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

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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 then resisting Reconstruction. Brown repudiated this backward-facing method of interpreting the Amendment and called upon the nation to change its practices to conform with its constitutional ideals. In so doing, Brown embraced an evolving understanding of the Constitution’s commitments—the approach to constitutional interpretation the Dobbs Court repudiated as it employed a count of state laws 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 others that seek to fix the Fourteenth Amendment in the deep past, arose in opposition to arguments that the Constitution’s meaning evolved. In tracing the argument that state laws in 1868 are proxies for the expectations and intent of the Fourteenth Amendment’s ratifiers, the 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 enables interpretive debates of the 1950s, the 1980s, and the 1990s to speak to debates of the present day.

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 objective 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 can enforce dynamic forms of interpretation and disempowering forms of democracy.
Counting states that segregated education (or banned abortion) in 1868 was not a neutral or objective 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.

Critically examining claims on the constitutional memory of *Brown* is a practice of fidelity to *Brown* as we commemorate its seventieth anniversary.
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This is an early draft. Comments welcome.

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.⁶ Justice Alito evoked this comparison multiple times,⁷ suggesting that his opinion in 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

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¹ 142 S. Ct. 2228 (2022).
³ 410 U.S. 113 (1973).
⁴ Dobbs, 142 S. Ct. at 2265 (citing Plessy, 163 U.S. 537 (1896)
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.”).
⁷ See infra note 37 and accompanying text.
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 177 (showing how Dobbs repeatedly argued that overturning Roe promoted democracy).
¹⁰ Dobbs, 142 S. Ct. at 2252 (“In this country, 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.”).
they counted states that segregated education at the time of the Amendment’s ratification, and that was carried into abortion jurisprudence by Justice William 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.

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 the Southern Manifesto employed to defend segregation and Plessy. That too would state Dobbs’s relation to Brown, but for most Americans it would discredit the Court’s decision, rather than imbue it with authority. 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.

As importantly, 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 the Constitution’s meaning is fixed in the deep past or evolves 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

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11 See infra Section I.A.
13 JOHN KYLE DAY, THE SOUTHERN MANIFESTO: MASSIVE RESISTANCE AND THE FIGHT TO PRESERVE SEGREGATION 3 (2014) (“On March 13, 1965, ninety-nine members of the 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 harnessed state level defiance of Brown to shield southern national officeholders from charges that they were acquiescent to desegregation. ensuring their continued dominance of congressional committees.”); 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 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 77-81 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 Khia M. Bridges, The Supreme Court, 2022 Term—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.”).
schools. However important it is to revisit this history—both to correct errors in Dobbs’s count and to examine the Court’s constitutionally significant omissions—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 adopting this change in method.

Counting states can serve different ends. It can promote or restrict an evolving understanding of the Constitution 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—for example, in decisions that incorporate federal rights against the states or appeal to evolving contemporary understandings as reason to build out the scope of federal rights. These practices of state-counting seek to identify an emerging consensus that can support the exercise of federal power. In Dobbs, by contrast, counting states’ practice at the time of the Fourteenth Amendment’s ratification serves to restrict the Fourteenth Amendment’s meaning to the expectations, intentions, and actions of legislators who ratified it and thus to insulate certain practices from federal constitutional review.

In determining the Fourteenth Amendment’s meaning through its ratifiers’ practices and expectations, Dobbs employs a method Plessy’s defenders employed in arguments that Brown refused to accept. The Warren Court rejected claims that Fourteenth Amendment’s meaning resided in the expectations, intentions, and practices of state legislators who ratified it, and in methods of interpretation that would entrench the South’s prior practice against constitutional challenge. It

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16 See infra note 85 and accompanying text.
18 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; Tang, supra note 17.
20 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”).
21 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).
22 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 (2009).
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.23

Brown interpreted the Constitution to disentrench laws and traditions that long enforced White Supremacy and so to vindicate for Black Americans the Constitution’s promise of the equal protection of the laws. Instead of deferring to local majorities in ways that would perpetuate the Constitution’s democratic deficits, the Court interpreted the Fourteenth Amendment to secure the equal participation of those originally locked out of the political process. Brown is renowned because it demonstrated how fidelity to the rule of law can be transformative. For generations Brown has exemplified the living Constitution.24

This history of the conflicts that led to Brown sheds light on the conflicts now engulfing substantive due process law. Roe and Planned Parenthood v. Casey,25 as well as Lawrence v. Texas26 and Obergefell v. Hodges,27 emerged from a debate over whether courts interpreting the Constitution’s liberty guarantee should look for guidance to the nation’s traditions as living and evolving—or fixed by practice at the time of the Fourteenth Amendment’s ratification.28 Arguments for interpreting the liberty guarantee by counting state practice in 1868 appeared in that context as well. Justice Rehnquist employed the method in his Roe dissent; it was endorsed by the Reagan administration, and a majority of the Supreme Court employed the method to define protections for intimate and family relations in Bowers v. Hardwick, prompting conflict that led the Court to reverse the decision.29 For decades the Court interpreted the Fourteenth Amendment’s liberty guarantee as the Court in Brown had: transformatively, vindicating understandings of liberty and equality that those who ratified the Fourteenth Amendment did not all share. As Justice Kennedy 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

23 See infra Section I.A.
24 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 (Washington, D.C., 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. 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,” citing Brown and 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. Id. 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 Biden, invoked the understanding that traditions are living recognized in key substantive due process decisions. See infra note 144 and accompanying text.
28 See infra Section II.B.
29 See infra Section I.B.
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.\(^{30}\)

It was not until after Justice Kennedy’s retirement that a Court constituted to reverse \(\text{Roe}^{31}\) employed state-counting in 1868 to justify its decision—claiming it was acting on the model of the Warren Court in \(\text{Brown}\).

Examining the history of \(\text{Brown}\) that \(\text{Dobbs}\) omitted not only identifies antecedents of its method; just as importantly, this history helps us think critically about the justifications \(\text{Dobbs}\) offered for choosing its method of determining the nation’s traditions of liberty. \(\text{Dobbs}\) argued that its use of state-counting in 1868 to enforce the Fourteenth Amendment’s liberty guarantee provided an objective standard that prevented interpreters from reasoning from their values and so protected democracy in the states.\(^{32}\) The history this Essay examines refutes each of these claims. Counting states that segregated education in 1868 was not a neutral or objective measure of the Constitution’s meaning; it expressed the interpreters’ values by perpetuating political inequalities of the past into the future. The democracy it supported was a thin majoritarianism, democracy without rights that protect the participation of those historically excluded from the democratic process. In other words, it is an account of democracy more like the account defended in \(\text{Plessy}\) than in \(\text{Carolene Products}\) Footnote Four\(^{33}\) or in \(\text{Brown}\) itself—decisions that help legitimate majoritarianism by protecting the infrastructure of democratic participation.\(^{34}\)

In tracing the argument that state laws in 1868 are proxies for the understandings of the Fourteenth Amendment’s ratifiers, the Essay uncovers debates of the past that show how originalism and \(\text{Dobbs}'\) history-and-tradition method grew out of resistance to \(\text{Brown}\) 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. Examining interpretive methods and their justifications in the political contexts in which they grew demonstrates how \(\text{Dobbs}'\) method can enforce dynamic forms of interpretation and 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 \(\text{Dobbs}'\) method.

\(^{30}\) \(\text{Obergefell, 576 U.S. at 664. See infra note 146 (observing that “Justice Kennedy’s opinions consistently cojoined emphasis on an evolving understanding of liberty and the urgency of respecting contemporary understandings of equal citizenship so pronounced as to draw repeated comparisons to Brown”).}\)

\(^{31}\) \(\text{See Siegel, supra note 2, at 1176-77.}\)

\(^{32}\) \(\text{See infra notes 124 and accompanying text.}\)

\(^{33}\) \(\text{United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).}\)

\(^{34}\) \(\text{Douglas NeJaime & Reva Siegel, Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy, 96 N.Y.U. L. REV. 1902 (2021).}\)
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. 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. 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 promote interpretive objectivity 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 demonstrating this again in the context of substantive due process jurisprudence. 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.

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. 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 the Essay demonstrates in 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.


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.” In overturning Roe, the Roberts Court claimed it was acting as the Warren Court had in overturning

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35 See infra Section I.A.


37 Dobbs, 142 S. Ct. at 2279; see also id. at 2262; 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.”)
that \emph{Dobbs} was like \emph{Brown}. Chief Justice Roberts drew upon this analogy to organize his year-end report on the federal judiciary, which emphasized the Court’s security needs by recounting threats faced by judges enforcing \emph{Brown}.\footnote{For Chief Justice Roberts’s claim on the \emph{Dobbs}/\emph{Brown} analogy in his year-end report, see \textit{John G. Roberts, Sup. Ct. U.S., 2022 Year-End Report on the Federal Judiciary} 1-4 (2022), \url{https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf}.} If his point were only to remind the public that the Justices need and merit protection, Chief Justice Roberts might have recalled the years of violent threats against Roe’s author, Justice Harry Blackmun, who had a shot fired through his window when he and his wife were home following an intimidation campaign by violent anti-abortion groups.\footnote{See Ben A. Franklin, \textit{Shot Fired Through Window of Blackmun Home}, N.Y. TIMES, Mar. 5, 1985, at A1, B5 (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 anti-abortion group). This analogy would have been especially appropriate given that violent attacks on clinics have sharply increased since \emph{Dobbs}. See \textit{Julia Shapero, Report Documents ‘Sharp Increase’ in Violence at Abortion Clinics}, THE HILL (May 5, 2023, 11:28 AM ET), \url{https://thehill.com/politics/healthcare/3999795-report-documents-sharp-increase-in-violence-at-abortion-clinics}; \textit{Betsy Woodruff Swan, Alito Said \emph{Dobbs} Would Lower the Temperature. Instead, It Fanned the Flames of Abortion Extremism}, POLITICO (June 24, 2023, 1:13 PM EDT), \url{https://www.politico.com/news/2023/06/24/abortion-extremist-violence-dobbs-00103539}.} But Chief Justice Roberts was not simply discussing the Justices’ security needs. By identifying the Court that decided \emph{Dobbs} with courts enforcing \emph{Brown}, Chief Justice Roberts sought to rehabilitate the authority of the Court that reversed Roe and to discredit citizens protesting its decision.\footnote{See supra note 38.}

In much the same way, \emph{Dobbs}’s claims on \emph{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 \emph{Dobbs} diminishes if we consider aspects of \emph{Dobbs}’s relation to \emph{Brown} that the Court does not recount. We begin that process as we recognize that \emph{Dobbs} justifies overruling Roe through methods of interpreting the Fourteenth Amendment that defenders of segregation employed to attack \emph{Brown}.

\emph{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.\footnote{See infra Section II.B.} To justify overruling Roe, the Court introduced a method of determining history and tradition in the substantive due process line of cases that had not been used in decades, a method of determining tradition that tied tradition’s meaning to the deep past: The Court counted state practice at the time of the Fourteenth Amendment’s ratification—arrayed in an appendix for emphasis\footnote{See \textit{Dobbs}, 142 S. Ct. at 2285-97.}—and declared that America was a nation with a tradition of banning abortion. \emph{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.”\footnote{Id. at 2248-49.} (The count is incorrect.\footnote{See \textit{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 twelve of the twenty-eight states on the majority’s list actually continued the centuries-old, common-law tradition of permitting pre-quickening abortions”). [YLJF essay]}

The Court also claimed that “[t]his overwhelming consensus endured until the day \emph{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.”

Counting states in accordance with laws enacted in 1868 seems on the face of it to tie constitutional meaning to objective 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 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* to *Obergefell*.

And it is this very feature of the Court’s reasoning in *Dobbs* that can be traced to constitutional conflicts over segregation. Counting state laws segregating education at the time of the Fourteenth Amendment’s ratification was prominently, popularly, and repeatedly asserted to insulate segregation from constitutional oversight in the era of *Brown*. In this history, we see the elements of method and justification *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 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, neutral, and impersonal, free of an interpreter’s value judgments. 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. The debate over segregation illustrates that these claims about interpretive method were hardly trans-substantive and impersonal; they were responses to shifts in legal and political culture and drenched in the interpreters’ values. 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.

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 the very elements of

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45 *Dobbs*, 142 S. Ct. at 2253.
46 381 U.S. 479 (1965).
47 *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).
48 I make no effort to establish that this was the first time this mode of argument was employed—although 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.
49 *See infra* Section II.A.
50 *See infra* note 127 and accompanying text.
Dobbs's method that ties 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\(^5^1\) emphasized “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 . . . .”\(^5^2\) Notwithstanding the evidence of segregation's harm to children introduced by NAACP lawyers Thurgood Marshall, Robert Carter, and Spottswood Robinson,\(^5^3\) the federal court refused to hold that segregation was itself a violation of equal protection:

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

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

> When 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,

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\(^5^2\) Id. at 532 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

\(^5^3\) *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 *2 (“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.”).*

\(^5^4\) 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, EPISCOPALIANS AND RACE 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.”).
it is a late day to say that such segregation is violative of fundamental constitutional rights.55

Custom, legislation, and the Court’s own decisions established the Constitution’s reach. Parker invoked *Lochner v. New York*56 to counsel judges against reaching into the 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.”57

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.

John 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. 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. During the argument of *Briggs*,58 Davis waved away a suggestion from Justice Harold Burton that “the Constitution is a living document”59 and a question from Justice Felix Frankfurter about whether the meaning of equal might be “fluid.”60 Davis countered the Justices’ suggestion that the requirements of equal protection might change in history by insisting instead that the language of the Constitution should be read as fixed by the understandings of those who ratified it.61 He found that meaning in the decision of the Congress that proposed the Fourteenth Amendment to maintain segregated schools in the District of Columbia62 and in a tally of states: “Of those thirty ratifying states, 23 either then or had, or immediately installed, separate schools for white and coloured children.”63 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,64 Davis urged the Supreme Court to count states

55 *Briggs*, 98 F. Supp. at 537.
56 198 U.S. 45 (1905).
59 Id. at 332 (statement of Justice Burton).
60 Id. at 332 (statement of Justice Frankfurter).
61 Id. at 331 (statement of John Davis).
62 Id. at 331, 333 (statement of John Davis).
63 Id. at 333 (statement of John Davis).
64 See supra notes 55-57 and accompanying text. See also *Briggs*, 98 F. Supp. at 534.
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.

South Carolina’s brief highlighted state practice during Reconstruction, including an appendix collecting all state provisions mandating school segregation existing at the time the Amendment was ratified or enacted shortly thereafter, and emphasizing the importance of respecting “[l]ocal self-government in local affairs” in a federated system.

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?”

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. The state’s brief on reargument included further discussion of state practice at the time of ratification, including state-count evidence in various subcategories. During

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65 Brief for Appellees at 15-16, Briggs v. Elliott, 347 U.S. 483 (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.”).
66 Id. at 47-50.
67 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, at *51 (“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.”); id. at 21 (“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?”).
68 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 65 (quoting brief counting states that segregated schools in 1868), Justice Frankfurter requested his clerk Alexander Bickel to research congressional debates on the question. When the Court could not reach 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 RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION, 618-19, 656-57 (2004).
69 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 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).
70 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; non-ratifying 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 the public schools, id. at 44. See also id. at 48 (summarizing state-counting results).
Brown’s reargument, other states put forth similar state-counting arguments. These included Virginia, Delaware, and Kansas.

It is remarkable how directly the Brown opinion—written in ordinary language for the public and in terms designed to avoid arousing the South—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,” and, going farther, rejected the very argument that the Court should base its decision on the original understanding and expectations of the Fourteenth Amendment’s ratification: “In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted,” 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 premise that understandings at the time of the Fourteenth Amendment’s ratification should decide segregation’s constitutionality, Southerners turned 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 99 Senators and Representatives condemning the Court’s decision in Brown, argued that Brown was contrary to the intentions of the Fourteenth Amendment’s framers. Counting states that imposed school segregation in 1868 featured prominently in their argument. A historian of the Manifesto has shown that the Manifesto’s 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.”

71 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.”).
72 Brief for Petitioners at 26, Gebhart v. Belton, 347 U.S. 483 (1954) (No. 10) (“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.”).
73 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).
74 Cf. David J. Garrow, The Civil Rights Era: 1946 to 1963, in THE AFRICAN AMERICAN ODYSSEY 105-21 (DEBRA NEWMAN HAM, ED., 1998); id. at 108 (“The Brown decision was brief, powerful, and purposely incomplete.”).
75 Brown, 347 U.S. at 489.
76 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 the 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” in Brown).
77 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 78-84 and accompanying text.
78 Day, supra note 13, at 88.
The Constitution does not mention education. Neither does the Fourteenth Amendment. The debates preceding the submission of this Amendment clearly show that there was no intent that this Amendment should affect the systems of education maintained by the states.

The very Congress which proposed the Amendment 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 either approved the operation of segregated schools in existence or subsequently established them by the same law-making body which considered the Fourteenth Amendment.79

The Manifesto shaped the language of massive resistance. In its wake, appeals to original “intent” and framers’ “intent” circulated widely in politics legitimating opposition to Brown, as historians have observed80—by seeming to shift the argument away from race.81 Precisely as the Warren Court rejected original understanding as the ground on which to interpret equal protection,82 critics of the Warren Court’s desegregation decisions embraced original intent as a rallying cry of resistance.

While claims on original understanding as one of many ways to interpret the Constitution have existed for centuries,83 claims that the original understanding is the only proper way to interpret the

81 See generally TerBeek, supra note 80, 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.”).
82 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. See id. at 9 (“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 problem, that although . . . historical sources ‘cast some light’ they are not sufficient to resolve the problem; [a]t best, they are inconclusive.” (alteration in original) (quoting Brown)).
83 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.”).
Constitution, and a ground for attacking the Court’s decisions, took shape in the decades after Brown. 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—specially, 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.”

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 reasoning from 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 on original intent, backed by counts of state practice at the time of the Fourteenth Amendment’s ratification, was 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.

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 William Rehnquist’s dissent in Roe. As the campaign against Brown declined in legitimacy, Justice Rehnquist drew on

84 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).
85 Dobbs, 142 S. Ct. at 2254 (emphasis added).
86 See Terbeck, supra note 80 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. Debates about gender concerned gender, but they also provided an outlet for concerns about race that were no longer safe to openly express”) (citation omitted).
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, suggesting the Court’s decision impermissibly intruded in 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. “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. “By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion.” While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today.”

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. Consider the evidence. Only the year before the publication of his Roe dissent, Rehnquist’s confirmation vote was engulfed in debate when news surfaced of a memo Rehnquist had written as a clerk to Justice Robert Jackson during the 1952 Term arguing that segregation was constitutional and that Plessy “was right and should be affirmed.” His memo, titled “A Random Thought on the Segregation Cases,” did not employ state-counting but did focus on John Davis’s and Thurgood Marshall’s oral argument in Briggs and defended Plessy as the court in Briggs had, suggesting that a decision striking down segregation would be illegitimate like Lochner.

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88 Id.
89 Id. at 174-75 & n.1 (enumerating state laws).
90 Id. at 175-76 & n.2 (enumerating state laws).
91 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, 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 prolif movement itself did not begin to speak through originalist frames until the 1980s. See infra note 107 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 at 57, Roe, 410 U.S. 113 (No. 70-18) (“If it be true that 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.”).
94 In his memo, then-clerk Rehnquist wrote:
This memo was introduced in 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. Rehnquist’s confirmation crisis helped make clear that it was no longer acceptable for persons seeking federal office to openly criticize Brown or to defend Plessy. 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. Prominent historians have concluded that the memo expressed Rehnquist’s own views, and that this and other confirmation conflicts 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—counting 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

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 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 92. 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 34; Jamal Greene, The Anticanon, 125 HAV. L. REV. 379, _ (2011).


Snyder & Barrett, supra note 95, at 632-33.

Snyder, supra note 96, at 436-48; Snyder & Barrett, supra note 95; Kluger, supra note 68, 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-more-doubt-on-rehnquist.html. 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 (observing that Rehnquist served as chief counsel for Senator Goldwater’s presidential campaign and “was the person who persuaded Goldwater to vote in 1964 against the Civil Rights Act”).
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 anti-abortion 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 the attack on original intent to abortion and other culture war topics, including bussing and affirmative action. The attack on Roe played a central part in the Reagan administration’s originalism. 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.

On the Constitution’s bicentennial Attorney General Meese provoked a famous debate with Justice William 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, yet associated with conservative outcomes in all of them. Following key points of Justice Rehnquist’s dissent in Roe, Meese identified Griswold and Roe as contrary to a jurisprudence of original intention and associated Griswold and Roe 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 prohibiting segregation was an illegitimate intrusion on the sovereign prerogatives of states. The Justice Department’s publications emphasized the virtues of originalism in comparison

99 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 (2nd 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 Regan 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.

100 See SIEGEL, supra note 2, at 1148-69.


102 See Edwin Meese III, Att’y Gen., U.S. Dep’t J., Address to the American Bar Association 7 (July 9, 1985) (transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf) (“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.”).

103 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). For Justice Brennan’s objections to the jurisprudence of original intention and his defense of evolving constitutional interpretation, see supra note 24 (quoting speech and a related decision).

104 See supra notes 87-91 and accompanying text.

to theories of evolving constitutional meaning exemplified by Griswold and Roe.106 When the Reagan 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.108 The administration’s brief calling for Roe’s reversal concluded in an appeal to the framers’ intention and state counting.109 Thereafter Professor James S. Witherspoon published Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment,110 with numerous counts of state law keyed to 1868 that Dobbs would cite in support of its claims.111

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 Bowers112 which employed state counting in 1868 to show that protections for same-sex sex were outside the nation’s history and traditions.113 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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106. See OFF. OF LEGAL POL’Y, U.S. DEP’T OF JUSTICE, 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. OF LEGAL POL’Y, U.S. DEP’T OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION iii-v, (1988). The Constitution in 2000 emphasized to readers that progress on the “social issues” “depended on electing presidents who would nominate judges with attention to “judicial philosophy,” that is, to debates between “strict interpretation vs. liberal 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 and notes. 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).

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

108. Brief for the United States as Amicus Curiae in Support of Appellants, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379), 1985 WL 669705, at *24-29 (“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.’”).

110. 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 & n.28, 40 & n.29, 42 & n.34.

111. Dobbs v. Jackson Women’s Health Organization, 142 S. Ct. 2228, 2052-53 & nn.33, 34 (2022). Witherspoon is one of several histories in which anti-abortion advocates widely rely. See e.g., Siegel, supra note 2, at 1189-90 & n.236. See also Alliance for Hippocratic Medicine v. FDA, No. 2:22-CV-223-Z, 2023 WL 2825871, at *18 (N.D. Tex. Apr. 7, 2023) (citing the Witherspoon article for the proposition that “thirty of thirty-seven states had statutory prohibitions in 1868—just five years before Congress enacted the Comstock Act.”).


113. 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
The Supreme Court well might 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; 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.115

During the three decades Justice Kennedy served, the Court never looked to the practices or expectations of the Constitution’s ratifiers to restrict the development of substantive due process law. Throughout his time on the Court, Justice Kennedy again and again opposed Justice Scalia’s efforts to impose a standard of this kind, instead embracing a dynamic understanding that approached tradition in substantive due process cases as what Justice Harlan famously called “a living thing.” Appeal to state laws in 1868 as a proxy for the original understanding—invoked by Justice Rehnquist in his *Roe* dissent and Justice White in *Bowers v. Hardwick*—played no role in deciding a substantive due process case during Justice Kennedy’s tenure on the Court. It was only after President Donald 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 employed this method to reverse *Roe*.

**Part 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 it, *Dobbs* broke with the dynamic understanding of history and tradition that guided the Court in *Griswold, Casey, and Obergefell*, and instead identified protected liberties through an understanding of history and tradition focused on the Constitution’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. Before *Dobbs*, no substantive due process in the Union” at the time the Fourteenth Amendment was ratified. *Id.* at 192-93; see also *id.* at 193-94 (explaining that “until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia” continue to do so). In *Bowers*, Justice White did not emphasize original intent; 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” that to argue that such a right is deeply rooted).

114 In 1971, Robert Bork drew on Herbert Wechsler’s critique of *Brown* to fashion a critique of *Griswold* as lacking a neutral principle and unethered from the Constitution’s text and history. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (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 106, at 143 (citing Bork’s article to support the proposition that “the 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”); Keith Whittington, *The New Originalism*, 2 GEO. J.L & PUB POLY 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).

115 See *Siegel, supra* note 2, at 1166-67 & n.139 (drawing on primary and secondary sources).

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

117 See *supra* note 138 and accompanying text.

118 See *supra* notes 43, 85 and accompanying text.
case employed state-counting in 1868 to identify unenumerated rights that are “deeply rooted in this Nation’s history and tradition” other than Bowers, a case that the Court reversed as mistaken in its account of the nation’s history and traditions of protecting liberty.\(^{119}\)

This Part examines the reasons Dobbs gave for replacing the prevailing standard, which viewed the nation’s history and traditions as evolving, with a standard that viewed the nation’s history and traditions as fixed in the past. 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 should enjoy.”\(^{120}\) 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,”\(^{121}\) 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 . . . .”\(^{122}\) Just as defenders of segregation invoked Lochner to warn the Brown Court against interfering with the legislative prerogatives of the states,\(^{123}\) 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.”\(^{124}\)

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 state’s freedom of self-government. Fidelity to original understanding would constrain the Justices from acting on their values, and thus protect democracy in the states.

Part II probes the Court’s claim that its use of history constrains expression of the Justices’ values. (Part III will examine 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 an apparently objective and impersonal standard that counts state practice in 1868 can conceal, yet express, rather than constrain, 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

\(^{119}\) See supra Section I.B. For Bowers’s discussion of “those liberties that are ‘deeply rooted in this Nation’s history and tradition,’” see Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (citations omitted). But see Lawrence v. Texas, 539 U.S. 558, 571 (2003) (“[T]he historical grounds relied upon in Bowers are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”). For discussion of the history-and-tradition cases after Bowers, see infra Section I.B.

\(^{120}\) Dobbs, 142 S. Ct. at 2247.

\(^{121}\) Dobbs, 142 S. Ct. at 2247-48 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

\(^{122}\) Dobbs, 142 S. Ct. at 2248 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) and citing Lochner v. New York, 198 U.S. 45 (1905)).

\(^{123}\) See supra notes 56-57, 94-94 and accompanying text.

\(^{124}\) Id. at 2247.
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**

Did *Dobbs*’s embrace of a standard defining history and traditions as fixed in the distant past prevent interpreters from reasoning from their values? The history this Essay has examined shows 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.

Recall that in the fight over segregation, segregation’s defenders initially appealed to *Plessy*, and then buttressed their appeal to stare decisis and custom with an argument that the Court should adhere to the original understanding of the Equal Protection Clause, as revealed by the number of legislatures that had enacted laws segregating schools at the time they ratified the Fourteenth Amendment. What did this appeal to the practices, expectations, and intentions of states ratifying Fourteenth Amendment’s *add to* arguments from stare decisis and custom on which equal protection cases before *Brown* focused? In the simplest sense, it shifted the argument about segregation’s constitutionality away from the value of segregation itself and focused it on the question whether the Constitution gave judges authority to rule in the *Brown* decision.

And defenders of segregation chose a particular way of analyzing 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. 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 understanding. Perhaps most fundamentally, the standard entrenched the status-based

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125 See supra Section I.A.
126 Cf. Siegel, *How “History and Tradition” Perpetuates Inequality*, supra note 15, at 901 (2023) (“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.”)
127 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*, 98 F. Supp. at 534. All eleven Confederate states were represented in that seventeen-state count, constituting around 65% of the total. 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 74%. See LIB. OF CONG., SECESSION, UNITED STATES (2011), https://www.loc.gov/rr/geogmap/placesinhistory/archive/2011/20110314_secession.html (identifying Confederate 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,
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 that segregation’s defenders choose to interpret the Equal Protection Clause was anything but neutral. 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.

As it became increasingly unacceptable to defend segregation on the terms it was in the era of Brown, those seeking to preserve traditional ways of life abstracted away from the defense of segregation itself to focus on “original intent” as the root of the Constitution’s meaning and authority. Original intent offered a shorthand for describing all that was wrong with Brown. By the 1970s Justice Rehnquist and Robert Bork showed how original intent—with or without state-counting—could be deployed to attack new targets, each appealing to the Constitution’s ratification in condemning Griswold and Roe. 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—even though the Department had no method or historical evidence to support these claims. The Reagan Administration 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. Across these cases, the Reagan administration and its allies disparaged


Calvin Terbeek discusses this dynamic. See supra note 81 and accompanying text.

See supra notes 87-90, 114-115 and accompanying text. In these examples, Rehnquist and Bork each appealed to Lochner; 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.

See supra Section IB; see generally Whittington, supra note 114, 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.”) (citation omitted); see also SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 110 (2007) (“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.”).

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 Department’s claims simply rested on conservative political beliefs.”) (citation omitted); id. at n.199 (observing that “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”).

See Siegel, supra note 2, at 1163 & nn.129-30.
evolving understandings of the Constitution’s meaning—the very approach Brown symbolized—and claimed that original intention was a neutral arbiter of the Constitution’s meaning.\textsuperscript{133}

These claims did not go unanswered. The administration’s critics replied that, rather than tethering the Constitution to objective and impersonal standards, appeals to original intent expressed the interpreters’ values and amounted to a disguised practice of living constitutionalism. In 1985, Professor Laurence Tribe observed that the Meese Justice Department was invoking “original intent” to discredit decisions opening public life to the equal participation of members of historically excluded groups, suggesting 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.\textsuperscript{134}

\textbf{B. Dobbs’s Use of State Counting in 1868 to Reorient History-and-Tradition Doctrine}

To justify overruling \textit{Roe}, the Court introduced a method of determining history and tradition in substantive due process cases that the Court had not used in \textit{Roe, Casey, Lawrence,\textsuperscript{135} Obergefell—\textsuperscript{136} or even in Washington v Glucksberg,\textsuperscript{137} the very decision Dobbs invoked to justify reversing \textit{Roe}. Griswold, Roe, Casey, Lawrence, and Obergefell reasoned about traditions as living and evolving, as Justice Harlan famously reasoned in \textit{Poe v. Ullman\textsuperscript{138}}—not static or fixed in the past. \textit{Glucksberg} itself recognized \textit{Casey} and the abortion right as within America’s history and traditions of liberty,\textsuperscript{139} though Dobbs never

\textsuperscript{133} See supra notes 102 and accompanying text; Section I.B.
\textsuperscript{134} Laurence H. Tribe, \textit{Who’s 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 130(arguing 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 \textit{The Constitution in 2020}, at 25-34 (Jack M. Balkin & Reva B. Siegel, eds., 2009).
\textsuperscript{135} 559 U.S. 558 (2003).
\textsuperscript{137} 521 U.S. 702 (1997).
\textsuperscript{138} 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); id. at 493-94 (Goldberg, J., concurring); id. at 495; id. 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); id. 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 24.
\textsuperscript{139} \textit{Glucksberg} was decided only five years after the Court reaffirmed \textit{Roe} in \textit{Casey}. In \textit{Glucksberg}, the majority asked for a “careful description” of the asserted fundamental liberty interest. 521 U.S. at 721. At the same time, the majority—which Justice Kennedy joined—specifically cited \textit{Casey}’s abortion right as within America’s history and traditions and thus “specifically protected” by the Due Process Clause. Id. at 710 (“We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.” (citing \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, 505 U.S. 833, 879-50 (1992))); id. 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 \textit{Casey}, 505 U.S. at 851)). See also Siegel, supra note 2, at 1182 n.213.
acknowledged this. To rewrite Glucksberg’s own account of the nation’s history and traditions of liberty, Dobbs employed a method of determining tradition that the Court had not used in any of these prior due process cases. Dobbs justified reversing Roe by identifying the nation’s history and traditions derived from a list of laws banning abortion in 1868, primarily arrayed in an appendix to the opinion.140

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.141 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 attentive to the Constitution’s evolving meaning could not).142

Considered in this context, it should be clear that Dobbs’s interpretation of the Constitution was not objective, impersonal, or “neutral,” as Justice Kavanaugh repeatedly emphasized.143 Dobbs rejected understandings of living tradition that guided the Court’s decisions in Griswold, Casey, Roe, Casey, and Obergefell —and that the Senate invoked in rejecting Judge Bork’s nomination for the Supreme Court144—and employed a method of 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 values. Justice Kennedy was appointed in the wake of Judge Bork’s defeat, he and Justice Scalia debated how to interpret the liberty guarantee for decades; and Kennedy prevailed in rejecting such a backwards-facing standard in favor of a dynamic interpretation of the Constitution’s liberty guarantee which he defended until he retired and was replaced by a President who promised to reverse Roe through his appointments.145 The Court refashioned by President Trump chose a standard that equated the meaning of the Constitution’s

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140 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 supra note 64 and accompanying text.

141 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 (discussing the hybrid character Dobbs’s reasoning); Siegel, supra note 2, at 1141-44, 1170-73 (discussing academic commentary on Dobbs); see also infra note 166 and accompanying text (discussing Professor Sherif Girgis’s views of the opinion as “living traditionalism”).

142 See supra Section I.B. For additional discussion of the fusions between originalism and traditionalism, see infra note 166 and accompanying text.

143 See Dobbs, 142 S. Ct. at 2305-10 (Kavanaugh, J., concurring) (invoking neutrality 13 times); infra note 177 (quoting Justice Kavanaugh discussing the Constitution’s neutrality on abortion).

144 Writing as the Chair of the Senate Judiciary Committee, Senator Joseph R. Biden invoked Justice Harlan’s famous dissent in Poe v. Ullman and then concluded that our Constitution is a “living” one. Comm. on the Judiciary United States Senate, Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court, 100th Cong. 1st Sess., No. 100-7, at 15-16, 98 (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, NPR, (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 (reporting that President Trump’s nominee, then-Judge Amy Barrett, refused to answer questions about Griswold).

145 See Siegel, supra note 2, at 1176-77.
liberty guarantee with laws enacted in 1868—laws enacted at time when men barred women from voting.

The debate between Justice Kennedy and Justice Scalia over the proper method of identifying the history and traditions that should guide interpretation of the Constitution’s liberty guarantee reveals the values guiding choice of method. 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.¹⁴⁶

In 1992, in Planned Parenthood v. Casey,¹⁴⁷ a court expected to reverse Roe instead decided to the 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.” Reasoning from this dynamic understanding of liberty, Casey repeatedly invoked contemporary concerns about sex equality as justifying its decision to reaffirm the abortion right.¹⁴⁸ In its most savagely mocked passage, 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.”¹⁴⁹ In so reasoning, the Court engaged in an act of transformative inclusion that said, women—even in respect of 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 matters could not define the attributes of personhood were they formed under compulsion of the State.”¹⁵⁰

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.”¹⁵¹ In support of this tradition-preserving standard he

¹⁴⁶ See, e.g., Akhil Reed Amar, Anthony Kennedy and the Ghost of Earl Warren, SLATE (Jul. 6, 2015, 4:17 PM), https://slate.com/human-interest/2015/07/obergefell-v-hodges-anthony-kennedy-continues-the-legacy-of-earl-warren.html (“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, The Supreme Court, 2012 Term—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.” (footnote omitted)).


¹⁴⁸ 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)))

¹⁴⁹ Casey, 505 U.S. at 851.

¹⁵⁰ Id.

¹⁵¹ Casey, 505 U.S. at 980 (Scalia, J., dissenting).
appealed to a footnote in his opinion in *Michael H. v. Gerald D*\(^{152}\) that only he and Chief Justice Rehnquist joined—and that discussed Bowers’s count of states in 1868\(^{153}\)—for the proposition that “in defining ‘liberty,’ we may not disregard a specific, ‘relevant tradition protecting, or denying protection to, the asserted right.’”\(^{154}\)

Scalia suggested that a tradition-preserving standard of this kind constrained his preferences, whereas disparagingly he asserted that “the Court does not wish to be fettered by any such limitations on its preferences.”\(^{155}\) But Scalia was choosing how to be bound. “The selection of a level of generality necessarily involves value choices.”\(^{156}\) His choice of standards helped vindicate his opposition to abortion. (Justice Scalia was as hostile to the abortion right—he compared abortion to bigamy\(^{157}\)—as the authors of the Southern Manifesto were hostile to *Brown*.) Justice Scalia singled out for special contempt the passage of the joint opinion that protected a pregnant women’s autonomy to decide her life’s course.\(^{158}\)

These attacks provoked the *Casey* Court expressly to repudiate Justice Scalia’s efforts to tie the meaning of liberty to a static 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.”\(^{159}\) In support of its dynamic interpretive approach, the *Casey* Court cited a string of cases, proudly leading with *Loving v. Virginia*\(^{160}\)—an opinion in which the Warren Court struck down laws prohibiting racial intermarriage on both due process and equal protection grounds.\(^{161}\)

This same debate between Justice Kennedy and Justice Scalia recurred in *Obergefell*. Kennedy again emphasized the importance of a dynamic interpretation of the Constitution’s liberty guarantee in protecting equal citizenship, reading the Constitution’s liberty guarantee as a responsibility delegated to future generations and cautioning, as the introduction of this Essay recounts, “The nature of

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\(^{152}\) 491 U.S. 110 (1989).

\(^{153}\) *Michael H.*, 491 U.S. at 127 n.6.

\(^{154}\) *Casey*, 505 U.S. at 981 (Scalia, J., dissenting) (quoting *Michael H.*, 491 U.S. at 127 n.6).

\(^{155}\) Id. at 981.


\(^{157}\) *Casey*, 505 U.S. at 980 (Scalia, J., dissenting). Justice Scalia made scant effort to filter out his views about the conduct at issue. Lawrence v. Texas, 539 U.S. 558, 588 (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.”).

\(^{158}\) 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.’”). 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. Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

\(^{159}\) Id. at 987 (citing *Michael H.*, 491 U.S. at 127-28 n.6 (opinion of Scalia, J.)).

\(^{160}\) Id. (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

\(^{161}\) *Loving*, 388 U.S. 1.
injustice is that we may not always see it in our own times." Scalia 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. 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." Justice Scalia's argument that the Fourteenth Amendment's meaning should be fixed in light of its ratifiers' practices and expectations concealed a practice of interpretation no less dynamic than Justice Kennedy's. Scalia may have talked about his commitment to following original meaning, but—as Casey and Obergefell illustrate—at critical junctures Scalia restricted the great promises of the Fourteenth Amendment to the laws, practices, expectations and intentions of Americans living one hundred and fifty years ago. As his dissents in the due process cases illustrate, Scalia would shift from arguments

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162 See supra text at notes 27-30. On equality values in Obergefell, see Laurence H. Tribe, Equal Dignity: Speaking Its Name, 129 HARV. L. REV. 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.”). 163 Obergefell v. Hodges, 576 U.S. 644, 715-16 (2015) (Scalia, J., dissenting) (footnote omitted). On Justice Scalia’s continuing focus on original expectations and traditional practices, see infra notes at 23, 165-166 and accompanying text. 164 Id. at 717 (Scalia, J., dissenting). 165 For Justice Scalia’s claim to follow original meaning, see Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in ORIGINAL MEANING SOURCEBOOK, supra note 106, at 106 (noting that he "ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning."); 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."). But as the quoted passage of Obergefell illustrates, Justice Scalia did not in fact change his ways. See JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 158 (2005)(“Originalists responded tactically by de-emphasizing the word *intent*, though of course not the jurisprudential approach associated with it”) (emphasis in original); JACK M. BALKIN, LIVING ORIGINALISM 7 (2011)(“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 to be applied.”). For another example of Justice Scalia’s focus on original expectations and practice see Scalia: Abortion Cases are ‘Easy’, POLITICO (Oct. 5, 2012, 5:49 AM EDT), https://www.politico.com/story/2012/10/scalia-says-abortion-gay-rights-are-easy-cases-082060 (reporting that at the American Enterprise Institute, in 2012, Justice Scalia 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”).
that construed text in light of original expectation and practice to arguments suggesting that interpretation of the Constitution had to respect tradition as a good in itself.166

And, as has been widely observed, Justice Scalia’s opinions invoked original understandings only intermittently. He, too, was interpreting a living Constitution, whose outlines were visible in the selective way he applied his method. In United States v. Virginia, decided a few years after Casey, 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.167 Yet at the time of Casey and Virginia, Scalia had already argued in a passionate dissenting opinion devoid of originalist reasoning that the Equal Protection Clause protected white men from affirmative action,168 and would go on to—without originalist justification—treat corporations as persons deserving of speech protections from campaign finance restrictions.169 The selectivity of Justice Scalia’s originalist methods expressed his values.170

Dobbs counted state laws in 1868 to produce the constitutional memory of America as an abortion-banning nation. Its interpretive method aligned with Justice Scalia’s dissent in Obergefell, and before it, the objections of Southerners engaged in massive resistance against Brown—restricting the meanings of the Fourteenth Amendment’s great commitments to the expectations and practices of nineteenth-century Americans. Yet members of the Dobbs majority only interpret the Constitution in this backward-looking way when it expresses their values.171 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.172 Had the Court employed more dynamic methods of ascertaining our national

166 See Sherif Girgis, Living Traditionalism, 98 N.Y.U. L. REV. (forthcoming) (draft as of Aug. 13, 2023) (manuscript at 37-39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366019 (observing that originalists have supported “living traditionalism,” that is, opinions interpreting the Constitution in light of post-ratification 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.

167 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 (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”).

168 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 steps the debate over the ratifiers’ understanding, and focuses instead on the race neutrality he believes is owed to white men. Croson, 488 U.S. at 527.


170 See Siegel, supra note 2, at 1167-69.

171 For a demonstration of this claim, see Siegel, How “History and Tradition” Perpetuates Inequality, supra note 15.

172 See supra Section II.A.
traditions and, critically, consulted a more democratically-inclusive array of authorities, 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 protection for decisions about reproduction and intimate life under both the Thirteenth and Fourteenth Amendments.

In sum, *Dobbs* is not simply pointing to objective facts that compel a constitutional outcome but instead is employing a method that advances its values—reaffirming the prerogative of localities to revive old carceral traditions without federal constitutional interference. Counting states that banned abortion in 1868 was not a neutral or objective 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.

**Part 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. As *Dobbs* repeatedly argued, overruling *Roe* promoted democracy. This conception of democracy as

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173 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)).


175 See Franklin & Siegel, *supra* note 174, at (“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)).

176 See *supra* notes 121-124 and accompanying text.

177 See, e.g., *Dobbs v. Jackson Women’s Health Organization*, 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 respect 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 office,” observing 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 36.
unfettered majoritarianism and non-interference is has roots in the fight over segregation—and 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 Blacks and women 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 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. 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.179

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 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.180

Observe that the lifeworld just described bears certain resemblances to the founding era when only small minorities of adults could vote.181 While our constitutional tradition reasons about democracy as unfettered majoritarianism and as a practice requiring certain conditions of participation,182 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

178 See *supra* notes 67 and accompanying text.
179 See *supra* notes 188-188,235-240 and accompanying text.
181 See Dave Umhoefer, POLITIFACT, April 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).
182 See Brennan, *supra* note 24 (“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 also 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 judicial review over time).
Constitution’s provisions were ratified.\textsuperscript{183} 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\textsuperscript{184} 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.\textsuperscript{185} What 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 \textit{Brown} as “democracy reinforcing”—as promoting rather than restricting democracy—demonstrated how judicial review protecting conditions of participation could strengthen and legitimate majoritarian decision making.\textsuperscript{186} Yet because Ely reasoned within the conventions of his time, he failed to grasp that gender hierarchy, no less than racial segregation, can obstruct equal participation necessary to legitimate democracy—and that families, like education, are institutions critical to that participation.\textsuperscript{187}

This understanding is at the root of the equality argument the Court recognized in \textit{Casey} and disparaged in \textit{Dobbs}. \textit{Casey} refused to reverse \textit{Roe}, focusing on how women relied on the right \textit{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.”\textsuperscript{188} Where \textit{Casey} focused on “the real-world social conditions in which women exercise abortion rights, the \textit{Dobbs} Court dismissively waved away real-world concerns about depriving women of constitutional rights as ‘specul[ative]’ 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.’”\textsuperscript{189}

\begin{itemize}
  \item \textsuperscript{183} See, e.g., \textit{supra} note 24 and accompanying text (quoting Justice Brennan on Brown and the sex discrimination cases, and case incorporating the Bill of Rights against the states).
  \item \textsuperscript{184} United States v. Carolene Products Co., 304 U.S. 144, 154 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)).
  \item \textsuperscript{185} See NeJaime & Siegel, \textit{supra} note 34, at 1942-59 (discussing competing conceptions of democracy in order to evaluate arguments advanced in John Hart Ely, \textit{The Wages of a Crying Wolf: A Comment on Roe v. Wade}, 82 YALE L.J. 920 (1973) and \textbf{JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1981)}).
  \item \textsuperscript{186} See Ely, \textit{supra} note 185, at 75-104 (discussing democracy-reinforcing review).
  \item \textsuperscript{187} NeJaime & Siegel, \textit{supra} note 34, 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.”).
  \item \textsuperscript{189} Siegel, \textit{supra} note 2, at 1195 (quoting Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2227 (citations omitted)).
\end{itemize}
Where *Casey*, like *Brown*, vindicated democracy as equal participation, *Dobbs* repudiated equality grounds for the abortion right\(^{190}\) and embraced democracy on the model of *Plessy*, democracy as non-interference.\(^{191}\) 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* choice of exclusionary criteria to define the liberty the Constitution protects and its indifference to bias in the infrastructure of representation suggest the Court’s talk of democracy is a mere excuse to enable legislators to ban abortion.\(^{192}\)

### 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,”\(^{193}\) 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.\(^{194}\)

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.\(^{195}\) And Mississippi’s reputation for obstructing the participation of minorities in the

\(^{190}\) *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, 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.”).

\(^{191}\) For examples of *Plessy*’s defenders invoking federalism, state sovereignty, and majoritarianism as grounds to reserving local control and contesting judicial review over the question whether to enforce racial segregation in the schools, see *supra* note 67 and accompanying text.

\(^{192}\) *Cf.* Murray & Shaw, *supra* note 36, at 31-32.


\(^{194}\) *Id.*

\(^{195}\) See *Women in State Legislatures* 2023, CTR. FOR AM. WOMEN AND POL., https://cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2023#table. Women are grossly underrepresented in state legislatures throughout the country. See Murray & Shaw, *supra* note 36, at 37. Barriers to women’s legislative participation help produce
legislative process remains strong. The state has some of the strictest voting laws in the nation, including a lifetime felony disenfranchisement provision with roots in the era of *Plessy* and Jim Crow, when its framers openly explained their aim “to exclude the Negro.” (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.) Under the state’s restrictions on the franchise, today 16% of Black voting age Mississippians find themselves permanently barred from voting.

This “history and tradition” still shapes life in Mississippi, including the conflict over abortion. The conflict over legislating abortion access in Mississippi is gendered and intensely raced. When the state enacted a 15-week ban in the hopes of encouraging the Court to overrule *Roe*, both women legislators and Black legislators (and especially, Black women legislators) opposed it. Black Mississippi legislators voted against the 15-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, abortion-restrictive regulation in dissonance with public opinion. See Aliza Forman Rabinovici & Olatunde C. A. Johnson, *Political Equality, Gender, and Democratic Legitimation in Dobbs*, 46 HARV. J.L. & GENDER (forthcoming 2023), https://ssrn.com/abstract=4416165.

These include limited access to absentee ballots; no in-person only 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 practice automatic voter registration); and stringent voter identification laws. VOTING RIGHTS LAB, *Mississippi, State Voting Rights Tracker*, https://tracker.votingrightslab.org/states/mississippi.


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/ (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* 40-41 (1990) (quoting James 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”).


Recent polling reflects deep gender divisions in the state’s abortion debate in the states and nationally. See infra note 208.

See infra note 148, at 286.
twenty came from Black legislators.\textsuperscript{203} 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.\textsuperscript{204} 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 Senate\textsuperscript{205} or state House.\textsuperscript{206} 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,\textsuperscript{207} and all three declined to vote for the bill in its final House session.

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 \textit{Dobbs}'s wake reported that Mississippians disagreed with the Supreme Court’s decision to overturn \textit{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 \textit{Roe} by 56\% to 37\% (-19)).\textsuperscript{208}

Despite the public’s response to \textit{Dobbs}, the legislature allowed the state’s more draconian trigger ban\textsuperscript{209} to supplant the 15-week ban the Supreme Court upheld in that case. Living under this near-absolute ban in the year since \textit{Dobbs}, a remarkable 45\% of likely voters in Mississippi’s Republican primary now support \textit{repealing} the trigger ban.\textsuperscript{210}

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 \textit{prevent} its expression: in considering whether to reinstate the state’s initiative process, state legislators

\begin{itemize}
\item \textsuperscript{203} See Mississippi College of Law, Legislative History Project, H.B. 1510, Gestational Age Act (Feb. 2, 2018), https://tinyurl.com/ymcvdbju; Mississippi College of Law, Legislative History Project, H.B. 1510, Gestational Age Act (Mar. 8, 2018), https://tinyurl.com/ymcvdbju; Mississippi College of Law, Legislative History Project, H.B. 1510, Gestational Age Act (Mar. 6, 2018), https://tinyurl.com/ymcvdbju.
\item \textsuperscript{204} Id.
\item \textsuperscript{209} 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.” Act of Jun. 27, 2022, 2007 Miss. Laws Ch. 441, § 2.
\item \textsuperscript{210} Bobby Harrison, \textit{Poll: Mississippi Republican Voters Cool on Abortion Ban}, MISS. TODAY (June 13, 2023), https://mississippitoday.org/2023/06/13/abortion-ban-mississippi-poll/.
\end{itemize}
expressly prohibited questions about abortion in the proposed initiative.211 (In Dobbs’s wake, other states have sought to deny majorities supporting abortion access an opportunity to prevail in referenda, by less forthright means.212) 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.”213

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 those 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 38% of the state’s population,214 Black women accounted for over 77% of its abortion patients in 2020.215 As Professor Khiara 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.216

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.217 In debating the 15-week ban at issue in Dobbs, backers bragged the bill would make

211 Emily Wagster Pettus, Mississippi Senator Kills Initiative Plan, Minus Abortion, AP NEWS (March 23, 2023), https://apnews.com/article/mississippi-ballot-initiative-election-abortion-443d0f2d05ffdb574ab8c72377b90df.
212 Republicans in Ohio attempted to change voting rules in their referendum, once they realized that there was considerably more than majority support for access in the state. See Alice Herman, It Destroys Democracy: Republicans Bid to Rewrite Ohio’s Abortion Rules, THE GUARDIAN (May 23, 2023), https://www.theguardian.com/us-news/2023/may/23/ohio-abortion-rights-republican-ballot-super-majority. 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, THE GUARDIAN (Dec. 19, 2022, 5:00 AM EST), https://www.theguardian.com/world/2022/dec/19/abortion-rights-votes-ballot-initiatives-republican-stop-referendum.
216 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: “overrepresented among Mississippi’s poor,” “more likely than other racial groups to encounter difficulties accessing safe and effective contraception,” and experience a “higher rate of intimate partner violence, sexual assault, and reproductive coercion”).
217 See Siegel, supra note 148 at 318-28 (examining the debate in Louisiana); Cary Franklin, Whole Women’s Health v. Hellerstedt and What It Means to Protect Women, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 223, 232-236 (Melissa Murray, Kate Shaw & Reva B. Siegel eds. 2019) (examining the debate in Texas).
Mississippi, which has the highest infant mortality rate in the nation, “the safest place in the country for unborn babies,” 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 who decide to continue a pregnancy. 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.”

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 would threaten the health and lives of both white and especially Black women. 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. It took continuing political pressure in the year after Dobbs for the Mississippi legislature to extend postpartum coverage from 2 to 12 months for those enrolled in Medicaid.

This course of legislative decision making in Mississippi makes plain the thin sense in which

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218 See Michael Goldberg, Abortion Ruling Means More and Riskier Births in Mississippi, AP NEWS, Oct. 24, 2022, https://apnews.com/article/abortion-health-tate-reeves-greenwood-mississippi-92c59302abe30a8afed74ee5d80b94b3f (“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.”).


225 Id. For background, see Emily Wagster Pettus, Mississippi House Leaders Kill Postpartum Medicaid Extension, AP NEWS (Mar. 9, 2022), https://apnews.com/article/health-mississippi-medicaid-e49dc8dc7b356f593485853ace5458c1
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.” 226 (“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.”227) Mississippi legislators instead are “looking to crisis pregnancy centers as the primary support system for women facing an unplanned pregnancy.”228 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.”229 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: women’s historic disempowerment is expressed in law which, in turn, entrenches women’s disempowerment.

**IV. Conclusion: Dobbs as Plessy**

Stories about abortion policy offer a window on the democratic process that shows 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 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”230—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.” 231 “What we’re asking for here is just a right to life,” one of their organizers emphasized.

227 See Franklin & Siegel, supra note 174, at 16-17 & n.70.
228 Wolfe, supra note 226. 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 222, at 88 & n.90.
230 Id.
231 Id.
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.232 They emphasized the myriad harms that abortion bans inflicted on women, but especially on poor women and women of color.233 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.234

Claimants in the early 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.”235

The Court in Roe and then in Casey responded, in the spirit of Brown, to the ways that inequalities impeded women’s participation.236 But 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 whether state coercion of pregnancy presented questions of equal protection was “squarely foreclosed by [the Court’s] precedents.”237

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.’”238

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

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232 NeJaime & Siegel, supra note 34, at 1924-26.
233 Id. at 1928-29.
234 Id. at 1927; see also id. at 1924.
235 Id. at 1939.
236 Planned Parenthood of Southeastern Pennsylvania 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 34, at 1944-49 (explaining how the Court has come to recognize, in decisions including Casey and Lawrence that control of the family makes political participation possible).
237 Dobbs, 142 S. Ct. at 2235 (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 is 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 222, at 68-69. For an account of equality arguments that Dobbs refused to address, see id.; and Franklin & Siegel, supra note 174.
on society and in particular on the lives of women’’ was something that the ‘‘Court has neither the authority nor the expertise to adjudicate.’’ One can hear echoes of segregation’s defenders dismissing Black Americans’ claims for equality as mere ‘‘sociology,’’ not law.

The voice of Plessy speaks through Dobbs when the Court declares that the Constitution is indifferent and impotent to intervene. We test our Constitution’s character, on this first anniversary of Dobbs and seventieth anniversary of Brown, in calling for Dobbs to meet Plessy’s fate.

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239 Dobbs, 142 S. Ct. at 2227.
240 See supra note 52-57 and accompanying text (discussing the district court opinion in Briggs); see also note 91-98 (discussing Rehnquist’s memo responding to the argument in Briggs).
241 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. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane’’).