

34. 576 U.S. 644, 657 (2015).

35. *See infra* Section II.B.

36. For discussion of the dynamic understanding of history and tradition to which the Court appealed in these cases, see *infra* Section II.B. For discussion of these cases as emerging from liberty and equality claims, see Douglas NeJaime & Reva B. Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. Rev. 1902

For decades the Court interpreted the Fourteenth Amendment's liberty guarantee as the Court in *Brown* had: transformatively, reasoning about the nation's traditions at a high level of generality to vindicate understandings of liberty and equality that those who ratified the Fourteenth Amendment did not all share. Justice Kennedy reasoned in the spirit of *Brown* as he explained in *Obergefell*:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[37]

It was not until after Justice Kennedy's retirement that a Supreme Court constituted to reverse *Roe* and *Casey*[38] attacked prior cases for reasoning about liberty "at a high level of generality"[39] and employed state-counting in 1868 to justify overturning the abortion right—while claiming the Court was acting on the model of the Warren Court in *Brown*. Examining the history of *Brown* that *Dobbs* omitted shows that the *Dobbs* Court was *not* acting on the model of the Warren Court in *Brown*; it was employing a method rooted in the defense of segregation.

Just as importantly, the history this Essay examines helps us think critically about the *justifications Dobbs* offered for the method it employed to determine the nation's traditions of liberty. *Dobbs* defended its use of state-counting in 1868 to enforce the Fourteenth Amendment's liberty guarantee as providing a disinterested standard that would prevent interpreters from reasoning from their values and so protect democracy in the states.[40] The history this Essay examines refutes each of these claims. Counting states that segregated education in 1868 was not a neutral measure of the Constitution's meaning; it perpetuated political inequalities of the past into the future.[41] The democracy it supported was a thin

(2021); and NeJaime & Siegel, *supra*, at 1934-38, quoting equality reasoning in *Casey*, *Lawrence*, and *Obergefell*. For discussion of the role of equality reasoning in the Court's decision to reaffirm *Roe* in *Casey*, see *infra* notes 169-171 and accompanying text.

37. *Obergefell*, 576 U.S. at 664. *See infra* note 166 and accompanying text (observing that "Justice Kennedy's opinions consistently cojoined emphasis on an evolving understanding of liberty and the urgency of respecting contemporary understandings of equal citizenship so pronounced as to draw repeated comparisons to *Brown*").

38. *See* Siegel, *supra* note 2, at 1176-77.

39. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257-58 (2022).

40. *See infra* note 140 and accompanying text.

41. *See infra* Part II.

majoritarianism — democracy without rights that protected the participation of those historically excluded from the democratic process.[42] In other words, it is an account of democracy more like the account defended in *Plessy* than in *Carolene Products* Footnote Four[43] or in *Brown* itself — decisions that help legitimate majoritarianism by protecting the infrastructure of democratic participation.[44]

In tracing the argument that state laws in 1868 are proxies for the understandings of the Fourteenth Amendment's ratifiers, this Essay uncovers debates of the past that show how originalism and *Dobbs*'s history-and-tradition method grew out of resistance to *Brown* and backlash to decisions of the Warren and Burger Courts. Locating debates over interpretive method in the political conflicts in which they arose enables us to evaluate justifications for these methods — *to assess whether the methods deliver the goods they promise*. Examined in this context, it is easier to see how *Dobbs*'s turn to history is not disinterested, but instead interested, and serves to veil rather than to constrain the interpreter's values. Examining interpretive methods and their justifications in the political contexts in which they grew demonstrates how *Dobbs*'s method conceals dynamic forms of interpretation and enforces disempowering forms of democracy. The Essay's history should illustrate this even for readers who are not prepared to recognize the debate over segregation as a source of *Dobb*'s method.

In other words, this Essay refutes the claim that *Dobbs* is like *Brown* on terms that contribute to contemporary debates in constitutional law and theory. In refuting the claim that *Dobbs* is like *Brown*, the Essay examines the growth of prominent forms of originalism and traditionalism and evaluates their justifications. It asks whether judges applying constitutional standards tied to particular expectations and practices in the deep past are more constrained than judges who do not, the question at issue in judicial debates over "levels of generality";[45] and it considers conditions in which enforcement of fundamental rights can threaten — or promote — democracy.[46] Understanding how Americans have disputed these questions over the last three-quarters of a century is critically important for the practice of law — as Americans debate *Dobbs*'s legitimacy and debate how, if at all, *Dobbs* should guide federal and state courts in interpreting liberty and equality guarantees.

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42. *See infra* Part III.

43. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

44. For an account of how substantive due process law protects the infrastructure of democratic participation, see NeJaime & Siegel, *supra* note 36, at 1907.

45. *See infra* Section II.B. For discussion of this "level of generality" question in a decision by Judge Sutton invoking *Dobbs* as he authorized enforcement of a state law banning gender-affirming care, see *infra* note 211 and accompanying text.

46. *See infra* Section III.A.

The Essay unfolds in three parts. Part I of this Essay shows that in *Dobbs* the Court appealed to *Brown* as authority for overturning *Roe* while it justified reversing *Roe* through modes of interpretation that the *Southern Manifesto* employed to advocate resistance to *Brown*.[47] It will then show how, once it was no longer acceptable to defend segregation, conservatives redirected these forms of argument to defend other contested practices, including laws banning abortion and sodomy.[48] This history shows how over time claims on original intention were abstracted away from the open defense of segregation and redirected toward defending traditional ways of life in a wider range of contexts.

The Essay next examines the justifications *Dobbs* offered for its state-counting method—that counting states banning abortion in 1868 would constrain judges from reasoning from their values and thus protect democracy. Part II interrogates the claim that examining the practices of those who ratified the Fourteenth Amendment offers an objective and impersonal proxy for its meaning, first showing how the method advanced interpreters' values in the debate over segregation and then demonstrating this in a several-decade debate between Justice Kennedy and Justice Scalia over substantive due process law. Examining justifications for interpretive methods in political context makes vivid how in debates over abortion and gay rights, as in the debate over segregation, a backward-looking standard that appears to fix the Constitution's meaning in the past in fact vindicates the interpreters' values and functions as a veiled form of conservative living constitutionalism.

Part III shows how examining the history of *Dobbs*'s method and its justifications changes the questions we ask of *Dobbs*'s claim that overturning *Roe* promotes democracy.[49] *Dobbs* reasons about constitutional rights as an illegitimate intrusion on democratic self-government—as *Plessy* did—rather than a necessary precondition of democratic self-government—as *Brown* did. *Dobbs* defines the Constitution's liberty guarantee through lawmaking in 1868 from which women and minorities were excluded, and the democratic processes it sanctions perpetuate these same political inequalities, as this Essay demonstrates through an account of race and gender conflicts over the abortion bans *Dobbs* authorized in Mississippi. In Mississippi politics we can see how the liberty and democracy *Dobbs* protects entrench the political inequalities of 1868.

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47. *See infra* Section I.A.

48. *See infra* Section I.B.

49. A growing literature interrogates *Dobbs*'s claims about democracy. *See, e.g.*, Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 127 HARV. L. REV. (forthcoming 2024) (on file with authors).

I. THE ROOTS OF ORIGINALISM AND *DOBBS*'S HISTORY-AND-TRADITION METHOD IN THE DEFENSE OF SEGREGATION

In *Dobbs*, the Court prominently and repeatedly cited *Brown* as authority for overruling past precedent, particularly decisions that were "egregiously wrong on the day they were handed down."[50] In overturning *Roe*, the Roberts Court claimed it was acting as the Warren Court had in overturning *Plessy*—that *Dobbs* was like *Brown*. Chief Justice Roberts drew upon this analogy to organize his entire year-end report on the federal judiciary, which emphasized the Court's security needs by recounting threats faced by judges enforcing *Brown*.[51] If his point were only to remind the public that the Justices need and merit protection, Roberts might have recalled the years of violent threats against *Roe*'s author, Justice Blackmun, who had a shot fired through the window of his home following an intimidation campaign by violent antiabortion groups.[52] But Roberts was not simply discussing the Justices' security needs. By identifying the Court that decided *Dobbs* with courts enforcing *Brown*, Roberts sought to rehabilitate the

50. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279; *see also id.* at 2262 (citing *Brown* as one of "[s]ome of our most important constitutional decisions [which] have overruled prior precedents"); *id.* at 2265 (arguing that the "infamous decision in Plessy" "should have been overruled at the earliest opportunity" and comparing it to *Roe* which "was also egregiously wrong"); *id.* at 2278-79 ("A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* would still be the law. That is not how *stare decisis* operates.").

51. Chief Justice Roberts built his entire year-end report on the *Dobbs*/*Brown* analogy. *See* John G. Roberts, Jr., *2022 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 1-4 (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf [https://perma.cc/X4R6-NTR4].

52. *See* Ben A. Franklin, *Shot Fired Through Window of Blackmun Home*, N.Y. TIMES (Mar. 5, 1985), https://www.nytimes.com/1985/03/05/nyregion/shot-fired-through-window-of-blackmun-home.html [https://perma.cc/WKE7-EJQD] (reporting on the shot fired through Justice Blackmun's home window and detailing threats that the Justice had received, including a written threat from a violent antiabortion group). This analogy would have been especially appropriate given that violent attacks on clinics have sharply increased since *Dobbs*. *See* Julia Shapero, *Report Documents 'Sharp Increase' in Violence at Abortion Clinics*, HILL (May 11, 2023, 11:28 AM ET), https://thehill.com/policy/healthcare/3999795-report-documents-sharp-increase-in-violence-at-abortion-clinics [https://perma.cc/Z88U-J3KV]; Betsy Woodruff Swan, *Alito Said* Dobbs *Would Lower the Temperature. Instead, It Fanned the Flames of Abortion Extremism*, POLITICO (June 24, 2023, 1:13 PM EDT), https://www.politico.com/news/2023/06/24/abortion-extremist-violence-dobbs-00103539 [https://perma.cc/P4WY-KP6G].

authority of the Court that reversed *Roe* and to discredit citizens protesting its decision.[53]

In much the same way, *Dobbs*'s claims on *Brown* seek to enhance the authority of the Court that reversed *Roe* and to discredit its critics. The power of these constitutional memory claims depends on selectivity. Their capacity to legitimate the Court's decision in *Dobbs* diminishes if we consider aspects of *Dobbs*'s relation to *Brown* that the Court does not recount. We begin that process as we recognize that *Dobbs* justifies overruling *Roe* through methods of interpreting the Fourteenth Amendment that defenders of segregation employed *to attack Brown*.

Roe reasoned about the Fourteenth Amendment's liberty guarantee as a commitment whose meaning can be derived from the nation's history and traditions as those traditions evolve in history.[54] To justify overruling *Roe*, the Court introduced a method of determining history and tradition in the substantive due process line of cases that it had not used in decades, a method that defined tradition in terms of particular practices in the deep past. The Court counted state practice at the time of the Fourteenth Amendment's ratification—arrayed in an appendix for emphasis[55]—and declared that America was a nation with a tradition of banning abortion. *Dobbs* claimed: "By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow."[56] (The count is incorrect.[57]) The Court also claimed that "[t]his overwhelming consensus endured until the day *Roe* was decided. At that time, by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother."[58]

Counting states according to laws enacted in 1868 seems on the face of it to tie constitutional meaning to impersonal criteria. But employing this method of identifying the nation's traditions entrenches values. The standard defines the Constitution's meaning as static and fixed in the deep past—and through laws

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53. *See supra* note 52.

54. *See infra* Section II.B.

55. *See Dobbs*, 142 S. Ct. at 2285-97.

56. *Id.* at 2248-49.

57. *See* Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1128-50 (2023) (citing evidence suggesting that "as many as 12 of the 28 states on the majority's list actually continued the centuries-old, common-law tradition of permitting pre-quickening abortions"); Tang, *supra* note 18, at 67 ("*Dobbs*'s assertion that twenty-eight out of thirty-seven states banned all abortion as of the Fourteenth Amendment's adoption—a claim *Dobbs* calls the 'most important historical fact' in its analysis—rests on a series of historical errors." (footnote omitted) (quoting *Dobbs*, 142 S. Ct. at 2267)).

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

enacted when women and people of color were excluded from voting and legislating. In short, it was not the Court's turn to history and tradition, but rather how the Court ascertained the nation's history and traditions that supplied justification for reversing the abortion right and threatened the line of due process decisions from *Griswold v. Connecticut*[59] to *Obergefell*.[60]

And it is this very feature of the Court's reasoning in *Dobbs* that can be traced to constitutional conflicts over segregation. Prominent lawyers and public officials arguing in courts and in politics at the time of *Brown*—including the Southern Congressional delegation—counted state laws segregating education at the time of the Fourteenth Amendment's ratification to demonstrate that segregation was immune from constitutional oversight.[61] In this history, we see the elements of method and justification that *Dobbs* shares with early originalism. Interrogating *Dobbs*'s claims about *Brown* returns us to a time when claims on original understanding were simply one mode of constitutional argument among many and shows how, through conflict, those defending segregation came to embrace claims on original understanding as *superior* authority that could be used to attack the Court's own decisions.

We can see in these arguments an early expression of what would come to be orthodox tenets of originalism—that original understanding has greater authority than doctrine, and that it can be ascertained by means that are objective, impersonal, and free of an interpreter's value judgments.[62] Yet this very same history illustrates how claims about the trumping authority of original understanding, and state-counting in 1868 as a proxy for the original understanding, were motivated reasoning. Segregation's defenders understood that it would preserve the existing racial order—and weaken the Fourteenth Amendment's limits on state action—if they defined those limits through the practices of states the Amendment was designed to constrain, many of which ratified the Amendment as a condition for readmission after secession.[63] After examining the history that undermines the Court's claim that *Dobbs* is like *Brown*, we are in a different position to understand *Dobbs*'s relationship to originalism, and how

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59. 381 U.S. 479 (1965).

60. *See* Siegel, *supra* note 2, at 1183 (noting that the *Dobbs* Court "deliberately sought to cast a wide shadow" that threatened, weakened, and marked for possible overruling a host of other substantive due process rights).

61. *See supra* note 13 & *infra* notes 71-96 and accompanying text. I make no effort to establish that this was the first time this mode of argument was employed, although in this Part I do provide evidence of how advocates began to focus state-counting on 1868 in opposing and then resisting the Court's decision in *Brown*, and suggest how that conflict itself led conservatives to express their values in the discourse of original intention.

62. *See infra* Section II.A.

63. *Id.*

the very elements of *Dobbs*'s method that tie the decision to originalism—interpreting the Fourteenth Amendment by counting states that banned abortion in 1868—express rather than constrain the interpreters' values.

A. Counting State Laws that Segregated Education in 1868

Segregation's constitutionality under the Equal Protection Clause was long justified under *Plessy* as a matter of stare decisis, custom, and the prerogative of sovereign states. The decision of the three-judge panel upholding South Carolina's prerogative to segregate its schools in the 1951 case of *Briggs v. Elliott*[64] emphasized that "there is no denial of the equal protection of the laws in segregating children in the schools for purposes of education, if the children of the different races are given equal facilities and opportunities. The leading case on the subject in the Supreme Court is *Plessy v. Ferguson* . . . ."[65] Notwithstanding the evidence of segregation's harm to children introduced by NAACP lawyers Thurgood Marshall, Robert Carter, and Spottswood Robinson,[66] the federal court refused to hold that segregation was itself a violation of equal protection:

> [W]hile the federal government protects the fundamental rights of the individual, it leaves to the several states the solution of local problems. In a country with a great expanse of territory with peoples of widely

64. 98 F. Supp. 529 (E.D.S.C. 1951). *Briggs v. Elliott* was the first of five federal lawsuits to challenge racial segregation in K–12 education and the first of which to reach the Supreme Court's docket in 1951. Now, nearly seventy years later, descendants of the original plaintiffs in *Briggs* are petitioning the Court to rename its *Brown v. Board of Education* decision overruling *Plessy* after the South Carolina case. Mark Walsh, *Should 'Brown v. Board of Education' Be Renamed? The Debate, Explained*, EDUC. WEEK (June 5, 2023), https://www.edweek.org/policy-politics/should-brown-v-board-of-education-be-renamed-the-debate-explained/2023/06 [https://perma.cc/2GD6-XMAL]. For an account of *Briggs*'s significance, see, for example, Robert E. Botsch, Briggs v. Elliott *(1954)*, UNIV. S.C. AIKEN (1999), https://polisci.usca.edu/aasc/briggsvelliott.htm [https://perma.cc/5JJX-3RJU], describing *Briggs* as where the repudiation of separate-but-equal doctrine "really began."

65. *Briggs*, 98 F. Supp. at 532 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

66. *See* Appellants' Brief Opposing Motion to Dismiss or Affirm at 3, Briggs v. Elliott, 342 U.S. 350 (1952) (No. 273), 1951 WL 82065, at *3 ("The uncontradicted testimony of appellants' expert witnesses show that compulsory racial segregation of pupils was harmful to the segregated students on the elementary and high school levels and deprived them of educational opportunities and advantages equal to those enjoyed by white students.").

> differing customs and ideas, local self-government in local matters is essential to the peace and happiness of the people . . . .[67]

A form of state-counting played a role in this judgment, but it was not focused on 1868. Judge John Parker's opinion argued:

> [W]hen seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights.[68]

Custom, legislation, and the Court's own decisions established the Constitution's reach. Parker invoked *Lochner v. New York*[69] to counsel judges against reaching into politics to decide matters properly left to legislative decision, warning that "[t]he members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics."[70]

But as *Plessy*'s authority weakened and the Court considered developing new equal protection doctrine, defenders of segregation added to their arguments from stare decisis an appeal to the Fourteenth Amendment's original understanding that might strengthen *Plessy*'s authority. Arguments about state practice in 1868 entered the debate over segregation in this context, as evidence about the understandings and expectations of the Amendment's ratifiers.

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67. *Briggs*, 98 F. Supp. at 532. For an account of the NAACP's argument, see CLAUDIA SMITH BRINSON, STORIES OF STRUGGLE: THE CLASH OVER CIVIL RIGHTS IN SOUTH CAROLINA 63-67 (2020); STEPHEN H. LOWE, THE SLOW UNDOING: THE FEDERAL COURTS AND THE LONG STRUGGLE FOR CIVIL RIGHTS IN SOUTH CAROLINA 56-58 (2021); and GARDINER H. SHATTUCK, JR., EPISCOPALIANS AND RACE: CIVIL WAR TO CIVIL RIGHTS 61 (2000), explaining that Thurgood Marshall heeded Judge Waring's advice and argued that segregation generated inherent inequality, as opposed to arguing that the Clarendon County officials were "in violation of the 'separate but equal' principle established by *Plessy*."

68. *Briggs*, 98 F. Supp. at 537.

69. 198 U.S. 45 (1905).

70. *Briggs*, 98 F. Supp. at 537. The reference to "sociology" referred to Dr. Kenneth Clark's famous doll studies showing the impact of segregation on children, which the NAACP introduced in *Briggs*. Brown v. Board *and the "Doll Test*," NAACP LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/significance-doll-test [https://perma.cc/YFH8-8N4F]. For a discussion of how *Brown* recognized the harms uncovered by sociological research as constitutionally cognizable, and how this recognition relates to the "massive resistance" that ensued in the decision's wake, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1484-89 (2004).

John W. Davis, the renowned Supreme Court litigator who represented South Carolina in the Supreme Court in the cases consolidated into *Brown*, focused his arguments on the Amendment's original understanding.[71] To prove that segregation was consistent with the Amendment's original understanding, Davis urged the Court to focus on evidence from the time of its ratification. At argument in *Briggs*,[72] Davis waved away a suggestion from Justice Burton that "the Constitution is a living document"[73] and a question from Justice Frankfurter about whether the meaning of equal might be "fluid."[74] Davis countered the Justices' suggestion that the requirements of equal protection might change by insisting instead that the language of the Constitution should be read as fixed by the understandings of those who ratified it.[75] He found evidence of the ratifiers' understandings in the decision of the Congress that proposed the Fourteenth Amendment to maintain segregated schools in the District of Columbia.[76] He also found it in a tally of states: "Of those thirty ratifying states, 23 either then had, or immediately installed, separate schools for white and coloured children."[77] The implication was that one could ascertain how those who ratified the amendment expected it would apply by counting states that preserved or added laws requiring racially segregated schools in 1868. Whereas Judge Parker had tallied states with a longstanding practice of segregating education at the time of his decision, presenting the count as a proxy for custom,[78] Davis urged the Supreme Court to count states that segregated education at the time of the Fourteenth Amendment's ratification, presenting the count as a proxy for the Amendment's original expected application.

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71. John W. Davis's career as a Supreme Court litigator was built on a life of public service. He served as Solicitor General and Ambassador to the United Kingdom in the Wilson Administration, was the Democratic nominee for president in 1924, and "participated one way or another in more than 250 cases heard by the Supreme Court of the United States — more than any other lawyer in the twentieth century — and many hundreds more in the lower courts." *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 527-31(2004).

72. Transcript of Oral Argument, Briggs v. Elliot, 342 U.S. 350 (1952) (No. 101).

73. *Id.* at 332 (statement of Justice Burton).

74. *Id.* (statement of Justice Frankfurter).

75. *Id.* at 331 (statement of John W. Davis).

76. *Id.* at 331, 333 (statement of John W. Davis).

77. *Id.* at 333 (statement of John W. Davis).

78. *See supra* notes 68-70 and accompanying text; *see also Briggs*, 98 F. Supp. at 534.

South Carolina's brief highlighted state practice during Reconstruction.[79] It included an appendix collecting all state provisions mandating school segregation existing at the time the Amendment was ratified or enacted shortly thereafter,[80] and emphasized the importance of respecting "[l]ocal self-government in local affairs" in a federated system.[81]

In response to these arguments, a divided Supreme Court requested reargument in *Brown*, now focusing on the question of the Fourteenth Amendment's original understanding—at least its original expected application. The Court sought evidence whether "the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"[82] South Carolina responded by highlighting states that enacted laws segregating schools at the same time that they ratified the Amendment, proffering these state counts as evidence of the ratifiers' expectations of the Amendment's application.[83] The state's brief on reargument included further discussion of state practice at the time of ratification, including

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79. Brief for Appellees at 15-16, Briggs v. Elliott, 342 U.S. 350 (1954) (No. 2) ("Of the 37 states in the Union at [the] time [of the Fourteenth Amendment's submission], 23 continued, or adopted soon after the Amendment, statutory or constitutional provisions calling for racial segregation in the public schools.").

80. *Id.* at 47-50.

81. *Id.* at 7; *see also* Brief for the State of Kansas on Reargument at 51, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1), 1953 WL 78289 ("The delicate nature of the problem of segregation and the paramount interest of the State of Kansas in preserving the internal peace and tranquility of its people indicates that this is a question which can best be solved on the local level, at least until Congress declares otherwise."); Brief for Appellees at 9, Davis v. Cnty. Sch. Bd., 347 U.S. 483 (1954) (No. 4) ("These facts indicate that the Virginia people overwhelmingly believe that segregated education is proper, are willing to provide equality and are completely prepared to bear the burdens of a dual school system."); Brief for Appellees at 21, Davis v. Cnty. Sch. Bd., 347 U.S. 483 (1954) (No. 4) ("When the great majority of the people feel so certain that segregated schooling is desirable in the circumstances under which they live, in what way is it irrational or arbitrary?").

82. Brown v. Bd. of Educ., 345 U.S. 972, 972 (1953) (per curiam). After South Carolina opened debate about the original understanding during the 1952 Term, see *infra* note 79 (quoting brief counting states that segregated schools in 1868), Justice Frankfurter requested his clerk Alexander M. Bickel to research *congressional* debates on the question. When the Court could not reach a decision in the segregation cases, Justice Frankfurter crafted questions about the original understanding for reargument. He circulated Bickel's completed memo to the Court a few days before reargument in December of 1953. *See* KLUGER, *supra* note 71, at 614-15, 668 (2004).

83. *See* Brief for Appellees on Reargument at 8, *Briggs*, 347 U.S. 483 (No. 2) (arguing that state-count evidence demonstrated that framers of the Fourteenth Amendment neither contemplated nor understood that it "would abolish segregation in public schools"). For an account of these events in a memoir of one of the lawyers who worked with John W. Davis on the state's brief on reargument, see Sydnor Thompson, *John W. Davis and His Role in the Public School Segregation Cases—A Personal Memoir*, 52 WASH. & LEE L. REV. 1679, 1688-90 (1995).

state-count evidence in various subcategories.[84] During *Brown*'s reargument, other states put forth similar state-counting arguments. These included Virginia,[85] Delaware,[86] and Kansas.[87]

It is remarkable how directly the *Brown* opinion—written in ordinary language for the public and in terms designed to avoid arousing the South[88]—rejected claims on original understanding that segregation's defenders had advanced. In *Brown*, the Supreme Court characterized the evidence on the adoption history of the Fourteenth Amendment as "inconclusive."[89] Going farther, *Brown* rejected the argument that the Court should base its decision on expectations

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84. South Carolina counted: ratifying states that either prohibited or made no provision for public-school segregation, Brief for Appellees on Reargument at 31, *Briggs*, 347 U.S. 483 (No. 2), or had segregated schools at the time of ratification and had maintained them until the time of reargument, *id.* at 38; nonratifying states whose failure to do so was, per South Carolina, no evidence of the Amendment's relationship to school segregation, *id.* at 35; ratifying Northern states that nevertheless operated segregated schools, *id.* at 39; and ratifying Southern states ("reorganized under the Reconstruction Acts") that required segregation in public schools, *id.* at 44. *See also id.* at 48 (summarizing state-counting results).

85. Brief for Appellees at 12-13, Davis v. Cnty. Sch. Bd., 347 U.S. 483 (1954) (No. 4) ("A majority of the States in the Union when the Amendment was ratified had segregated schools. It is inconceivable that, at that time, a serious contention could have been made that the Amendment outlawed segregated schools.").

86. Brief for Petitioners at 26, Gebhart v. Belton, 344 U.S. 891 (1952) (No. 448) ("Segregation by color in the primary and secondary schools of the various states existed at the time the Fourteenth Amendment was adopted and prior thereto both in slaveholding and non-slaveholding states.").

87. Brief for the State of Kansas on Reargument at 34-35, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1), 1953 WL 78289 (arguing that "of the 37 states that comprised the Union at the time of adoption of the Fourteenth Amendment, 24 of them maintained legal segregation in the public schools at the time of adoption of subsequent thereto . . . . This we deem positive evidence that none of those 24 states considered that segregation was abolished by the Fourteenth Amendment" (footnote omitted)).

88. *Cf.* David J. Garrow, *The Civil Rights Era: 1946 to 1965*, *in* THE AFRICAN AMERICAN ODYSSEY 105-21 (Debra Newman Ham, ed., 1998) ("Chief Justice . . . Warren carefully took the lead in establishing unanimous agreement among the nine justices that the only proper result was a direct and low-key opinion declaring that racial segregation in education was both immoral and unconstitutional."); *id.* at 108 ("The *Brown* decision was brief, powerful, and purposely incomplete.").

89. *Brown*, 347 U.S. at 489.

> Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.

Id.

and intentions at the time of the Fourteenth Amendment's ratification: "In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted,"[90] the Court famously reasoned. This was the Court's response to arguments from original understanding. The Court never otherwise addressed the South's state-counting arguments or other evidence of the ratifying states' understandings and expectations.

And precisely as the Court itself rejected the South's claims that understandings at the time of the Fourteenth Amendment's ratification should decide segregation's constitutionality, Southerners turned their appeal to original understanding into a rallying cry of resistance, imbuing claims on original understanding with vivid racial import. The "*Southern Manifesto*," a statement of 19 Senators and 77 Representatives condemning the Court's decision in *Brown*, argued that *Brown* was contrary to the intentions of the Fourteenth Amendment's framers.[91] Counting states that imposed school segregation in 1868 featured prominently in their argument. A historian of the *Manifesto* has shown that its reasoning, "like most segregationist thought, followed John W. Davis's oral arguments in *Briggs v. Elliott* (1952) . . . . Russell's and Thurmond's initial drafts, as well as all of the subsequent recommendations of the southern senators, had drawn upon Davis's reasoning."[92] The *Manifesto* famously declared:

> The original Constitution does not mention education. Neither does the 14th amendment or any other amendment. The debates preceding the submission of this 14th amendment clearly show that there was no intent that it should affect the systems of education maintained by the States.
>
> The very Congress which proposed the Amendment subsequently provided for segregated schools in the District of Columbia.
>
> When the amendment was adopted in 1868, there were 37 States of the Union. Every one of the 26 states that had any substantial racial differences among its people either approved the operation of segregated schools already in existence or subsequently established such schools by

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90. *Id.* at 492. *See generally* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 2 (1955) (reviewing evidence gathered as Justice Frankfurter's clerk in *Brown* and observing "the brevity of [*Brown*'s] reference to the history of the fourteenth amendment's adoption and the briskness of the transition from an apparent assumption of that history's relevance to the statement that the clock cannot be turned back").

91. On the role of the "*Southern Manifesto*" in mobilizing massive resistance to *Brown* at the state and federal levels, see *supra* note 13 and *infra* notes 92-99 and accompanying text.

92. DAY, *supra* note 13, at 88.

> action of the same law-making body which considered the 14th amendment.[93]

The *Manifesto* shaped the language of massive resistance.[94] In its wake, appeals to original "intent" and framers' "intent" circulated widely in politics, legitimating opposition to *Brown* by, as historians have observed,[95] seeming to shift the argument away from race to focus on the Court's constitutional authority to intervene in segregation.[96] *Precisely as the Warren Court rejected original understanding as the ground on which to interpret equal protection,*[97] *critics of the Warren Court's desegregation decisions embraced original intent as a rallying cry of resistance.*

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93. 102 CONG. REC. 4515-16 (1956) (publishing the "Declaration of Principles" popularly known as the Southern Manifesto).

94. For a sample of newspapers contemporaneously reproducing the full text or lengthy excerpts of the *Manifesto*, see, for example, *Text of Southern Congressmen's Declaration*, ATLANTA CONST., Mar. 12, 1956, at 7; *Manifesto Text: Court's Ruling on Schools Called Abuse of Judiciary*, NASHVILLE TENNESSEAN, Mar. 13, 1956, at 5; *Text of Segregation 'Declaration,'* BALT. SUN, Mar. 12, 1956, at 4; and *South's Manifesto*, N.Y. HERALD TRIB., Mar. 12, 1956, at 7. Debates over the *Manifesto* within the halls of Congress made their way to the papers, too. Having reproduced the *Manifesto* in full just weeks prior, *South's Manifesto*, *supra*, the *New York Herald Tribune* just twelve days later also reported on a debate between a supporter and opponent of the Manifesto. Rowland Evans, Jr., *Manifesto Signer Assails Lehman*, N.Y. HERALD TRIB., Mar. 24, 1956, at 3.

95. *See* Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 827-29 (2021); KEN L. KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 92-93 (2019). For more on original intent, see BARRY GOLDWATER & BRENT BOZELL JR., THE CONSCIENCE OF A CONSERVATIVE 128-31 (2019); JAMES J. KILPATRICK, THE SOUTHERN CASE FOR SEGREGATION 129-32 (1962) (arguing that "in constructing a written Constitution, an inquiry into intent is paramount" and that "the necessity of courts[] holding steadfastly to the demonstrable intention of a constitutional provision" was well-established); and DAVID J. MAYS & JAMES J. KILPATRICK, CIVIL RIGHTS AND FEDERAL POWERS, VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT 27-102 (1963).

96. *See generally* TerBeek, *supra* note 95, at 822 ("The archival and primary source evidence delineated here shows that non-legal actors set upon the *intent construct* as an ostensibly non-racialized first constitutional principle to delegitimize *Brown*.").

97. The Warren Court itself finally slammed the door shut on advocates' efforts to limit equal protection through claims on the original understanding a decade later in *Loving v. Virginia*, 388 U.S. 1 (1967), when the Court quoted *Brown*'s conclusion that that the Amendment's original understanding was inconclusive and then interpreted the Amendment's purpose at a high level of generality as making all racial classifications suspect under the Equal Protection Clause:

> The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws . . . . As for . . . the Fourteenth Amendment, we have said in connection with a related

Claims on original understanding as one of many ways to interpret the Constitution have existed for centuries.[98] But claims that original understanding is the *only* proper way to interpret the Constitution, and constitutes a ground for attacking the Court's decisions, took shape in the decades after *Brown*.[99] As the Court began to interpret equal protection in ways it had not before, defenders of segregation increasingly came to defend segregation through claims on original intention—intention now serving as a shorthand for an *expanded understanding of the authority of original understanding* that had *power to trump the Court's decisions—especially, the new body of equal protection doctrine that was emerging in* Brown*'s wake*.

These are the missing pieces of *Dobbs*'s relationship to *Brown*. The *Southern Manifesto* relied upon state-counting in 1868 to prove the Fourteenth Amendment's original "intent." That argument (indeed, that precise tabulation) resurfaced in an almost uncanny way in *Dobbs*, in which the Court observed "that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy," emphasizing that "*26 out of 37 States* prohibited abortion before quickening."[100]

Understanding why and how advocates turned to these claims about original understanding to prevent and then to attack the development of equal protection law suggests how state-counting in 1868 could be employed to oppose the development of substantive due process law. A mode of argument that ties the meaning of principles expressed in the Constitution's text to the expectations of lawmakers who ratified the Amendment is likely to restrict the meaning of those principles, by rooting them in assumptions about status and custom prevailing in the nineteenth century. This prospect was not abstract; it was richly demonstrated in the fight over segregation. The *Southern Manifesto* showed that claims

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problem, that although . . . historical sources "cast some light" they are not sufficient to resolve the problem; "[a]t best, they are inconclusive."

Id. at 9 (alteration in original) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954)).

98. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405 (1857) ("The duty of the court is, to interpret the instrument . . . according to its true intent and meaning when it was adopted."); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175-76 (1874) ("All the States had governments when the Constitution was adopted . . . . Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.").

99. Even in the immediate aftermath of *Brown*, authors of the *Southern Manifesto* still invoked arguments from stare decisis and custom to defend segregation. *See* Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1060-79 (2014) (detailing how the *Southern Manifesto* employed a variety of modalities of constitutional interpretation to defend the legality of racial segregation).

100. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2254 (2022) (emphasis added). *Dobbs* also argued that "[t]he Constitution makes no reference to abortion," *id.* at 2242, just as the *Southern Manifesto* argued that neither the "original Constitution" nor any of its amendments "mention[ed] education," *see supra* text accompanying note 93.

on original intent, backed by counts of state practice in 1868, were a powerful ground on which to refute a dynamic interpretation of the Constitution's text. In the wake of this fight, the claim on intent was implicitly racialized, and associated with defense of traditional ways of life.[101]

As the Court began to extend substantive due process law to protect intimate and family decisions, state-counting in 1868 entered the debate over abortion and gay rights.

B. State-Counting: From the Defense of School Segregation to the Defense of Abortion Bans

There is one prominent moment when counting states at the time of the Fourteenth Amendment's ratification jumped the tracks from an argument about equal protection in *Brown* to an argument about the meaning of the due process liberty guarantee, and it is Justice Rehnquist's dissent in *Roe*. As the campaign against *Brown* declined in legitimacy, Rehnquist drew on arguments that the South had used to oppose *Brown* and turned them against *Roe*. Counting state practice at the time of the Fourteenth Amendment's ratification figured prominently.

His dissent in *Roe* began by comparing *Roe* to *Lochner*,[102] suggesting the Court's decision impermissibly intruded on politics. He then objected that the decision's reasoning "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment," and employed state-counting to connect a claim about original intent to majoritarianism and tradition.[103] "The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication it seems to me" that the abortion right was not in American traditions.[104] "By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial

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101. *See* TerBeek, *supra* note 95 and accompanying text. Soon, claims on original intent would converge with the defense of traditional family values, which also offered Southerners a language in which to defend the traditional racial order. *See* Siegel, *supra* note 2, at 1151 (observing that "[a]s the South came to embrace the antiabortion cause as a pro-family cause, a pro-family movement came to stand for protecting traditional modes of life . . . against the threats posed by civil rights for women, Black people, and gay people" as "[d]ebates about gender concerned gender, but they also provided an outlet for concerns about race that were no longer safe to openly express" (citation omitted)).

102. Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

103. *Id.*

104. *Id.*

legislatures limiting abortion."[105] "While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today."[106]

There is good reason to think that in counting state practice in 1868 to argue that *Roe* was contrary to American traditions and to "the intent of the drafters of the Fourteenth Amendment," Justice Rehnquist was drawing on modes of argument learned in the debate over segregation in *Brown*.[107] Consider the evidence. Only the year before the publication of his *Roe* dissent, Rehnquist's confirmation vote was engulfed in conflict when news surfaced of a memo he wrote as a clerk to Justice Jackson during the 1952 Term arguing that segregation was constitutional and that *Plessy* "was right and should be reaffirmed."[108] His memo defending *Plessy*, titled "A Random Thought on the Segregation Cases," did not employ state-counting but did focus on John W. Davis's and Thurgood Marshall's oral argument in *Briggs*.[109] The memo defended *Plessy* as the court in *Briggs* had: suggesting that a decision striking down segregation would be illegitimate like *Lochner*.[110] This memo provides compelling evidence suggesting that the forms

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105. *Id.* at 174-75 & n.1 (enumerating state laws).

106. *Id.* at 175-76 & n.2 (enumerating state laws).

107. Justice Rehnquist seems to have introduced these arguments into the abortion debate. In *Roe*, Texas did not make arguments of this kind; the state focused on the state's interest in protecting the life of the unborn. *See* Brief for Appellee at 31, Roe v. Wade, 410 U.S. 113 (No. 70-18) (arguing that modern science "establishes the humanity of the unborn child" so that the Texas legislature had a duty to endeavor "to save the unborn child from indiscriminate extermination"). The pro-life movement itself did not begin to speak through originalist frames until the 1980s. *See infra* note 117 and accompanying text. Notably, Texas in its briefing even suggested that the Court might deviate from historical practice on account of modern research. *See* Brief for Appellee, *supra*, at 57 ("If it be true that the compelling state interest in prohibiting or regulating abortion did not exist at one time in the stage of history, under the result of the findings and research of modern medicine, a different legal conclusion can now be reached.").

108. Fred P. Graham, *Rehnquist '52 Schools Memo Reported*, N.Y. TIMES, Dec. 6, 1971, at L35. For the memo, see Memorandum from William H. Rehnquist, Law Clerk, to Justice Jackson, Associate J., Sup. Ct. U.S., A Random Thought on the Segregation Cases (1952), *in Hearings on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States*, 99th Cong., 2d Sess. (1986) [hereinafter *Rehnquist Memo*].

109. Brad Snyder, *What Would Justice Holmes Do (WWJHD)?: Rehnquist's* Plessy *Memo, Majoritarianism, and* Parents Involved, 69 OHIO ST. L.J. 873, 879 (2008) (observing that the memo reflects "reaction to John W. Davis's and Thurgood Marshall's December 10, 1952 oral argument . . . in the South Carolina case, *Briggs*"); *see also id.* at 880.

110. In his memo, then-clerk William H. Rehnquist wrote:

> In these cases now before the Court, the Court is, as Davis suggested, being asked to read its own sociological views into the Constitution . . . . To the argument made by Thurgood Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long

of argument that Rehnquist employed in his *Roe* dissent—state-counting in 1868, appeals to original intent, and comparisons to *Lochner* to discredit judicial review—were forms of argument learned from those defending segregation.

The memo was introduced in Justice Rehnquist's confirmation hearings just before the vote in December of 1971, accompanied by the testimony of more than ten witnesses to his efforts to challenge the credentials of minority voters in 1960, 1962, and 1964; the public's vehement reaction persuaded Rehnquist he needed to disassociate himself from the memo's defense of *Plessy* (and its comparison of *Brown* to *Lochner*) to assure his confirmation to the Court.[111] Rehnquist's confirmation crisis helped make clear that it was no longer acceptable for persons seeking federal office to openly criticize *Brown* or defend *Plessy*.[112] Rehnquist secured confirmation by claiming he wrote the memo to satisfy Justice Jackson's interest in seeing its argument and by, for the first time, affirming his fealty to *Brown*.[113] Prominent historians have concluded that the memo expressed Rehnquist's own views,[114] and that this and other confirmation conflicts

> run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have been sloughed off, and crept silently to rest . . . . I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdal's *American Dilemma*.

Rehnquist Memo, *supra* note 108. In referencing Spencer's *Social Statics*, Rehnquist was incorporating by reference Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), as a framework for opposing the NAACP's arguments in *Brown*. Before the Court decided *Brown*, warnings against judicial overreach and comparisons to *Lochner* were aimed at those who sought *Plessy*'s overruling. *See* Briggs v. Elliott, 98 F. Supp. 529, 537 (E.D.S.C. 1951) ("The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics."). Today, the *Lochner* objection is aimed at substantive due process cases and not at equal protection cases like *Brown*. *See* NeJaime & Siegel, *supra* note 36; Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

111. *See* Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and* Brown, 53 B.C. L. REV. 631, 633 (2012) (quoting Rehnquist's letter to Senate Judiciary Chairman James O. Eastland); Robert Lindsey, *Rehnquist in Arizona: A Militant Conservative in 60's Politics*, N.Y. TIMES, Aug. 4, 1986, at A7 (recounting witness testimony); Stuart Taylor Jr., *Rehnquist Says He Didn't Deter Voter in 60's*, N.Y. TIMES, July 13, 1986, at A1 (same).

112. *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 431-50 (2000).

113. Snyder & Barrett, *supra* note 111, at 632-33.

114. Snyder, *supra* note 112, at 436-48; Snyder & Barrett, *supra* note 111; KLUGER, *supra* note 71, at 608; Adam Liptak, *New Look at an Old Memo Casts More Doubt on Rehnquist*, N.Y. TIMES (Mar. 19, 2012), https://www.nytimes.com/2012/03/20/us/new-look-at-an-old-memo-casts-

over conservative nominees' ties to segregation helped "canonize" the *Brown* decision by leading conservatives as well as liberals to assert that the case was rightly decided. This convergence of views from left and right appeared to lift judgments about the *Brown* decision above politics.

Within the year, Justice Rehnquist authored a dissent that seemed to redirect original intent arguments—counts of state practice in 1868, unfettered majoritarianism, states' rights, and the defense of tradition—as well as his objection that judicial intervention in *Brown*, like *Lochner*, was an illegitimate interference with democracy, from the attack on *Brown* to an attack on *Roe*. This familiar repertoire of arguments performed similar work in a new setting, providing a language to express values in apparently objective and impersonal form—*and* in an idiom that had powerful associations with opposition to *Brown*.

These claims on original understanding took root in the antiabortion movement in the 1980s as it abandoned its quest to reverse *Roe* by constitutional amendment and focused its hopes for reversing *Roe* on the courts. In the 1980s the Reagan Administration came to power in a new coalition that sought to realign Southerners, conservative Catholics, and other longtime members of the Democrats' base by publicly and prominently extending original intent arguments to attack the Court's decisions on abortion and other culture war topics, including bussing and affirmative action.[115] The attack on *Roe* played a central part in the Reagan Administration's originalism.[116] Members of the pro-life movement did not naturally embrace originalism but slowly learned to speak the language as members of this disparate New Right coalition.[117]

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more-doubt-on-rehnquist.html [https://perma.cc/7YEU-TH2C]. For additional evidence of Rehnquist's conservatism, see, for example, Bill Mears, *New Biography Details Rehnquist's Complex Legacy*, CNN (Oct. 28, 2012, 12:02 PM EDT), https://www.cnn.com/2012/10/28/justice/rehnquist-legacy/index.html [https://perma.cc/VK7Y-65HW], which observes that Rehnquist served as chief counsel for Senator Barry M. Goldwater's presidential campaign and "persuaded Goldwater to vote in 1964 against the Civil Rights Act."

115. On abortion in the New Right's realignment strategy for the Republican Party, see LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 286-304 (2d ed. 2012); and Daniel K. Williams, *The Partisan Trajectory of the American Pro-Life Movement: How a Liberal Catholic Campaign Became a Conservative Evangelical Cause*, 6 RELIGIONS 451 (2015). For the extension of originalist arguments to abortion during the Reagan years, *see* Siegel, *supra* note 2. On the New Right's strategy of attacking the Court to build a coalition across disparate-issue groups, and how originalist and anticourt frames supplied a language that knit together the "social issues" concerning this disparate group, see GREENHOUSE & SIEGEL, *supra*, at 286-314.

116. *See* Siegel, *supra* note 2, at 1148-69.

117. *See* Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 907-23; Mary Ziegler, *Grassroots Originalism: Judicial Activism Arguments, the Abortion Debate, and the Politics of Judicial Philosophy*, 51 U. LOUISVILLE L. REV. 201 (2013).

On the Constitution's bicentennial, Attorney General Edwin Meese III provoked a famous debate with Justice Brennan by arguing that a "jurisprudence of original intention" spoke to a range of constitutional controversies about rights and structure, claiming that original intention was ideologically neutral,[118] yet associated with conservative outcomes in all of them.[119] Following key points of Justice Rehnquist's dissent in *Roe*,[120] Meese identified *Griswold* and *Roe* as contrary to a jurisprudence of original intention and associated the decisions with *Lochner*, arguing that the substantive due process cases usurped states' democratic prerogatives, much as defenders of segregation once associated *Brown* with *Lochner* and argued that interpretation of the Fourteenth Amendment as prohibiting segregation was an illegitimate intrusion on the sovereign prerogatives of states.[121] The Justice Department's publications emphasized the virtues of originalism in comparison to theories supporting evolving application of constitutional guarantees exemplified by *Griswold* and *Roe*.[122] When the Reagan

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118. *See* Edwin Meese III, Att'y Gen., U.S. Dep't Just., Address to the American Bar Association 7 (July 9, 1985) ("What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention. [T]he Court could avoid . . . the charge of being either too conservative or too liberal. A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.").

119. *See* Siegel, *supra* note 2, at 1161-64; *see generally id.* at 1159-60 (describing the arguments in favor of appointing conservative nominees set forth in THE CONSTITUTION IN 2000, *infra*, note 122). For Justice Brennan's objections to the jurisprudence of original intention and his defense of evolving constitutional interpretation, see *supra* note 28 (quoting Brennan's speech and a related decision).

120. *See supra* notes 102-107 and accompanying text.

121. *See* Edwin Meese III, Att'y Gen., U.S. Dep't of Just., Address to the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985); Philip Hager, *Meese Again Attacks Judicial Activism: Intensifies Criticism of Decisions Based on 'Social Theories*,*'* L.A. TIMES (Nov. 16, 1985, 12:00 AM), https://www.latimes.com/archives/la-xpm-1985-11-16-mn-2754-story.html [https://perma.cc/W8P5-VXG7] (describing Attorney General Edwin Meese III as "indicat[ing]" that Roe was an example of a case in which "the Constitution had been used as a 'charter for judicial activism' in court decisions not fully supported by the document's text or history"). *See generally* Siegel, *supra* note 2, at 1163 (discussing originalism as employed by Attorney General Meese's Justice Department).

122. *See* OFF. LEGAL POL'Y, U.S. DEP'T JUST., ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 1-2, 60, 63 (1987) [hereinafter ORIGINAL MEANING SOURCEBOOK] ("In *Roe*, the Supreme Court extended the *Griswold* 'right of privacy' to invalidate state laws prohibiting abortion. As in *Griswold*, the Court in *Roe* made no attempt to justify its decision based on the original meaning of the Constitution."); OFF. LEGAL POL'Y, U.S. DEP'T JUST., THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION iii-v, (1988) [hereinafter THE CONSTITUTION IN 2000]. The CONSTITUTION IN 2000 emphasized to readers that progress on the "social issues" required electing presidents who would nominate judges with attention to their "judicial philosophy," regarding "strict interpretation vs. liberal

Administration called for *Roe*'s overturning in 1985, Attorney General Meese invoked "a [j]urisprudence of [o]riginal [i]ntention" as grounds for attacking *Roe* and *Griswold*.[123] The Administration's brief calling for *Roe*'s reversal concluded in an appeal to the framers' intention and state-counting.[124] Thereafter Professor James S. Witherspoon published *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*,[125] with numerous counts of state law keyed to 1868, which *Dobbs* would cite in support of its claims.[126]

In 1986, the Supreme Court in fact counted state laws at the time of the Fourteenth Amendment's ratification to impose limits on substantive due process law in the Court's now repudiated decision in *Bowers*,[127] which employed state-counting in 1868 to show that protections for same-sex sex were outside the nation's history and traditions.[128] The decision helped justify the Court's refusal to protect gay rights for nearly two decades, until its reversal in *Lawrence*.

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interpretation or commitment to original meaning vs. commitment to an evolving constitution." For further discussion of these documents, see Siegel, *supra* note 2, at 1158-61. *See also id.* at 1159 ("The Constitution in the Year 2000 tracked the 'social issues' that defined the New Right (listing first the rights of criminal defendants, abortion, gay rights, disparate impact/affirmative action, and religious liberty)." (citation omitted)).

123. *See* Siegel, *supra* note 2, at 1163 (citations omitted).

124. Brief for the United States as Amicus Curiae in Support of Appellants, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists at *24-29, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379), 1985 WL 669705 ("More accurately, it would seem that the passage of the Fourteenth Amendment roughly coincided with the rise of particular stringency in abortion laws, and that, between 1868 and 1973, such stringent laws appeared as a general feature of the legal landscape, representing by the Court's own count the policy 'in a majority of the States.'").

125. James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 33 & n.15 (1989) ("At the end of 1868, the year in which the fourteenth amendment was ratified, thirty of the thirty-seven states had such statutes, including twenty-five of the thirty ratifying states, along with six territories."). The article discusses numerous statutes of the ratification era. *See, e.g.*, *id.* at 33 & n.15, 34 & n.18, 34 & n.19, 35-36 & n.22, 40 & nn.28-29, 42 & n.34.

126. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2052-53 & nn.33-34 (2022). Witherspoon's is one of several accounts of nineteenth-century legislation on which antiabortion advocates widely rely. *See, e.g.*, Siegel, *supra* note 2, at 1189-90 & n.236*; see also* All. for Hippocratic Med. v. FDA, No. 22-CV-223, 2023 WL 2825871, at *18 (N.D. Tex. Apr. 7, 2023) (citing the Witherspoon article, *supra* note 125, for the proposition that "thirty of thirty-seven states had statutory prohibitions in 1868—just five years before Congress enacted the Comstock Act").

127. Bowers v. Hardwick, 478 U.S. 186 (1986).

128. To support the claim that the Fourteenth Amendment's liberty guarantee did not reach laws criminalizing same-sex sex, the Court observed the "ancient roots" of criminal prohibitions against sodomy, counted such prohibitions in all thirteen states at the time the Bill of Rights was ratified, and emphasized laws banning sodomy in "all but 5 of the 37 States in the Union" at the time the Fourteenth Amendment was ratified. *Id.* at 192-93; *see also id.* at 193-94

The Supreme Court might well have continued to reason about substantive due process law in this backward-looking fashion had President Reagan succeeded in appointing Judge Bork, who had attacked *Griswold* in a 1971 article that came to be viewed as a foundation for originalism.[129] But Bork's hostility to substantive due process and a panoply of other rights aroused public opposition leading to the defeat of his nomination, and to Anthony Kennedy securing the appointment instead.[130]

Throughout his time on the Court, Justice Kennedy again and again opposed Justice Scalia's efforts to impose a standard looking to the practices or expectations of the Constitution's ratifiers to restrict the development of substantive due process law. Instead, Kennedy embraced a dynamic understanding that approached tradition in substantive due process cases as what Justice Harlan famously called "a living thing."[131] It was only after President Donald J. Trump's appointments reshaped the Court that a new majority revived a standard of counting state law in 1868 to identify the nation's history and traditions—and then employed this method to reverse *Roe*.

(explaining that "until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to do so" (footnote omitted)). In *Bowers*, Justice White did not emphasize original intent; rather, he counted states to reject the "claim that a right to engage in [sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty.'" *Id.* at 194 (proclaiming that it "is, at best, facetious" to argue that such a right is deeply rooted).

129. In 1971, Robert H. Bork drew on Herbert Wechsler's critique of *Brown* to fashion a critique of *Griswold* as lacking a neutral principle and untethered from the Constitution's text and history. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971) (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, *in* PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 3, 27 (1961) (originally published as Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)). Bork's article is widely cited as a foundation of originalism. *See* ORIGINAL MEANING SOURCEBOOK, *supra* note 122, at 142-43 (citing Bork, *supra*, to support the proposition that "[t]he Constitution represents fundamental choices that have been made by the people, and the task of the Courts is to effectuate them, 'not [to] construct new rights'" (alteration in original)); Keith Whittington, *The New Originalism*, 2 GEO. J.L & PUB. POL'Y 599, 599-600 (2004) (identifying Bork as an early exponent of originalism on the ground that "his *Indiana Law Journal* article . . . forcefully rejected any alternative to originalism as illegitimate" in asserting that "[t]he only alternative to the judicial assertion of 'personal political and social views,' was for the judge to 'stick close to the text and history, and their fair implications, and not construct new rights,'" so that "value choices are attributed to the Founding Fathers, not the Court" (quoting Bork, *supra*, at 4, 8, 10)).

130. *See* Siegel, *supra* note 2, at 1166-67 & 1166 n.139 (drawing on primary and secondary sources detailing opposition to Bork's nomination).

131. For a discussion of the influence of Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), and the debate between Justices Kennedy and Scalia, see infra Section II.B.

II. ORIGINALIST AND HISTORY-AND-TRADITION METHODS: HOW ASSERTEDLY OBJECTIVE CLAIMS ON THE PAST CAN CONCEAL AND EXPRESS AN INTERPRETER'S VALUES

Without ever acknowledging that it was changing the law, *Dobbs* broke with the dynamic understanding of history and tradition that guided the Court in *Griswold*, *Roe*, *Casey*, *Lawrence*, and *Obergefell*,[132] and instead identified protected liberties through an understanding of history and tradition focused on practices at the time of the Fourteenth Amendment's ratification. As we have seen, it was by counting states that banned abortion in 1868 that the *Dobbs* Court justified reversing *Roe* as outside the nation's history and traditions.[133] Part I has shown that the method of interpreting the Fourteenth Amendment *Dobbs* employed to reverse *Roe* was prominently employed to defend segregation. This Part examines the justifications *Dobbs* offered for replacing a substantive due process standard that viewed the nation's history and traditions as evolving with a standard that viewed the nation's history and traditions as fixed by particular understandings and practices in the past—justifications to which judges and lawyers have appealed in *Dobbs* and other cases.[134]

In justifying an interpretive method focused on the expectations and practices of 1868, *Dobbs* drew on Justice Scalia's justifications for originalism. In *Originalism: The Lesser Evil*, Scalia warned that "the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law," and claimed that "[o]riginalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[135]

Dobbs appeals to this familiar justification for originalism as it justifies its own method, which so prominently relies on state-counting in 1868 to identify liberties protected under the Fourteenth Amendment. The *Dobbs* majority claimed that in interpreting the Fourteenth Amendment's liberty guarantee, "we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans

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132. *See infra* Section II.B.

133. *See supra* notes 56, 100 and accompanying text.

134. *See, e.g.*, L.W. by & through Williams v. Skrmetti, Nos. 23-5600 & 23-5609, 2023 WL 6321688, at *7 (6th Cir. Sept. 28, 2023) (enforcing a ban on gender-affirming care and observing that "in this country . . . we look to democracy to answer pioneering public-policy questions, meaning that federal courts must resist the temptation to invoke an unenumerated guarantee to 'substitute' their views for those of legislatures" (citing Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022))).

135. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863-64 (1989).

should enjoy."[136] Warning against allowing "the liberty protected by the Due Process Clause [to] be subtly transformed into the policy preferences of the Members of this Court,"[137] the *Dobbs* Court claimed that tying law to the past would prevent judges from injecting their "policy preferences" into the interpretation of the Constitution's liberty guarantee. "[W]hen the Court has ignored the '[a]ppropriate limits' imposed by 'respect for the teachings of history,' it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner* . . . ."[138] Just as defenders of segregation invoked *Lochner* to warn the *Brown* Court against interfering with the legislative prerogatives of the states,[139] so too did *Dobbs* appeal to *Lochner*, warning that substantive due process "has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives."[140]

In short, the *Dobbs* Court claimed that its method tying the Constitution's meaning to a count of state laws at the time of the Fourteenth Amendment's ratification was critical to prevent judges from introducing their values in the Constitution's interpretation and encroaching on states' freedom of self-government. Fidelity to original understanding would constrain the Justices from acting on their values, and thus protect democracy in the states. *Dobbs* did not acknowledge what even Justice Scalia conceded in *Originalism: The Lesser Evil*: that the turn to history will not prevent a judge from "projecting upon the age of 1789 current, modern values"[141] — though the appeal to history can and often does conceal it.

This Part probes the Court's claim that use of history constrains expression of the Justices' values. (Part III will then examine the Court's claim that its use of history protects democracy in the states.) First, drawing on the equal protection conflict over *Brown*, Section II.A shows how the decision to employ an apparently objective and impersonal standard that counts state practice in 1868 can

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136. *Dobbs*, 142 S. Ct. at 2247.

137. *Id.* at 2247-48 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

138. *Id.* at 2248 (internal quotation marks omitted) (citations omitted) (quoting Moore v. City of East Cleveland, 431 U. S. 494, 503 (1977) (plurality opinion); and then citing Lochner v. New York, 198 U.S. 45 (1905)).

139. *See supra* notes 69-70, 110-111 and accompanying text.

140. *Dobbs*, 142 S. Ct. at 2247 (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985)).

141. *See* Scalia, *supra* note 135, at 864.

> The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values — so that as applied, even as applied in the best of faith, originalism will (as the historical record shows) end up as something of a compromise.

Id.

conceal, rather than constrain, expression of an interpreter's values. Section II.B examines this same question in cases interpreting the Constitution's liberty guarantee. In particular, it examines the decades-long debate between Justice Kennedy and Justice Scalia over dynamic and backwards-looking substantive due process standards in the years preceding *Dobbs*. This debate reveals how *Dobbs*'s choice of method is no less dynamic, living, and value-based than the case law it attacks.

A. The Right's Living Constitution: How the Appeal to Ratifiers' Practices, Expectations, and Intentions Can Express the Interpreter's Values

As we have seen, *Dobbs* justified its approach to history and traditions as fixed in the distant past on the grounds that "limits imposed by respect for the teachings of history" would prevent interpreters from reasoning from their values.[142] This claim—a common justification for originalist methods[143]—is undermined by the genealogy of state-counting in 1868 that we have just examined. Arguments over segregation show how the method *Dobbs* embraced—counting state practice at the time of the Fourteenth Amendment's ratification as a proxy for its ratifiers' expectations or intentions—provided a framework in which interpreters could express their values in seemingly impersonal form.

Defenders of segregation chose a particular way to analyze the reach of the Equal Protection Clause. The standard they advocated amplified the original Constitution's democratic deficits by tying the meaning of the Equal Protection Clause to the decisions of legislators who excluded minorities (and women) as unfit to participate in the legislative process.[144] The standard tethered the Reconstruction Amendments to customs of the Confederacy: it treated the lawmaking of states segregating education in 1868—*most of which were Confederate states then-resisting emancipating their slaves, the precise conduct the Amendments sought to constrain*—as evidence of the Fourteenth Amendment's original

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142. *Dobbs*, 142 S. Ct. at 2248 (internal quotation marks omitted); see *supra* text accompanying note 138.

143. *See supra* text accompanying note 135.

144. *Cf.* Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 15, at 901 ("The tradition-entrenching methods the Court employed to decide *Bruen* and *Dobbs* elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law. The methods the Court employs are gendered in the simple sense that they tie the Constitution's meaning to lawmaking from which women were excluded and in the deeper sense that the turn to the past provides the Court resources for expressing identity and value drawn from a culture whose laws and mores were more hierarchical than our own.").

understanding.[145] (In *Brown*, the litigants challenging segregation attacked standards tied to customary practice that entrenched racial inequality.[146]) The standard entrenched the status-based assumptions of the past by arguing that the ratifiers' practices, expectations, or intentions *limited* the meaning of the great principles enunciated in the Fourteenth Amendment's text and *prevented* courts from interpreting the Equal Protection guarantee in light of changing circumstances and the public's evolving understanding of its commitments. In short, the standard by which segregation's defenders chose to interpret the Equal Protection Clause was neither neutral nor impersonal. In the debate over segregation, counting state laws in 1868 as a proxy for original intent was a standard that expressed the interpreters' values in (thinly) veiled form.

Yet over time, critics of the Warren Court would come to argue that claims on original understanding were authoritative precisely because they were impersonal. As it became increasingly unacceptable to defend segregation in the era of

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145. As proof that segregation is sanctioned by the Fourteenth Amendment, the *Briggs* court listed seventeen states that had statutes or constitutional provisions requiring segregation. *See Briggs v. Elliot*, 98 F. Supp. 529, 534 (E.D.S.C. 1951). All eleven Confederate states were represented in that seventeen-state count, constituting around sixty-five percent of the total. *See* LIBR. CONG., SECESSION, UNITED STATES (2011) [hereinafter SECESSION, UNITED STATES], https://www.loc.gov/rr/geogmap/placesinhistory/archive/2011/20110314_secession.html [https://perma.cc/8MAN-VEQN] (identifying Confederate states). If one excludes the two states that were not yet admitted to the Union at the time of the Civil War (West Virginia and Oklahoma), the representation of Confederate states in the *Briggs* state count rises to 7seventy-four percent. *See* SECESSION, UNITED STATES. All eleven states of the Confederacy enacted "Black Codes" imposing legal disabilities on the newly emancipated slaves that enabled former owners to continue to exert control over them: Mississippi, South Carolina, Alabama, Louisiana, Florida, Virginia, Georgia, North Carolina, Texas, Tennessee, and Arkansas. *See* EDWARD MCPHERSON, A HANDBOOK OF POLITICS FOR 1868, at 29-44 (Washington, Philip & Solomons 1868) (reproducing "[l]egislation [r]especting [f]reedmen" in all former Confederate states except Arkansas); 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION: POLITICAL, MILITARY, SOCIAL, RELIGIOUS, EDUCATIONAL & INDUSTRIAL, 1865 TO THE PRESENT TIME, at 273-312 (1906) (reproducing "[l]aws [r]elating to [f]reedmen" passed in Alabama, Arkansas, Florida, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee).

146. Brief for Appellants in Nos. 1, 2 & 4 and for Respondents in No. 10 on Reargument at 43, Brown v. Bd. of Educ., 347 U.S. 483 (Nos. 1, 2, 3, 5), 1953 WL 48699, at *43 (arguing that the Court's prior cases employing "old usages, customs and traditions as the basis for determining the reasonableness of segregation statutes designed to resubjugate the Negro to an inferior status . . . made a travesty of the equal protection clause of the Fourteenth Amendment," and adding that "[e]ven if there be some situations in which custom, usage and tradition may be considered in testing the reasonableness of governmental action, customs, traditions and usages rooted in slavery cannot be worthy of the constitutional sanction of this Court"). The attorneys representing and advising the children and families challenging segregation included Robert L. Carter, Jack Greenberg, Thurgood Marshall, Spottswood W. Robinson, III, Charles L. Black, Jr., William T. Coleman, Jr, Constance Baker Motley, and Jack B. Weinstein. *Id.* at 1.

Brown, those seeking to preserve traditional ways of life shifted away from the defense of segregation itself to focus on "original intent" as the root of the Constitution's meaning and authority, and employed "original intent" as a shorthand for attacking the decisions of the Warren Court.[147] By the 1970s Justice Rehnquist and Robert H. Bork showed how original intent—with or without state-counting—could be deployed to attack *new targets*; they each appealed to the Constitution's ratification in condemning *Roe* and *Griswold*.[148] In the 1980s, the Meese Justice Department invoked a "jurisprudence of original intention" to discredit *Roe* and other decisions of the Warren and Burger Courts extending rights to members of historically excluded groups[149]—even though the Department had no method or historical evidence to support these claims.[150] The

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147. Professor Calvin TerBeek discusses how the language of original intent veiled discussions of race. *See supra* note 96 and accompanying text. Observe also that appeals to original intent assumed new authority among modalities of interpretive arguments. Once *Brown* was decided the appeal to original understanding no longer supported claims rooted in the Court's doctrine (*Plessy*); it took on a new and increasingly prominent role as a framework for *attacking* doctrine.

148. *See supra* notes 102-106, 129 and accompanying text. In these examples, Justice Rehnquist and Bork each appealed to *Lochner*. *See supra* notes 102-106 and accompanying text (discussing Rehnquist's dissent in *Roe*); Bork, *supra* note 129, at 11 (arguing that "substantive due process, revived by the *Griswold* case, is and always has been an improper doctrine," and identifying *Lochner* as a "wrongly decided" "antecedent[]" of *Griswold*). Meese's claim that *Griswold* and *Roe* were contrary to a jurisprudence of original attention appealed to *Lochner* and to John Hart Ely. *See* Siegel, *supra* note 2, at 1159-60 & n. 118.

149. *See supra* Section I.B; *see also* SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 110 (2007). Barber and Fleming argued:

> Originalism is an ism, a conservative ideology that emerged in reaction against the Warren Court. Before Richard Nixon and Robert Bork launched their attacks on the Warren Court (and the right to privacy decisions of the early Burger Court), originalism as we know it did not exist. Constitutional interpretation in light of original understanding did exist, but . . . was regarded as merely one source of constitutional meaning among several, not a general theory of constitutional interpretation, and less the exclusive legitimate theory.

Id. See generally Whittington, *supra* note 129, at 601 (explaining that originalism was a "reactive theory motivated by substantive disagreements" with the Warren and Burger Courts and a way to critique the Court's actions, primarily those striking down "government actions in the name of individual rights"); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 547 (2006) ("Critics of the Warren Court began to argue that determining the original understanding of the Constitution's framers was the *only* legitimate way of interpreting the Constitution, and they began to denounce all other approaches to constitutional interpretation as improper and unprincipled.").

150. *See* Siegel, *supra* note 2, at 1160 ("If, as documents of the era demonstrate and historians recount, the Meese Justice Department had no systematic interpretive method to guide the many claims the Department was making about the Constitution's original meaning, then the

Meese Justice Department did not directly attack *Brown*; instead it spoke through indirection, arguing, for the first time, that a "neutral," "colorblind" *Brown* was consistent with original intention, while continuing to honor, associate with, and assist *Brown*'s critics.[151] Across these cases, the Reagan Administration and its allies disparaged evolving applications of the Constitution's guarantees — the very approach *Brown* symbolized — and claimed that original intention was a neutral arbiter of the Constitution's meaning.[152] It was in this era that Justice Scalia argued that originalism (as an "ism") was superior to an evolving understanding of the Constitution because "[o]riginalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[153]

These claims did not go unanswered. Critics replied that, rather than tethering the Constitution to seemingly impersonal historical standards, appeals to original intent expressed the interpreters' values and amounted to a disguised practice of living constitutionalism. In 1985, Professor Laurence H. Tribe observed that the Meese Justice Department was invoking "original intent" to discredit decisions that opened public life to the equal participation of members of historically excluded groups, and suggested that the Administration was:

> manipulating the appeal to original intent in order to give a gloss of respectability and a patina of neutrality to a particular social vision that is unconcerned with racial justice and the plight of the oppressed, that is quick to disapprove the tragic choice of women who find themselves unable to continue a pregnancy, and that yearns to prop up the waning authority of the state with the symbols of the church. [154]

Department's claims simply rested on conservative political beliefs.") (footnote omitted); *id.* at 1160 n.119 ("The internal memoranda support what the Department's published documents demonstrate: that in this era the Justice Department had neither method nor evidence to substantiate a jurisprudence of original intentions.").

151. *See* Siegel, *supra* note 2, at 1163 & nn.129-30.

152. *See supra* note 118 and accompanying text; *see also supra* Section I.B.

153. *See supra* note 135 and accompanying text.

154. Laurence H. Tribe, *Whose Constitution?*, BALT. SUN, Sept. 17, 1985, at 9A (questioning whether "the resort to 'original intent' [was] a selective one . . . to be invoked only when it suits the administration's political purposes"). For subsequent accounts, see Post & Siegel, *supra* note 149, at 549, which argues that originalism is a political practice both on and off the bench and one that "connects constitutional law to a living political culture;" and Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, at 25-34 (Jack M. Balkin & Reva B. Siegel eds., 2009).

B. Dobbs*'s Use of State-Counting in 1868 to Reorient History-and-Tradition Doctrine*

To justify overruling *Roe*, the *Dobbs* Court employed a standard for determining history and tradition in substantive due process cases that the Supreme Court had not used in *Roe*, *Casey*, *Lawrence*, *Obergefell*—or even in *Washington v. Glucksberg*,[155] the very decision *Dobbs* invoked to justify reversing *Roe*. *Griswold*, *Roe*, *Casey*, *Lawrence*, and *Obergefell* reasoned about traditions as living and evolving, as Justice Harlan famously reasoned in *Poe v. Ullman*[156]—not static or fixed by particular understandings and practices in the past. *Glucksberg* itself recognized *Casey* and the abortion right as within America's history and traditions of liberty,[157] though *Dobbs* never acknowledged this. To rewrite *Glucksberg*'s own

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155. 521 U.S. 702 (1997).

156. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."). Harlan's dissent is cited, quoted, or discussed in the ensuing cases. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *Griswold*, 381 U.S. at 493-94 (Goldberg, J., concurring); *Griswold*, 381 U.S. at 495; *Griswold*, 381 U.S. at 500 (Harlan, J., concurring); Roe v. Wade, 410 U.S. 113, 169 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848-49 (1992); *Casey*, 505 U.S. at 850; Obergefell v. Hodges, 576 U.S. 644, 663-64 (2015). In defending an evolving understanding of the Constitution's guarantees, Justice Brennan specifically cited to Harlan's dissent in *Poe*. *See* Brennan, *supra* note 28.

157. Part II of the *Glucksberg* opinion, which sets forth the Court's reasoning about the liberty guarantee beyond the case of assisted suicide, begins by listing many rights the Court has recognized in substantive due process cases. The majority—which Justice Kennedy joined—specifically cites *Casey*'s abortion right as within America's history and traditions and thus included in "the 'liberty' specially protected" by the Due Process Clause. 521 U.S. at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right to . . . abortion." (citing *Casey*, 505 U.S. at 851)); *see also* Siegel, *supra* note 2, at 1182 n.213. *Glucksberg* was decided only five years after the Court reaffirmed *Roe* in *Casey*.

Part I of *Glucksberg* does mention state law at "the time the Fourteenth Amendment was ratified," recited as part of a long history of the legal regulation of suicide spanning 700 years to the time of the decision, *Glucksberg*, 521 U.S. at 711-19; but ratification-based standards make no appearance in Part II of the opinion which sets out the Court's "established method of substantive-due-process analysis." *Glucksberg*, 521 U.S. at 720-21 (observing that the Due Process Clause "specially protects" liberties that are objectively deeply rooted and requires "a 'careful description' of the asserted fundamental liberty interest"). This portion of the *Glucksberg* opinion makes no reference to state-counting in 1868, nor does it incorporate Justice Scalia's direction that judges should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *See supra* note 174 (quoting an opinion joined only by Justice Scalia and Chief Justice Rehnquist in *Michael H.*) Mary Ziegler recounts that in *Glucksberg* advocates sought to "elevate a history-and-tradition test that would undermine a right to choose abortion," but observes that the *Glucksberg*

account of the nation's history and traditions of liberty, *Dobbs* employed a doctrinal framework for determining tradition that the Court had not used in any of these prior due process cases. *Dobbs* justified reversing *Roe* by deriving the nation's history and traditions from a list of laws banning abortion in 1868, specifically arrayed in an appendix to the opinion.[158]

Dobbs was methodologically hybrid. Its source of authority was doctrinal (prior substantive due process decisions), yet the Court introduced into the case law a focus on lawmaking in 1868, infusing substantive due process doctrine with "originalish" concerns. Originalists complained.[159] Many were not satisfied by Justice Alito's suggestion that his version of substantive due process doctrine would deliver the very goods that originalists promised their method produced: an objective, impersonal account of the Constitution's meaning that separated law from politics (as originalists claimed methods recognizing the Constitution's evolving application could not).[160]

Considered in this context, it should be clear that the standard that *Dobbs* employed to guide application of the Constitution's liberty guarantee was not impersonal or "neutral," as Justice Kavanaugh repeatedly emphasized.[161] *Dobbs* rejected understandings of living tradition that guided the Court's decisions in *Griswold*, *Roe*, *Casey*, and *Obergefell* — and that the Senate invoked in rejecting Judge Bork's nomination for the Supreme Court[162] — and employed a method of

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Court, unlike the *Bowers* Court, "still staked out a middle-ground view of history and tradition, one that justified a right to choose abortion." Mary Ziegler, *The History of Neutrality:* Dobbs *and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 182-83 (2023).

158. *Dobbs*, 142 S. Ct. at 2285. South Carolina relied on an appendix of statutes to anchor its claims about the Fourteenth Amendment's meaning in *Briggs v. Elliott*. *See* Brief for Appellees, *supra* note 79, at apps. A-C; *supra* note 79 and accompanying text.

159. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338811 [https://perma.cc/VF8Q-UNLQ] (discussing the hybrid character of *Dobbs*'s reasoning); Siegel, *supra* note 2, at 1141-44, 1170-73 (discussing academic commentary on *Dobbs*); *see also infra* note 203 and accompanying text (discussing Professor Sherif Girgis's views of the opinion as "living traditionalism").

160. *See supra* Section I.B. *See also* notes 135-140 and accompanying text (discussing the justification for originalism that Justice Scalia advanced in *Originalism: The Lesser Evil*, *supra* note 135, and that Justice Alito advanced for *Dobbs*'s method). For additional discussion of the fusions between originalism and traditionalism, see *infra* note 203 and accompanying text.

161. *See Dobbs*, 142 S. Ct. at 2305-10 (Kavanaugh, J., concurring) (invoking neutrality thirteen times); *infra* note 216 (quoting Justice Kavanaugh discussing the Constitution's neutrality on abortion).

162. Writing as the Chair of the Senate Judiciary Committee, Senator Joseph R. Biden Jr. invoked Justice Harlan's famous dissent in *Poe v. Ullman* and then concluded that our Constitution is

reasoning about the nation's history and traditions that *Bowers* employed in holding that laws criminalizing same-sex sex are outside the Fourteenth Amendment's reach. Dobbs'*s choice of methods expressed the Justices' values*.[163] In *Dobbs*, the Court was embracing understandings of the history-and-tradition method that Justice Scalia long espoused in dissent from substantive due process opinions that Justice Kennedy authored for the Court. Justice Kennedy joined the Court after *Bowers*, in the wake of Judge Bork's defeat; for decades he and Justice Scalia debated how to apply the liberty guarantee; and during this time Kennedy repeatedly prevailed, writing opinions for the Court that *rejected* a backwards-facing standard in favor of a dynamic application of the Constitution's liberty guarantee. Kennedy defended that dynamic standard until he retired and was replaced by a President who promised to reverse *Roe* through his appointments.[164] The Court refashioned by President Trump chose a standard that equated the meaning of the Constitution's liberty guarantee with laws enacted in 1868—a time when law so systematically enforced "gender-role divisions that the Supreme Court itself authorized states to bar women from voting and to deny women the right to practice law."[165]

As we examine the long-running debate between Justice Kennedy and Justice Scalia about how to identify the history and traditions that should guide interpretation of the Constitution's liberty guarantee, we can see the Justices discussing the values guiding their choice of method. Kennedy's opinions consistently cojoined an emphasis on an evolving application of the liberty guarantee with attention to concerns about respecting equal citizenship. These two interconnected qualities of his opinions were so pronounced as to draw repeated

a "living" one. Comm. on Judiciary U.S. Senate, 100th Cong., Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court, No. 100-7, at 15-16, 98 (1st Sess. 1987). After the Senate rejected Judge Bork, liberal and conservative nominees expressed fealty to *Griswold*. *See* Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J.F. 316, 321 (2015) ("After this great conflict, subsequent nominees concluded that *Griswold*, like *Brown*, was part of the constitutional canon—accepted as mainstream."). *But see* Samantha Raphelson, *Pressed on Landmark Contraception Case, Barrett Again Declines to Answer*, NAT'L PUB. RADIO, (Oct. 14, 2020, 3:42 PM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/14/923713602/pressed-on-landmark-contraception-case-barrett-again-declines-to-answer [https://perma.cc/T7Q9-LQHM] (reporting that President Trump's nominee, then-Judge Amy Coney Barrett, refused to answer questions about *Griswold*).

163. For a close analysis of the Justices' selectivity in interpreting the Constitution to adhere to past traditions, see Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 15.

164. *See* Siegel, *supra* note 2, at 1176-77.

165. *Id.* at 1186 (citing Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1875) and Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873)).

comparisons to *Brown*.[166] Scalia savagely attacked these decisions as politics and preference, not law.

We can see the debate between Justice Kennedy and Justice Scalia in 1992, in *Planned Parenthood v. Casey*,[167] when a Court expected to reverse *Roe* instead decided to narrow and reaffirm the decision. Emphasizing Justice Harlan's dynamic understanding of liberty in substantive due process cases since *Griswold*, *Casey* asserted that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[168] Reasoning from this dynamic understanding of liberty, *Casey* repeatedly invoked concerns about sex equality in justifying its decision to reaffirm the abortion right.[169] The joint opinion engaged in the radically gender-egalitarian act of identifying decisions about childbearing at the *core* of self-definition, of dignity, autonomy, and liberty: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[170] In so reasoning, the Court engaged in an act of transformative inclusion that said, women—even with respect to child bearing—are persons, too. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these

166. *See, e.g.*, Akhil Reed Amar, *Anthony Kennedy and the Ghost of Earl Warren*, SLATE (July 6, 2015, 4:17 PM), https://slate.com/human-interest/2015/07/obergefell-v-hodges-anthony-kennedy-continues-the-legacy-of-earl-warren.html [https://perma.cc/5MYQ-A2VV] ("The June 26 ruling on same-sex marriage is the closest the court has ever come to a repeat of *Brown*."); *see also id.* ("In the opening minutes of the April 28 oral argument in *Obergefell*, it was Kennedy who, unprompted, explicitly invoked Warren's two most famous decisions on race: *Brown v. Board* and *Loving v. Virginia*."); *cf.* Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 91-92 (2013) ("In *Windsor*, Justice Kennedy reasons about laws defining marriage with attention to the understanding and experience of those whom the law has historically excluded. By asking whether a law's enforcement 'tells' minorities they are 'unworthy,' or by asking whether a law's enforcement 'demeans' and 'humiliates' them, Justice Kennedy reasons about equality in the tradition of *Brown*.").

167. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

168. *Id.* at 848.

169. *See* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 SUP. CT. REV. 277, 294-96 (2021); *id.* at 295 ("The joint opinion expressed 'constitutional limitations on abortion laws in the language of its equal protection sex discrimination opinions, illuminating liberty concerns at the heart of the sex equality cases in the very act of recognizing equality concerns at the root of its liberty cases.'" (citing Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 831 (2007))).

170. *Casey*, 505 U.S. at 851.

matters could not define the attributes of personhood were they formed under compulsion of the State."[171]

Justice Scalia dissented, arguing that the Court should not interpret the "liberty" protected by the Due Process Clause to include practices which "the longstanding traditions of American society have permitted . . . to be legally proscribed."[172] In support of this tradition-preserving standard he appealed to a footnote in his opinion in *Michael H. v. Gerald D.*[173] that he and Chief Justice Rehnquist, but not Justice Kennedy, joined, that discussed *Bowers*'s count of states in 1868[174]for the proposition that "in defining 'liberty,' we may not disregard a specific, 'relevant tradition protecting, or denying protection to, the asserted right.'"[175] Where the Court stood by its understanding of the nation's history and traditions as evolving and growing in response to new understandings of women as equal citizens, Scalia suggested that interpreting the liberty guarantee to recognize change of this kind was mere politics, and argued that the Court should tie the meaning of the liberty guarantee to a more particularized understanding of tradition in the distant past.

Justice Scalia argued that his proposed standard was objective and impersonal. As he had in *Originalism: The Lesser Evil*, Scalia claimed that a standard that tied the meaning of the liberty guarantee to the particulars of past practice constrained his preferences, whereas disparagingly he asserted that "the Court does not wish to be fettered by any such limitations on its preferences."[176] But in asserting that the Court should restrict the meaning of constitutional guarantees to particular expectations and practices of the past, Scalia *was choosing how to be bound*. As Professors Laurence H. Tribe and Michael C. Dorf put it, "[t]he selection of a level of generality necessarily involves value choices."[177] In *Casey*, Scalia's

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171. *Id.*

172. *Id.* at 980 (Scalia, J., dissenting).

173. 491 U.S. 110 (1989) (opinion of Scalia, J.).

174. *Id.* at 127 n.6; *id.* ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

175. *Casey*, 505 U.S. at 981 (Scalia, J., dissenting) (quoting *Michael H.*, 491 U.S. at 127 n.6 (opinion of Scalia, J.)). Only two Justices—Justice Scalia and Chief Justice Rehnquist—signed on to footnote six; while Rehnquist joined Justice Scalia's Opinion of the Court in full, Justices O'Connor and Kennedy declined to adopt the standard Scalia put forth in this footnote, joining all but this portion of the opinion. *See Michael H.*, 491 U.S. at 113.

176. *Casey*, 505 U.S. at 981 (Scalia, J., dissenting). For Justice Scalia's famous lecture asserting that the turn to history would constrain the expression of judges' preferences, see *supra* note 135 and accompanying text.

177. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085-98 (1990) (discussing Justice Scalia's position in *Michael H.*). For an account of the fight over levels of generality in the Court's substantive due process case law, see Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015).

choice of standards helped vindicate his opposition to abortion. (Scalia was as hostile to the abortion right—he compared abortion to bigamy[178]—as the authors of the *Southern Manifesto* were hostile to *Brown*.) Scalia singled out for special contempt the passage of the joint opinion that protected a pregnant woman's autonomy to decide her life's course.[179]

These attacks provoked the *Casey* Court expressly to repudiate Justice Scalia's efforts to tie the meaning of liberty to a particular and backwards-looking standard. *Casey* opposed the rights-restricting claim "that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified."[180] In support of its dynamic approach, the *Casey* Court cited a string of cases, proudly leading with *Loving v. Virginia*[181]—an opinion in which the Warren Court struck down laws prohibiting racial intermarriage on both due process and equal protection grounds.[182]

This same debate between Justice Kennedy and Justice Scalia recurred in *Lawrence*. Kennedy justified the Court's decision to overturn *Bowers* by showing the decision's historical errors—and by asserting an evolving application of the Constitution's liberty guarantees supported by authority in the years before and after *Bowers*.[183] Scalia fiercely objected to the majority's reasoning in a dissent that quoted *Bowers* counting state practice at the founding, in 1868, and in the

178. *Casey*, 505 U.S. at 980 (Scalia, J., dissenting). Justice Scalia made scant effort to filter out his views about the conduct at issue. *See* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a court . . . that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.").

179. *See Casey*, 505 U.S. at 980 (Scalia, J., dissenting) ("I reach [the] conclusion" that abortion is not "a liberty protected by the Constitution of the United States" "not because of anything so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life'" (quoting *Casey*, 505 U.S. at 851)). In *Lawrence*, Scalia encouraged generations of conservatives to mock *Casey*'s "famed sweet-mystery-of-life passage" as he attacked the Court for interpreting the liberty guarantee to protect same-sex sex. 539 U.S. at 588 (Scalia, J., dissenting).

180. *Casey*, 505 U.S. at 847 (citing *Michael H.*, 491 U.S. at 127 n.6 (opinion of Scalia, J.)).

181. *Id.* at 848 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

182. *Loving*, 388 U.S. at 12.

183. Lawrence v. Texas, 539 U.S. 558, 565-71 (2003) (criticizing the historical reasoning of the *Bowers* decision); *id.* at 571-72 ("In all events we think that *our laws and traditions in the past half century are of most relevance here*. These references show an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. '[H]istory and tradition are the *starting point but not in all cases the ending point* of the substantive due process inquiry.'" (alteration in original) (emphasis added) (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

present.[184] Kennedy directly and resoundingly rejected Scalia's efforts to restrict the meaning of the Constitution's guarantees to the ratifiers' particular expectations and practices—to the past described at the most specific level of generality.[185] Kennedy's opinion for the Court concluded:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[186]

This same debate between Justice Kennedy and Justice Scalia recurred yet again in *Obergefell*. Here, too, Kennedy emphasized the importance of dynamic interpretation, reading the Constitution's liberty guarantee as a responsibility delegated to future generations—not a commitment limited by the expectations and practices of its ratifiers—and cautioning, as the introduction of this Essay recounts, "The nature of injustice is that we may not always see it in our own times."[187] The Court acknowledged that *Washington v. Glucksberg*[188] "called for a 'careful description' of fundamental rights" "defined in a most circumscribed manner, with central reference to specific historical practices."[189] But it ruled that while *Glucksberg*'s approach might suffice for the right to physician-assisted suicide there at issue, it was "inconsistent with the approach this Court has used in discussing other fundamental rights," citing cases including *Loving* and emphasizing that "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups

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184. *Lawrence*, 539 U.S. at 596 (Scalia, J., dissenting).

185. For Scalia's views on defining history and tradition at the most specific level of generality, see *supra* note 174 and accompanying text.

186. *Lawrence*, 539 U.S. at 578-79.

187. *See supra* text accompanying notes 34-37. On equality values in *Obergefell*, see Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 23 (2015) ("Justice Kennedy has wound the Equal Protection and Due Process Clauses more tightly, finally fusing them together in Obergefell with the notion of 'equal dignity in the eyes of the law.'" (quoting Obergefell v. Hodges, 576 U.S. 644, 681 (2015))).

188. 521 U.S. 701 (1997).

189. *Obergefell*, 576 U.S. at 671 (quoting and citing *Glucksberg*, 521 U.S. at 721) (internal quotation marks omitted). For discussion of the *Glucksberg* standard and how it differed from other approaches to history and tradition discussed in this Section, see *supra* note 157.

could not invoke rights once denied."[190] Kennedy's appeal to *Loving* was a reminder of how a direction to follow history and tradition at the most specific level of generality could entrench inequality.

Where Justice Kennedy appealed to *Loving*, Justice Scalia's dissent in *Obergefell* denounced the majority's decision to protect same-sex marriage by appealing to the Fourteenth Amendment's expected application, which he inferred from state laws enacted in 1868, much as the defenders of segregation had:

> When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision — such as "due process of law" or "equal protection of the laws" — it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.[191]

Scalia inveighed against dynamic interpretation as usurping the people's prerogatives of self-government: "A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."[192]

In sharp contrast to Justice Scalia, Justice Kennedy's appeal to *Loving* highlights his view — recounted in the introduction to this Essay — that every generation is responsible for acting in fidelity to the Constitution's guarantees.[193] And as his appeal to *Loving* suggests, in *Casey*, *Lawrence*, and *Obergefell*, the Court was insistent on taking responsibility for decisions about how to apply the Constitution's guarantees in cases where liberty and equality intersect.[194] In these cases, the Court refused to define the Fourteenth Amendment's guarantees by state-counting in 1868 or the ratifiers' particular expectations and practices, just as the Warren Court had in *Brown*. The Court was seeking to disentrench the original Constitution's democratic deficits, and not to exacerbate them. Repeatedly, Scalia attacked these decisions as politics, not law.

Justice Scalia's appeal to the law-politics distinction was rooted in dispute over the history-and-tradition method at issue in the substantive due process

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190. *Obergefell*, 576 U.S. at 671.

191. *Id.* at 715-16 (Scalia, J., dissenting) (footnote omitted). On Justice Scalia's continuing focus on original expectations and traditional practices, see *infra* notes 202-203 and accompanying text.

192. *Obergefell*, 576 U.S. at 717 (Scalia, J., dissenting).

193. *See supra* text accompanying note 37.

194. In addition to the passages discussed in this section, see sources cited *supra* note 36.

cases. From the time he penned *Originalism: The Lesser Evil*, Scalia insisted that tying interpretation of the Constitution to historical facts "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[195] *But facts, however ascertained, do not decide cases themselves; interpretation is required to identify which facts are relevant and why*. Judicial discretion is just as plainly involved in selecting and applying the standards that Scalia favored, for example, characterizing traditions of liberty at "the most specific level at which a relevant tradition protecting . . . the asserted right can be identified."[196] In claiming that his historical method rendered judgment impersonal, Scalia was disowning interpretive agency and responsibility for judgments that initially, at least, he conceded would likely be shaped by the judges' values.[197] Scalia's appeal to history concealed the values grounding his judgment. Again and again, he complained that the majority was reasoning from its values, talking "politics," while he was talking law.[198]

Simply put, Justice Scalia's argument that the Fourteenth Amendment's meaning should be fixed in light of particular practices and expectations of its ratifiers concealed a method of interpretation that was *no less dynamic than Justice Kennedy's*. As we have seen, in advancing these claims on constitutional memory, Scalia was choosing how to be bound, singling out and characterizing historical facts that, he asserted, decided the case before him—even as he creatively depicted himself as constrained.[199]

We can see how Justice Scalia's claims on constitutional memory advance value-based judgments from a different vantage point, by focusing on his

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195. *See supra* note 135 and accompanying text.

196. *See supra* notes 173-175 and accompanying text.

197. *See supra* note 141 and accompanying text.

198. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 237 (2008) ("Even as Justice Scalia changes constitutional law in ways that vindicate the values of the New Right, he presents himself as self-denying, 'confine[d]' by 'rules,' 'handcuffed,' depict[ing] his own views as fidelity to law, while denouncing his liberal colleagues for injecting their values into judging." (citations omitted)).

199. *See id.* For prior work in which I have examined the logic of constitutional memory and originalism as the right's living Constitution, see Siegel, *supra* note 9; and Siegel, *supra* note 2; at 1132 & n.15 (discussing prior work). Jack M. Balkin surveys the role of history in legal argument and argues that these claims on the past are irreducibly creative: "In the quest for authority, lawyers do not merely condense and simplify. They also *extend* legal authority from the past. . . . This act of extension in pursuit of authority is always creative." JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 234 (forthcoming 2024) (on file with author) (emphasis in original). He argues, as I do here, that the turn to history cannot relieve constitutional interpreters of responsibility for their arguments: "Instead of directing our course of action, [history] may clarify our choices. Instead of urging us to imitate our ancestors, it may remind us how much our actions must be our own responsibility." BALKIN, *supra*, at 266.

methodological inconsistencies. For example, Scalia famously talked about his commitment to following original public meaning, the ratifiers' understanding of the text.[200] Yet, in these cases we have just examined, Scalia did *not* focus on the meaning of the Constitution's text, which might be understood at a relatively high level of generality[201] and is underdeterminate, allowing for a range of possible applications. Instead, Scalia limited the meaning of the Amendment to its original expected application, which he inferred from the practices of Americans living one hundred and fifty years ago.[202] At other points, Scalia would shift to

200. For Justice Scalia's claim to follow original meaning, see Antonin Scalia, Assoc. Just. of the U.S. Sup. Ct., Address by Justice Antonin Scalia Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* ORIGINAL MEANING SOURCEBOOK, *supra* note 122, at 106 (noting that he "ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning"); and *id.* at 103 (arguing that the appropriate question is "the most plausible meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended").

201. Originalists committed to uncovering the Constitution's original public meaning may sometimes interpret the Constitution's text at a relatively high level of generality. *See* Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 491 (2017) (observing that "many new originalists have abandoned the old originalism's refusal to acknowledge the possibility that the Constitution ought to be read at a high level of abstraction"); JACK M. BALKIN, LIVING ORIGINALISM 13 (2011) (explaining that "[f]idelity to 'original meaning' in constitutional interpretation refers only to . . . the semantic content of the words in the clause" and "[f]idelity to original meaning as original semantic content does not require that we must apply the equal protection clause the same way that people at the time of enactment would have expected it would be applied"); *see generally* Randy E. Barnette, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 645 (1999) (noting that "[i]nterpreting the meaning of the Constitution requires a historical inquiry into the degree of generality or abstraction the framers meant to convey when using certain words or phrases" as, "[d]ue to either ambiguity or generality, the original meaning of the text may not always determine a unique rule of law to be applied to a particular case or controversy," meaning that "[w]hile not indeterminate, its meaning is underdeterminate" so "interpretation must be supplemented by constitutional construction within the bounds established by original meaning" (footnotes and citations omitted)); Lawrence B. Solum, *Surprising Originalism,* 9 CONLAWNOW 235, 254 (2018) (explaining that "[o]riginalists believe that the original meaning of the constitutional text is fixed and that it binds us, but they do not believe that the framers' beliefs about facts are binding" and "originalism rejects the idea that our view of the facts to which the constitution applies should be frozen in time by the beliefs of the framers about circumstances that no longer exist").

202. As the quoted passage of *Obergefell* illustrates, Justice Scalia did not in fact abandon his focus on the ratifiers' expected application. *See* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 158 (2005) ("Originalists responded tactically by de-emphasizing the term *intent*, though of course not the jurisprudential approach associated with it."); BALKIN, *supra* note 201, at 7 ("Scalia's version of 'original meaning' is . . . a more limited interpretive principle, *original expected application*[, which] . . . asks how people living at the time the text was adopted would have expected it would be applied . . . ."). For another example of Scalia's focus on original expectations and practice, see Associated Press, *Scalia: Abortion Cases Are 'Easy'*, POLITICO (Oct. 5, 2012, 5:49 AM EDT),

arguments suggesting that interpretation of the Constitution had to respect tradition as a good in itself.[203]

Just as importantly, Justice Scalia's opinions invoked tradition and original understandings only intermittently, in some cases but not in others. There was no transsubstantive principle determining when Scalia would turn "originalish" and attack the Court's doctrine, asserting that the Court should interpret the Constitution's text in accordance with practices or expectations of the distant past—and when he would simply engage in doctrinal debates. Whether we describe Scalia as inconsistent, as selective, or simply as an interpretive pluralist, he, too, was interpreting a living Constitution, whose outlines were visible in the value-driven way he applied his method. Consider *United States v. Virginia*, decided a few years after *Casey*, in which Scalia announced that his fidelity to following the Constitution's meaning at the time of its ratification meant that the Fourteenth Amendment contained *no equal protection scrutiny for cases involving sex discrimination*.[204] Yet at the time of *Casey* and *Virginia*, Scalia had already argued in a passionate concurring opinion devoid of originalist reasoning that the Equal Protection Clause protected white men from affirmative action,[205] and would go on—without originalist justification—to treat corporations as persons

https://www.politico.com/story/2012/10/scalia-says-abortion-gay-rights-are-easy-cases-082060 [https://perma.cc/SK3Q-RKP2] (reporting that at the American Enterprise Institute, Justice Scalia in 2012 said, "The death penalty? Give me a break. It's easy. Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion. Homosexual sodomy? Come on. For 200 years, it was criminal in every state").

203. *See* Girgis, *supra* note 29, at 37-39 (observing that originalists have supported "living traditionalism," that is, opinions interpreting the Constitution in light of postratification practices or traditions); *id.* at 38 ("Relying on practices to fill gaps in meaning may seem to [originalists] more legitimate than appealing to their own policy goals (and substantively better than relying on Warren or Burger Court precedents."); *id.* at 39 ("[T]raditions may provide a basis for an originalist-friendly Court to chip away at non-originalist precedents, and reach more originalist outcomes, without embracing originalist reasoning that might require overruling those precedents wholesale. One could read *Dobbs* and *Glucksberg* as attempts to reach outcomes thought to be favored by originalism (rejection of constitutional claims to abortion and assisted suicide), without the originalist reasoning that might have impugned other substantive due process rights.").

204. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent."); Adam Cohen, *Justice Scalia Mouths Off on Sex Discrimination*, TIME (Sept. 22, 2010), https://content.time.com/time/nation/article/0,8599,2020667,00.html [https://perma.cc/RY8U-R895] (relaying Justice Scalia's remarks to an audience at the University of California's Hastings College of Law, which included that "[n]obody thought [that the Fourteenth Amendment] was directed against sex discrimination," and that "[i]f the current society wants to outlaw discrimination by sex, you have legislatures").

205. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in the judgment). In *Croson*, Justice Scalia side stepped the debate over the ratifiers' understanding and focuses instead on the race neutrality he believes is owed to white men. *Id.* at 527.

deserving of speech protections from campaign finance restrictions.[206] The selectivity of Scalia's originalist methods expressed *his* values.[207]

Properly speaking then, the debate between Justice Kennedy and Justice Scalia was not a debate between a living and a "dead" Constitution, but instead between two expressions of the living Constitution, one open about its values and the other ventriloquizing them — refusing to own the Court's own agency in interpreting the Constitution and its responsibility for doing so.[208]

This decades-long debate between Justice Kennedy and Justice Scalia clarifies how *Dobbs* justified *Roe*'s overruling. *Dobbs* counted state laws in 1868 to produce the constitutional memory of America as an abortion-banning nation. To produce this memory, the Court's new conservative majority changed its method of ascertaining the nation's history and traditions to align with Scalia's dissent in *Obergefell*, and to embrace a practice of interpretation reaching back to *Bowers*, and before that, the objections of Southerners engaged in massive resistance against *Brown* — restricting the meanings of the Fourteenth

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206. *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 125-26 (2018).

207. *See* Siegel, *supra* note 2, at 1167-69. On originalists' selectivity, see generally Richard H. Fallon, Selective Originalism and Judicial Role Morality (Feb. 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4347334 [https://perma.cc/9U5M-6WES].

208. *See* Siegel, *supra* note 2, at 1134 (explaining that "[o]riginalists disdain living constitutionalism yet practice living constitutionalism by expressing contested values as claims about the nation's history and traditions" and "[o]riginalist judges ventriloquize historical sources. This mode of reasoning is a deeply antidemocratic mode of constitutional interpretation, not because it appeals to the past, but because it denies its own values as it is doing so"). Professor Sherif Girgis makes a remarkably similar observation about originalists who interpret the Constitution to entrench particular traditional practices. *See* Girgis, *supra* note 29. Some commentators are more critical in describing how history-and-tradition methodology can mask value-based judgments. *See* Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 S.M.U. L. REV. 841, 847 (2013) ("[T]raditionalism cloaks discretionary judging and subjectivity in the garb of a purportedly objective and discretion-limiting methodology."); Turner, *supra*, at 858 ("Contrary to th[e] discretion-limiting rationale, . . . traditionalism is in fact a discretionary and non-constraining interpretive approach."); Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 1032-33 (1992).

> Determining the appropriate level of specificity at which it recognize a tradition and formulate a legal rule, and deciding which past practices should be taken account of in making those decisions, require judges to do what their title implies: make judgments. The contention that this can be done in a value-free manner is fatuous . . . . The traditionalist misdescription of the nature of adjudication . . . enables judges to smuggle their values into the interpretive process under the guise of adhering to purportedly "controlling" traditions or rules which are in reality the product of value-driven choices.

Id.

Amendment's great commitments to the expectations and practices of nineteenth-century Americans.

Of course, the conservative justices do not reason in this fashion in all cases; members of the *Dobbs* majority only interpret the Constitution in this backward-looking way when it expresses their values.[209] Tying the Constitution's meaning to laws enacted over a hundred and fifty years ago quite predictably elevates certain forms of argument and authority over others.[210] (Conservative judges now deploying *Dobbs* in the federal courts show they understand its history-and-tradition method is an instrument for achieving conservative ends: "Level of generality is everything in constitutional law, which is why the Court requires "a 'careful description' of the asserted fundamental liberty interest." So described, no such tradition exists."[211]) Had the Court reasoned about our national traditions dynamically, at a higher level of generality—and consulted a more democratically inclusive array of authorities[212]—the Court would have produced a very different account of the nation's history and traditions of liberty in questions of reproduction and intimate life; these alternate accounts could support

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209. For a demonstration of this claim, see Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 15, at 911-20.

210. *See supra* Section II.A.

211. L.W. by & through Williams v. Skrmetti, Nos. 23-5600 & 23-5609, 2023 WL 6321688, at *9 (6th Cir. Sept. 28, 2023) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *id.* (rejecting a challenge to a ban on gender-affirming care and observing that "[t]he key problem is that the claimants overstate the parental right by climbing up the ladder of generality to a perch—in which parents control all drug and other medical treatments for their children—that the case law and our traditions simply do not support"). In *Skrmetti*, Judge Sutton read *Glucksberg* as if it contained a direction to read past practice as Justice Scalia and Chief Justice Rehnquist urged in *Michael H.*—at the most specific level of generality. But *Glucksberg* incorporates no such direction and in fact recognizes a panoply of substantive due process rights. *See supra* note 157 and accompanying text (discussing *Glucksberg*). For a decision by Justice Gorsuch discussing "levels of generality" as a standard that can be manipulated to control outcomes, see Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1739 (2018) (Gorsuch, J., concurring). Gorsuch objected to "results-driven reasoning" and observed that "by adjusting the dials just right—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—[]you [can] engineer the . . . outcome." *Id.*

212. *See* Siegel, *supra* note 2, at 1196-97 ("Today, a family of originalist methods privileges the authority of the past over the present, and models meaning as univocal and consensual rather than plural, contested, and evolving. In these and other ways, originalism tends to marginalize in the Constitution not only those rights that open democratic life to more broad-based participation, but the Americans who helped secure them." (citations omitted)).

protection for decisions about reproduction and intimate life under both the Thirteenth and Fourteenth Amendments.[213]

In sum, *Dobbs* was not simply pointing to objective facts that compel a constitutional outcome but instead was choosing to employ a method that advanced the majority's values—reaffirming the prerogative of localities to revive old carceral traditions without federal constitutional interference.[214] Counting states that banned abortion in 1868 was not a neutral or disinterested measure of the Constitution's meaning; the method expressed the interpreters' values as it perpetuated political inequalities of the past into the future. The democracy it supported was a thin majoritarianism, democracy without rights that would protect the participation of those historically excluded from the democratic process.

III. *DOBBS* AND DEMOCRACY: CONSTITUTIONAL DEMOCRACY ON THE MODEL OF *BROWN* OR *PLESSY*?

Dobbs justified imposing a backward-looking method of determining the nation's history and traditions on the grounds that it would prevent judges from imposing their political preferences and thus protect the prerogative of states to govern themselves free of federal judicial interference.[215] As *Dobbs* repeatedly argued, overruling *Roe* promoted democracy.[216] This conception of democracy as

213. For a few alternative accounts of the relevant history, see Siegel, *supra* note 2; Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 15; Cary Franklin & Reva B. Siegel, *Equality Emerges as a Ground for Abortion Rights in and After* Dobbs, *in* ROE V. DOBBS: THE PAST, PRESENT AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee Bollinger & Geoffrey R. Stone eds., forthcoming 2023), https://ssrn.com/abstract=4315876 [https://perma.cc/9NH6-GWEC]; Tang, *supra* note 57; and Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV 111 (2023).

214. *See* Franklin & Siegel, *supra* note 213 (manuscript at 5) ("The state must protect new life in ways that respect women as equals in the constitutional order . . . with historical memory of the ways that the state for too long restricted women's civic status and instrumentalized women's lives in the service of family care . . . . [W]omen's status as equal citizens—recognized in Supreme Court equal protection case law—gives rise to an anti-carceral presumption." (emphasis omitted)).

215. *See supra* notes 136–140 and accompanying text.

216. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives . . . ."); *id.* at 2257 ("Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."); *id.* at 2265 ("The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any aspect from *Roe*."); *id.* at 2277 (observing that the decision "allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for

unfettered majoritarianism and noninterference has roots in the fight over segregation[217]—and is not a conception of constitutional democracy to which those claiming equal protection in *Brown* appealed.

This Part begins by identifying differences in these two accounts of democracy—democracy as unfettered majoritarianism and democracy as equal participation—each of which circulates in our constitutional tradition. It shows how these competing accounts of democracy are at stake in *Casey* and *Dobbs*. And then it shows why the choice matters. In equating the Fourteenth Amendment's meaning with the practices of legislators who viewed Black people and women of all races as properly excluded from the legislative process, *Dobbs* defines the liberty guaranteed by the Fourteenth Amendment in terms that perpetuate these very inequalities. *Dobbs* embraces unfettered majoritarianism as democracy and insists that the inequalities it produces have nothing to do with the Constitution. That follows only *if one defines the Constitution in terms that sanction and naturalize these original exclusions*—by adopting interpretive methods that entrench the original Constitution's democratic deficits while ignoring continuing biases in the infrastructure of representation.

Examining race and gender conflicts in the enactment and enforcement of the abortion bans that *Dobbs* authorized in Mississippi, we can see how the liberty and democracy *Dobbs* protects entrench inequalities of 1868. As *Dobbs* understands it, brutal acts of state coercion have nothing to do with the freedom the Constitution guarantees.[218]

A. Democracy as Unfettered Majoritarianism, Democracy as Equal Participation

Is democracy simple majoritarianism? What if the majority is only a minority of the population that controls the apparatus of the state, and denies the majority of adults in the community an opportunity to participate? What if those in power entrench state authority—including its monopoly on violence—to dominate and subordinate the disfranchised, arrogating to itself control over property and

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office," noting that "the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so," and pointing out that in the 2020 election "women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots" (footnotes omitted)); *see also id.* at 2305 (Kavanaugh, J., concurring) ("On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress . . . ."). For an account tracing the emergence of this claim in the Court's abortion cases and in *Dobbs* itself, see Murray & Shaw, *supra* note 49.

217. *See supra* note 81 and accompanying text.

218. *See infra* notes 228, 276-281 and accompanying text.

speech? Equating democracy with simple majoritarianism is less appealing when a minority anoints itself as the majority under these background conditions. Certain background conditions of participation are necessary to legitimate majoritarianism as democracy. Debate about those precise conditions — and the institutions that should enforce them — vitalize constitutional democracies.[219]

Observe that the lifeworld just described bears certain resemblances to the Founding Era when only small minorities of adults could vote.[220] While our constitutional tradition reasons about democracy as unfettered majoritarianism and as a practice requiring certain conditions of participation,[221] the modern constitutional order emerged as Americans began to define those conditions of participation with attention to the democratic deficits of the conditions under which the Constitution's provisions were ratified.[222] Even as courts did so, the original exclusions produced biases in the infrastructure of representation. And these biases in structures of representation in turn shape the exercise of public power in ways that continue to make it harder for some to participate in collective decision-making than others.

And so as *Carolene Products* Footnote Four[223] and John Hart Ely taught the nation, constitutional review to secure the background conditions of participation may be necessary to insure that majoritarianism serves democracy.[224] What

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219. *See* NeJaime & Siegel, *supra* note 36, at 1942-59.

220. *See* Dave Umhoefer, POLITIFACT (Apr. 16, 2015) (consulting with historians of the Founding Era who confirmed that only small minorities of the population were eligible to vote at that time, with estimates varying by jurisdiction and region).

221. *See* Brennan, *supra* note 28, at 14 ("At the core of the debate is what the late Yale Law School professor Alexander Bickel labeled 'the countermajoritarian difficulty.' Our commitment to self-governance in a representative democracy must be reconciled with vesting in electorally unaccountable Justices the power to invalidate the expressed desires of representative bodies on the ground of inconsistency with higher law."). *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (tracing debates about judicial review over time).

222. *See, e.g.*, *supra* note 28 and accompanying text (quoting Justice Brennan on *Brown*, the sex-discrimination cases, and a case incorporating the Bill of Rights against the states).

223. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (contemplating a different role for courts in cases involving the protection of individual rights and in cases involving laws that "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," and asking "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry" (citations omitted)).

224. *See* NeJaime & Siegel, *supra* note 36, at 1942-59 (discussing competing conceptions of democracy in order to evaluate arguments advanced in John Hart Ely, *The Wages of a Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1981)).

of laws that deny free speech, authorize searches without a warrant, deny the right to vote, or segregate the institutions of public life? Is majoritarianism a legitimate expression of democratic will when conducted under these background conditions? We have answered these questions differently over time. Ely's defense of the Warren Court's decision in *Brown* as "representation-reinforcing"—as promoting rather than restricting democracy—demonstrated how judicial review protecting conditions of participation could strengthen and legitimate majoritarian decision-making.[225] Yet because Ely continued to reason within (then-contested) gender conventions, he failed to grasp that gender hierarchy, no less than racial segregation, can obstruct the equal participation necessary to legitimate democracy—and that families, like education, are institutions critical to that participation.[226]

This understanding is at the root of the equality argument the Court recognized in *Casey* and disparaged in *Dobbs*. *Casey* refused to reverse *Roe*, focusing on how women relied on the right *Roe* protected—"[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[227] Where *Casey* focused on "the real-world social conditions in which women exercise abortion rights, the *Dobbs* Court dismissively waved away real-world concerns about depriving women of constitutional rights as 'speculat[ive]' and deemed questions concerning the 'empirical . . . effect of the abortion right on society and in particular on the lives of women' something that the 'Court has neither the authority nor the expertise to adjudicate.'"[228]

Where *Casey*, like *Brown*, vindicated democracy as equal participation, *Dobbs* repudiated equality grounds for the abortion right[229] and embraced democracy

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225. *See* ELY, *supra* note 224, at 75-104 (discussing representation-reinforcing review).

226. NeJaime & Siegel, *supra* note 36, at 1944-49; *see also id.* at 1946 ("Just as Ely understands decisions protecting rights to voting, speech, and school integration as integral to membership in a democracy, so too are decisions about intimate and family relations."). Constitutional law faculty of the era had begun to recognize the equality dimensions of reproductive regulation that Ely failed to grasp. *See, e.g.*, Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-59 (1977).

227. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835 (1992).

228. Siegel, *supra* note 2, at 1195 (footnote omitted) (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022)).

229. *Dobbs*, 142 S. Ct. at 2235 ("Others have suggested that support can be found in the Fourteenth Amendment's Equal Protection Clause, but that theory is squarely foreclosed by the Court's precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications.").

on the model of *Plessy*, democracy as noninterference.[230] The Court claimed that it was promoting democracy by abrogating constitutional protections for women's decisions about bearing children; but the Court showed no interest in women's capacity to vindicate these interests in the democratic process — in Mississippi, which enacted the ban at issue in the case, or elsewhere.

Dobbs's silence is telling. *Dobbs*'s choice of exclusionary criteria to define the liberty the Constitution protects and its indifference to bias in the infrastructure of representation suggest the Supreme Court's talk of democracy is a mere excuse to enable legislators to ban abortion.[231]

B. Dobbs *in Mississippi: How Democracy Can Perpetuate a History and Tradition of Inequality*

After trial on the abortion ban at issue in *Dobbs*, Judge Carlton Reeves warned about the consequences of removing constitutional guardrails from the exercise of political power in Mississippi. Without certain guardrails, democratic self-government would reproduce inequalities of political power that date to the Founding. Judge Reeves pointed out that Mississippi's "leaders are proud to challenge *Roe* but choose not to lift a finger to address the tragedies lurking on the other side of the delivery room: our alarming infant and maternal mortality rates,"[232] and he traced these policy choices to the longstanding disempowerment of women and minorities in the state:

> [L]egislation like H.B. 1510 is closer to the old Mississippi — the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries "so they may continue their service as mothers, wives, and homemakers." The Mississippi that, in Fannie Lou Hamer's reporting, sterilized six out of ten black women in Sunflower County at the local hospital — against their will. And the Mississippi that, in the early 1980s, was the last State to ratify the 19th Amendment — the authority guaranteeing women the right to vote.[233]

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230. For examples of *Plessy*'s defenders invoking federalism, state sovereignty, and majoritarianism as grounds for reserving local control and contesting judicial review over the question of whether to enforce racial segregation in the schools, see *supra* note 81 and accompanying text.

231. *See* Murray & Shaw, *supra* note 49, at 73-79 ("The *Dobbs* majority seeks to insulate its overruling of *Roe* and *Casey* from charges of judicial imperialism by recasting it as an effort to restore and preserve democracy.").

232. Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 540 n.22 (2018).

233. *Id.* at 541 n.22 (internal citations omitted).

This history still shapes the political process in Mississippi. In 2023, the Mississippi state legislature was composed of 14.4% women, ranked with Tennessee as the second lowest percentage in the nation.[234] And Mississippi's reputation for obstructing the participation of minorities in the legislative process remains strong. The state has some of the strictest voting laws in the nation,[235] including a lifetime felony disenfranchisement provision with roots in the era of *Plessy* and Jim Crow,[236] when its framers openly explained their aim "to exclude the Negro."[237] (The Supreme Court declined to hear a challenge to that Mississippi law a year after deciding *Dobbs*, at the same time as the Court was declaring that affirmative action in education was no longer needed.[238]) Under the state's

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234. *See Women in State Legislatures 2023*, CTR. AM. WOMEN & POL. (2023), https://cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2023 [https://perma.cc/ZUL4-7YL5]. Women are grossly underrepresented in state legislatures throughout the country. *Cf.* Murray & Shaw, *supra* note 49, at 36 (noting the often unrepresentative nature of state legislatures). Barriers to women's legislative participation help produce abortion-restrictive regulation in dissonance with public opinion. *See* Aliza Forman Rabinovici & Olatunde C. Johnson, *Political Equality, Gender, and Democratic Legitimation in* Dobbs, 46 HARV. J.L. & GENDER (forthcoming 2023), https://ssrn.com/abstract=4416165 [https://perma.cc/Z2PJ-NAWV].

235. These include limited access to absentee ballots; no in-person early voting (Mississippi is one of only four states without it); no automatic, online, or same-day voter registration (twenty-seven states offer same-day voter registration and twenty-two have or are implementing automatic voter registration); and stringent voter identification laws. *Mississippi*, STATE VOTING RIGHTS TRACKER, VOTING RIGHTS LAB, https://tracker.votingrightslab.org/states/mississippi [https://perma.cc/864X-U9R3].

236. In 1890, Mississippi legislators convened in Jackson, determined to "blunt [the] trend" of increasing Black political power after the enactment of the Fifteenth Amendment. *See* Sam Levine, *The Racist 1890 Law that's Still Blocking Thousands of Black Americans from Voting*, GUARDIAN (Jan. 8, 2022, 5:00 AM EST), https://www.theguardian.com/us-news/2022/jan/08/us-1890-law-black-americans-voting [https://perma.cc/CWW8-5FHM].

237. *See, e.g.*, Ronald G. Shafer, *The 'Mississippi Plan' to Keep Blacks from Voting in 1890: 'We Came Here to Exclude the Negro,'* WASH. POST (May 1, 2021, 7:00 AM EDT), https://www.washingtonpost.com/history/2021/05/01/mississippi-constitution-voting-rights-jim-crow [https://perma.cc/L4UL-8CL] (quoting Judge Solomon Saladin Calhoon, the president of the 1890 Mississippi Convention, as saying "Let's tell the truth . . . . We came here to exclude the Negro"); NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 43 (1989) (quoting James K. Vardaman (who would go on to become Mississippi's governor in 1903) as rebutting the suggestion that the racially disparate impacts of the convention's provisions were unfortunate or unintended side effects: "Mississippi's constitutional convention of 1890 was held for no other purpose than to eliminate the [n-word] from politics.").

238. Justice Jackson pointed to this same history as she objected to the Court's denial of certiorari in *Harness v. Watson*, 47 F.4th 296 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 2426, 2426-27 (2023) (Jackson, J., dissenting). The Court announced it would not hear appeal in the case the day after it decided *Students for Fair Admissions v. President & Fellows of Harvard College*, 143 S. Ct.

restrictions on the franchise, today, sixteen percent of Black voting-age Mississippians find themselves permanently barred from voting.[239]

This "history and tradition" still shapes life in Mississippi, including the conflict over abortion. The conflict over legislating abortion access in Mississippi is gendered[240] and intensely raced. When the state enacted a fifteen-week ban in the hopes of encouraging the Court to overrule *Roe*,[241] both women legislators and Black legislators (and especially, Black women legislators) opposed it. Black Mississippi legislators voted against the fifteen-week ban at issue in *Dobbs* but were systematically outvoted by white legislators. In both the state House and state Senate, Black elected officials comprised the overwhelming majority of the resistance to H.B. 1510's passage: of twenty-two speeches against it, twenty came from Black legislators.[242]By extension, white elected officials constituted the entirety of the bill's defense: no legislator of color spoke in favor of the bill during the entirety of its consideration in the state legislature.[243] But for the votes of a few white Democrats, the passage of H.B. 1510 would have been race-categorical: not a single Black legislator voted for the bill in its final passage in the state

2141 (2023). For a perspective from Mississippi that is critical of the Fifth Circuit's decision in *Harness* and the Supreme Court's decision to let it stand, see Ashton Pittman, *Mississippi Jim Crow Felony Voting Law Will Remain After Supreme Court Denies Appeal*, MISS. FREE PRESS (June 30, 2023), https://www.mississippifreepress.org/34312/mississippi-jim-crow-felony-voting-law-will-remain-after-supreme-court-denies-appeal [https://perma.cc/XV3L-EZTP].

239. Bobby Harrison, *Study: 11% of All Mississippians, 16% of Black Mississippians Can't Vote Because of Felony Convictions*, MISS. TODAY (Oct. 19, 2020), https://mississippitoday.org/2020/10/19/study-11-of-all-mississippians-16-of-black-mississippians-cant-vote-because-of-felony-convictions [https://perma.cc/A4DU-GAVR] (conveying the findings of *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT (Oct. 30, 2020), https://www.sentencingproject.org/app/uploads/2022/08/Locked-Out-2020.pdf [https://perma.cc/QB45-R9PW]).

240. Recent polling reflects deep gender divisions in the state's abortion debate in the state and nationally. *See infra* note 248 and accompanying text.

241. *See* Siegel, *supra* note 169, at 286.

242. *See H.B. 1510, Gestational Age Act*, LEGISLATIVE HISTORY PROJECT, MISS. COLL. L. (Feb. 2, 2018; Mar. 6, 2018; Mar. 8, 2018), https://law-db.mc.edu/legislature/bill_details.php?id=6977&session=2018 [https://perma.cc/6AE9-WRGD]. These counts reflect the current and former membership of the Mississippi Legislative Black Caucus, as well as former legislators' biographies and self-identifications in the media. These sources and full accounts of the speeches made for and against the bill, and by whom, are on file with the author.

243. *Id.*

Senate[244] or state House.[245] Indeed, in total, only four of one hundred twenty-two white legislators voted against H.B. 1510. Only three Black representatives (of fifty-one) *ever* voted for the bill during any part of the process,[246] and all three declined to vote for the bill in its final House session.[247]

In other words, there is in fact substantial opposition to banning abortion in Mississippi, aligned on the axes of race and gender, but women and minorities have been unable to shape the law. One poll in *Dobbs*'s wake reported that Mississippians disagreed with the Supreme Court's decision to overturn *Roe* (51% oppose and 42% support)—that tally masked striking gender differences in response. Men supported the decision by 48% to 44% (+4), while Mississippi women objected to overturning *Roe* by 56% to 37% (-19).[248]

Despite the public's response to *Dobbs*, the legislature allowed the state's *more* draconian trigger ban[249] to supplant the fifteen-week ban the Supreme Court upheld in that case. Living under this near-absolute ban in the year since *Dobbs*,

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244. *Yeas and Nays on H.B. 1510 No. 1510*, MISS. STATE SENATE (Mar. 6, 2018), http://billstatus.ls.state.ms.us/2018/pdf/votes/senate/0640039.pdf [https://perma.cc/UQU8-WPP9]; *see* H.B. 1510, 2018 Leg., Reg. Sess. (Miss. 2018). Again, these counts reflect the current and former membership of the Mississippi Legislative Black Caucus, as well as former legislators' biographies and self-identifications in the media. These sources and full accounts of these breakdowns are on file with the author.

245. MISS. HOUSE OF REPRESENTATIVES (Mar. 8, 2018), http://billstatus.ls.state.ms.us/2018/pdf/votes/house/0660014.pdf [https://perma.cc/EW7X-8K34]; *see* H.B. 1510, 2018 Leg., Reg. Sess. (Miss. 2018).

246. Representatives Credell Calhoun (D-68) (retired), Angela Cockerham (I-96), and Karl Gibbs (D-36) cast three of the eighty "Yea" votes that led H.B. 1510 to pass the Mississippi House in February 2018. *See* MISS. HOUSE OF REPRESENTATIVES (Feb. 2, 2018), http://billstatus.ls.state.ms.us/2018/pdf/votes/house/0320008.pdf.

247. MISS. HOUSE OF REPRESENTATIVES (Mar. 8, 2018), http://billstatus.ls.state.ms.us/2018/pdf/votes/house/0660014.pdf [https://perma.cc/EW7X-8K34].

248. *New Poll Says Majority of Mississippians Oppose the SCOTUS Decision to Overturn Roe*, ACLU MISS. (July 14, 2022), https://www.aclu-ms.org/en/press-releases/new-poll-says-majority-mississippians-oppose-scotus-decision-overturn-roe [https://perma.cc/4A58-Z3EU]. For a recent national survey on gender differences, and gender-role differences, in the abortion debate, see Perry Undem, *Assessing the State of Public Opinion Toward Women, Gender, Equality—And Abortion: Analysis from National PerryUndem Survey* 55 (Jan. 31, 2023), https://perryundem.com/wp-content/uploads/2023/01/PerryUndem-Landscape-of-Views-toward-Women-Gender-and-Abortion.pdf [https://perma.cc/7L4V-GSVQ].

249. Mississippi's "trigger law" prohibits abortions in Mississippi "except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape." 2007 Miss. Laws 956.

a remarkable forty-five percent of likely voters in *Mississippi's Republican primary* now support *repealing* the trigger ban.[250]

There's a democracy problem here—and it goes beyond the inability of historically underrepresented groups to shape lawmaking in the state legislature. It appears that leadership of the Mississippi legislature is aware of emergent majority support for abortion access and determined to *prevent* its expression: in considering whether to reinstate the state's initiative process, state legislators expressly prohibited questions about abortion in the proposed initiative.[251] (In *Dobbs*'s wake, other states have sought to deny majorities supporting abortion access an opportunity to prevail in referenda, by less forthright means.[252]) The condition the legislature sought to impose on the referendum process shows that legislators seek to enforce the state bans *despite* voter opposition to them. This is not the understanding of democracy the Court invoked when it promised that overruling *Roe* would return the abortion question "to the people."[253]

The legislature's resistance to making the law democratically responsive cannot be explained as the simple expression of moral or religious views about abortion. As we will see, the legislature's response reflects gender and racial disparities among legislators debating abortion and, relatedly among Mississippians seeking abortion. This becomes evident as one considers the choices about abortion and safety-net policies the legislature has made in *Dobbs*'s wake.

Though Black people constitute less than thirty-eight percent of the state's population,[254] Black women accounted for over seventy percent of its abortion

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250. Bobby Harrison, *Poll: Mississippi Republican Voters Cool on Abortion Ban*, MISS. TODAY (June 13, 2023), https://mississippitoday.org/2023/06/13/abortion-ban-mississippi-poll [https://perma.cc/SHG6-JC5K].

251. Emily Wagster Pettus, *Mississippi Senator Kills Initiative Plan, Minus Abortion*, ASSOCIATED PRESS (Mar. 23, 2023), https://apnews.com/article/mississippi-ballot-initiative-election-abortion-443d0f2d05ffdb574ab8c72377bf90df [https://perma.cc/BG3A-DYCV].

252. Republicans in Ohio attempted to change voting rules in their referendum, fearing that a majority of Ohioans would vote to enshrine abortion rights in the state constitution. *See* Alice Herman, *'It Destroys Democracy': Republicans Bid to Rewrite Ohio's Abortion Rules*, GUARDIAN (May 23, 2023, 6:00 EDT), https://www.theguardian.com/us-news/2023/may/23/ohio-abortion-rights-republican-ballot-super-majority [https://perma.cc/J9BG-HMYW]. And Ohio is not alone: "Missouri is also currently discussing an increase in the threshold for constitutional amendments, to 60% of the vote. The Fairness Project fought two similar proposals in 2022, in South Dakota and Arkansas . . . ." Poppy Noor, *How Republicans Are Trying to Block Voters from Having a Say on Abortion*, GUARDIAN (Dec. 19, 2022, 5:00 AM EST), https://www.theguardian.com/world/2022/dec/19/abortion-rights-votes-ballot-initiatives-republican-stop-referendum [https://perma.cc/3GMM-JTKX].

253. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

254. *Mississippi's Population Declined 0.2%*, U.S. CENSUS BUREAU (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/mississippi-population-change-between-census-decade.html [https://perma.cc/S4S3-ZW9W].

patients in 2020.[255] As Professor Khiara M. Bridges has observed, Black women's disproportionate reliance on abortion care is "a direct result of black people's higher rates of unintended pregnancy"—a response to the conditions of poverty in which they are more likely to live, conditions characterized by less healthcare, effective contraception or resources for raising children, and greater exposure to sexual violence, reproductive coercion, and intimate partner violence.[256]

These background conditions—which the Mississippi legislature helped create—are the conditions in which women—and their families—make decisions about abortion. Citizens debating abortion emphasized this in the heat of the abortion debate in the Mississippi legislature and elsewhere.[257] In debating the fifteen-week ban at issue in *Dobbs*, backers bragged the bill would make Mississippi, which has the highest infant mortality rate in the nation,[258] "the safest place in the country for unborn babies,"[259] even as the state's current governor then leading its senate, blocked—as "not germane"—amendments that would have provided healthcare and childcare benefits for women subject to the ban

255. Katherine Kortsmit et al., *Abortion Surveillance—United States, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION 18, https://cdc.gov/mmwr/volumes/71/ss/pdfs/ss7110a1-H.pdf [https://perma.cc/JVX7-9RAY].

256. Bridges, *supra* note 14, at 42-44; *see also* Brief of Reproductive Justice Scholars as Amici Curiae Supporting Respondents at 15-20, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (explaining that Black women disproportionately utilize abortion services in Mississippi specifically because they are: "[o]verrepresented [a]mong Mississippi's [p]oor," "[m]ore [l]ikely [t]han [o]ther [r]acial [g]roups to [e]ncounter [d]ifficulties [a]ccessing [s]afe and [e]ffective [c]ontraception," and experience a "higher rate of intimate partner violence, sexual assault, and reproductive coercion").

257. *See* Siegel, *supra* note 169, at 318-28 (examining the debate in Louisiana); Cary Franklin, Whole Woman's Health v. Hellerstedt *and What It Means to Protect Women*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 223, 232-36 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019) (examining the debate in Texas). For glimpses of this conversation in Mississippi, see *infra* text accompanying notes 261, 270-272.

258. *See* Michael Goldberg, *Abortion Ruling Means More and Riskier Births in Mississippi*, ASSOCIATED PRESS (Oct. 24, 2022, 1:44 PM), https://apnews.com/article/abortion-health-tate-reeves-greenwood-mississippi-92e59302abe30a8afd74ee5d80b94b3f [https://perma.cc/S84C-3DNU] ("Mississippi has the nation's highest fetal mortality rate, highest infant mortality rate, highest pre-term birth rate and is among the worst states for maternal mortality. Black women are nearly three times more likely to die due to childbirth than white women in Mississippi.").

259. Sarah Fowler, *Mississippi Banned Most Abortions to Be the 'Safest State' for the Unborn. Meanwhile, One in Three Mississippi Kids Lives in Poverty.*, BUS. INSIDER (Nov. 26, 2021, 9:23 AM), https://www.businessinsider.com/mississippi-defends-abortion-ban-one-in-three-kids-in-poverty-2021-11 [https://perma.cc/8VNV-YCXZ].

who decide to continue a pregnancy.[260] One of the amendments would have provided women who continued a pregnancy under the ban health insurance while raising the child — "the same coverage offered to Mississippi State Legislators."[261]

Even after *Dobbs* triggered the state's ban, the Mississippi legislature *still* refused to provide support to those whose choices it sought to control. It was evident that enforcing the ban in a state with Mississippi's high maternal mortality rate and weak safety net[262] would threaten the health and lives of both white and especially Black women.[263] Yet the Mississippi legislature, along with many other abortion-banning states, continued to refuse to expand Medicaid, even as "[e]xpanding Medicaid would uncork a spigot of about $1.35 billion a year in federal funds to hospitals and health care providers, . . . [a]nd . . . guarantee medical coverage to some 100,000 uninsured adults" — and even as the decision forced hospitals to close in *Dobbs*'s wake.[264] It took continuing political pressure in the year after *Dobbs* for the Mississippi legislature to extend postpartum coverage from two to twelve months for those enrolled in Medicaid.[265]

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260. Ashton Pittman, *Abortion Advocates Ignore Women's Poverty, Attorney General Fitch Claims*, MISS. FREE PRESS (Oct. 8, 2021), https://www.mississippifreepress.org/16779/abortion-advocates-ignore-womens-poverty-attorney-general-fitch-claims [https://perma.cc/CHG7-9UC2].

261. Amendment No. 2 to Committee Amendment No. 1 Proposed to H.B. 1510, 2018 Leg., Reg. Sess. (Miss. 2018).

262. *See* Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & LAW 67, 84-90 (2023).

263. The maternal mortality rate for Black women in the state is more than fifty-seven percent greater than the national rate for Black women and a striking 375% greater than the national rate for white women. *Compare Mississippi Maternal Mortality Report 2017-2019*, MISS. STATE DEP'T HEALTH 8 & fig.1 (2023), https://msdh.ms.gov/page/resources/19612.pdf [https://perma.cc/HFH9-CMGQ], *with Mississippi Maternal Mortality Report* 2013-2016, MISS. STATE DEP'T HEALTH 12 (2019), https://msdh.ms.gov/msdhsite/index.cfm/31,8127,299,pdf/MS_Maternal_Mortality_Report_2019_Final.pdf [https://perma.cc/YC6L-CG6C]. And while outcomes improved for white women over this period, outcomes for Black women deteriorated significantly: the maternal mortality rate for Black women increased by 25.4%. *See Mississippi Maternal Mortality Report 2017-2019*, *supra*, at 8 fig.1.

264. Sharon LaFraniere, *'We're Going Away': A State's Choice to Forgo Medicaid Funds Is Killing Hospitals*, N.Y. TIMES (Mar. 29, 2023), https://www.nytimes.com/2023/03/28/us/politics/mississippi-medicaid-hospitals.html [https://perma.cc/348P-Z94G]; *see also* Pittman, *supra* note 260 ("A 2018 study published in Health Affairs found that hospitals were six times less likely to close in states that expanded Medicaid as in states that refused to do so.").

265. LaFraniere, *supra* note 264. For background, see Emily Wagster Pettus, *Mississippi House Leaders Kill Postpartum Medicaid Extension*, AP NEWS (Mar. 9, 2022, 6:19 PM EDT), https://apnews.com/article/health-mississippi-medicaid-c49dcbdc7b356f593485853aee5458c1 [https://perma.cc/TL3F-4DQZ].

This course of legislative decision-making in Mississippi makes plain the thin sense in which the Supreme Court's decision to reverse *Roe* promotes democracy. The Court's decision to abrogate the abortion right has allowed those with power to exercise it against those without the capacity to vindicate their interests in the legislative process.

In the year since *Dobbs*, the Mississippi legislature has implemented what amounts to a total ban on abortion, even as bills "to strengthen the social safety net, fund child care for low-income parents and increase access to resources like contraceptives have all died before lawmakers had a chance to vote on them." [266] ("The states that have rushed to criminalize abortion in the wake of *Dobbs* are the states *least likely* to have pursued any of these other means of protecting potential life."[267]) Mississippi legislators instead are "looking to crisis pregnancy centers as the primary support system for women facing an unplanned pregnancy."[268] The Mississippi legislature makes these choices knowing that "Mississippi ranks worst or near-worst in infant and maternal mortality, poverty, hunger, access to health care and child care."[269] It is willing to use the criminal law to coerce birth, but systematically resists providing resources to support its citizens' health and life.

This combination of choices cannot be explained as the simple outworking of moral or religious belief about protecting life. Instead, inequality begets more inequality: the disempowerment of Black people and women shapes the law which, in turn, entrenches their continuing disempowerment.

CONCLUSION: *DOBBS* AS *PLESSY*

Stories about abortion policy offer a window into the democratic process, illustrating how the infrastructure of representation perpetuates the nation's history and traditions of inequality. Generations after enfranchisement, groups that were deemed unfit to vote on the Fourteenth Amendment's ratification are still

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266. Anna Wolfe, *Republicans Vowed a Robust Post-Roe Agenda. Here's How It's Going.*, MISS. TODAY (Feb. 10, 2023), https://mississippitoday.org/2023/02/10/republicans-post-roe-agenda [https://perma.cc/7SWX-55QS].

267. *See* Franklin & Siegel, *supra* note 213, at 16-17 & n.70.

268. Wolfe, *supra* note 266. Antiabortion legislatures divert federal funding from Temporary Assistance for Needy Families to these centers even though they do provide misleading information about abortion and contraception, and do not provide medical care. *See* Siegel, Mayeri & Murray, *supra* note 262, at 88 & n.90.

269. Geoff Pender, *'We're 50th By a Mile.' Experts Tell Lawmakers Where Mississippi Stands with Health of Mothers, Children*, MISS. TODAY (Sept. 27, 2022), https://mississippitoday.org/2022/09/27/where-mississippi-stands-with-health-of-mothers-children [https://perma.cc/DC78-B2PM].

struggling to make their voices heard in the political process. This is as true after *Dobbs* as it was before *Roe*.

In the wake of *Dobbs*, lawmakers in Mississippi held a hearing to consider policies the state might adopt in response to its abysmal health rankings. Black women walked out and held a press conference entitled "We Are the Data" to draw attention to the fact that "Black women and babies experience a disproportionate share of the state's highest-in-the-nation rates of stillbirth, low birth weight, and infant mortality"[270] — and to "complain[] about a lack of Black women on the Senate committee — only one of the nine members — and among [the legislative hearing's] presenters."[271] "What we're asking for here is just a right to life," one of their organizers emphasized.[272]

The scene echoed another over a half-century earlier. In 1969, the New York legislature held hearings on reforming its abortion law in which the experts called to testify included fourteen men and one nun, prompting women to walk out and hold the first abortion speak-out in a church in Greenwich Village.[273] They emphasized the myriad harms that abortion bans inflicted on women, but especially on poor women and women of color.[274] These speak-outs not only shaped the movement's organizing but its arguments in court where women turned as they struggled to make themselves heard in a constitutional order in which they had long been marginalized.[275]

Claimants in the modern substantive due process cases "turned to the courts in part because they faced forms of subordination and stigma that silenced them and impeded their democratic participation . . . . [They faced] the kind of deliberative blockages at issue in equal protection cases like *Brown* — cases understood to be paradigmatic exercises of judicial review within the *Carolene Products* framework."[276]

The Supreme Court in *Roe* and then in *Casey* responded, in the spirit of *Brown*, to the ways that inequalities impeded women's participation.[277] But

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270. *Id.*

271. *Id.*

272. *Id.*

273. NeJaime & Siegel, *supra* note 36, at 1924-26.

274. *Id.* at 1928-29.

275. *Id.* at 1924, 1927.

276. *Id.* at 1939.

277. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); *see also* NeJaime & Siegel, *supra* note 36, at 1944-49 (explaining how the Court has come to recognize, in decisions including *Casey* and *Lawrence*, how conditions of family life enable political participation).

Dobbs responded in the spirit of *Plessy*. Before overturning the abortion right, Justice Alito reached out in dicta to assert that the Court was powerless to consider women's equality—taunting, before he rejected a half-century of abortion-rights precedent, that the question of whether state coercion of pregnancy presented questions of equal protection was "squarely foreclosed by [the Court's] precedents."[278]

Nor did *Dobbs* view women's reliance on the abortion right in making decisions about their bodies and lives as implicating a liberty of constitutional consequence. *Dobbs* disparaged women's dignitary, health, emotional, economic, and social interests in a right to control decisions about childbearing—that federal courts had protected for a half-century—as "novel and intangible," taunting that federal courts were institutions better suited to protect "concrete reliance interests . . . in 'cases involving property and contract rights.'"[279]

In unleashing abortion bans on women and authorizing coercion deemed unconstitutional for a half-century, *Dobbs* declared that questions concerning the "empirical . . . effect of the abortion right on society and in particular on the lives of women" were something that the "Court has neither the authority nor the expertise to adjudicate."[280] One can hear echoes of segregation's defenders dismissing Black Americans' claims for equality as mere "sociology,"[281] not law.

The voice of *Plessy* speaks through *Dobbs* when the Court declares that the Constitution is indifferent and impotent to intervene.[282] It is blasphemous that *Dobbs* claimed the authority of *Brown* to enforce the Constitution as *Plessy*'s defenders did. We test our Constitution's character, on this first anniversary of

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278. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) (citing Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva Siegel as Amici Curiae Supporting Respondent, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), 2021 WL 4340072 (2021)). Justice Alito's discussion is significant as an expression of the majority's views, but is dicta as there was no equal protection claim then remaining in the case. *See* Siegel, Mayeri & Murray, *supra* note 262, at 68-69. For an account of equality arguments that *Dobbs* refused to address, see *id.*; and Franklin & Siegel, *supra* note 213.

279. *Id.* at 2276-77 (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)). For responses to *Dobbs*'s claim about women's reliance interests in the right *Roe* recognized, see Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023); and Rachel Bayefsky, *Tangibility and Tainted Reliance in* Dobbs, 136 HARV. L. REV. F. 384 (2023).

280. *Dobbs*, 142 S. Ct. at 2277.

281. *See supra* notes 65-70 and accompanying text (discussing the district court opinion in *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951)); *see also* notes 107-114 (discussing Rehnquist's memo responding to the argument in *Briggs*).

282. *See* Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) (observing that "[l]egislation is powerless . . . to abolish distinctions based upon physical differences," and concluding that "[i]f the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically" and "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane").

Dobbs and seventieth anniversary of *Brown*, in calling for *Dobbs* to meet *Plessy*'s fate.

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On Brown*'s seventieth anniversary, I dedicate this Essay to Judge Spottswood Robinson, III, for whom I was privileged to clerk. The Judge believed fidelity to the rule of law is transformative and demonstrated it in his work in* Briggs v. Elliot*, 98 F. Supp. 529 (E.D.S.C. 1951), and the cases consolidated in* Brown*, and on the bench, where he drew on these understandings in decisions that built modern sex discrimination law, including* Barnes v. Costle*, 561 F.983 (D.C. Cir. 1977), the first case recognizing that sexual harassment is discrimination on the basis of sex under the 1964 Civil Rights Act, and* Abraham v. Graphic Arts International Union*, 660 F.2d 811 (D.C. Cir. 1981), the first case recognizing a disparate impact claim of pregnancy discrimination under that statute, anticipating the frontiers of equality law today. This Essay shares with the rising generation of law students understandings of law I learned through the Judge's stories of the civil rights movement.*