

Memory Games: *Dobbs's* Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance

Reva B. Siegel ©
101 TEXAS L. REV. (forthcoming 2023)

Abstract.

This Article examines originalism's role in overruling Roe in Dobbs v. Jackson Women's Health Organization. Through this case study the Article explores competing understandings of originalism. It shows that originalism is not simply a value-neutral method of interpreting the Constitution. Originalism is also a political practice whose long-term goal has been the overturning of Roe. As the conservative legal movement has developed originalism, judicial appointments matter critically to originalism's authority, as do originalism's appeals to constitutional memory to legitimate the exercise of public power. Examining these different dimensions of originalism's authority, the Article shows that the conservative legal movement has practiced originalism as form of living constitutionalism that makes our constitutional order less democratic in several important ways.

To demonstrate how this is so, the Article returns to originalism's roots in the Reagan years and examines originalism's origins in a backlash to the decisions of the Warren and Burger Courts. In 1980, for the first time—and continuously ever since—the Republican Party's platform promised that “[w]e will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.” I examine the family-values politics from which the quest to overturn Roe emerged, the judicial screening practices developed to pursue it, and the talk of law and politics employed to justify it.

The Article reads Dobbs through a double lens. I first consider how originalists have evaluated the originalism of the opinion (some term Dobbs “living constitutionalist”) and then go on to show how Dobbs depends on the appointments politics and constitutional memory claims I have identified as part of the political practice of originalism. Dobbs's living constitutionalism serves contemporary movement goals: the history-and-traditions standard that Dobbs employs to overturn

* “ Nicholas deB. Katzenbach Professor, Yale Law School. I thank readers who commented on the manuscript including Jack Balkin, Emily Bazelon, Khiara Bridges, Steven Calabresi, Nancy Cott, Blake Emerson, Richard Fallon, Robert Gordon, Linda Greenhouse, Laura Kalman, Andrea Katz, Anna Lvovsky, Frank Michelman, Doug NeJaime, Robert Post, Sai Prakash, Daphna Renan, Elizabeth Reese, Noah Rosenblum, Neil Siegel, Aaron Tang, Justin Weinstein-Tull, Katharine Young and participants in the Critical Public Law Workshop, the Harvard Legal History Workshop, and the Yale Law School Faculty Workshop. And I am grateful for the research assistance of Gustavo Berrizbeitia, Bardia Faghihvaseghi, Jim Huang, Alex Johnson, David Herman, Danny Li, Emma LeBlanc, Jake Mazeitis, Jessica Quinter, and Malina Simard-Halm.

Roe threatens many of the same lines of cases targeted for reversal by the architects of originalism in the Reagan Administration.

The deepest problem with Dobbs, however, is that its originalism is living constitutionalism that makes our constitutional order less democratic. Dobbs restricts and threatens rights that enable equal participation of members of historically marginalized groups; Dobbs locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies; and Dobbs presents its contested value-judgments as expert claims of law and historical fact to which the public owes deference. A concluding Part focuses on constitutional memory as a terrain of constitutional conflict and begins to ask questions about how claims on our constitutional past might be democratized, both inside and outside of originalism, in the aspiration to take back the Constitution from the Court.

TABLE OF CONTENTS

INTRODUCTION	4
I. THE PRACTICE OF ORIGINALISM IN THE ACADEMY, IN THE COURTS, AND IN THE EXECUTIVE BRANCH	12
A. THE MANY MEANINGS OF ORIGINALISM	15
B. CONSERVATIVE MOVEMENT-IDENTIFIED ORIGINALISM	18
C. ORIGINALISM’S ORIGINS IN THE EXECUTIVE BRANCH OF THE REAGAN ADMINISTRATION	22
1. Originalism, Abortion, and the “Social Issues” of the New Right	23
2. Originalism and Article II Change Through Judicial Appointments: Abortion as Litmus Test	26
3. Originalism As Strategy for Article II Change by Screening of Judges.....	28
4. How Originalism Legitimated the Screening of Judges.....	32
5. How Originalism Entrenched Status Inequality in a Civil Rights Era	35
II. <i>DOBBS</i>’S ORIGINALISM AS THE RIGHT’S LIVING CONSTITUTION	43
A. HOW <i>DOBBS</i> DEPENDS ON HARDBALL APPOINTMENTS POLITICS	50
B. MEMORY GAMES: HOW <i>DOBBS</i> READS “FAMILY VALUES” INTO NINETEENTH-CENTURY LEGAL MATERIALS	54
1. Replacing an Evolving Standard of Liberty with a History-and-Traditions Standard.....	55
2. Applying <i>Dobbs</i> ’s History-and-Traditions Standard.....	58
III. PATHWAYS OF RESISTANCE: DEMOCRATIZING VOICE	67
A. CHANGING WHO TALKS ABOUT ORIGINALISM, AND HOW	71
B. CONTESTING ORIGINALIST CLAIMS ON CONSTITUTIONAL MEMORY: RECOVERING EXCLUDED VOICES	73
CONCLUSION	77

INTRODUCTION

The Supreme Court has reversed many cases. But never has the Court reversed a right that the Court itself had justified as important to a group's equal participation "in the economic and social life of the Nation."¹ And *no* case retracting a marginalized group's equal-participation rights earns respect in the constitutional canon.²

This Article examines originalism's role in targeting *Roe v. Wade*³ and legitimating its reversal in *Dobbs v. Jackson Women's Health Organization*.⁴ To make that case, it is first critical to clarify that originalism is not only a method of interpreting the Constitution; originalism is also a politics whose longstanding goal has been reversing *Roe*. This goal was so important that during the Court's deliberations in *Dobbs*, originalists were threatening to break with the movement and embrace a more openly values-based method if the Court did not overturn *Roe*.⁵ The Article offers an account

¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives"); *see also* *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) ("A woman's right to make [the choice whether to end her pregnancy] freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all."). In *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923), the Court related its decision striking down the minimum wage to changes "in the contractual, political and civil status of women, culminating in the Nineteenth Amendment," but did not claim that invalidating sex-based protective labor legislation would facilitate women's equal participation in the market or other spheres of democratic life. *Id.* at 553.

² In 1990, the Supreme Court held that laws of general applicability burdening the free exercise of religious minorities would no longer be subject to close scrutiny and its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which prompted widespread objection and the passage of the Religious Freedom Restoration Act. *See, e.g.*, Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 *YALE L.J.* 408, 425–27 (2018).

³ 410 U.S. 113 (1973).

⁴ 142 S. Ct. 2228 (2022).

⁵ *See, e.g.*, Nathanael Blake, *If the Supreme Court Whiffs on Abortion, They'll Blow Up the Conservative Legal Movement*, *FEDERALIST* (Dec. 7, 2021), <https://thefederalist.com/2021/12/07/if-the-supreme-court-whiffs-on-abortion-theyll-blow-up-the-conservative-legal-movement/> [<https://perma.cc/57HA-ETZW>] ("Because originalism demands that *Roe* be overturned, pro-lifers have enthusiastically supported originalist nominees . . . and voted for the Republican politicians who nominate and confirm originalists. This will be vindicated if the originalist justices do their duty and overturn *Roe*, but many conservatives are concerned there are too many imposters and cowards among the originalist ranks."); *id.* ("If [originalists] follow the law and Constitution as written, then challengers to originalism, such as common-good constitutionalism, will shuffle back to the fringes. But if conservative legal elites break their word, then all hell will break loose."); *see also* Josh Blackman, *#FedSoc2021 and Dobbs*, *REASON: VOLOKH CONSPIRACY* (Nov. 13, 2021, 3:54 PM), <https://reason.com/volokh/2021/11/13/fedsoc2021-and-dobbs/> [<https://perma.cc/87FN-QU6F>] ("For five decades, the conservative legal movement has germinated from a primary objective:

of originalism as a political practice as well as a method, and examines the forms of hard (state) and soft (storytelling) power that the political practice of originalism employs. On this account, executive branch appointments politics matter critically to originalism's authority, as do originalism's appeals to constitutional memory to legitimate the exercise of public power.⁶

The Article examines the birth of originalism in the Reagan Administration, and through this history, shows how originalists who are identified with the conservative legal movement have pursued constitutional change: through specialized judicial appointment practices designed to achieve movement-party goals and through constitutional memory work that can justify a new court's doctrinal innovations as restoring the Framers' Constitution.⁷ Examining *Dobbs*'s roots in early originalism helps explain why the Court reversed *Roe* in *Dobbs*, and how. A Supreme Court that the Republican Party composed by a series of norm-busting appointments practices immediately thereafter changed several bodies of law to decide *Dobbs*.⁸ Rather than overturn the abortion right incrementally, and narrowly, and endeavor to reaffirm the equal citizenship of those whose rights the Court was abrogating, the *Dobbs* Court defined women's liberties in terms of nineteenth-century norms under a new history-and-traditions standard that upended a half-century of abortion law and threatened many other rights, transforming protected liberties in ways that make our constitutional order less democratic.⁹ Both the standard and its application clash with modern constitutional law, which is what the history-and-traditions standard and its application are designed to do. The *Dobbs* Court appealed to the past—claiming to restore the Constitution of 1868—in order to enforce a family-values backlash against decisions of the Warren, Burger, Rehnquist, and Roberts Courts, overturning a half century of abortion rights and discrediting many more.¹⁰

overruling *Roe*. . . . If six members of the Court, who arose in this movement, cannot overrule *Roe*, then the movement will be deemed a failure for [many.]; Joe Patrice, *Law School Professors Shocked to Learn Originalism Just an Empty Shell for Right-Wing Political Outcomes*, ABOVE THE LAW (Nov. 15, 2021, 3:01 PM), <https://abovethelaw.com/2021/11/law-school-professors-shocked-to-learn-originalism-just-an-empty-shell-for-right-wing-political-outcomes/> [https://perma.cc/DXR5-623U] (“If originalists can’t deliver Republican party policy under the guise of unimpeachably clear reading on the Founders’ intent, then the conservative movement will happily move on to a theory that does.”).

⁶ On the concept of constitutional memory, see Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL’Y 19, 21 & n.5 (2022).

⁷ See *infra* subpart I(C).

⁸ See *infra* subpart II(A), section II(B)(1).

⁹ See *infra* subpart II(B), Part III.

¹⁰ Compare *infra* section I(C)(4), with subpart II(B).

Now that movement-identified originalists can be expected to control the Supreme Court for a very long time,¹¹ it is critical that we renew conversations about what originalism is and what it might portend for the nation. Is there one originalism or might there be many, and what might be at stake in distinguishing among the forms of its practice? For these same reasons, it is now urgent that we attend to the many kinds of arguments from constitutional memory in our constitutional tradition, inside and outside of courts. It is time we focus, carefully, on the ways that arguments from constitutional memory can be deployed in the service of rights deprivation. And it is time we begin to explore some ways that arguments from constitutional memory might be deployed in resistance. This Article aims to provoke and enable these very different conversations, for the short- and the long-term—wherever the seeds of tomorrow might be found.

Originalists claim that there are compelling reasons for interpreting the Constitution in backwards-facing ways. Originalist methods are said to promote the values of (1) democracy¹² and (2) judicial constraint. The late Justice Antonin Scalia wrote in *Originalism: The Lesser Evil* that looking to history “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”¹³ Justice Scalia argued that originalism provides judges objective, value-neutral methods by which they can decide cases without regard to their own personal commitments. The originalist claims that judges employing originalist methods promote the separation of law and politics. This Article probes these claims.

Originalism took shape as a value-laden, goal-oriented politics in the Justice Department of the Reagan Presidency before originalism was elaborated as a presumptively value-neutral method of interpretation in the legal academy.¹⁴

¹¹ See Ian Ayres & Kart Kandula, *How Long is a Republican-Nominated Majority on the Supreme Court Likely to Persist?*, BALKINIZATION (July 3, 2022), <https://balkin.blogspot.com/2022/07/how-long-is-republican-nominated.html> [<https://perma.cc/GK2U-XBA4>] (estimating that a Republican-nominated majority will continue for at least several decades).

¹² See Edwin Meese III, *Our Constitution's Design: The Implications for Its Interpretation*, 70 MARQ. L. REV. 381, 387 (1987) (“A judge acts properly . . . when he or she looks at the relevant written constitutional provision and enforces it according to its plain words as originally understood. Thus, the judge properly . . . enforces the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue.”); see also Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5, 8, 10 (1988).

¹³ 57 U. CIN. L. REV. 849, 864 (1989).

¹⁴ In speaking of “originalism,” I am not referring to modalities of constitutional interpretation whose genealogy might be traced to the early Republic. I am discussing a movement that began to take institutional shape in the Reagan Administration, which was called “originalism” in 1980, and whose members subsequently embraced the name. See, e.g., Randy E. Barnett, *Scalia Restored Right to Bear Arms*, USA TODAY (Feb. 17, 2016, 8:27 AM), <https://www.usatoday.com/story/opinion/2016/02/17/randy-barnett-antonin-scalia-new->

Originalism began and has continued over the decades as an executive-branch based strategy of constitutional change—a strategy for criticizing and changing constitutional case law through judicial appointments justified through frames of constitutional restoration.¹⁵

Originalists can legitimate partisan appointments as embodying fidelity to law through a special set of claims about restoring the Founders' Constitution. When originalists called for constitutional change as constitutional restoration, they were tapping into a fundamental set of beliefs about the difference between politics and law. President Reagan could address voters transactionally—politically—by promising to appoint judges who would deliver the results the voters wanted (enforce law and order and end abortion, bussing, and quotas).¹⁶ Originalism offered a way of talking about the “philosophy” of judges selected by this litmus test as committed to enforcing the Framers' law. How was this alchemy possible? Appealing to the Founders' Constitution invoked understandings about authority and identity that are rooted in the Nation's creation story. A claim on *constitutional memory* transmuted politics into law.¹⁷

originalism-heller-second-amendment-column/80450446/ [https://perma.cc/SQ76-3VKT]. See *infra* subpart I(C).

¹⁵ See *infra* subpart I(C). I described this dynamic in earlier work. My last account of originalism depicted the practice taking shape in the Meese Justice Department as a strategy of constitutional change focused on judicial appointments justified through frames of constitutional restoration. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 219–22 (2008) [hereinafter Siegel, *Dead or Alive*]. This paper built on two others. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1347 (2006) [hereinafter Siegel, *Social Movement Conflict and Constitutional Change*] (“Originalism, in other words, is not merely a jurisprudence. It is a discourse employed in politics to mount an attack on courts. Since the 1970s, originalism’s proponents have deployed the law/politics distinction and the language of constitutional restoration in the service of constitutional change—so successfully that, without Article V lawmaking, what was once the language of a constitutional insurgency is now the language of the constitutional establishment.”); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006) (“The current ascendancy of originalism does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement. We argue that originalism’s current appeal cannot be understood unless the jurisprudence of originalism is distinguished from the political practice of originalism.”). I returned to these themes in Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 28 (2013) [hereinafter Siegel, *2012 Term Foreword*] (explaining that the Justice Department under Meese changed course and accepted *Brown* by “associat[ing] the original meaning of the Equal Protection Clause with the colorblind Constitution”).

¹⁶ See *infra* sections I(C)(2)–(3).

¹⁷ See Siegel, *supra* note 6, at 21 & n.5 (“We could describe constitutional memory as a form of collective memory forged through constitutional interpretation.”).

Originalists mobilized this law–politics code to address some of the great democratic struggles of the late twentieth century. Originalism offered a new mode of talking about conflicts that were increasingly fraught in a civil rights era.¹⁸ Originalism supplied a coded language for an emerging coalition of Americans interested in electing Presidents who would appoint judges to enforce law and order, and end abortion, bussing, and quotas to restore the Framers’ law—forging a juggernaut politics that, like family values, could appeal to race, sex, sexuality, and religion without seeming to say so.¹⁹

Originalism turns to the past in search for authority whose claim on the collective imagination is powerful enough to displace—and ultimately to kill off—rival claims on the collective imagination. Originalism tells stories about “We the People” that have the power to discredit other stories about “We the People”—the stories that gave life to decisions of the Warren and Burger Courts.²⁰ Originalism is at once jurigenerative and jurispathic, making and killing law.²¹ In some settings originalism can enforce its will with the force of the state. Even when it cannot, it is continuously vying for authority to redefine the center and the periphery of our constitutional order—in ways that tend to amplify the Constitution’s democratic deficits.

Originalism has power to amplify the Constitution’s democratic deficits in at least three ways—all of which this Article will show are vividly exemplified by the Supreme Court’s decision in *Dobbs* overturning the abortion right and threatening other fundamental rights.²² First, from its inception, originalism attacked a variety of

¹⁸ By the 1980s discussion of race is coded, and often displaced. *See, e.g., infra* note 81 and accompanying text; *infra* note 91.

¹⁹ *See infra* section I(C)(1).

²⁰ Benedict Anderson famously described nations as “imagined communities” that give people a sense of “history, place, and belonging.” BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6–7 (2006). These constructions of the nation’s past are the object of perpetual contest.

²¹ *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (“[I]t is the thesis of this Foreword that the creation of legal meaning—‘jurisgenesis’—takes place always through an essentially cultural medium.”). A jurispathic court selects among legal traditions, declares law, and kills or tries to destroy the rest. *See id.* at 53; *cf.* Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623 (1999). Explaining how a judge’s role in deciding a case is jurispathic, Professor Snyder observes:

When a judge faces a question in which legal meaning is contested, therefore, the problem is not, as is usually said, that there is a “gap” in the law or that the law is ‘unclear.’ Rather, there is simply too much law—a host of meanings competing for recognition. Under this view, the judge does not “make” law to fill a gap, but rather plucks one existing meaning from the host available. The role of the judge therefore is purely negative. It is “jurispathic,” or law-killing, in the sense that the judge will select one of the squalling brood of conflicting legal meanings to elevate and to enforce with the violence of the state—and will slay the rest.

Id. at 1624 (footnote omitted).

²² *See infra* Part III.

rights that opened democratic life to more broad-based participation.²³ Second, even when originalism is not seeking to kill rights that open democratic life to more broad-based participation, originalist interpretive methods tend to amplify the Constitution's democratic deficits. This is because originalism (1) locates democratic authority in *imagined communities of the past* (2) about which originalism reasons in *lawmaking stories that entrench norms, traditions, and modes of life associated with old status hierarchies*, even when that is not the object (which it too often seems to be).

Third, originalism's claims on constitutional memory too often present the interpreter's value judgments about the law as seemingly objective and expert claims of historical fact to which the public owes deference. Originalists disdain living constitutionalism, yet practice living constitutionalism by expressing contested values as claims about the nation's history and traditions, as I have demonstrated²⁴ and this Article will again show in the *Dobbs* case. Originalist judges ventriloquize historical sources. This mode of reasoning is a deeply antidemocratic mode of constitutional interpretation, not because it appeals to the past, but because it denies its own values as it is doing so.

Dobbs provides a fresh opportunity to engage with all these features of originalist argument. In part, this is because the stakes are so high—the Court seized the attention of the nation and of the world by overruling *Roe* and threatening other fundamental rights²⁵—and in part it is because the *Dobbs* opinion provides such a graphic illustration of originalist constitutional memory games at work.²⁶

Dobbs is a radical opinion. *Dobbs* may be full of “history and tradition” talk, but the Court does not exhibit respect for the history and traditions of the last half century, demonstrate Burkean concern for preserving the status quo,²⁷ or even reaffirm the

²³ For a discussion on *The Constitution in the Year 2000* tying judicial nominees' originalist philosophy to “social issues” of the New Right, listing first the rights of criminal defendants, abortion, gay rights, disparate impact/affirmative action, and religious liberty, see *infra* section I(C)(4). For originalism's roots in the attack on *Brown v. Board* and the interracial marriage decisions, see *infra* note 119.

²⁴ See *supra* note 15.

²⁵ See *Thousands Protest End of Constitutional Right to Abortion*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/live/2022/06/24/us/roe-wade-abortion-supreme-court> [<https://perma.cc/JUU8-9ZWY>] (documenting the protests that swept the nation following the release of the *Dobbs* decision); Natasha Ishak, *In 48 Hours of Protest, Thousands of Americans Cry Out for Abortion Rights*, VOX (June 26, 2022, 4:00 PM), <https://www.vox.com/2022/6/26/23183750/abortion-rights-scotus-roe-overturned-protests> [<https://perma.cc/8CWM-HP4E>] (same); Jen Kirby, *Why America's Allies Are Worried About the End of Roe*, VOX (June 30, 2022, 2:00 PM), <https://www.vox.com/23186751/roe-supreme-court-europe-world-reaction/> [<https://perma.cc/52WT-N8C3>].

²⁶ See *infra* section II(B)(2).

²⁷ See *infra* note 170 and accompanying text (discussing Professor Cass Sunstein's observation that because originalism “calls for dramatic movements in the law,” it is “unacceptable” to those with Burkean commitments).

equal membership of those whose rights the Court is abrogating. After an opening paragraph in which Justice Alito speaks as a judge capable of internalizing competing perspectives,²⁸ the majority takes off its gloves and gets to work making the movement case for demolishing *Roe*. *Dobbs* overturns *Roe* with undisguised expressions of contempt for the precedent,²⁹ despite the Court's undoubted awareness that this right is of central significance to American women of every age and of all walks of life.

The opinion performs its history-and-traditions analysis with the energies of movement-identified judges achieving a goal long sought by Team Originalism. Justice Alito's disparaging dicta on equal protection—his anxious effort to undermine the authority of an equal protection claim that was not even in the case—was couched in this same movement-inflected language.³⁰

²⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022).

²⁹ *E.g., id.* at 2240–41, 2243, 2245, 2249, 2265.

³⁰ In *Dobbs*, Justice Alito asserted that equal protection was not an independent ground for abortion rights even though he knew that there was no equal protection claim in the case. (Judge Carlton Reeves pointed out that the plaintiffs had amended their complaint to drop their equal protection challenge to Mississippi's statute. *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 538 (S.D. Miss. 2018)). Justice Alito pointed to an amicus brief arguing that abortion rights are grounded in equal protection as well as liberty and said that the brief's arguments were “squarely foreclosed by our precedents.” *Dobbs*, 142 S. Ct. at 2245 (citing Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340072 [hereinafter Brief of Equal Protection Constitutional Law Scholars]). See generally Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. (forthcoming 2023) (explaining arguments of equal protection brief).

While the Court could not rule on equal protection claims in the *Dobbs* case, the idea that the Court could kill future equal protection claims by an unargued sentence fragment, “squarely foreclosed by our precedents” (1) in an opinion that never bothered to address a single equal protection case in the brief it was citing and (2) in a case that was *overturning fifty years of abortion rights law* was more than startling in its spitefulness. What does the phrase “squarely foreclosed by our precedents” mean when it is asserted under *those two conditions*? Justice Alito threw in a cite to *Geduldig v. Aiello*, 417 U.S. 484 (1974), which as a source provided by the brief pointed out, the Court had not cited in a half century, Brief of Equal Protection Constitutional Law Scholars, *supra*, at 11 (citing Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. (NINETEENTH AMENDMENT EDITION). 167, 189–211, 208 n.229 (2020)). Given that the brief's cases and arguments—which the Court never mentioned—showed that *Geduldig* has been superseded by later equal protection sex discrimination cases, the Court's citation to *Geduldig* was designed to provoke. It was an argument from power, not reason, and a succinct expression of the opinion's repudiation of women's rights. Justice Alito's fidelity to pregnancy discrimination precedent from a half-century ago, before the rise of sex discrimination law, was a fitting prelude to a decision that overturned a half century of substantive due process law—by tying the meaning of the due process liberty guarantee to laws enacted in 1868.

While Justice Alito's tone suggests he might well prefer it if women had the rights they possessed at the time of the Fourteenth Amendment's ratification, other members of the *Dobbs* majority

It is this movement energy that courses through *Dobbs*'s veins—not a commitment to give a balanced accounting of America's history and traditions. Given the Court's dicta on equal protection, it seems not accidental that *Dobbs* justifies *Roe*'s overturning in maximal ways that not only threaten other fundamental rights, but that seem designed to call into question women's equal standing in the polity. The Court justified depriving women of abortion rights by defining women's constitutionally protected liberties in terms of laws enacted in the mid-nineteenth century, a time when women were without voice or vote in the political process.

Another not-so-veiled attack on women's equal membership appears in the Court's discussion of women's reliance interests—interests that were the precise locus of equality reasoning in *Casey*.³¹ *Dobbs* disparaged women's reliance interests in a right concerning childbearing that the Court had recognized for a half century by describing that interest as “novel and intangible” and advised that courts were institutions better suited to protect “concrete reliance interests . . . in ‘cases involving property and contract rights.’”³² We the People ratified the Constitution to “secure the Blessings of Liberty to ourselves and our Posterity,”³³ but the *Dobbs* Court deemed unworthy of a court's consideration the health, relational, or dignitary interests of persons bearing children. No case in United States Reports directed the Court to restrict the Constitution's guarantee of liberty in this way.³⁴

It is not possible to make sense of how radically *Dobbs* transformed our constitutional law—or the tone in which it did so—without locating the decision in a larger twentieth-century framework. This Article begins a much-needed historical accounting.

may respond differently to equal protection claims involving pregnancy in a future case—for example, if medical personnel are chilled from providing care in the shadow of abortion bans. See Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. (forthcoming 2023, manuscript at 47-50), available at <https://ssrn.com/abstract=4152472>; Kate Zernike, *What Does ‘Abortion’ Mean? Even the Word Itself is Up for Debate*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/us/abortion-roe-debate.html> [<https://perma.cc/7PXN-CCPD>]; *Bleeding and in Pain, She Couldn't Get 2 Louisiana ERs to Answer: Is It a Miscarriage?*, NPR, Dec. 29, 2022, <https://www.npr.org/transcripts/1143823727>.

³¹ See *supra* note 1 and accompanying text.

³² *Dobbs*, 142 S. Ct. at 2276. Distinguishing and disparaging the reliance interests recognized in *Casey*, the *Dobbs* Court observed:

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women.

Id. at 2277.

³³ U.S. CONST. pmbl.

³⁴ See *infra* subpart II(B).

The Article's analysis of the Court's originalism is not conventional. But *Dobbs* is not a conventional judicial performance. To do the decision justice, I have tried to sketch a rudimentary account of the institutional framework in which the abortion right was abolished after a half century.

* * *

Because it is more common in the legal academy to discuss originalism as a (value-neutral) interpretive method than as a politics, I begin in subparts I(A) and I(B) by sampling some of the everyday language and practices used to distinguish and coordinate originalism as an interpretive method and goal-oriented political practice. In subpart I(C), I examine originalism's roots as the political practice of the conservative legal movement in the executive branch of the Reagan Administration. In this history we can recognize the movement practices and goals that give shape to the *Dobbs* opinion.

In Part II of the Article, I show how understanding originalism as a political practice helps make sense of the *Dobbs* decision. I read *Dobbs* through a double lens. I first consider how originalists have evaluated the originalism of the opinion and then go on to read *Dobbs* in historical perspective, showing how *Dobbs* is the expression of the forms of hard and soft power I have identified as part of the political practice of originalism. Subpart II(A) shows how *Dobbs* is the product of hardball appointments politics, and subpart II(B) shows how in *Dobbs* the new majority forges doctrine to achieve the conservative legal movement's twentieth-century goals. *Dobbs*'s claims on constitutional memory serve the ends of living constitutionalism: the history-and-traditions standard that *Dobbs* fashions to overturn *Roe* threatens many of the same lines of cases targeted for reversal by the architects of originalism in the Reagan Administration.

Part III demonstrates that *Dobbs* is a living constitutionalist decision that exacerbates the democratic deficits of our constitutional order in three distinct and important senses. *Dobbs* restricts and threatens rights that enable equal participation of historically marginalized groups. *Dobbs* locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies. And *Dobbs* presents its contested value judgments as expert claims of law and historical fact to which the public owes deference. This concluding Part focuses on constitutional memory as a terrain of constitutional conflict and begins to ask questions about how claims on our constitutional past might be democratized, in arguments unfolding both inside and outside of originalism and inside and outside of courts.

I. THE PRACTICE OF ORIGINALISM IN THE ACADEMY, IN THE COURTS, AND IN THE EXECUTIVE BRANCH

What is originalism? Originalist methods are said to promote the values of (1) democracy³⁵ and (2) judicial constraint. On this view, originalism is a value-neutral interpretive method—that method of constitutional interpretation that aspires to insulate adjudication from politics. That was the view that Justice Scalia staked out in *Originalism: The Lesser Evil*, where he argued that looking to history “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”³⁶

For decades now, critics have challenged originalism’s claims about the nature of interpretation, its claim to deliver constraint as well as its claim to stand at a distance from politics.³⁷ Despite decades of critique, originalism has flourished in the legal academy where it is much more likely to be debated as a method of interpretation

³⁵ See Meese III, *supra* note 12, at 387 (“A judge acts properly . . . when he or she looks at the relevant written constitutional provision and enforces it according to its plain words as originally understood. Thus, the judge properly . . . enforces the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue.”).

³⁶ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Not all originalists embrace Justice Scalia’s positivism. For example, Professor Randy Barnett argues that the Constitution is to be interpreted in light of a presumption of liberty. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 5 (2004) (proposing that such a presumption of liberty would “provide a practical way to restore the lost Constitution”).

³⁷ As Professor Mitch Berman observed the state of play in 2009, “*Plus ça change, plus c’est la même chose*. While proponents declare originalism to be dominant, indeed inescapable, critics marvel that anyone takes it seriously.” Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 4 (2009). A vast and wide-ranging literature exists on originalism. See, e.g., *id.* at 93–94 (showing that movement-identified originalists are committed to “strong originalism”—the view that original meaning is the only proper target of judicial interpretation—and arguing that claims for strong originalism rest on claims about “the very nature of interpretation or on what is entailed by a commitment to binding constitutionalism [that] are fallacious”); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) (“The very changes that make the New Originalism theoretically defensible also strip it of any pretense of a power to constrain judges to a meaningful degree.”); Neil S. Siegel, *Jack Balkin’s Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 MICH. L. REV. 931, 932 (2013) (book review) (“Balkin does not seem to register the potential consequences of turning to ‘originalism’ given how long the term has been associated in public debates with a conservative political practice. . . . [Turning to originalism] would risk lending unintended support to the ongoing fruits of conservative originalism”); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 716 (2009) (“[O]riginalism satisfies certain demands—for ease of explication, for the appearance of value-neutrality, for diverting power from social and political elites, and for divesting our constitutional politics of foreign influence”); Jamal Greene, *On the Origins of Originalism*, 88 TEXAS L. REV. 1, 86 (2009) (“The originalism movement is connected to a set of political commitments. We need not guess at what those commitments are.”). For some of my own contributions to this literature, see Post & Siegel, *supra* note 15; Siegel, *Dead or Alive*, *supra* note 15. For work at the time Justice Scalia wrote, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L. J. 1085 (1989). For a recent history of debates over originalism in different eras from the founding to the present, see ERIC J. SEGALL, ORIGINALISM AS FAITH (2018).

(however flawed) than it is to be discussed as a political practice.³⁸ As Logan Sawyer recently observed, “[r]ight now, there are two separate histories of originalism. One examines originalism in the academy and emphasizes the way principled argument has shaped the theory’s development. A second has investigated originalism’s political history. It highlights how the theory has responded to conservative political interests.”³⁹ This history of originalism as a goal-oriented conservative political practice is predominately located in the disciplines of history and political science.⁴⁰

³⁸ Erwin Chemerinsky has recently published a book-length attack on originalism as a method of interpretation, which notes its origins in the 1980s and discusses the claims of Attorney General Edwin Meese and Judge Robert Bork, but in the course of criticizing originalist method does not discuss its political history or practice. See ERWIN CHEMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022).

³⁹ Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198, 199 (2017) (footnotes omitted) (first citing Post & Siegel, *supra* note 15; then citing Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869 (2014); and then citing Dawn E. Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 HARV. L. & POL’Y REV. 239 (2007)); see generally Sawyer, *supra*, at 203–06 (discussing the influence of the 2006 Post & Siegel article investigating “originalism as a political practice”).

⁴⁰ Historians and political scientists have chronicled the history of modern originalism as a political movement. See, e.g., KEN I. KERSCH, *CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM* (2019); JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* (2016); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008) [hereinafter TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT*]; JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005); Steven M. Teles, *Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment*, 23 STUDS. AM. POL. DEV. 61 (2009) [hereinafter Teles, *Transformative Bureaucracy*]; Calvin TerBeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021); Paul Baumgardner, *Originalism and the Academy in Exile*, 37 LAW & HIST. REV. 787 (2019). As Logan Sawyer observes, some in the legal academy analyze originalism from this historical vantage point as well. See *supra* note 39.

There is also a group of historians of the Founding Era and of Reconstruction who have critiqued originalism’s methodology and historical claims. See, e.g., ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019); JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE CONSTITUTION IN THE FOUNDING ERA* (2018); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (Vintage Books 1st ed. 1996); Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321 (2021); Saul Cornell, *Reading the Constitution, 1787-91: History, Originalism, and Constitutional Meaning*, 37 LAW & HIST. REV. 821 (2019); Saul Cornell, “*To Assemble Together For Their Common Good*”: *History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 FORDHAM L. REV. 915 (2015); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015); Helen Irving, *Outsourcing the Law: History and the Disciplinary*

I note this fascinating disciplinary divide in the history of originalism as an invitation for readers in law to consider the many different ways that we have of talking about originalism, and to observe the ways that talk of originalism as an interpretive method may come along with talk of originalism as a political affiliation.

In subpart I(A), I briefly sample conversation about the leaked draft of the *Dobbs* opinion to illustrate that, even as talk about originalism as a family of interpretive methods appears to predominate in law, it coexists with other modes of talk about originalism as a movement-identified, goal-oriented political practice. Subpart I(B) examines a few networks and institutions that connect and coordinate academic and judicial practitioners of originalism who identify with the conservative legal movement and the Republican Party. Subpart I(C) examines the historical roots of these relationships. It returns to the beginnings of originalism in the executive branch of the Reagan Administration to explain certain familiar features of the political practice of originalism, and to identify features of the practice that help shape the *Dobbs* case.

A. *The Many Meanings of Originalism*

When Justice Alito's draft of the *Dobbs* opinion leaked, the *Wall Street Journal* was quick to celebrate *Justice Alito's* originalist triumph.⁴¹ On Twitter, law professors debated whether the leaked draft was in fact originalist. Georgetown Professor Larry Solum tweeted out that because Alito's leaked draft opinion focused on "historical practice," it was in fact a "living constitutionalis[t]" decision.⁴² As the debate raged on, Professor Joseph Fishkin argued that even if the draft was "completely uninterested in what academic originalists care about, the original public meaning of the words of

Limits of Constitutional Reasoning, 84 FORDHAM L. REV. 957 (2015); Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969 (2015); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011).

⁴¹ David J. Garrow, *Justice Alito's Originalist Triumph*, WALL ST. J. (May 4, 2022, 6:51 PM), <https://www.wsj.com/articles/justice-alitos-originalist-triumph-supreme-court-draft-opinion-constitution-abortion-roe-v-wade-justices-11651695865> [https://perma.cc/LD4J-SRBE] ("Justice Samuel Alito's draft opinion in *Dobbs v. Jackson Women's Health Organization* represents the auspicious culmination of the conservative legal movement, which has fundamentally transformed U.S. constitutional interpretation over the past quarter-century.").

⁴² Lawrence Solum (@lsolum), TWITTER (May 5, 2022, 6:33 AM), <https://twitter.com/lsolum/status/1522162603291643904> [https://perma.cc/92YZ-CUT4]; cf. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006) (contending that Scalia "is willing to avoid objectionable outcomes that would result from originalism by invoking the precedents established by the dead hand of nonoriginalist justices," such that "[w]here originalism gives him the results he wants, he can embrace originalism" and "[w]here it does not, he can embrace precedent that will").

constitutional text,”⁴³ “[t]here is a ton of evidence—good evidence according to OPM methodology—that the ordinary meaning of the word ‘originalism’ today is not academic originalism. Instead, basically, ‘originalism’ means conservative traditionalism. It means exactly what Alito is doing in [*Dobbs*].”⁴⁴

It took an intervention from outside the academy to insist that originalism concerned more than an interpretive method. Josh Hammer, a Claremont-trained⁴⁵ *Newsweek* editor who styles himself a “common good originalist”⁴⁶ and a “national conservative,”⁴⁷ recently promoted by chapters of the Federalist Society,⁴⁸ intervened in this debate with a post entitled *Manly Originalism*.⁴⁹ In it, Hammer contemptuously called out the academics who were tweeting about originalism as a value-neutral method as elitist, effete fakes, “abortion apologists,” and practitioners of “soyoriginalism.”⁵⁰ He was most contemptuous of the idea, floated by some on Twitter,

⁴³ Joseph Fishkin (@joeyfishkin), TWITTER (May 13, 2022, 2:27 AM), <https://twitter.com/joeyfishkin/status/1524999866694258689> [<https://perma.cc/GD9Z-P3UY>].

⁴⁴ Joseph Fishkin (@joeyfishkin), TWITTER (May 13, 2022, 2:27 AM), <https://twitter.com/joeyfishkin/status/1524999871006052352> [<https://perma.cc/MA65-Z9JT>].

⁴⁵ 2018 *John Marshall Fellows*, CLAREMONT INST., <https://www.claremont.org/page/2018-john-marshall-fellows/> [<https://perma.cc/43W6-4AZ8>]. Judge Kathryn Kimball Mizelle, who recently struck down the CDC’s mask mandate in *Health Freedom Defense Fund Inc. v. Biden*, No. 8:21-cv-1693, 2022 WL 1134138 (M.D. Fla. Apr. 18, 2022), was a John Marshall fellow the year before Hammer. 2017 *John Marshall Fellows*, CLAREMONT INST., <https://www.claremont.org/page/2017-john-marshall-fellows/> [<https://perma.cc/R2J2-PQFF>].

⁴⁶ Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J. L. & PUB. POL’Y 917, 921 (2021), <https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2021/06/Hammer-Common-Good-Originalism.pdf> [<https://perma.cc/A7GW-V69Z>].

⁴⁷ Josh Hammer, *The Only Path Forward Is National Conservatism*, AM. CONSERVATIVE (Nov. 5, 2021, 12:01 AM), <https://www.theamericanconservative.com/articles/the-only-path-forward-is-national-conservatism/> [<https://perma.cc/W2FL-KP9L>] (“Common good originalism overtly and unapologetically places its interpretive thumb on the scale of the telos—the overarching substantive orientation—of the American regime.”).

⁴⁸ E.g., *Debating Originalism and the Common Good*, YALE L. SCH., <https://law.yale.edu/yls-today/yale-law-school-events/debating-originalism-and-common-good> [<https://perma.cc/SJ44-CGPZ>] (posting for a panel discussion at Yale Law School featuring Josh Hammer and Adam Mortara); *A Conversation with Adam Mortara and Josh Hammer*, FEDERALIST SOC., <https://fedsoc.org/events/a-conversation-with-adam-mortara-and-josh-hammer> [<https://perma.cc/8BNZ-FZLL>] (event at The University of Chicago Law School); *Federalist Society Small Dinner with Josh Hammer*, FEDERALIST SOC., <https://fedsoc.org/events/federalist-society-small-dinner-with-josh-hammer> [<https://perma.cc/UH9V-GQGM>] (event with the Colorado Lawyers Chapter of the Federalist Society).

⁴⁹ Josh Hammer, *Manly Originalism*, AM. MIND (May 19, 2022), <https://americanmind.org/features/a-human-event/manly-originalism/> [<https://perma.cc/FD36-BCR4>].

⁵⁰ *Id.*

that originalist methods could support abortion rights. *Manly* originalists understood that the “Constitution cannot, and should not, be twisted to favor abortion.”⁵¹

Hammer attacked from outside the academy. Yet, in expressing a movement-identified and goal-oriented understanding of originalism, he spoke as part of the conservative legal movement and not from its fringe. Hammer was giving voice to the very understandings that led originalists identified with the conservative legal movement—inside and outside the academy—to threaten the Court that it must overturn *Roe*, or they would defect for a more openly values-based branch of the conservative legal movement.⁵²

Debate over the leaked *Dobbs* draft illustrates certain ambiguities and deep stabilities in originalism’s meaning. Despite fierce disagreements, the law professors all understood originalism as an interpretive method. They debated whether originalism referred only to the textualist-based original public meaning method of interpretation or also included traditions-based analysis of the *Glucksberg*⁵³ variety; but no one questioned that originalism was a method of interpreting the Constitution. It took Hammer’s entry from outside the professoriate to accuse the law professors of a category error. *Soyoriginalism* is an interpretive method. Originalism—*manly* originalism—is a values-based, goal-oriented political practice that begins in a condemnation of abortion and seeks the reversal of *Roe*.

Yet even if Hammer expressed himself confrontationally, he posed a question that ran to the very core of the practice. Was the commitment to values and goals some *new* innovation within originalism—a feature of Hammer’s “common good

⁵¹ *Id.* In an earlier post with natural law professor Hadley Arkes, Hammer announced his determination to wrench back control of originalism from any confused claims of “hollow positivism” and emphasized that originalism was “directed to substantive ends.” Hadley Arkes, Josh Hammer, Matthew Peterson & Garrett Snedeker, *A Better Originalism*, AM. MIND (Mar. 18, 2021), <https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism> [<https://perma.cc/HG52-ERGT>] (“A truly conservative jurisprudence and politics today that threatened actually to be effective in conserving good political order would say and do what its vicious opponents will no doubt describe as ‘radical,’ ‘extremist,’ and ‘fascist.’ So be it.”).

After *Dobbs*, Hammer called for the Supreme Court to read protection for unborn life into the Equal Protection Clause. See Josh Hammer & Josh Craddock, *The Next Pro-Life Goal is Constitutional Personhood*, NEWSWEEK (July 19, 2022, 6:30 AM), <https://www.newsweek.com/next-pro-life-goal-constitutional-personhood-opinion-1725698> [<https://perma.cc/ZQU5-YHVC>] (“But younger conservative lawyers, who gravitate toward a more substantive approach to originalism, see clearly the overarching moral imperative of abortion abolitionism . . . whether the unborn child is not or is a natural person.” (emphasis omitted)); *id.* (“Thank goodness for *Dobbs*. But for our generation of abortion abolitionists, the fight is not over until every unborn child in America is protected by love and by law.”)

⁵² See *supra* note 5 and accompanying text.

⁵³ *Washington v. Glucksberg*, 521 U.S. 702 (1997). For discussion of *Glucksberg* in the *Dobbs* case, see *infra* Part II.

originalism”⁵⁴ allied with its turn to the national conservative movement⁵⁵ or Professor Adrian Vermeule’s common good constitutionalism,⁵⁶ but *not* of the original originalism with its commitment to positivism? Or might the original originalism of the New Right *also* share an underlying commitment to values and goals, as Professor Josh Blackman seemed to be insisting in his posts in the lead-up to the oral argument in *Dobbs*?⁵⁷

There is surely no reason to give Hammer or Blackman authority to define what originalism is. There are many academics who practice originalism as method of constitutional interpretation that aspires to insulate adjudication from politics.

Yet it is equally important to recognize that (1) there are large numbers of originalists in the academy, in politics, and on the bench who are identified with the conservative legal movement that Professor Blackman so enthusiastically describes as overflowing the halls of the Federalist Society meetings, and (2) that the movement understands itself as having an identity and telos—a “substantive moral constitutionalism” to borrow Professor Vermeule’s term.⁵⁸

B. *Conservative Movement-Identified Originalism*

⁵⁴ See *supra* note 46.

⁵⁵ See *supra* note 47.

⁵⁶ See Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/AA6B-M5MC>]. Professor Vermeule called for “a substantive moral constitutionalism . . . not enslaved to the original meaning of the Constitution . . . also liberated from the left-liberals’ overarching sacramental narrative, the relentless expansion of individualistic autonomy”:

This approach should take as its starting point substantive moral principles that conduce to the common good, principles that officials (including, but by no means limited to, judges) should read into the majestic generalities and ambiguities of the written Constitution. These principles include respect for the authority of rule and of rulers; respect for the hierarchies needed for society to function; solidarity within and among families, social groups, and workers’ unions, trade associations, and professions; appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society; and a candid willingness to “legislate morality”—indeed, a recognition that all legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function of authority. Such principles promote the common good and make for a just and well-ordered society.

Id.

⁵⁷ See Blackman, *supra* note 5. Professor Blackman is reporting an argument that many other movement-identified originalists were then having.

⁵⁸ See *supra* note 56.

It would be comforting if we could map the world into discrete domains—university, courts, politics—and describe the types of originalist argument practiced by actors in each domain. But, of course, we know that the networks of the conservative legal movement cut across these domains and complicate the business of characterizing originalist argument in each of these domains. There are certainly persons who engage in originalist argument in the academy who are identified and networked with movement originalists on the bench and in politics—as well as those who are not. These networks and pathways of identification make it hard to separate originalist practice into discrete domains in which academics are wholly distinct from politics or judging.

If we focus for a moment on the networks that connect conservative movement-identified originalists across the domains of academics, judging, and politics, it is possible to see how members of the conservative movement can engage in value-laden, goal-oriented originalist interpretation, without expressly employing that discourse. For example, today originalist academics and judges interact through institutions like Federalist Society and the multiplying originalist classes, such as the bootcamp run by the Georgetown Center for the Constitution⁵⁹ and professors who

⁵⁹ *Originalism Summer Seminar*, GEO. L., <https://www.law.georgetown.edu/constitution-center/originalism-summer-seminar/> [<https://perma.cc/UGS2-LQUE>] (offering a \$1,000 stipend and expenses for completing a week-long bootcamp hosted by the Georgetown Center on the Constitution and led by Randy Barnett and Larry Solum, featuring sessions with some thirteen or fourteen academics and meetings with Justices Gorsuch and Thomas).

The Georgetown Center for the Constitution accepts direct donations. *See Donate*, GEO. L., <https://www.law.georgetown.edu/constitution-center/donate/> [<https://perma.cc/SF5M-PFTL>] (allowing donors to earmark donations to the Center online or by mail). The Center's funders include Donors Trust and the Lynde and Harry Bradley Foundation. *See* DONORS TR., INC., FORM 990: RETURN OF ORGANIZATIONAL EXEMPT FROM INCOME TAX (2019), <https://fm.cnbc.com/applications/cnbc.com/resources/editorialfiles/2021/01/12/2019DTForm990PUBLICDISCLOSURE.pdf> [<https://perma.cc/J8SK-3AL3>] (reporting a gift to the “Georgetown Center on the Constitution at Georgetown University Law Center”); LYNDE & HARRY BRADLEY FOUND., INC., FORM 990-PF: RETURN OF PRIVATE FOUNDATION (2018), https://990s.foundationcenter.org/990pf_pdf_archive/396/396037928/396037928_201812_990PF.pdf [<https://perma.cc/JS7G-883W>] (reporting a gift “[t]o support the Center for the Constitution” at Georgetown University); LYNDE & HARRY BRADLEY FOUND., INC., FORM 990-PF: RETURN OF PRIVATE FOUNDATION (2016), https://990s.foundationcenter.org/990pf_pdf_archive/396/396037928/396037928_201612_990PF.pdf [<https://perma.cc/A3AG-L2ZX>] (same).

lecture clerks at the Heritage Foundation⁶⁰ and Claremont Institute,⁶¹ in which academics network with judges and train their clerks in originalist and textualist method. Georgetown runs a separate special seminar entitled “Originalism for Judges,”⁶² which the school does not seem to advertise in the same location it features its summer seminar for prospective clerks.⁶³ Twenty-one federal judges attended the 2022 seminar, all of whom were appointed by Republican Presidents—including nineteen Trump appointees.⁶⁴ Through these interactions, judges confer prestige on academics, and academics legitimate the practice of judges.

⁶⁰ Josh Blackman, *Heritage 2022 Judicial Clerkship Training Academy*, REASON: VOLOKH CONSPIRACY (Jan. 4, 2022, 8:30 AM), <https://reason.com/volokh/2022/01/04/heritage-2022-judicial-clerkship-training-academy/> [<https://perma.cc/WZD7-KUKZ>]; Heritage Found., *Edwin Meese III Originalism Lecture*, YOUTUBE (Mar. 24, 2022), <https://youtu.be/sN1PcD9yBx0> [<https://perma.cc/9WQB-G788>].

⁶¹ *John Marshall Fellowship*, CLAREMONT INST., <https://www.claremont.org/page/john-marshall-fellowship/> [<https://perma.cc/UPE5-RTW9>] (providing Marshall Fellows \$1,500 honorarium and expenses for seven day of “intensive seminars in American political thought and jurisprudence . . . taught by a core faculty of John Eastman, Ronald J. Pestritto, Vincent Phillip Muñoz, Matthew Peterson, and John Yoo . . . a specific focus on the origins and development of American constitutional jurisprudence,” and explaining that “[t]he John Marshall Fellowship Program is intended for prospective clerks and legal scholars who will have opportunities to educate the judges and Justices with whom they work, and the legal community at large”).

⁶² This Georgetown-funded seminar is offered annually. *See, e.g.*, Mark Joseph Stern (@mjs_DC), TWITTER (July 28, 2022, 12:07 PM), https://twitter.com/mjs_DC/status/1552687208171290626 [<https://perma.cc/SY3G-Z3QA>] (reporting that, “[i]n June, a bunch of Trump judges attended an ‘originalism for judges’ seminar in Sarasota, funded by Georgetown Law” and drawing attention to the seminar disclosure report filed by Judge Menashi of the Second Circuit); Steven James Menashi, *Privately Funded Seminar Disclosure Report*, U.S. CTS. (Oct. 11, 2022), <https://psds.uscourts.gov/seminar.fwx?mode=pubpdfview&refno=0000024520&pprefno=0000192241> [<https://perma.cc/CJ7Y-SD29>] (disclosing his attendance at the 2022 seminar in Sarasota, FL and listing “Georgetown Law” as the funder); *Curriculum Vitae of Thomas Rex Lee* 4, HARV. L. SCH., <https://helios.law.harvard.edu/Public/Faculty/Cv.aspx?i=11827> [<https://perma.cc/K9RN-JT3B>] (listing “Georgetown Center for the Constitution, *Originalism for Judges Seminar* (June 18, 2021)” under “Appearances & Presentations”).

Like the Originalism Summer Seminar, the “Originalism for Judges” seminar seems to be hosted by the Georgetown Center for the Constitution. *See id.* (same); Menashi, *supra* (listing Elana Quint as the “Seminar host”); *Our Team*, GEO. L., <https://www.law.georgetown.edu/constitution-center/our-team/> [<https://perma.cc/95C5-YN4D>] (“Elana Quint is the Program Manager of the Center [for the Constitution] and an evening student at Georgetown Law.”).

⁶³ The “Originalism for Judges” seminar is not mentioned on Georgetown’s website. *See, e.g.*, *Core Programs*, GEO. L., <https://www.law.georgetown.edu/constitution-center/chase-lecture-and-colloquium/> [<https://perma.cc/T5JL-8LFH>] (describing the Georgetown Center for the Constitution’s “Core Programs,” including the “Originalism Summer Seminar” but excluding the Originalism for Judges seminar).

⁶⁴ The judges reported on the Menashi disclosure form are Douglas H. Ginsburg (Reagan), Thomas M. Hardiman (W. Bush), and Trump appointees, including: Elizabeth L. Branch, Patrick J. Bumatay, John

To put the point modestly, a program called “Originalism for Judges”—whose apparent attendance list features only judges appointed by Republican Presidents and academics who employ originalist methods without skepticism about their practical or normative problems or considered analysis of alternatives⁶⁵—will (1) restrict the perspectives on originalism that the judges discuss and (2) provide a rich opportunity to infuse originalist interpretation with values-based reasoning.

By whatever means the seminar was populated, by invitation or by network, its composition and subject matter are *movement-party identified*. Everyone knows that originalism is the language of conservative judges appointed by Republican presidents, even if certain progressives may call themselves originalist.⁶⁶ The composition of this seminar points to the value-based understanding of originalism that historians and political scientists chronicle⁶⁷—the understanding of originalism as a movement-party practice tied to the Republican Party itself.

The judging seminar, mapped on federal disclosure forms, illustrates how originalism—without Josh Hammer or Adrian Vermeule injecting values into a new “common good originalism” or “common good constitutionalism”—has its own ways of engaging in values-based reasoning, despite its claim to liberate constitutional interpretation from politics.

Peter Cronan, Stuart Kyle Duncan, Leonard Steven Grasz, Gregory G. Katsas, Thomas L. Kirsch II, Barbara Lagoa, Paul B. Matey, Steven James Menashi, Trevor N. McFadden, Kathryn Kimball Mizelle, John B. Nalbandian, Ryan Douglas Nelson, Kevin Christopher Newsom, Chad A. Readler, Julius Ness Richardson, Anuraag Hari Singhal, David Ryan Stras, Menashi, *supra* note 62; *see also Federal Judges Nominated by Ronald Reagan*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Ronald_Reagan [https://perma.cc/HUL4-AAZR] (listing Reagan-nominated judges); *Federal Judges Nominated by George W. Bush*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_George_W._Bush [https://perma.cc/FSV4-L4GH] (listing Bush-nominated judges); *Federal Judges Nominated by Donald Trump*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump [https://perma.cc/UQN7-VJTQ] (listing Trump-nominated judges).

⁶⁵ The faculty leading the seminar were: Josh Blackman (South Texas College of Law, on “Contrary Opinions”); John Stinneford (Florida Law, on “Cruel and Unusual Punishment”); Jud Campbell (Richmond Law, on “How To Do Originalist Research”); Randy Barnett (Georgetown Law, on “Normative Rationales for Originalism”); Jennifer Mascott (Scalia Law, on “Officers of the United States”); Michael Ramsey (San Diego Law, on “Originalism and Birthright Citizenship”); and Larry Solum (UVA Law, on “Originalist Interpretation and Construction”). Menashi, *supra* note 62.

⁶⁶ For a prominent example of progressive originalism, see JACK M. BALKIN, *LIVING ORIGINALISM* (2011). For another example, see the work of the Constitutional Accountability Center. *About CAC*, CONST. ACCOUNTABILITY CTR., <https://www.theconstitution.org/about-cac/> [https://perma.cc/C8UZ-KUB4] (“Combined, honest textualism and principled originalism—text and history—constitute CAC’s method and form the essential foundation for assessing constitutional accountability.”).

⁶⁷ *See supra* note 40 and accompanying text.

As the composition of the seminar suggests, values-based reasoning enters originalist judging through the appointments process—through the selection of judges from a curated “short list” of constitutional interpreters who have been identified as likely to decide cases in a way that pleases the voters of the president who nominated them.⁶⁸ The composition of the seminar appears to be wholly at odds with the understanding of originalism as a value-neutral interpretive practice, but fully consistent with the understanding of originalism as a value-laden, goal-oriented political practice. We can assume that the “Originalism for Judges” seminar and the various bootcamps for clerks are styled as nonpartisan events; but they are only one step off partisan convenings, as the meetings have no purpose other than coordinating how Republican-nominated judges would apply originalism.

In what follows, I am going to follow the practice of originalism back to its early days in the Reagan Administration. Returning to originalism’s roots in the Reagan Administration shows how originalism took shape as a goal-oriented political practice of the executive branch centered on its judicial appointments. This history examines originalism’s techniques and aims as movement-party practices—many of which shape the Court’s decision in the *Dobbs* case.

C. *Originalism’s Origins in the Executive Branch of the Reagan Administration*

Examining originalism’s early history in the Reagan Administration helps identify tensions between originalism as a value-neutral interpretive method and originalism as a value-laden, goal-driven political practice. First, and most importantly, this history shows that overturning *Roe* was the defining goal of originalism as a political practice—and not the result of applying originalism as a value-neutral interpretive method. The Administration lacked such a method.

Second, and perhaps just as importantly, this history shows that the assault on abortion was not just about abortion. When President Reagan’s supporters mobilized against *Roe*, they were concerned to protect the embryo-fetus, but they were also

⁶⁸ For a discussion of the short list that President Trump used, see Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/R8A7-V6K2>]. Toobin describes the operations of President Trump’s litmus test as follows:

The distinction between Trump’s blunt campaign promise on abortion and his cagier instructions to Leo (if Leo’s account is complete) illustrates one of the political calculations of modern Supreme Court selection. Candidates can be frank about their litmus tests, but Presidents, and their judicial nominees, are supposed to be more circumspect—though everyone knows the likely result is the same.

Id.

seeking to protect “family values”—the understandings about sex, sexuality, race, and religion that shape a community’s traditional ways of life.⁶⁹

Third, this history shows that originalism began in the executive branch of an administration that employed judges as means to ends, as political instruments of executive branch policy.⁷⁰ The 1980 Republican Party platform promised the “appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”⁷¹ Today we may be accustomed to candidates soliciting votes for judges—judges whom a candidate promises will overrule *Roe* “automatically”⁷²—but the exchange was norm-busting when first proposed and occasioned controversy on the campaign trail and in the Administration. Did Reagan’s appointments alleviate the politicization of the judiciary, or did they exacerbate the politicization of the judiciary?

Fourth, this history shows how originalism’s constitutional memory claims—its claims to restore the Framers’ Constitution—legitimated the Administration’s politics as law by offering a framework in which Republicans could speak from fidelity to the Constitution as they promised voters to appoint judges who would implement voters’ policy goals. We have become so accustomed to the originalist’s restorationist claims that we no longer notice that originalists formulaically claim to be impersonally bound by the authority of the past at exactly those points at which they are pursuing movement goals. Originalism supplies a language of impersonal authority—of law—that aligns with the conservative legal movement’s values and goals.

When we look back at this history, it is easier to appreciate the ways that originalism legitimates a certain practice of constitutional change, and so to appreciate why and how originalism’s memory games amplify the Constitution’s democratic deficits in *Dobbs* and other cases.

1. *Originalism, Abortion, and the “Social Issues” of the New Right*

Liberals often discuss opposition to abortion as if it were solely about protecting unborn life. It is about that—and much more. When President Reagan’s supporters mobilized against *Roe*, they were concerned to protect the embryo-fetus,

⁶⁹ At the time of *Roe*, it was Catholics, not white evangelicals, who sought to overturn the decision. See *infra* note 79 and accompanying text. Today, most Catholics (68 percent) support *Roe* against complete overruling, whereas only half as many white evangelicals (35 percent) take that position. See Dalia Fahmy, *8 Key Findings About Catholics and Abortion*, PEW RSCH. CTR. (Oct. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/10/20/8-key-findings-about-catholics-and-abortion> [https://perma.cc/2QTK-FYVN].

⁷⁰ See *infra* sections I(C)(1)–(3).

⁷¹ See *infra* note 85 and accompanying text.

⁷² See *infra* note 92 and accompanying text.

but they were also seeking to protect “family values”—the understandings about sex, sexuality, race, and religion that shape a community’s traditional ways of life.

In the late 1970s, Reagan and the rising “New Right” in the Republican Party reached out and embraced the antiabortion cause and brought Catholic Democratic voters into coalition with white Southern Evangelical Protestants who before then had not mobilized against abortion.⁷³ As New Right strategist Paul Weyrich and others involved in that realignment effort have since reported, mobilization around abortion provided a vehicle to connect conservative Catholics who had long opposed the decriminalization of abortion with southern evangelicals who were then not politically opposed to abortion, but were spurred to political action by the IRS decision to threaten the tax exempt status of their “segregation academies.”⁷⁴

Reagan realigned voters as he explained in a famous 1977 Conservative Political Action Conference speech by embedding abortion in a cluster of “the so-called social issues—law and order, abortion, busing, quota systems— . . . usually associated with the blue-collar, ethnic, and religious groups [that] are traditionally associated with the Democratic Party.”⁷⁵ Reagan also broke with the Republican

⁷³ See LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 260 (2012) (“[C]onservatives of the New Right—led by Ronald Reagan . . . urged fundamentalist Christians to make common cause with Catholics in opposition to abortion and in support of family values. They attacked Roe as a threat to life and family and as a symbol of judicial overreaching.”).

⁷⁴ See Olatunde C. Johnson, *The Story of Bob Jones University v. United States* (1983): *Race, Religion, and Congress’ Extraordinary Acquiescence*, in STATUTORY INTERPRETATION STORIES 127 (William N. Eskridge Jr., Philip P. Frickey, and Elizabeth Garrett, eds., 2011). In 1990, Paul Weyrich, a key architect of Reagan’s New Right coalition, described what prompted the mobilization of evangelicals. He recalled with some bemusement that “I was trying to get these people interested in those issues [pornography, school prayer, the proposed Equal Rights Amendment to the Constitution, and abortion] and I utterly failed.” Instead, he recalled that “[w]hat changed their mind was Jimmy Carter’s intervention against the Christian schools, trying to deny them tax-exempt status on the basis of so-called de facto segregation.” RANDALL BALMER, EVANGELICALISM IN AMERICA 112 (2016). Weyrich’s 1990 recollection finds confirmation in the work of political scientist Michael Lienesch who in 1982 observed that “[t]he Christian conservative lobbyists were originally concerned with protecting the Christian schools from Internal Revenue Service investigations over the issue of racial imbalance.” Michael Lienesch, *Right-Wing Religion: Christian Conservatism as a Political Movement*, 97 POL. SCI. Q. 403, 409 (1982). These differences in Catholic and white evangelical Protestant engagement persist into the present. See *supra* note 69.

⁷⁵ Ronald Reagan, Governor of Cal., Reshaping the American Political Landscape, Address Before the American Conservative Union Banquet (Feb. 6, 1977), in A TIME FOR CHOOSING: THE SPEECHES OF RONALD REAGAN 1961—1982, at 183–84 (Alfred A. Balitzer & Gerald M. Bonetto eds., 1983). On Reagan’s use of social issues to realign voters, see THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 137–53 (1991). This realignment of voters would take decades for the Republican Party to complete. See GREENHOUSE & SIEGEL, *supra* note 73, at 299–303.

Party's long support for the ERA⁷⁶ and aligned his campaign with Phyllis Schlafly's explosive new campaign for family values, which negatively associated the ERA with abortion *and* with "day-care centers."⁷⁷ By 1977, Phyllis Schlafly's Pro-Family Coalition had denounced the ERA as a threat to gender roles, and was supporting the "male-breadwinner, female-housewife model of family and opposing feminism, the ERA, abortion and gay rights."⁷⁸

This pro-family framing of abortion changed abortion's meaning for Southern Baptists and others.⁷⁹ The timing was perfect. Southern voters sought freedom from civil-rights nationalism and new ways to defend traditional forms of life. As 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 many threats of modernity arrayed against it—against the threats posed by civil rights for women, Blacks, and gays.⁸⁰

Debates about gender concerned gender, but they also provided an outlet for concerns about race that were no longer safe to openly express. Marjorie Spruill observes that "[b]y the late 1970s" gender talk offered a "coded language" that worked "to soften or disguise appeals to racism. Ironically, just as it became unacceptable to be overtly racist, it was increasingly acceptable to be overtly antifeminist," and

⁷⁶ Tanya Melich, *THE REPUBLICAN WAR AGAINST WOMEN: AN INSIDER'S REPORT FROM BEHIND THE LINES* 116–17 (1996).

⁷⁷ Phyllis Schlafly, *Women's Libber's Do Not Speak For Us*, PHYLLIS SCHLAFLY REP., *February 1972*, reprinted in GREENHOUSE & SIEGEL, *supra* note 73, at 218–20 ("Women's libbers are . . . promoting Federal 'day-care centers' for babies instead of homes. They are promoting abortions instead of families.").

⁷⁸ Anneke Stasson, *The Politicization of Family Life: How Headship Became Essential to Evangelical Identity in the Late Twentieth Century*, 24 RELIGION & AM. CULTURE 100, 108 (2014); *see also* Matthew D. Lassiter, *Inventing Family Values*, in *RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S* 13, 23 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) (recounting that the ERA was depicted "as an assault on mainstream American values, from the immorality of legalized abortion and gay rights to the weakening of the nuclear family by policies promoting day care and working mothers").

⁷⁹ By 1980, a Gallup poll showed that evangelical Protestants "were more likely than either Catholics or mainline Protestants to oppose abortion." 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, 459 (2015). That same year, the Southern Baptist Convention "replaced its moderate language on abortion with a staunchly pro-life resolution that . . . allowed for abortion only when a woman's life was endangered." *Id.* at 465. Unlike Catholics during the 1960s and 1970s, the Southern Baptist Convention's new resolution was linked "not to a violation of a human rights tradition, but to 'moral relativism and sexual permissiveness.'" *Id.* It paired this resolution with "resolutions condemning homosexuality and cohabitation outside marriage, and affirming the 'biblical definition of the family.'" *Id.*

⁸⁰ *See generally* MARJORIE J. SPRUILL, *DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS* (2017) (depicting currents of religious, sexual, and racial concerns at the birth of the modern pro-family movement protesting the 1977 ERA conference in Houston).

opposition to feminist aspirations “became a part of the coded language,” enabling “conservatives to safely employ familiar arguments about innate differences and natural or divinely created hierarchies, and cast the federal government as in thrall to radical reformers, the enemy of the American way of life, while putting the blame squarely on the Democrats.”⁸¹

2. *Originalism and Article II Change Through Judicial Appointments: Abortion as Litmus Test*

As Reagan campaigned, appealing to Americans threatened by social change, he invoked the Supreme Court as responsible for all the forces that were threatening to change traditional ways of life. He figured himself as the great defender of America’s traditions, which put him in battle with the Court, for the People.⁸² Sometimes Reagan talked about changing the law of the Warren and Burger Courts through constitutional amendments—like the School Prayer Amendment.⁸³ But Reagan and the Republican Party also promised to fix the problems of run-away federal courts directly by appointing judges who would simply restore American law.

In 1980, for the first time—and continuously ever since⁸⁴—the Republican platform promised that “[w]e will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human

⁸¹ *Id.* at 305 (footnote omitted).

⁸² See Edwin Meese III, *A Return to the Founders*, NAT’L L.J. (June 28, 2004), <https://www.law.com/nationallawjournal/almID/900005410326/> [<https://perma.cc/JGA7-XTXR>] (“Reagan challenged the prevailing activist approach on such issues as racial discrimination through preferences and quotas, unenumerated constitutional ‘rights,’ federalism, exaggerated expansions of the Bill of Rights and the separation of powers. He did so . . . perhaps most importantly in superb appointments to the federal judiciary.”); Ronald Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. REV. BOOKS (July 18, 1991), <https://www.nybooks.com/articles/1991/07/18/the-reagan-revolution-and-the-supreme-court> [<https://perma.cc/4CFJ-VDBC>] (describing Reagan’s antipathy toward the Warren Court).

⁸³ Roger Thompson, *School Prayer*, CQ PRESS (Aug. 16, 1983), <http://library.cqpress.com/cqresearcher/cqresrre1983091600> [<https://perma.cc/9GAL-RG22>].

⁸⁴ Though there is some slight variation, every Republican Platform since 1980 has featured a promise to appoint judges who “respect traditional family values and the sanctity of innocent human life.” *E.g.*, *2016 Republican Party Platform*, AM. PRESIDENCY PROJECT (JULY 18, 2016), <https://www.presidency.ucsb.edu/documents/2016-party-platforms> [<https://perma.cc/GNJ7-RM7V>]; see also Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 955 n. 112 (2019) (“All Republican platforms since 1980 have had strong antiabortion planks and related calls ‘for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.’” (quoting *1984 Republican Party Platform*, AM. PRESIDENCY PROJECT (Aug. 20, 1984), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1984> [<https://perma.cc/NVU6-EBPH>])).

life.”⁸⁵ This platform plank promised that the party would use a result-oriented litmus test in selecting judges. It was focused on but by no means limited to abortion.

John Hart Ely helped legitimate the use of this litmus test when he attacked *Roe* as anti-democratic. In 1980, at a time when liberals would no longer sanction open resistance to *Brown v. Board of Education*,⁸⁶ Ely developed a theory of judicial review that justified the Warren Court’s decision in *Brown* as democracy-promoting, but at the same time figured *Roe* as intruding in democratic politics and thus licensed conservative attacks on the decision.⁸⁷

⁸⁵ *Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT (July 15, 1980), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980> [<https://perma.cc/M47Q-B3J5>]; see also *id.* (pledging to appoint “women and men . . . whose judicial philosophy is . . . consistent with the belief in the decentralization of the federal government and efforts to return decisionmaking power to state and local elected officials”).

⁸⁶ 347 U.S. 483 (1954). See Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 386–88 (2000).

⁸⁷ In 1973, John Hart Ely famously greeted *Roe* as the new *Lochner*. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 939–40 (1973) [hereinafter Ely, *The Wages of Crying Wolf*]. In 1980, Ely published *Democracy and Distrust* (1980), in which he defended *Brown* as democracy-reinforcing review, while joining the Reagan Administration in characterizing judicial review in favor of rights for women and gays as antidemocratic overreach. See 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, 1917 (2021). Ely never saw how the democracy-reinforcing theory of judicial review he proposed might extend to the substantive due process cases he attacked. As Ely disparaged rights for women and gays, he seemed not to have noticed that scarcely any members of these groups were represented on the bench or in the legal academy—if present, they might have explained how the rights Ely questioned were also rights that promoted the equal participation of marginalized groups. See *id.* at 1940 & n.192.

In 1973, Ely had gone out of his way to question abortion rights on both liberty and equality grounds. Disparaging the case for judicial scrutiny of abortion restrictions, Ely asserted:

Compared with men, women may constitute such a “minority”; compared with the unborn, they do not. I’m not sure I’d know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I’d expect no credit for the former answer.

Ely, *The Wages of Crying Wolf*, *supra*, at 934–35 (footnotes omitted). However, Ely failed to explain how all-male legislatures were constitutionally adequate to represent either.

The tone of this account, dismissive of the stakes for all concerned, just about says it all. In fact, by the time Ely wrote in 1973, Yale students had already succeeded in persuading a federal court to invalidate Connecticut’s nineteenth-century abortion ban on equality-inflected grounds that were more far-reaching than any decision that has ever been rendered since—and Ely trashed *Roe* by equating it to *Lochner* without ever mentioning the abortion decision’s Connecticut antecedent, on which *Roe* builds. Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 480 & n.127 (2020), <https://www.yalelawjournal.org/forum/the-nineteenth-amendment-and-the-democratization-of-the-family> [<https://perma.cc/7HE8-9SM6>]. By 1980, when Ely published *Democracy and Distrust*, the illiberal logic of the pro-family movement was perfectly evident in advocacy of Anita Bryant, Phyllis Schlafly, and others, but Ely acted as if it had no constitutional significance.

Ely missed two large constitutional questions that led to an immense political mistake. Because Ely failed to grapple with the ways that women's equal participation rights were at stake in decisions about abortion, he failed to appreciate the many ways in which the right *Roe* recognized was democracy-promoting.⁸⁸ Further, he interpreted opposition to abortion through the lens of liberalism, as concern about harm to an embryo-fetus,⁸⁹ without recognizing the illiberalism of the movement for protecting "traditional family values" —how that movement connected the wrongs of abortion to the preservation of traditional status roles, to entrenching customary relations of gender, sexuality, race, and religion.⁹⁰

With Ely's assistance, opposition to *Roe* became the trojan horse, or barnyard door, through which the Reagan Administration could make judicial appointments hostile not only to abortion, but to civil rights generally.⁹¹

3. *Originalism As Strategy for Article II Change by Screening of Judges*

Today many are accustomed to presidents campaigning on promises to appoint judges who are committed to executing presidential policy, but this has not always been the case. In fact, when the Republicans introduced their platform plank advocating that views on abortion serve as a litmus test in selecting federal judges, the plan ignited a storm of controversy. The objections were sufficiently pervasive in the legal community that the American Bar Association's House of Delegates called on the candidate to disavow the apparent intent of the platform.⁹²

⁸⁸ Doug NeJaime and I have set forth the case. *See* NeJaime & Siegel, *supra* note 87, at 1934-37, 1946-48 (arguing that those who engaged in speaking out and coming out to challenge the criminalization of intimate and family life emphasized the stakes for democratic participation, but Ely failed to grasp the connection). Ely seemed determined to analyze the abortion question without saying anything about the relative power of men and women, but then keptadverting to these matters as he attempted to justify why he believed the Court should refuse constitutional oversight and defer to a political settlement. *See* Ely, *The Wages of Crying Wolf*, *supra* note 87, at 933 n.85, 935 nn.88-89.

⁸⁹ *See supra* note 87; *see generally* NeJaime & Siegel, *supra* note 87 (discussing some of the limitations in the ways Ely conceived of democracy).

⁹⁰ *See supra* section I(C)(1).

⁹¹ Reagan campaigned on a Southern strategy that appealed to coded racial resentments. *See, e.g.*, Siegel, *2012 Term Foreword*, *supra* note 15, at 32-33, 32 n.164 (discussing the Reagan Administration's social issues agenda and quoting strategist Lee Atwater on the Administration's use of racial code). It is hard to see how giving up abortion—which had been coded as pro-family for years—was anything other than an invitation for the Administration to make appointments that would support laws tending to restore traditional ways of life.

⁹² "The American Bar Association yesterday sharply criticized the Republican Party's platform provision on the selection of judges, officially calling on Ronald Reagan, the Republican Presidential nominee, to disavow the platform's requirement that only persons who oppose abortion should be considered for judgeships." Linda Greenhouse, *Bar Panel Opposes G.O.P.'s Plank for Judges Who Support Abortion*, N.Y. TIMES, Aug. 8, 1980, at A20,

Initially Reagan seemed to concede critics' objections to his plans, at least in principle. "Asked if he might not use opposition to abortion as a litmus test, for example, he replied, "No . . . I don't think you can use single issues."⁹³ But only a few weeks later, Reagan reversed course. The candidate had plainly decided to turn confrontation with the ABA into an opportunity to score points with voters. He defended a litmus test for judicial nominees, counting on his voters' inattention to pesky concerns like judicial independence. Almost tongue-in-cheek, Reagan emphasized that the judges he would appoint were no different than anyone else: "We all ought to have a compassion for innocent human life."⁹⁴ Reagan's first Attorney General, William French Smith was equally clear that the Administration planned to use "judicial appointments" "to rein in 'judicial activism,'" especially in areas where "federal courts had gone beyond their proper role in cases involving abortion, school busing, prisoners' rights, and other socially sensitive areas which they should have left to elected officials."⁹⁵

<https://timesmachine.nytimes.com/timesmachine/1980/08/08/111270769.html?pageNumber=21>
[<https://perma.cc/9SD6-JN74>].

New York Times reporter Stuart Taylor argued that the 1980 platform "builds on a long tradition" of presidents trying "to appoint Supreme Court Justices who shared their own political views," citing Washington, Roosevelt, and Carter as examples; but Taylor observed that the single-issue test took this to a new level and the "American Bar Association vote is evidence that most lawyers thought this was going too far." Stuart Taylor Jr., *Politics of the Bench: Carter and Reagan Seek Gains from Prospective Judiciary Appointments*, N.Y. TIMES, Oct. 28, 1980, at A27, <https://timesmachine.nytimes.com/timesmachine/1980/10/28/111305209.html?pageNumber=27> [<https://perma.cc/6UAW-YJF7>]. Even defenders of the platform plank acknowledged its unprecedented nature (while arguing that it comported with other appointment traditions). See Charles E. Rice, *Ronald Reagan and the Supreme Court Issue*, WALL ST. J., Sept. 23, 1980, at 34 ("This is the first time in a major party platform that such an express pledge has been made. The fact, however, is that the Republican platform in this respect is merely a specification of a practice sanctioned by tradition and practical necessity."). The California State Bar adopted a resolution urging political candidates to disavow the GOP platform plank. See Gene Blake, *State Bar Sees Threat to Judiciary in GOP Platform*, L.A. TIMES, Sept. 29, 1980, at E5. The report also discusses the potential existence of a 20-page questionnaire Reagan employed as governor of California to probe the political beliefs of potential state judicial nominees. See *id.* (alluding to the possibility that Reagan issued ideological litmus tests to potential appointees).

⁹³ Wallace Turner, *Reagan Says He Would Not Use Single-Issue Test to Pick Judges*, N.Y. TIMES (Oct. 2, 1980), <https://timesmachine.nytimes.com/timesmachine/1980/10/02/111176884.html?pageNumber=1> [<https://perma.cc/X528-2TUK>].

⁹⁴ Taylor, *supra* note 92.

⁹⁵ Fred Barbash & Mary Thornton, *Smith Outlines Strategy to Curb Court Activism*, WASH. POST, Nov. 30, 1981, at A1.

We know that the Reagan Administration had an unprecedented opportunity to appoint judges—402 federal judges,⁹⁶ approximately half of the entire federal judiciary and, at that point, more than any other president had appointed in the history of the country.⁹⁷ The Administration did its best to wrest control of those appointments away from Congress and the ABA and take judicial appointments in-house, where privately funded organizations of the New Right could assist in judicial selection.⁹⁸ The Justice Department created “Special Counsel for Judicial Selection”⁹⁹ in 1984; and during his second term, Reagan had the Assistant Attorney General for the Office of Legal Policy, Stephen Markman, report on nominations directly to AG Meese—a stark departure from prior practice.¹⁰⁰

A point of bringing the selection process in-house was to get more information about judicial nominees’ views—about “how a candidate approaches questions of

⁹⁶ *Judgeship Appointments by President*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president> [<https://perma.cc/W2BY-F683>].

⁹⁷ Andrea Neal, *Reagan to Have Lasting Legacy on Courts*, UNITED PRESS INT’L ARCHIVES (Sept. 4, 1988), <https://www.upi.com/Archives/1988/09/04/Reagan-to-have-lasting-legacy-on-courts/4205589348800/> [<https://perma.cc/R2LT-PAND>].

⁹⁸ David O’Brien, *If the Bench Becomes a Brawl: Reagan’s Legacy for U.S. Courts*, L.A. TIMES (Aug. 23, 1987, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1987-08-23-op-2934-story.html> [<https://perma.cc/WNR8-8KGT>]. Doug Kmiec provides a detailed account of the confirmation process, but does not explain how the Reagan Administration reorganized the procedures employed by the Carter Administration and moved the pre-confirmation process into the executive branch. See Douglas W. Kmiec, *Judicial Selection and the Pursuit of Justice: The Unsettled Relationship Between Law and Morality*, 1 CATHOLIC U. L. REV. 1 (1989). Reagan discontinued the Carter Administration’s panel system, which had increased democratic participation by nominating the recommendations of bipartisan, presidentially appointed panels consisting of individuals with both legal and nonlegal backgrounds. Stuart Taylor Jr., *Reagan Judicial Plan Is Defended*, N.Y. TIMES, May 8, 1981, at A17, <https://www.nytimes.com/1981/05/08/us/reagan-judicial-plan-is-defended.html> [<https://perma.cc/TMD3-LBK4>]. Reagan’s was the “first Republican Administration in 30 years in which the American Bar Association Standing Committee on Federal Judiciary was not actively utilized and consulted in the prenomination stage.” Sheldon Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 316 (1985).

Conservative organizations like the privately funded Center for Judicial Studies reviewed judicial performance in its publication, *Benchmark*. For example, *Benchmark* released assessments of the decisions of Reagan’s appointees alongside opinion pieces advocating a jurisprudence of original intent. See *Judging the Judges: The First Two Years of the Reagan Bench*, BENCHMARK, July–Oct. 1984 (evaluating sixty-two judges appointed by President Reagan). The nascent Federalist Society attempted to provide an alternative to the ABA. See Siegel, *Dead or Alive*, *supra* note 15, at 220 & n.142 (discussing the role and funding of the Federalist Society in 1986); TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT, *supra* note 39, at 168.

⁹⁹ Goldman, *supra* note 98, at 315.

¹⁰⁰ Sheldon Goldman, *Reagan’s Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 326 (1987).

abortion, affirmative action and First Amendment rights.”¹⁰¹ For example, an internal Heritage Foundation review of Reagan’s first-term judicial appointments demonstrated that use of criteria such as “judicial restraint” did not reliably translate into judges who would vote in accordance with the Party’s abortion plank.¹⁰²

This new DOJ screening process attracted controversy. The press lurked, trying to establish exactly how politicized the appointments process had become. If the Administration had committed to appoint judges who were going to deliver results, how was the Administration going to assure itself that the judges appointed were reliable?

Participants reported that DOJ officials would conduct daylong interviews with nominees that even previous attorneys general and conservative law professors criticized, with one calling the process “shocking.”¹⁰³ According to Nina Totenberg, several judicial contenders told NPR they were asked directly about their views on abortion; “one female state court judge said she was asked twice how she would rule on an abortion case if it came before her.”¹⁰⁴ Another prospective nominee, “a lifelong Republican” and “well-known state court judge,” admitted after questioning, “I guess most of us have accepted that we’re not going to get these judgeships unless we’re willing to commit to a particular position, which we think would be improper.”¹⁰⁵

¹⁰¹ James Reston, *Reagan and the Courts*, N.Y. TIMES, Sept. 18, 1985, at A27, <https://www.nytimes.com/1985/09/18/opinion/washington-reagan-and-the-courts.html> [<https://perma.cc/93L5-9Z24>] (reporting that “[o]ne of the various private conservative organizations that are active in ‘screening’ judicial applicants is the Center for Judicial Studies, headed by James McClellan, former aide to Senator Jesse Helms of North Carolina” and reporting that center was supported by the Moral Majority Foundation and other “right-wing groups interested in perpetuating their conservative agenda through the courts”).

¹⁰² Patrick Francis Gallagher, *The Conservative Incubator of Originalism: The Reagan Department of Justice* 25 (Aug. 2017) (M.A. thesis, University of Chicago), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3022365 [<https://perma.cc/6KHV-THFN>]. The new internal screening process assessed candidates’ publications for “quality and philosophy.” W. Gary Fowler, *Judicial Selection under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures*, 67 JUDICATURE 265, 274 (1983).

¹⁰³ David M. O’Brien, *Federal Judgeships in Retrospect*, in *THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES* 327, 334 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003); see also William Overend, *Judges Need No ‘Litmus Test,’ 9th Circuit Told*, L.A. TIMES (June 3, 1985, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1985-06-03-mn-5593-story.html> [<https://perma.cc/S3ZH-5EQ3>] (documenting widespread concern about a “litmus test” for new judges).

¹⁰⁴ Audio tape: Interview by Nina Totenberg with Fred Fielding, White House Counsel, in NPR’s Morning Edition (Aug. 21, 1985) (on file with author).

¹⁰⁵ *Id.*; cf. Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1214, 1218 (1988) (stating that reviewing the writings and legal practice of a Supreme Court nominee, “if done properly, is an enormous amount of work” but nevertheless, “nominees should not be asked to commit themselves on a question that may come before the court”).

Shortly after serving as Assistant Attorney General for the Office of Legal Counsel under Reagan and Bush, Douglas Kmiec tried to depict the process as a reasonable outgrowth of the President's frank commitments to the American people.¹⁰⁶ But continuing controversy around the Administration's efforts to screen judges highlighted the contradiction: How could the Administration accuse the Warren and Burger Courts of acting politically, if the Reagan Administration was itself going to appoint judges "to reflect the conservative results of the 1980 election."¹⁰⁷

4. *How Originalism Legitimated the Screening of Judges*

Reagan's effort to harness judicial appointments as an instrument of the executive branch played a role in the genesis of originalism. Attorney General Meese and Assistant Attorney General Stephen Markman recall the Justice Department's focus on originalism emerging as an integral part of the Department's involvement in judicial selection.¹⁰⁸ And a review of Justice Department memoranda provides additional support for that view.¹⁰⁹

Originalism developed in significant part in an effort to legitimate the screening of judges. As Patrick Gallagher illustrates, Markman employed originalism to combat critics of the Administration's nominations. Markman identified the *conservative* cause with the Constitution:¹¹⁰

Nominations—Perhaps a more explicit connection could be drawn between our views on jurisprudence and the mettle of the people that we are nominating to the judiciary. Contrary to allegations, we are not choosing judges

¹⁰⁶ See Kmiec, *supra* note 98, at 7–8 (characterizing President Reagan's judicial screening process as the fulfillment of his campaign promises and the 1980 Republican platform).

¹⁰⁷ Barbash & Thornton, *supra* note 95.

¹⁰⁸ See Teles, *Transformative Bureaucracy*, *supra* note 40, at 77 & n.103. Stephen Markman recalled the role of originalism in the selection of candidates for judgeships: "What General Meese gave the Department was an improved framework within which to assess candidates." *Id.* Teles reports that "Meese himself acknowledges that the speeches were 'particularly directed at what our view of the judicial role was, and the standards by which we would be recommending to the President the appointment of judges.'" *Id.* at 77 n.103.

¹⁰⁹ See Gallagher, *supra* note 102, at 24 nn.91–92, 27 nn.104–08 (citing internal memoranda written by DOJ officials—including James M. Spears and Erik Kitchen—in which they propose devising a judicial selection mechanism "which will guarantee that judicial candidates are ideologically compatible with [President Reagan]").

¹¹⁰ Memorandum from Stephen J. Markman, Assistant Att'y Gen., to Edwin Meese III, Att'y Gen. 2 (Jan. 3, 1986) (reproduced in Gallagher, *supra* note 102, at app. at 62–65) ("The idea of 'original intent' must not be marketed as simply another theory of jurisprudence; rather it is an essential part of the constitutional framework of checks and balances."); *see also id.* at 1 ("Burden—In popular forums, our case can perhaps be presented most emphatically by placing the burden on our adversaries to suggest an appropriate theory of jurisprudence in place of 'original intent.'").

who will impose a “right-wing social agenda” upon the Nation, but rather those who recognize that they, too, are bound by the Constitution.¹¹¹

Here Markman is working out originalism’s law-politics grammar *ab initio*. Markman simply equates what some see as “politics” with an appeal to foundational “law.”

As I have been describing for some years, the Reagan Administration identified the “social issues” of the “New Right” with the original meaning of the Constitution.¹¹² The Meese Justice Department attached originalism to politics: to hot-button culture-war issues around which voters were already mobilized.

We can see the basic rhetorical strategy laid out in a lengthy document entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*.¹¹³ In this document, written by Markman during the Reagan Administration and published just after the Bork nomination, the OLP singled out the areas of substantive law that the conservative legal movement’s judicial appointments would affect.¹¹⁴

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).¹¹⁵ OLP explained that judicial appointments would determine whether the law governing these issues departed from

¹¹¹ *Id.* at 3–4.

¹¹² Siegel, *2012 Term Foreword*, *supra* note 15, at 27–29 (arguing that the Justice Department “associated the original meaning of the Equal Protection Clause with the colorblind Constitution,” and “depicted the threat of judicial overreaching by invoking the specter of affirmative action”); Siegel, *Dead or Alive*, *supra* note 15, at 222–24 (observing that “[t]he executive branch’s project of constitutional restoration”—through publication of *The Constitution in the Year 2000* and other actions—strengthened individual rights claims under the Second Amendment); Greenhouse & Siegel, *supra* note 19, at 313–15 (“[The] New Right’s appeal to originalism gave constitutional form to a ‘social issues’ agenda”—which included abortion—“that the Republican Party used in service of realignment” of demographic subpopulations who traditionally voted for Democrats).

¹¹³ See OFFICE OF LEGAL POLY, U.S. DEP’T. OF JUST., *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* (1988), [hereinafter *CONSTITUTION IN THE YEAR 2000*] <https://hdl.handle.net/2027/mdp.39015014943511> [https://perma.cc/ZW63-SQMH].

¹¹⁴ See Teles, *Transformative Bureaucracy*, *supra* note 40, at 8.1 Professor Teles interviewed Markman, who explained the Justice Department’s efforts to shape the public’s views about constitutional interpretation:

In our monograph on *The Constitution in the Year 2000*, we tried to translate the debate for the public by defining the practical consequences in having originalist and nonoriginalist judges and justices. . . . [D]ifferent futures would occur depending upon what philosophies came to predominate on the courts. . . . [A]bortion has been one matter in which national policy had been determined in this manner, but there were many other issues in which future public policies would be similarly determined. . . . [such as] the role of religion in public life, affirmative action, federalism, and a variety of social issues. . . .

Id.

¹¹⁵ *CONSTITUTION IN THE YEAR 2000*, *supra* note 113, at 1, 11, 20, 33, 44, 82.

the original meaning of the Constitution.¹¹⁶ The report explained to the voting public that the “social issues” of the New Right depended on electing presidents who would nominate judges with attention to “judicial philosophy”: to debates between “strict interpretation vs. liberal interpretation or commitment to original meaning vs. commitment to an evolving constitution”¹¹⁷

Yet, despite this claim, *The Constitution in the Year 2000* did not employ originalist methods of constitutional interpretation in defining the positions of the conservative legal movement on these culture-war questions. The document simply equated the positions of the conservative legal movement with “commitment to original meaning” while defending its positions employing conventional modes of doctrinal argument.¹¹⁸ As the analysis of *The Constitution in the Year 2000* itself demonstrates, in the late 1980s the Reagan Administration in fact had no systematic interpretive method to implement the jurisprudence of original intention.¹¹⁹

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,¹²⁰ then the

¹¹⁶ *Id.* at iii (observing that “[t]here have been few times in the history of our country [in which the] famous statement that ‘the Constitution of the United States is what the judges say it is’ has more accurately depicted the state of American jurisprudence,” and depicting the resolution of cases involving the “social issues” of the New Right as certain to “determine how the Constitution at the turn of the twenty-first century looks different from the Constitution of . . . 1789”).

¹¹⁷ *Id.*

¹¹⁸ *See, e.g., id.* at 12–13 (observing that Professor Laurence Tribe had criticized *Roe*’s reasoning, and Professor John Hart Ely had compared *Roe* to *Lochner v. New York*, 198 U.S. 45 (1905), and quoting several of Ely’s objections to the Court’s reasoning in *Roe*).

¹¹⁹ In the summer and fall of 1985 Attorney General Meese gave speeches calling for a jurisprudence of original intention. Internal departmental memos debated the speeches’ implications for the Department’s litigating positions and speculated about “production of ‘original intent’ evidence.” In 1986 these discussions were quite tentative. *See* Memorandum from Stephen J. Markman, Assistant Att’y Gen., to Edwin Meese III, Att’y Gen. (Feb. 4, 1986) (on file with author). The internal memoranda support what the Department’s published documents demonstrate: that in this era the DOJ had neither method nor evidence to substantiate a jurisprudence of original intentions.

Another document illustrating that in this era originalism lacked a systematic method capable of deciding constitutional cases is OFFICE OF LEGAL POL’Y, U.S. DEP’T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987). Much of this document is devoted to rebutting critics. It includes excerpts of RAUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (criticizing proponents of a “living Constitution”); *id.* at 367 (criticizing all those who “endeavored to discredit ‘original intention,’ to rid us of the ‘dead hand of the past’”); *id.* at 370 (stating that “[i]f the Court may substitute its own meaning for that of the Framers it may . . . rewrite the Constitution without limit”). Raoul Berger’s book attacked Warren Court decisions including *Brown, Reynold v. Sims*, 377 U.S. 533 (1964), and the interracial marriage decisions.

¹²⁰ Originalists have observed that theories of originalism emerged after the Reagan years as government lawyers moved into law schools. *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A*

Department's claims simply rested on conservative political beliefs. These beliefs about the shape of the legitimate constitutional order steered the Administration's new judicial screening apparatus and its claim to distinguish law and politics and restore the Founders' Constitution—an understanding of the Attorney General's project that even conservatives of the day grasped. As one commentator put it:

The aim is now to accomplish in the courts what the Administration failed to persuade Congress to do—namely, adopt its positions on abortion, apportionment, affirmative action, school prayer and the like. . . . Nothing symbolizes Meese's agenda more than his call for “a return to the jurisprudence of original intentions.” . . . Candidates for judgeships tell of being rigorously questioned about their views by young, ideologically committed staff. No harsher criticism has been leveled than one from conservative University of Chicago Law School Prof. Philip B. Kurland, who observes: “Judges are being appointed in the expectation that they will rewrite laws and the Constitution to the Administration's liking. Reagan's judges are activists in support of conservative dogma.”¹²¹

5. *How Originalism Entrenched Status Inequality in a Civil Rights Era*

One can understand early expressions of originalism in the Meese Justice Department as defending traditional—that is, mid-twentieth century—understandings of constitutional law against bewildering forces of change, much as

Unified Theory of Originalism, 107 GEO. L.J. 1, 9–10 (2018) (observing that a defensible theory of originalism emerged after lawyers left government for the academy). Paul Baumgardner provides an account of originalism in this early period. See Paul Baumgardner, *Originalism and the Academy in Exile*, 37 LAW & HIST. REV. 787, 788 (2019) (“Major intellectual and institutional changes were occurring across many American law schools during the first half of the 1980s, but this generational transition did not include originalism or the type of ‘founding history’ interdisciplinary research that we now associate with the originalist scholarly program.”). Remarkling on the dearth of originalist scholarship, he notes:

In the words of a current originalist scholar, “If you try to look for the literature on originalism in the 1970s, there isn't any. This was not something that was part of the conversation.” From 1975 to 1985, only one article appeared in the pages of the *Yale Law Journal* that directly addressed the topic of constitutional originalism and took up the mantle on behalf of this brand of interpretivism, and none appeared in the *Harvard Law Review*, the *Stanford Law Review*, the *University of Chicago Law Review*, or the *Columbia Law Review*.

Id. at 793 (footnotes omitted).

¹²¹ See David M. O'Brien, *Meese's Agenda for Ensuring the Reagan Legacy*, L.A. TIMES, Sept. 28, 1986, at E3; see also Arthur Schlesinger, Jr., *Board of Contributors: On 'Original Intent'*, WALL ST. J., Jan. 17, 1986, at 1 (“Mr. Meese's version of original intent is a patent fraud on the public. The attorney general uses original intent not as a neutral principle at all but only as a means of getting certain results for the Reagan administration. He is shamelessly selective.”); *id.* (“He has further muddled the issue by hailing original intent as a weapon against judicial activism. Another fraud: He is not against activist, result-oriented judges—only against those whose results he dislikes.”).

family-values politics defended traditional orderings of community life against those same upheavals.¹²² Attorney General Meese called for restoring the original understanding of the Constitution just as women and minorities were beginning to gain access to positions where they might more directly participate in shaping understandings of the Constitution. (Primarily because of the efforts of President Carter, there were now a few women and people of color serving as federal judges,¹²³ and a handful of women and minorities had secured positions as tenured faculty at elite law schools, where student bodies were beginning to diversify.¹²⁴)

Attorney General Meese's early speeches tell a story of originalism arising in reaction to what he experienced as the excesses of the Warren and Burger Courts. In his first speech on originalism on July 9, 1985 before the American Bar Association, Attorney General Meese objected to "the radical egalitarianism and expansive civil

¹²² Contemporary critics questioned whether the "the resort to 'original intent' [was] a selective one, a cynical substitution of polemics for serious analysis, to be invoked only when it suits the administration's political purposes?" See, e.g., Laurence H. Tribe, *Whose Constitution?*, BALT. SUN, Sept. 17, 1985, 9A. Professor Laurence Tribe noted that the Meese Justice Department was inclined to attack as contrary to original intent decisions opening the institutions of public life to the equal participation of members of groups long blocked from full membership in the American constitutional order, 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 fund themselves unable to continue a pregnancy, and that years to prop up the waning authority of the state with the symbols of the church." *Id.*

¹²³ On the appointments of President Carter, see NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER COURT APPOINTMENT PROCESS 80 (2005) ("Carter appointed nine blacks (16.1 percent of all Carter appellate court appointments) and eleven women (19.6 percent) to the courts of appeals and twenty-eight blacks (13.9 percent of all Carter district court appointments) and twenty-nine women (14.4 percent) to the district courts."). By contrast, Reagan's appointees were mostly white male Republicans. See Goldman, *supra* note 100, at 338 (predicting that future Reagan appointees "will continue to be white male Republicans"). His first term appointees were 93.0% white and 90.7% men. Goldman, *supra* note 98, at 319.

¹²⁴ See generally Elizabeth Katz, Kyle Rozema & Sarath Sanga, *Women in U.S. Law Schools, 1948-2021*, at 16 (Aug. 16, 2022) (on file with SSRN), [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4194210&dgcid=ejournal_html_email_women,:gender:the:law:ejournal_abstractlink \[https://perma.cc/8B2W-ANU4](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4194210&dgcid=ejournal_html_email_women,:gender:the:law:ejournal_abstractlink [https://perma.cc/8B2W-ANU4) ("Higher ranked schools . . . lagged in women's representation in faculty. The gap between Tier 1 [law schools consistently ranked in the top 14] versus the rest existed throughout the entire period we study [1948–2021] and increased in magnitude during the 1980s and 1990s."); see also *id.* at 24 ("Since the 1990s, however, women faculty have been 2 to 3 times more likely than men faculty to occupy lower status positions."); see also *id.* at 46 (Figure 9) (graphing this phenomenon). For accounts of the faculty demographics at Harvard Law School and Yale Law School in the years that John Hart Ely was writing about *Roe*, see Nejaime & Siegel, *supra* note 87, at 1940 n.192. In the late 1980s there were a series of high-profile cases of women denied tenure at law schools that drew the attention of the Association of American Law Schools (AALS). See Catherine J. Lanctot, *Women Law Professors: The First Century (1896–1996)*, 65 VILL. L. REV. 933, 981–87 (2020) (discussing individual cases and the response of the AALS).

libertarianism of the Warren Court,” and after asking, “What, then, should a constitutional jurisprudence actually be?”, answered, “It should be a Jurisprudence of Original Intention.”¹²⁵

In November of 1985 at the Federalist Society, Attorney General Meese invoked “a jurisprudence of original intention”¹²⁶ as grounds for attacking *Roe* and *Griswold v. Connecticut*,¹²⁷ while carefully indicating respect for *Brown*.¹²⁸ (The Administration asserted that *Brown* was colorblind per the original understanding of the Fourteenth Amendment—hence opposed to affirmative action,¹²⁹ even as the

¹²⁵ See Edwin Meese III Att’y Gen., U.S. Dep’t of Just., Speech to the American Bar Association (July 9, 1985), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf> [<https://perma.cc/XT68-DTE3>] (“A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.”). The speech was an attack on Warren Court decisions protecting the rights of criminal defendants and cases requiring separation of church and state. *Id.*

¹²⁶ Edwin Meese III, Att’y Gen., U.S. Dep’t of Just., Address to the D.C. Chapter of the Federalist Society Lawyers Division 8 (Nov. 15, 1985) [hereinafter Meese Address to the Federalist Society], <https://fedsoc.org/commentary/publications/the-great-debate-attorney-general-ed-meese-iii-november-15-1985> [<https://perma.cc/D256-6MFA>]; Philip Hager, *Meese Against Attacks Judicial Activism: Intensifies Criticism of Decisions Based on ‘Social Theories,’* L.A. TIMES (Nov. 16, 1985, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1985-11-16-mn-2754-story.html> [<https://perma.cc/9LNH-H49J>] (describing Meese as “indicating” that *Roe* was an example of a case in which “the Constitution had been used as a ‘charter for judicial activism’ in court decisions not fully supported by the document’s text or history”).

¹²⁷ 31 U.S. 479 (1965).

¹²⁸ Meese Address to the Federalist Society, *supra* note 126.

¹²⁹ Soon after Reagan’s election, William Bradford Reynolds, the head of the Civil Rights Division, equated Justice Harlan’s colorblindness dissent in *Plessy* with the original intention of the Fourteenth Amendment and turned this new originalist narrative about *Brown* into an assault on affirmative action. See, e.g., William Bradford Reynolds, Assistant Att’y Gen., *Individualism vs. Group Rights: The Legacy of Brown, Speech before the Lincoln Institute Conference (Sept. 28, 1983)*, in 93 YALE L.J. 995 (1984). Reynold’s 1984 speech ignored the originalist case in support of affirmative action set forth in Justice Marshall’s opinion in *Regents of the University of California. v. Bakke*, 438 U.S. 265, 396-98 (1978) (Marshall, J., dissenting); see also Brief of the NAACP as Amicus Curiae, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 189517, at *21 (arguing that in ratifying the Fourteenth Amendment Congress approved of race-conscious remedies).

The Administration reasserted this originalist claim about the Fourteenth Amendment as colorblind on the occasion of the Constitution’s bicentennial. See William Bradford Reynolds, Assistant Att’y Gen., *Securing Equal Liberty in an Egalitarian Age*, Earl F. Nelson Memorial Lecture at the University of Missouri-Columbia (Sept. 12, 1986), in 52 MO. L. REV. 585, 598 (1987) quoting with approval Justice Harlan’s assertion that the Constitution is colorblind). The argument Reynolds advanced at that time was *not* rooted in an analysis of the debates over Reconstruction. See, e.g., *id.* at 603. Instead, Reynolds’s “originalist” claim for colorblindness was rooted in objections to the “radical egalitarianism” of recent jurisprudence. See *id.* at 585–86 (warning of a movement “aimed at wrenching the Constitution free from its great historical and philosophical moorings in the name of a much

Administration continued to associate with and honor the work of Raoul Berger, a prominent originalist critic of *Brown*.¹³⁰)

Attorney General Meese targeted *Roe* as contrary to a “jurisprudence of original intention” in this same 1985 Federalist Society speech, yet offered no originalist support other than a lone quotation from John Hart Ely questioning *Roe*’s authority as constitutional law.¹³¹ Simply put: in 1985, Meese’s claim that *Roe* was contrary to original intentions rested on an appeal to Ely’s authority, as well as the belief of the Reagan Administration and its voters that *Roe* was contrary to “family values” and traditional ways of life.¹³²

In challenging *Roe*’s constitutional authority, Meese spoke on behalf of the Administration that had recently filed a brief calling for *Roe*’s overruling in *Thornburgh*

distorted notion of equality” and of the emerging threat of an “aconstitutional, or even anti-constitutional, jurisprudence—moved largely by a seemingly unrelenting commitment to a radically egalitarian society”). Note that Reynolds was reiterating Attorney General Meese’s announced objections to the “radical egalitarianism” of the Warren Court. *See supra* text accompanying note 125.

¹³⁰ At the same time that the Administration was equating a colorblind reading of *Brown* with the Fourteenth Amendment’s original understanding, the Justice Department continued to honor Raoul Berger, a prominent originalist critic of *Brown*. The Department publicized its ties to Raoul Berger. Raoul Berger was in correspondence with Attorney General Meese and William Bradford Reynolds, Gallagher, *supra* note 109, at 40, and Markman included excerpts of Berger’s book which attacked *Brown*, interracial marriage, and the reapportionment decision as contrary to the original understanding in the Department’s sourcebook to exemplify the methods of originalism. *See supra* note 119.

The Justice Department sourcebook singled out Berger as an originator of originalist methods, not for the substance of his attack on *Brown*. Yet at this time Berger was still publicly attacking the decisions of the Second Reconstruction. *See* Raoul Berger, *Seeking the Framers’ Intent is the Court’s Duty*, HARTFORD COURANT, Nov. 6, 1985, at B11 (hereinafter Berger, *Seeking the Framers’ Intent is the Court’s Duty*) (attacking reapportionment decisions); Raoul Berger, *What the Framers Said*, WASH. POST, Jan. 3, 1988, at B7 [hereinafter Berger, *What the Framers Said*] (“[*Brown*] has become a sacred cow that an office-seeker criticizes at his peril. But the duty of a scholar is to set aside his own predilections, to hew to the line, let the chips fall where they may”).

In honoring as a founder of originalism a man who employed originalist methods to attack key Warren Court decisions of the Second Reconstruction, the Justice Department could well have been understood to be sending a message to constituencies who continued to question *Brown*. For an example of Attorney General Meese honoring Berger as criticized by “the left” (but not the right) for his constitutional positions on racial questions, see Edwin Meese III, Att’y Gen., Speech to the Joseph Story Awards Banquet (Mar. 24, 1988) (“Professor Berger is not simply a man of great learning and scholarship, but also one who has proved himself willing to take the political heat for his views. He drew the wrath of the left for *Government By Judiciary*, published in 1977.”). For an account of the racial roots of originalism, see TerBeek, *supra* note 39, at 822.

¹³¹ Meese Address to the Federalist Society, *supra* note 126. *The Constitution in the Year 2000* relies on John Hart Ely, as well. *See supra* note 118. Internal departmental memos substantiate what the text of Attorney General Meese’s speeches makes clear—that in this era Meese lacked a method or evidence to support his originalist claims. *See supra* note 119 and accompanying text.

¹³² The Reagan Administration expressly made this argument in calling for *Roe*’s overruling. *See infra* text accompanying note 133.

v. American College of Obstetricians and Gynecologists.¹³³ A young Sam Alito worked on the brief.¹³⁴ He had applied for a position with Attorney General Meese with a statement of personal qualifications that emphasized his aspiration to work toward the Court's declaring affirmative action unconstitutional and overturning *Roe*.¹³⁵ Alito appreciated that the Court as then constituted was not prepared to overrule *Roe*, but Alito saw the brief as an "opportunity to advance the goals of bringing about the eventual overruling

¹³³ Brief for 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 *2. The brief expressed values of the pro-family movement supporting the Reagan Administration. It uncritically endorsed the nineteenth-century campaign to ban abortion because the campaign sought to protect maternal health and potential life and *to promote family values* that the Administration affirmed as of enduring concern to the state:

Nor does the tenor and contemporaneous understanding of those [antiabortion] laws leave much doubt that they were directed, not only at protecting maternal health, but also at what was widely viewed as a moral evil comprehending the destruction of actual or potential human life and the undermining of family values in whose definition and reenforcement [sic] the state has always had a significant stake.

Id. at *26 (citation omitted).

¹³⁴ Michael Kranish, *A Coauthor Says Alito Was Instrumental in Roe v. Wade Brief*, BOSTON.COM (Nov. 16, 2005), http://archive.boston.com/news/nation/articles/2005/11/16/a_coauthor_says_alito_was_instrumental_in_roe_v_wade_brief [<https://perma.cc/HS3X-J4AA>].

¹³⁵ See Application of Samuel Alito for Deputy Assistant Attorney General of the Office of Legal Counsel (Dec. 12, 1985), <https://www.archives.gov/files/news/samuel-alito/accession-060-97-761/Acc060-97-761-box1-Alito.pdf> [<https://perma.cc/7XV4-UT9S>]. In his application, Alito stated:

I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration. . . . I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed, and that the Constitution does not protect a right to an abortion.

Id. see also Ari Shapiro & Robert Siegel, *Alito Wrote Abortion Isn't a Protected Right*, NPR (Nov. 14, 2005, 12:00 AM), <https://www.npr.org/2005/11/14/5012335/alito-wrote-abortion-isnt-a-protected-right> [<https://perma.cc/2VL5-KHL6>] (reiterating the same language); Gillian Brockell, *Alito Was 'Proud' of Fighting to Overturn Roe v. Wade As Early As 1985*, WASH. POST (May 3, 2022, 10:08 AM), <https://www.washingtonpost.com/history/2022/05/03/alito-history-roe-wade/> [<https://perma.cc/SF7U-S7NW>] (explaining that Alito described himself as a "life-long registered Republican" and that he was "particularly proud" of his work on cases arguing "that the Constitution does not protect a right to an abortion").

Justice Alito also listed on his OLC job application his membership in an organization called the Concerned Alumni of Princeton (CAP), formed to criticize Princeton's efforts to diversify admissions; conservative contemporaries speculate that he listed membership in CAP to signal his bona fides as a real Reagan conservative to Attorney General Meese. See Margaret Talbot, *Justice Alito's Crusade Against a Secular America Isn't Over*, NEW YORKER (Aug. 28, 2022), <https://www.newyorker.com/magazine/2022/09/05/justice-alitos-crusade-against-a-secular-america-isnt-over> [<https://perma.cc/87MU-CZP6>] (reporting observations of Fox News analyst Andrew Napolitano).

of *Roe v. Wade* and, in the meantime, of mitigating its effects,”¹³⁶ as he explained his thoughts in an interoffice memo to Solicitor General Charles Fried. The brief on which Alito worked affirmed the state’s interest in banning abortion, not only to protect potential life but to prevent “the undermining of family values in whose definition and reinforcement [sic] the state has always had a significant stake.”¹³⁷

As Alito feared, the Reagan Administration failed to reverse *Roe* in the Court’s 1985 *Thornburgh* decision, provoking instead from Justice Blackmun a resounding reaffirmation of *Roe* and the first recognition that *Roe* itself vindicated equality values—a statement that the Court was protecting “a central part of the sphere of liberty that our liberty that our law guarantees equally to all.”¹³⁸

But with Justice Powell’s retirement the following year, President Reagan seized his opportunity to nominate Judge Robert Bork, whose appointment would enable the Supreme Court to repudiate key lines of Warren and Burger Court cases. *Roe* was hardly the only case that hung in the balance.

All understood that the Bork nomination would change key areas of constitutional law. At the time of his nomination, Judge Bork was known as a critic of the public-accommodations provisions of the nation’s civil rights laws, as an opponent of affirmative action, and as “an originalist who believed that the equal protection sex discrimination cases of the Burger Court were contrary to the intent of the Fourteenth Amendment’s Framers” and who critiqued “*Griswold* as an ‘unprincipled’ usurpation of democratic authority unauthorized by the Constitution’s text—a critique he reiterated as a judge on the D.C. Circuit in an opinion with then-Judge Scalia upholding the Navy’s discharge of a gay service member as consistent with equal protection and

¹³⁶ Memorandum from Samuel A. Alito to Charles Fried, Solic. Gen. (June 3, 1985), <https://www.archives.gov/files/news/samuel-alito/accession-060-89-1/Acc060-89-1-box18-SG-AbortionsAlt-1985.pdf> [<https://perma.cc/M3VZ-XV9X>]. Another member of the team was Stephen Galebach, the author of the Human Life Statute, which proposed to overturn *Roe* by congressional enactment. Bernard Weinraub, *Determining When Life Begins and Abortions Stop*, N.Y. TIMES, Apr. 23, 1981, at B9, <https://timesmachine.nytimes.com/timesmachine/1981/04/23/094493.html?pageNumber=33> [<https://perma.cc/FKN8-REDX>].

¹³⁷ See Brief for the United States as Amicus Curiae in Support of Appellants, *supra* note 133, at *26.

¹³⁸ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (“A woman’s right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.”).

due process.”¹³⁹ Bork’s nomination was successfully opposed by those who supported the causes of racial justice, women’s rights, reproductive rights, and gay rights.¹⁴⁰

* * *

Examining the practice of originalism in its earliest years cannot tell us how it would develop. As the practice of originalism moved outward from the Justice Department into the academy and onto the bench, it multiplied into many forms.¹⁴¹

But there are patterns present at its origins that persisted. Many originalists who identified with the conservative legal movement continued to act on the understandings, values, and practices of originalism’s inaugural years.

Consider the following example. In 1989, the same year that Justice Scalia published *Originalism: The Lesser Evil*,¹⁴² which argued that originalism disciplines judges because it “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself,”¹⁴³ Justice Scalia cast the deciding vote in *City of Richmond v. J.A. Croson Co.*,¹⁴⁴ enabling a majority of the Court for the first time to apply strict scrutiny to affirmative action.¹⁴⁵ Scalia voted in *Croson* to apply strict scrutiny to

¹³⁹ Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J.F. 316, 320 (2015) (footnotes omitted), <http://www.yalelawjournal.org/forum/how-conflict-entrenched-the-right-to-privacy> [https://perma.cc/2RYU-2DQV]; see ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 74-75 (2007) (recounting the D.C. Circuit case and highlighting Bork’s distaste for right-of-privacy jurisprudence); Linda Greenhouse, *The Bork Battle: Visions of the Constitution*, N.Y. TIMES, Oct. 4, 1987 (§ 4), at 22–23, <https://timesmachine.nytimes.com/timesmachine/1987/10/04/095087.html?pageNumber=166> [https://perma.cc/E5ZF-CWET] (reporting that Bork viewed the Court’s privacy decisions as “illegitimate”); Linda Greenhouse, *A Deeper Dimension: The Senators, Judging Bork, Try to Define Conservatism*, N.Y. TIMES, Oct. 11, 1987 (§ 4), at 26–27, <https://timesmachine.nytimes.com/timesmachine/1987/10/11/192687.html?pageNumber=216> [https://perma.cc/MBU4-6EJH]. Bork partly retreated from this categorical position during his confirmation hearings. See Stuart Taylor Jr., *Bork Backs Away From Earlier Stance on Civil Rights*, N.Y. TIMES, Sept. 17, 1987, at A1, B11 (“In describing his new views, Judge Bork said he now believes that the Constitution bars some forms of sex discrimination . . .”). For further description of Bork’s position on sex discrimination during his confirmation hearings, see Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 159-61, 392 (1987); BRONNER, *supra*, at 241; and Al Kamen & Edward Walsh, *Softening of Bork’s Controversial Stands Raises Issue of ‘Confirmation Conversion’*, N.Y. TIMES, Sept. 18, 1987, at A1, A10.

¹⁴⁰ Siegel, *supra* note 139, at 320–21.

¹⁴¹ For one account of this transition, see Baumgardner, *supra* note 40.

¹⁴² Scalia, *supra* note 13. This speech happens to be one of Scalia’s first published statements about originalism. See Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 150 (2016) (describing *The Lesser Evil* as amounting “to Justice Scalia’s most extended public defense to that point of originalism”).

¹⁴³ Scalia, *supra* note 13, at 864.

¹⁴⁴ 488 U.S. 469 (1989).

¹⁴⁵ Siegel, *2012 Term Foreword*, *supra* note 15, at 29–38.

affirmative action *without ever mentioning that there were originalist arguments in support of affirmative action*, and over a dissent by Justice Marshall taunting him for this evasion.¹⁴⁶ Rather than engage Justice Marshall's arguments that supported affirmative action as consistent with the original understanding of the Fourteenth Amendment, which the Meese Justice Department had refused to do,¹⁴⁷ Justice Scalia avoided originalist arguments in *Croson* (and in every subsequent affirmative action case¹⁴⁸) and voted with contemporary social movements¹⁴⁹ to apply strict scrutiny to equal protection challenges to affirmative action in an opinion voicing a full-throated plea for the cause of white men.¹⁵⁰

¹⁴⁶ I recount this story in Siegel, *supra* note 6, at 49–50, 50 n.148, Siegel, *2012 Term Foreword, supra* note 15, at 28 n. 140, 35-37, and with Jack Balkin in *Originalism and Colorblindness: The Triumph of Constitutional Memory over Constitutional History* (draft manuscript on file with authors).

¹⁴⁷ See *supra* note 129.

¹⁴⁸ See EDWARD A. PURCELL JR., ANTONIN SCALIA AND AMERICAN CONSTITUTIONALISM: THE HISTORICAL SIGNIFICANCE OF A JUDICIAL ICON 262 (2020) (observing that Justice Scalia “ignored originalist historical evidence in condemning affirmative action” in his opinions); Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 73 (2013) (noting that Justice Scalia did not make “any real effort to justify [his] affirmative action opinions based on the Constitution’s original meaning”); RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 105–07 (2018) (same).

¹⁴⁹ For accounts of protests against affirmative action in the decade preceding Reagan’s election, see DENNIS DESLIPPE, *PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION* (2012); ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S* (2012); and TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 111–60 (2004).

¹⁵⁰ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (invoking Justice Harlan’s statement in *Plessy* that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens” (alteration in original) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))). Countering arguments that affirmative action promotes equality, Justice Scalia argued that race-conscious remedial action would injure and enrage white men:

“A DeFunis [sic] who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.” . . . When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.

Id. At 527 (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting)).

For a reading of *Croson* as an expression of the Reagan Administration’s living constitutionalism, see Siegel, *2012 Term Foreword, supra* note 15, at 29–44, and for an account of how early strict scrutiny cases talked about the interests of “whites,” see *id.* at 40–41 & nn. 201–02 (“As Powell’s discussion of the ‘white ‘majority’” in *Bakke* illustrates, the first arguments for extending heightened scrutiny to affirmative action were openly engaged with the concerns of ‘whites’—reasoning in racially particularized ways that diminished in *Croson’s* wake.” (footnotes omitted)). For Scalia’s earliest account of affirmative action, from which he was reasoning in *Croson*, see Antonin Scalia, Commentary, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race.”*, 1979 WASH. U. L.Q. 147 (1979).

Only seven years later, in *United States v. Virginia*,¹⁵¹ Justice Scalia refused to join seven other Justices in declaring that Virginia's exclusion of women from the state's premier leadership institute violated the Equal Protection Clause. To justify his lone vote in dissent, he appealed to equal protection's original meaning: "Since it is entirely clear that the Constitution of the United States—the *old one*—takes no sides in this educational debate, I dissent."¹⁵² When asked to apply intermediate scrutiny under the Equal Protection Clause to protect *women* against injury, Justice Scalia suddenly became the originalist who, like Judge Bork,¹⁵³ refused to apply intermediate scrutiny in the name of the "old" Constitution, and ended his dissent with a lengthy constitutional-memory ode to "manly 'honor' . . . and the system it represents."¹⁵⁴

At one level, Justice Scalia's interpretation of the Equal Protection Clause in *Croson* and *Virginia* exposes him to a charge of inconsistency or even hypocrisy. Why did Justice Scalia mock living constitutionalism when he himself was engaged in practicing it? But framing the problem this way obscures the values that likely guided Justice Scalia's originalism.

Like Attorney General Meese before him, what seems to have guided Justice Scalia in writing these equal-protection opinions is an intuition that he knew what was in the Framers' Constitution. Justice Scalia just *knew*—without fancy historical research—that the Original Constitution, the Framer's Constitution, the *Real* Constitution, aligned with the best in American traditions as he understood them, that it protected "manly 'honor' . . . and the system it represents,"¹⁵⁵ and that the Original Constitution did *not* prohibit sex discrimination, or protect abortion rights or gay rights or affirmative action. There was an inside and an outside—and Justice Scalia was on the inside defending his traditions, his way of life, and his Constitution against incursions by the wrong kind of people.

At the root of Justice Scalia's apparent contradictions, I believe we would find a commitment to a way of life—let's call it family values traditionalism—that Justice Scalia drew on originalism to defend. Justice Scalia's views are, of course, not idiosyncratic. He came to prominence as a brilliant spokesperson for the conservative legal movement's commitment to originalism. The traditions he defends are the movement's.

II. *DOBBS'S* ORIGINALISM AS THE RIGHT'S LIVING CONSTITUTION

¹⁵¹ 518 U.S. 515 (1996).

¹⁵² *Id.* at 567 (Scalia, J., dissenting) (emphasis added).

¹⁵³ See *supra* text accompanying note 139.

¹⁵⁴ *Virginia*, 518 U.S. at 601 (Scalia, J., dissenting).

¹⁵⁵ *Id.*

In this Part I read *Dobbs* through a double lens. I first consider how originalists have evaluated the decision, given that *Dobbs* does not employ methods of original public meaning originalism that many academic originalists favor, but instead reasons from precedent, history, and tradition. For this reason, some originalists term *Dobbs* a living constitutionalist decision. I then read *Dobbs* in light of the twentieth-century history of originalism set out in the first Part of this Article and show how *Dobbs* employs techniques and vindicates goals I have identified as part of the political practice of originalism. This reading offers a very differently inflected account of why *Dobbs* is a living constitutionalist decision.

Dobbs ruled that *Roe* and *Casey* are not supported by the Fourteenth Amendment's liberty guarantee in light of "the overwhelming consensus of state laws [banning abortion] in effect in 1868."¹⁵⁶ Remarkably, in *Dobbs*, Justice Alito never once discussed the history or great public meanings of the Reconstruction Amendments. Nor did the Court examine the original public meaning of the liberty guarantee—the meaning the text communicated to the public at the time of ratification.¹⁵⁷ Nor did the Court ask what relationship, if any, laws banning abortion had to the Fourteenth Amendment's expected application. (Even if we should be thinking about the meaning of "liberty" at the time of its ratification—which is assuredly not the way the United States Supreme Court has interpreted the Fourteenth Amendment in cases like *Brown*, *Virginia*, or *Loving v. Virginia*¹⁵⁸—*Dobbs* made no claim and offered no evidence that any contemporary drew a connection between abortion and the Fourteenth Amendment at the time it was ratified.¹⁵⁹) Rather, Justice Alito insisted that following this history-and-traditions standard, adapted (with changes *sub silentio*¹⁶⁰) from a 1997 substantive due process case called *Washington v. Glucksberg*,¹⁶¹ would constrain judicial discretion in interpreting the Fourteenth Amendment's liberty guarantee.

Like Justice Scalia in *Originalism: The Lesser Evil*,¹⁶² Justice Alito claimed that tying the meaning of the Fourteenth Amendment's liberty guarantee to America's "history and traditions" prevents the justices from imposing their own views on the

¹⁵⁶ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2267 (2022). See *infra* section II(B)(2).

¹⁵⁷ See, e.g., Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U.L. REV. 1953, 1957 (2021).

¹⁵⁸ 388 U.S. 1 (1967).

¹⁵⁹ Justice Alito finds a history and tradition by citing statutes (collected in the opinion's appendix) but refuses to examine the debates leading to their enactment. See *infra* section II(B)(2). Doctors campaigning to criminalize abortion in mid-nineteenth century America regularly complained about the public's persisting belief in quickening and the acceptability of ending early pregnancy. For examples, see *infra* note 232 and accompanying text.

¹⁶⁰ See *infra* section II(B)(1).

¹⁶¹ 521 U.S. 702 (1997).

¹⁶² Scalia, *supra* note 13.

case at hand. “In interpreting what is meant by the Fourteenth Amendment’s reference to ‘liberty,’” he wrote, “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.”¹⁶³

As we have seen, from the first appearance of the leaked draft, academic originalists have debated whether *Dobbs*’s history-and-traditions method can qualify as originalist because the decision followed a substantive due process rather than original public meaning approach to interpreting the Fourteenth Amendment’s liberty guarantee.¹⁶⁴ Professor Lawrence Solum has emphasized that because *Dobbs* focused on “historical practice” rather than the meaning of the Constitution’s text, *Dobbs* was in fact “a living constitutionalist decision”¹⁶⁵—a position he reiterated in an interview calling the decision “classic living constitutionalism” and the Court’s end of Term historically-focused decisions “conservative living constitutionalist decisions.”¹⁶⁶

¹⁶³ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247 (2022). The Court continued: “As the Court cautioned in *Glucksberg*, [w]e must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Id.* at 2247–48 (quoting *Glucksberg*, 521 U.S. at 720).

¹⁶⁴ See, e.g., *supra* subpart I(A); see also Nick Gillespie, *Randy Barnett: Abortion, Guns, and the Future of the Supreme Court*, REASON, at 11:41–12:06 (June 29, 2022, 4:18 PM), <https://reason.com/podcast/2022/06/29/andy-barnett-abortion-guns-and-the-future-of-the-supreme-court> [<https://perma.cc/2LKZ-NXN2>] (“I disagree, in some sense, with both the substantive due process approach of the majority [from] *Glucksberg*, because it’s operating within modern substantive due process doctrine . . . [and] with Justice Thomas’s concurring opinion . . .”).

¹⁶⁵ See *supra* note 42 and accompanying text.

¹⁶⁶ Professor Solum expanded on this initial characterization of the decision in a subsequent interview:

Lawrence Solum, a University of Virginia School of Law professor who has written extensively on originalism, called the abortion opinion “classic living constitutionalism,” saying Alito relied on a number of non-textual factors, including history. “And this pattern is followed by the court in many other decisions,” Solum said. “The last two terms, the big cases are almost all conservative living constitutionalist decisions.” But Solum also said also said the outcomes in those cases “may very well have been influenced by originalism.”

Greg Stohr, *Scalia’s Legacy Lives on in Supreme Court’s Abortion, Gun Cases*, BLOOMBERG, Aug. 6, 2022, <https://www.bloomberg.com/news/articles/2022-08-06/scalia-s-legacy-lives-on-in-supreme-court-s-abortion-gun-cases> [<https://perma.cc/6894-8EZG>].

Professor Evan Bernick has observed, “*Dobbs* isn’t originalism and gives almost no sense of an obligation to try to be. It focuses its attention on the right time period, but its inquiry into that period is limited by nonoriginalist doctrine, and Alito limits it still further in ways that aren’t defended on originalist grounds.” Evan D. Bernick, *Vindicating Cassandra: A Comment on Dobbs v. Jackson Women’s Health Organization* (2021–2022), CATO SUP. CT. REV. (forthcoming 2022) (manuscript at 263), <http://www.cato.org/sites/cato.org/files/2022-09/Supreme-Court-Review-2022-Chapter-9.pdf> [<https://perma.cc/Q3ME-DBUJ>]. Michael Smith argues that there is a severe disconnect between the

Professors Steven Calabresi and Ilan Wurman also questioned *Dobbs*'s originalism because the decision was grounded in substantive due process doctrine and recognized that unenumerated rights are protected by due process.¹⁶⁷

Several natural law originalists have argued that *Dobbs*'s substantive-due-process history-and-traditions analysis approximated original meaning so far as feasible for a judge who respects precedent, consistent with a judge's role commitments to stare decisis.¹⁶⁸ This approach to the *Dobbs* opinion is revealing. It

premises of academic originalism and decisions of the Supreme Court's 2021 Term. See Michael L. Smith, *Abandoning Original Meaning*, 36 ALB. L. REV. (forthcoming 2023) (manuscript at 1), available at <https://ssrn.com/abstract=4211660> [<https://perma.cc/657B-CKTZ>] (“Originalists must reckon with the fact that when it came time for the Court to issue its most crucial opinions, the Court not only refused to consider their work, but it refused to even consider the field of constitutional interpretation that they have spent decades developing.”).

¹⁶⁷ In a letter to the editor of the *Wall Street Journal*, Professor Calabresi asserted:

A true originalist ruling overturning *Roe v. Wade* (1973) would say that abortion is not a privilege or immunity of citizenship because it is not deeply rooted in American tradition or in the concept of ordered liberty, as is required by *Corfield v. Coryell* (1823), the case that the framers of the 14th Amendment said interpreted its most important clause: the Privileges or Immunities Clause. . . . This means taking the Privileges or Immunities Clause seriously and stopping the charade of tilting at the Due Process Clause, which protects only procedural rights. No one in legal academia today thinks unenumerated rights are protected by substantive due process, which is an oxymoron anyway.

Steven G. Calabresi, Letter to the Editor, *The True Originalist Answer to Roe v. Wade*, WALL ST. J. (May 8, 2022, 12:38 PM), <https://www.wsj.com/articles/the-true-originalist-answer-to-roe-v-wade-11652027903> [<https://perma.cc/YP6G-YBNL>]. Sounding similar notes, Professor Wurman observed:

Dobbs is even harder to square with originalism. Most originalists agree that “substantive due process” is particularly problematic as applied to unwritten rights. *Roe v. Wade* was such a substantive due process decision: There the court identified a right to abortion nowhere written in the Constitution and held that despite that fact no state could fully prohibit that right. In *Dobbs*, the Supreme Court overturned *Roe*, but it did not repudiate substantive due process; it merely limited the doctrine to those written or unwritten rights “deeply rooted in history and tradition.” That is certainly more consistent with originalism, though it is not quite originalism.

Ilan Wurman, *Hard to Square Dobbs and Bruen with Originalism*, DENVER POST (July 12, 2022), <https://www.denverpost.com/2022/07/12/roe-vs-wade-originalism-dobbs-bruen-abortion-guns> [<https://perma.cc/GC7Q-AS22>].

¹⁶⁸ Professors Lee Strang and Joel Alica have defended *Dobbs* as originalist. Strang admitted that *Dobbs* “follows *Glucksberg*'s [substantive due process] approach” and that it “spends little time articulating and applying original meaning,” but he nevertheless characterizes the opinion as originalist because it “uses the tools of the text and *stare decisis* to move errant constitutional doctrine back to the Constitution's original meaning” and as such represents a “progression toward a fully originalist” constitutional practice.” Lee J. Strang, *A Three-Step Program for Originalism*, PUB. DISCOURSE (June 12, 2022), <https://www.thepublicdiscourse.com/2022/06/82703/> [<https://perma.cc/WQ3S-KSBU>]. In justifying *Dobbs* as originalist despite its reliance on *Glucksberg*, Professor Alica likewise conceded that

suggests that, unconstrained, an originalist judge would overturn not only the abortion right but most other substantive due process rights, as Justice Thomas called for in his concurring opinion¹⁶⁹ possibly including *incorporated* (enumerated) rights as well.¹⁷⁰

This Article understands *Dobbs* as originalist on different grounds. *Dobbs* does not employ the methods of academic originalists; it shows no interest in the original public meaning of the Fourteenth Amendment. But *Dobbs* is the expression of originalism that has developed in the conservative legal movement and the Republican Party over the last forty years. In this Part I show how *Dobbs* grows out of the movement-party practice of originalism. *Dobbs* employs hardball appointments politics and constitutional memory frames in the service of constitutional change, drawing upon a history-and-traditions standard to overturn *Roe* and threaten many of the same

stare decisis prevented the Court from, in a single opinion, discarding substantive due process wholesale, but that its “detailed historical analysis of how abortion was treated by American law up through the ratification of the Fourteenth Amendment . . . serves the same function as demonstrating that a right to abortion is not supported by the original meaning of the Fourteenth Amendment.” J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), <https://www.city-journal.org/dobbs-abortion-ruling-is-a-triumph-for-originalists> [<https://perma.cc/F4U6-UBZD>]. Alicea additionally conceded that *Dobbs*’s *Glucksberg* analysis at best provides evidence for a constitutional provision’s “original expected applications” rather than original meaning. *Id.*

¹⁶⁹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring).

¹⁷⁰ Professor Strang believes that eventually, constitutional jurisprudence will return to a “fully originalist practice” but does not explain all the changes in our law this practice would entail. He does provide a suggestion. In other writings, Professor Strang has criticized the incorporation of the Bill of Rights against the states for incurring “significant costs to federalism.” Lee J. Strang, *Incorporation Doctrine’s Federalism Costs: A Cautionary Note for the European Union*, 20 EUR. J.L. REFORM no. 2–3 2018, at 129, 130. Justice Thomas has written that he would revisit certain incorporated rights—such as that protected by the Second Amendment—under the Privileges or Immunities Clause of the Fourteenth Amendment. *Cf. McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring) (arguing that the right to bear arms applies to the States through the Privileges or Immunities Clause, not the Due Process Clause). However, Justice Thomas has questioned “whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution.” *See Dobbs*, 142 S. Ct. at 2302 (Thomas, J., concurring). To put the point modestly, Justice Thomas is signaling that originalists would recognize under Privileges or Immunities only a limited number of rights presently incorporated under Due Process.

Contemporary originalists are carrying forward aspirations of the 1980s movement. Overturning incorporation was at one point a serious priority of the Department of Justice under Ed Meese, President Ronald Reagan’s Attorney General. *See Calvin TerBeek, The Untold Story of How Conservative Embraced the Bill of Rights and Incorporation*, A HOUSE DIVIDED (Feb. 12, 2019), <https://ahousedividedapd.com/2019/02/12/the-untold-story-of-how-conservatives-embraced-the-bill-of-rights-and-incorporation/> [<https://perma.cc/96G8-PDRY>].

Originalism is not small “c” conservative. Professor Cass Sunstein once observed of originalism: “Burkean minimalists have little interest in originalism. From the Burkean perspective, originalism is far too radical, because it calls for dramatic movements in the law, and it is unacceptable for exactly that reason. Originalists are in the grip of a priori reasoning.” Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 358–59 (2006) (footnote omitted).

rights attacked in Judge Bork's confirmation hearing¹⁷¹ and in *The Constitution in the Year 2000*.¹⁷²

As the right celebrates *Dobbs* as “magnificently correct”¹⁷³ and “masterly,”¹⁷⁴ it is critical to record, for history, that it took appointments politics that had recently turned newly norm-busting¹⁷⁵ to create a Supreme Court that would throw out fifty years of our constitutional law and play constitutional memory games with the nation's history and traditions to justify it.¹⁷⁶ There would be no *Dobbs* opinion unless the specialized judicial appointments practice we examined in subpart I(C) continued into the present, as subpart II(A) shows. To illustrate: when the Bush Administration nominated Judge Alito, the Administration had his application for a position in the Meese Justice Department in which he described his “contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed, and that the Constitution does not protect a right to an abortion.”¹⁷⁷ Other Justices in the *Dobbs* majority were screened¹⁷⁸ and elevated via the hardball nomination politics of the Trump presidency in order to create the Court that overturned *Roe*.¹⁷⁹ *No aspect of the Dobbs opinion would be law without them*. Appointments-based features of the story do not come into view when we talk about originalism as a value-neutral method. Yet these appointments strategies are central to *Dobbs* when we

¹⁷¹ See *supra* text accompanying note 139.

¹⁷² See *supra* text accompanying note 113.

¹⁷³ Michael Stokes Paulsen, *The Magnificence of Dobbs*, PUB. DISCOURSE (June 26, 2022), <https://www.thepublicdiscourse.com/2022/06/83022/> [https://perma.cc/HM8D-4AFR].

¹⁷⁴ See Ed Whelan, *Servants of the Constitution*, NAT'L REV. (July 14, 2022, 4:21 PM), <https://www.nationalreview.com/magazine/2022/08/01/servants-of-the-constitution/> [https://perma.cc/BF7U-6VG3].

¹⁷⁵ See *infra* subpart II(A).

¹⁷⁶ See *infra* subpart II(B).

¹⁷⁷ See *supra* notes 134–136 and accompanying text. These archival materials surfaced during then-Judge Alito's confirmation hearings. See Shapiro, *supra* note 135 (discussing the archival materials and their contents); see also JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 312 (2007) (same).

Senator Edward Kennedy recounted in his diary a private meeting during the confirmation process in which “Judge Alito assured Mr. Kennedy that he should not put much stock in the memo. He had been seeking a promotion and wrote what he thought his bosses wanted to hear. ‘I was a younger person,’ Judge Alito said. ‘I’ve matured a lot.’” Senator Kennedy was not reassured and “who went on to vote against Judge Alito's confirmation. If the judge could configure his beliefs to get that 1985 promotion, Mr. Kennedy asked in a notation in his diary, how might he dissemble to clinch a lifetime appointment to the nation's highest court?” John A. Farrell, *Alito Assured Ted Kennedy in 2005 of Respect for Roe v. Wade, Diary Says*, N.Y. TIMES (Oct. 24, 2022), <https://www.nytimes.com/2022/10/24/us/politics/alito-kennedy-abortion.html> [https://perma.cc/559W-GS3Z].

¹⁷⁸ See *infra* note 187 and accompanying text.

¹⁷⁹ See *supra* sections I(C)(2)-(3).

discuss originalism as a goal-oriented political practice. Movement-identified originalists have emphasized how critical they were to *Dobbs* in the wake of the decision.¹⁸⁰

When we examine *Dobbs* with attention to appointments, we better appreciate the decision's history-and-traditions standard, as I show in section II(B)(1). The Court that decided *Dobbs* dramatically revised the doctrine that defines the reach of the Fourteenth Amendment's liberty guarantee, and it did so without even explaining that it was dramatically transforming that body of law.¹⁸¹ This is how the Trump Court made law to achieve the long-sought goals of movement originalists.

Justice Alito claimed that the purpose of a history-and-traditions standard was not to ascertain the original meaning of the Fourteenth Amendment's liberty guarantee, but to constrain judicial discretion.¹⁸² This strains credulity. The history-and-traditions framework is a claim on constitutional memory, a memory game that rationalizes the exercise of power. It functions to conceal rather than to constrain discretion. On this view, Justices who disdain living constitutionalism and values-based constitutional interpretation turn to the past to *vindicate values that they do not wish openly to endorse*. On this view, originalism employs constitutional memory games to justify normative ends the Justices refuse to own as their own.

As I show in section II(B)(2), today as in the 1980s, originalism's memory games offer a special way of talking that dissolves hardball appointments politics into claims about constitutionally redemptive law. *Dobbs*'s account of our history and traditions—its appendix of laws in whose enactment women had no voice or vote—plays a critical part in legitimating the Court's decision to overturn a half century of women's equal-citizenship rights and to authorize states to govern pregnancy through a coercive and carceral regime subject to minimal constitutional oversight.

Professor Lawrence Solum understands *Dobbs* as “a living constitutionalist decision”¹⁸³ because the Justices reasoned from a substantive-due-process history-and-traditions standard rather than from the Fourteenth Amendment's original public meaning. This Article understands *Dobbs* as a “living constitutionalist” decision in an overlapping and in a larger sense: *Dobbs* is a “living constitutionalist” decision because it refashions substantive due process doctrine to achieve changes that movement-identified originalists have sought since the days of the Reagan Administration.¹⁸⁴ The

¹⁸⁰ See *infra* note 190 and accompanying text.

¹⁸¹ See *infra* section II(B)(1).

¹⁸² See *supra* text accompanying notes 161–163.

¹⁸³ See *supra* note 166 and accompanying text.

¹⁸⁴ In an interview on the case, Professor Lawrence Solum can be understood as saying something at least in part related to this position. He employs the epithet “living constitutionalist” to judge *Dobbs*, not simply because the case is decided on historical and doctrinal rather than textual grounds, but *also*

deepest problem with *Dobbs*'s brand of living constitutionalism is that it makes our constitutional order less democratic, the concern I turn to in Part III of this Article.

A. How Dobbs Depends on Hardball Appointments Politics

The Republican Party engaged in norm-busting appointments politics to produce the Supreme Court that decided the *Dobbs* case. These norm-busting appointments politics were a necessary condition for the decision. When I call *Dobbs* an originalist decision, I include within my account of originalism the appointment practices that produced the Court that decided the case. In the absence of appointments practices such as these—engineered by Republican Senator McConnell, the Republican Senate, and Republican President Donald Trump—there would be no Supreme Court to reverse *Roe*.

We have come a long way—and not all that far—from the Republican Party's 1980 platform plank promising the “appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life,”¹⁸⁵ and Meese and Markman's decision to take over screening judicial nominees.¹⁸⁶ Donald Trump campaigned in 2016 with a list of Federalist-Society-screened and vetted nominees¹⁸⁷ whom Trump promised voters would overturn *Roe* “automatically in my

to characterize the direction in which the Court moved doctrine. He called *Dobbs* and other end of Term decisions “conservative living constitutionalist decisions” whose “outcomes” “may very well have been influenced by originalism.” In this interview, Professor Solum does not explain what it means for a practitioner of conservative living constitutionalism to be “influenced by originalism” sufficiently to shape the “outcomes” of his decisions. *See supra* note 166.

¹⁸⁵ *See supra* note 85 and accompanying text.

¹⁸⁶ *See supra* sections I(C)(2)–(3).

¹⁸⁷ *See* Lawrence Baum & Neal Devins, *Federalist Court: How the Federalist Society Became the De Facto Selector of Republican Supreme Court Justices*, SLATE (Jan. 31, 2017, 10:12 AM), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html> [<https://perma.cc/688V-JQ86>] (describing the evolution of the Federalist Society's influence over the judicial nomination process, from the Reagan to the Trump presidencies); Toobin, *supra* note 68 (profiling Leonard Leo, executive vice president of the Federalist Society, and tracing the organization's development and expansion). In 2021, Senator Sheldon Whitehouse delivered a series of speeches on the Senate Floor entitled “the Scheme” in order to “chronicle the long-running . . . scheme” by the Federalist Society and other conservative organizations to “capture the Supreme Court.” *See, e.g.*, 167 CONG. REC. S4858-59 (daily ed. July 13, 2021) (statement of Sen. Sheldon Whitehouse). Chief Judge William Holcombe Pryor, Jr. of the Eleventh Circuit mocked those who have criticized the Federalist Society's longstanding influence over the judicial-nomination process, including by disparaging Senator Whitehouse's “the Scheme” speeches and *Slate* writers Dahlia Lithwick and Richard L. Hasen, and *Above the Law* contributor Elie Mystal, *See* Mark Joseph Stern (@mjs_DC), TWITTER (Nov. 10, 2022, 10:20 AM), https://twitter.com/mjs_dc/status/1590725994847272961 [<https://perma.cc/JX9X-BXYF>] (providing a clip of the speech's introduction); *see also* Richard L.

opinion.”¹⁸⁸ His nominees were confirmed in increasingly contentious hearings.¹⁸⁹ Consider these two episodes: In February of 2016 when Justice Scalia passed away, Senator McConnell blocked hearings for President Barack Obama’s nominee, Merrick Garland. McConnell claimed February hearings for Merrick Garland were out of bounds because they were taking place “during an election year,” Senator McConnell claimed.¹⁹⁰

But, in September of 2020, when Justice Ginsburg passed away, Senator McConnell abandoned his Garland-rule to rush through a hearing for Amy Coney Barrett literally in the midst of mail-in voting. We could spend a long time debating the harm to the Court’s legitimacy inflicted by the Republicans’ approach to the Garland nomination, but in combination with the Barrett nomination, the Party’s

Hasen & Dahlia Lithwick, *The Truly Scary Part of the \$1.6 Billion Conservative Donation*, SLATE (Aug. 23, 2022, 7:24 PM), <https://slate.com/news-and-politics/2022/08/leonard-leo-billion-donation-real-problem.html> [<https://perma.cc/KEJ9-NREP>] (tracing the history and scale of Leonard Leo’s conservative-agenda-pushing tactics).

¹⁸⁸ Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016, 9:31 PM), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> [<https://perma.cc/UNE2-8R7Y>].

¹⁸⁹ See Tessa Berenson, *How Neil Gorsuch’s Confirmation Fight Changed Politics*, TIME (Apr. 7, 2017, 11:58 AM), <https://time.com/4730746/neil-gorsuch-confirmed-supreme-court-year/> [<https://perma.cc/AU9S-98UW>] (on Justice Gorsuch’s confirmation hearings); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 158–59 (2019) (on Justice Kavanaugh’s confirmation hearings); Deirdre Walsh, *Takeaways From Amy Coney Barrett’s Judiciary Confirmation Hearings*, NPR (Oct. 15, 2020, 5:01 AM), <https://www.npr.org/2020/10/15/923637375/takeaways-from-amy-coney-barretts-judiciary-confirmation-hearings> [<https://perma.cc/LQM2-E7TJ>] (on Justice Barrett’s confirmation hearings); see also Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, in 2020 SUP. CT. REV. 277, 284 (“Through appointments that were each distinctively tumultuous, Justice Gorsuch took Justice Scalia’s seat, Justice Kavanaugh took Justice Kennedy’s seat, and Justice Amy Coney Barrett took Justice Ginsburg’s seat.”).

¹⁹⁰ See Julian E. Zelizer, *How Conservatives Won the Battle Over the Courts*, ATLANTIC (July 7, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/how-conservatives-won-the-battle-over-the-courts/564533> [<https://perma.cc/67C2-3EC6>] (noting that per McConnell’s instructions, Merrick Garland received “no votes, no hearings, no nothing”). Some conservative legal scholars have described the Republicans’ decision to block the Garland nomination as a cornerstone of the Court’s new originalist jurisprudence. Ed Whelan celebrated the decision to block Garland as key on the path to *Dobbs* and critical in Trump’s electoral victory over Hillary Clinton. Whelan, *supra* note 174. According to Josh Blackman, “This was a momentous decision that altered the course of the Supreme Court’s history.” Josh Blackman, *For Legal Conservatives, Six Decades of Folding, Followed by Sixteen Years to Draw a Full House*, REASON: VOLOKH CONSPIRACY (July 25, 2022, 8:00 AM), <https://reason.com/volokh/2022/07/25/for-legal-conservatives-six-decades-of-folding-followed-by-sixteen-years-to-draw-a-full-house/> [<https://perma.cc/G82J-EV3S>].

approach to Supreme Court confirmations was simple, clear, and visible for all to see. As Nicholas Goldberg observed in the *L.A. Times*:¹⁹¹

The same Republican senators who in 2016 refused to consider Merrick Garland’s appointment to the Supreme Court because, with eight months to go, it was supposedly too close to the presidential election, have now confirmed Amy Coney Barrett with just eight days left before the election. This is so unprincipled, so inconsistent and so cynical that it defies the imagination. It is the flip-flop of the century, undertaken by the Republicans for one reason: Barrett’s confirmation ensures a conservative majority on the high court for the foreseeable future.

In the end, the only principle that explained the Republicans’ approach to the Garland and Barrett appointments was the principle to pack the Court—here I use the term advisedly in light of the Republicans’ differential treatment of the Garland and Barrett nominations—to secure control of the Court, at whatever cost to the legitimacy of the institution.

There was no authority for the *Dobbs* decision in *United States Reports* until this hardball nominations strategy produced a Court to change the law. Rather than act to preserve the institutional authority of the Court after these fiercely contested changes to its membership, the Court’s new majority instead moved as quickly as possible to change the law.

One body of law the new majority swept away was fifty years of precedent for the abortion right. A Supreme Court with different members had affirmed and reaffirmed *Roe* innumerable times over nearly a half century. In 1992 the Supreme Court reaffirmed and narrowed *Roe* in its surprise *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁹² judgment, giving more recognition to the state’s interest in protecting potential life, but also giving full-throated recognition to women’s equality interest in controlling their bodies and lives.¹⁹³ The Court had extended the abortion

¹⁹¹ See Nicholas Goldberg, *Column: Amy Coney Barrett’s Confirmation Was Shockingly Hypocritical. But There May Be a Silver Lining*, L.A. TIMES (Oct. 26, 2020, 5:46 PM), <https://www.latimes.com/opinion/story/2020-10-26/confirmation-amy-coney-barrett-silver-lining> [<https://perma.cc/8GRR-KSFB>] (emphasis omitted). In explaining shifts in the Court’s composition in the wake of oral argument, the editorial board of the Washington Post adverted to this sequence as “underhanded politics.” Editorial Board, *Gutting ‘Roe’ Would Devastate Millions of Americans—And the Court Itself*, WASH. POST (Dec. 1, 2021, 2:30 PM), <https://www.washingtonpost.com/opinions/2021/12/01/gutting-roe-v-wade-devastate-americans/> [<https://perma.cc/5WE4-7BLB>]; see also Editorial Board, *The Republican Party’s Supreme Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/opinion/amy-coney-barrett-supreme-court.html> [<https://perma.cc/R8KN-SLJA>] (arguing Barrett’s confirmation nearly one week before the election “smack[s] of unseemly hypocrisy”).

¹⁹² 505 U.S. 833 (1992).

¹⁹³ Siegel, *supra* note 189, at 292–96.

right again as recently as 2016 in *Whole Woman's Health v. Hellerstedt*¹⁹⁴ and the Supreme Court reaffirmed *Roe* yet again as recently as 2020 in *June Medical Services L.L.C. v. Russo*.¹⁹⁵

Judges reasoning with less of a “conservative legal movement”-informed sense of role would *not* overthrow a case reaffirmed that many times and as recently as 2020, merely because the Court’s membership had changed—let alone changed under such dubious and contested circumstances. (In oral argument, Justice Sotomayor referred to the institutional-legitimacy effects of changing the law after this kind of personnel change as “stench.”¹⁹⁶)

Chief Justice Roberts—who is no fan of *Roe*—struggled long and hard throughout the pendency of the *Dobbs* litigation to try to uphold the Mississippi fifteen-week ban without overturning *Roe*.¹⁹⁷ (Indeed, one leading theory is that the leaker’s motivation was to prevent the Chief Justice from persuading a member of the majority—likely Justice Brett Kavanaugh—to join the Chief Justice in a plurality opinion that upheld the Mississippi statute, under a much-narrowed *Roe* and *Casey*.¹⁹⁸) This compromise—possibly only to give the Court institutional cover for a few years as it shifted ground and ultimately overturned *Roe*—would have protected women’s

¹⁹⁴ 579 U.S. 582, 591 (2016).

¹⁹⁵ 140 S. Ct. 2103, 2132–33 (2020).

¹⁹⁶ Transcript of Oral Argument at 14–15, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (“[T]he Senate sponsors said we’re doing [the newest six-week ban] because we have new justices on the Supreme Court. Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?”). Justice Kagan has made a series of remarks emphasizing that changing the law so swiftly after personnel changes of this kind erodes confidence in the Court’s decisions as law. *See, e.g.*, Ruth Marcus, *What Chief Justice Roberts Misses*, WASH. POST (Sept. 11, 2022, 3:29 PM), <https://www.washingtonpost.com/opinions/2022/09/11/roberts-remarks-misunderstand-court-anger> [<https://perma.cc/U96B-6CSS>] (quoting Justice Kagan as observing that “[p]eople are rightly suspicious if one justice leaves the court or dies and another justice takes his or her place and all of a sudden the law changes on you,” which “doesn’t seem like law”); Jennifer Rubin, *Elena Kagan to Her Colleagues: You’re Why the Supreme Court Has Lost Legitimacy*, WASH. POST (Sept. 14, 2022, 12:00 PM), <https://www.washingtonpost.com/opinions/2022/09/14/kagan-speech-supreme-court-legitimacy-roberts/> [<https://perma.cc/2EUM-NHZC>] (quoting Justice Kagan as stressing that the public has a right to expect “that changes in personnel don’t send the entire legal system up for grabs”).

¹⁹⁷ Editorial Board, *Abortion and the Supreme Court*, WALL ST. J. (Apr. 26, 2022, 6:39 PM), <https://www.wsj.com/articles/abortion-and-the-supreme-court-dobbs-v-jackson-mississippi-john-roberts-11651009292> [<https://perma.cc/4DLL-GM6W>].

¹⁹⁸ For accounts of this theory, see Matt Stieb, *A Running List of Theories About the Supreme Court Leaker*, N.Y. MAG.: INTELLIGENCER (May 8, 2022), <https://nymag.com/intelligencer/2022/05/who-leaked-the-supreme-court-draft-overturning-roe-v-wade.html> [<https://perma.cc/QC6G-68UL>]; and Joan Biskupic, *The Inside Story of How John Roberts Failed to Save Abortion Rights*, CNN (July 26, 2022, 7:53 AM), <https://www.cnn.com/2022/07/26/politics/supreme-court-john-roberts-abortion-dobbs/index.html> [<https://perma.cc/98AM-8P3D>].

decisions about abortion only early in pregnancy, and given them a so-called “reasonable opportunity to choose” for a much shorter time period than *Roe* and *Casey* had protected abortion decisions.¹⁹⁹

But Justice Alito, Justice Thomas, and the Trump appointees would have none of it. They now had the votes to overturn *Roe*. After the draft opinion leaked, Justice Thomas offered casual remarks justifying the majority’s plan to throw out a half century of abortion rights. He went out of his way to emphasize that precedent is for *losers*: “I always say that when someone uses *stare decisis* that means they’re out of arguments Now they’re just waving the white flag. And I just keep going.”²⁰⁰ Justice Thomas’s message seemed to be: “We have the power now.”

Of course, when movement originalists celebrate *Dobbs* as a triumph of originalism, they are not typically referring to the exercise of power necessary to constitute the Court that decided the case.²⁰¹ Appeal to the history-and-traditions standard seeks to legitimate the new Court’s reconstruction of the law.

B. *Memory Games: How Dobbs Reads “Family Values” into Nineteenth-Century Legal Materials*

Before discussing history and traditions in *Dobbs*, it is important to consider how we come to find ourselves considering this question, as prevailing due process law did not direct the Justices to analyze constitutionally protected liberties on these terms at the outset of the decision. Adoption of the history-and-traditions standard represents a dramatic shift in governing law and is by no means the only way, or even the most likely way, that a judge determined to overrule a half-century-old precedent would proceed.

A judge with ordinary professional craft sense who believed *Roe* was wrongly decided (1) still might not overrule, or (2) might overrule a half-century-old precedent cautiously, in steps (that is what Chief Justice Roberts was apparently trying to do), expressly leaving open the door to federal court for women raising due process and equal protection rights to life and health (as even Justice Rehnquist’s dissent in *Roe*

¹⁹⁹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2310 (2022) (Roberts, C.J., concurring).

²⁰⁰ Adam Liptak, *Justice Thomas Says Leaked Opinion Destroyed Trust at the Supreme Court*, N.Y. TIMES (May 14, 2022), <https://www.nytimes.com/2022/05/14/us/politics/supreme-court-clarence-thomas.html> [<https://perma.cc/H7XM-GP63>].

²⁰¹ *But see* Whelan, *supra* note 174.

did²⁰²), or (3) if reversing *Roe*, would write the decision narrowly, focusing on the differences of the abortion right from all other liberty rights.

Rather than offering the narrowest possible justification, the Court employed a remarkably broad and polarizing history-and-traditions standard that calls into question the continuing legitimacy of a wide range of other constitutional rights. In *Dobbs*, the Court transformed doctrinal standards for determining the scope of the Fourteenth Amendment’s liberty guarantee, without acknowledging that it had just changed the scope of constitutionally protected liberties, or why.

1. *Replacing an Evolving Standard of Liberty with a History-and-Traditions Standard*

Though he never acknowledged it, in adopting the history-and-traditions standard, Justice Alito was reasoning from the arguments of the *dissenting* justices in the abortion and gay rights cases.²⁰³ Before *Dobbs*, the Court had interpreted the Fourteenth Amendment’s liberty guarantee as requiring judges to identify fundamental rights in a dynamic way.

In *Obergefell*,²⁰⁴ Justice Kennedy explained that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries,” and, citing Justice Harlan’s dissent in *Poe v. Ullman*,²⁰⁵ emphasized “[t]hat method respects our history

²⁰² See *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (observing that “[t]he Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this,” so that “[i]f the Texas statute were to prohibit an abortion even where the mother’s life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson*”)

²⁰³ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 715–19 (2015) (Scalia, J., dissenting) (“When it comes to determining the meaning of a vague constitutional provision—such as ‘due process of law’ . . . —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.” (footnote omitted)); *id.* at 697–98 (Roberts, C.J., dissenting) (“Our precedents have required that implied fundamental rights be ‘objectively, deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.’” (quoting *Washington v. Glucksberg*, 521 U.S. 644, 720–21 (2015))); *id.* at 737 (Alito, J., dissenting) (“[T]he Court has held that ‘liberty’ under the Due Process Clause should be understood to protect only those rights that are ‘‘deeply rooted in this Nation’s history and tradition.’’ And it is beyond dispute that the right to same-sex marriage is not among those rights.” (quoting *Glucksberg*, 521 U.S. at 720–21)); *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (“*Roe* and *Casey* have been equally ‘eroded’ by *Washington v. Glucksberg*, which held that *only* fundamental rights which are “‘deeply rooted in this Nation’s history and tradition’” qualify for anything other than rational-basis scrutiny under the doctrine of ‘substantive due process.’” (emphasis in original) (citation omitted)); *cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980–81 (1992) (Scalia, J., dissenting in part) (“[I]n defining ‘liberty,’ we may not disregard a specific, ‘relevant tradition protecting, or denying protection to, the asserted right.’” (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989))).

²⁰⁴ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²⁰⁵ *Id.* at 664 (quoting *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting)).

and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times.”²⁰⁶ Justice Kennedy specifically rejected the *Glucksberg* history-and-traditions standard in favor of an evolving understanding of liberty.²⁰⁷ *Dobbs*’s backward-looking history-and-traditions analysis thus threatens to discredit many decisions, ranging from the right to interracial marriage (*Loving v. Virginia*²⁰⁸), to the right to contraception (*Griswold v. Connecticut*²⁰⁹), to the right to same-sex intimacy (*Lawrence v. Texas*²¹⁰) and same-sex marriage (*Obergefell v. Hodges*²¹¹). None of these decisions is easily upheld under the kind of history-and-traditions analysis the majority practices in *Dobbs*.²¹²

Reading the Fourteenth Amendment’s guarantees in light of evolving understandings of liberty has been so foundational in modern constitutional jurisprudence that even the *Glucksberg* case on which the Court relied for authority to consider history and traditions *recognizes abortion as a protected liberty*.²¹³ There was, in short, no body of precedent that mandated that the Court decide *Dobbs* employing a history-and-traditions standard, and the case to which the *Dobbs* Court pointed did not itself mandate *Roe*’s overturning. (*Glucksberg* was decided in 1997, only five years after

²⁰⁶ *Id.*

²⁰⁷ *See id.* at 671. Justice Kennedy explained:

Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights

Id. at 671; *cf. id.* (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach.”).

²⁰⁸ 388 U.S. 1 (1967).

²⁰⁹ 381 U.S. 479 (1965).

²¹⁰ 539 U.S. 558 (2003).

²¹¹ 576 U.S. 664 (2015).

²¹² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2319 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

²¹³ In fact, *Glucksberg* itself defines liberties protected by the Due Process Clause far more expansively than does Justice Alito’s opinion. Most importantly, Justice Kennedy was in the majority in *Glucksberg*, and *Glucksberg* includes *Casey* and *abortion as within America’s history and traditions*. *Washington v. Glucksberg*, 521 U.S. 702, 710, 720, 726–28 (1997) (It is also critical to note that the Court’s original opinion in *Glucksberg* asks for a “‘careful description’ of the asserted *fundamental liberty interest*,” *id.* at 721 (emphasis added), but it does not ask for a showing of a formally recognized “legal right [to abortion],” *see Dobbs*, 142 S. Ct. at 2250 (emphasis omitted), which would be historically implausible to find in the mid-nineteenth century for reasons too many to count, among them, that law did not then conceive of women, slave or free, as rights-holders of this kind.) Justice Alito’s fabricated “*Glucksberg*” was not even faithful to *Glucksberg* itself. It is designed to kill *Casey* and *Roe*.

the Court had reaffirmed *Roe* in *Casey*, and so defines and applies its history-and-traditions standard differently than *Dobbs* itself does.²¹⁴)

The *Glucksberg* that *Dobbs* invokes was invented in 2022 for a purpose. In the course of reversing *Roe*, the *Dobbs* Court deliberately sought to cast a wide shadow that threatened—weakened, discredited, or marked for possible overruling—a host of *other* substantive due process rights.

It is in this context, before we turn to *Dobbs*'s claims on the historical record, we ought to ask ourselves: what kind of standard is this history-and-traditions standard?

First of all, at present the standard is standardless. It is the kind of law that a Court made to change law makes to change law. Just as the Court changed the law for determining the liberties protected by the Due Process Clause without ever acknowledging why it was doing so, the *Dobbs* case offers no criteria for choosing which laws constitute relevant history and tradition in the next case, allowing the decision maker to do as the *Dobbs* Court did in this case—to look out over a crowd and pick friends.

Second of all, it is not clear why we're fighting over the historical record—other than as a proxy for picking our friends. There is no reason to assume that the chosen body of legislation illuminates the expected application or original public meaning of constitutional text. Instead, Justice Alito claims that tying the meaning of the Fourteenth Amendment's liberty guarantee to America's "history and traditions" prevents the justices from imposing their own views on the case at hand.²¹⁵

It is hard to recite this with a straight face. I can't. Can you? The Justices who have been appealing to *Glucksberg* in dissent in the gay rights cases seem to be doing so in the conviction that any test that refers to "old tymes" can be used to knock out liberty claims challenging laws that enforce traditional family values. Differently put, the Justices in the *Dobbs* majority have turned to history and traditions *to express*—not to constrain—their moral views.

This shows why Justice Scalia's and Justice Alito's claims for the constraining force of originalism are "dead wrong." A judge's turn to the historical record can just as easily disguise judicial discretion as constrain it. *The originalist judge may employ the historical record covertly to express values that the originalist judge does not wish to acknowledge as his own.*

In these circumstances, originalism is a practice of living constitutionalism that is not forthright about its values, aims, and commitments. This mode of reasoning is an antidemocratic mode of constitutional interpretation, *not* because it appeals to the past, but because it refuses to own its own values as it is doing so. Originalist judges

²¹⁴ See *supra* note 213.

²¹⁵ *Dobbs*, 142 S. Ct. at 2247–48.

ventriloquize historical sources. As we will see, *Dobbs*'s history-and-traditions standard projects a family-values agenda into nineteenth-century legal materials.

2. *Applying Dobbs's History-and-Traditions Standard*

In *Dobbs*, the Court declared that the Fourteenth Amendment's liberty guarantee provides no protection against state action coercing pregnancy. A half century of cases under *Roe* were wrongly decided because, the Court said, liberty is defined with reference to America's history and traditions. Which history and traditions? Remarkably the *Dobbs* opinion does not provide criteria by which judges are to ascertain the nation's history and traditions except as they can be inferred from the Court's discussion of the record in this case.

At the Founding and during the early republic, the common law criminalized abortion only *after* quickening—as late as weeks 16 to 25 in pregnancy²¹⁶—but Justice Alito quickly glossed over this history in his account.²¹⁷ The Court did not focus on the Founding or the early republic or on the last half century—as *Glucksberg* itself must have when it included *Casey*²¹⁸—but instead focused on the mid-nineteenth century in

²¹⁶ See JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 at 6 (1978) (“[I]ndictments for abortion prior to quickening were virtually never brought into American courts. Every time the issue arose prior to 1850, the same conclusion was sustained: the interruption of a suspected pregnancy prior to quickening was not a crime in itself.”); Cornelia Hughes Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 WM. & MARY Q. 19, 20 n.3 (1991) (“Abortion before quickening . . . was not viewed by the English or colonial courts as criminal. No statute law on abortion existed in either Britain or the colonies. . . . [N]o New England court before 1745 had attempted to prosecute a physician or other conspirators for carrying out an abortion.”); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 8 (1997); Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents at 2, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) [hereinafter Brief for Amici Curiae American Historical Ass’n].

²¹⁷ Justice Alito did all he could to direct his readers’ attention away from the common law’s requirement of quickening, appreciating that it significantly changed the character of the history he was attempting to characterize as a monolithic tradition. See *Dobbs*, 142 S. Ct. at 2249 (“We begin with the common law, under which abortion was a crime at least after ‘quickening’—i.e., the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.” (footnote omitted)); cf. *id.* at 2259 (“Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening.”). He discussed cases where a woman died in an abortion, and then minimized the significance of the quickening requirement for prosecution in others by emphasizing that abortion was not “a legal right” or a “positive right.” *Dobbs*, 142 S.Ct. at 2249-51. He offered misleading accounts of the common law: “The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.” *Id.* at 2253-54. Cf. *id.* at 2248 (“Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion.”).

²¹⁸ See *supra* note 213 and accompanying text.

the years before and after the ratification of the Fourteenth Amendment.²¹⁹ During that period, there was a campaign to ban abortion across the nation; ²²⁰ many of the state statutes then enacted are included in an appendix to the decision.²²¹ Justice Alito does not claim, however, that anyone involved with the ratification of the Fourteenth Amendment or the banning of abortion understood any connection between the Amendment and the antiabortion statutes.

One might infer from all this that the Court's finding of a tradition was based solely on the number of statutes banning abortion that were enacted in the era of the Fourteenth Amendment's ratification. But on closer reading of the *Dobbs* opinion, one can see that the Court's finding of a tradition depended on an additional critical factor—on a determination that prior practice was sufficiently respect-worthy and consistent with contemporary constitutional commitments that Americans could identify with it as their tradition.

In *Dobbs*, Justice Alito spent pages refuting arguments of amici that nineteenth-century abortion bans were not the kind of laws to which the due process guarantee of liberty should be tethered. These amici argued that the nineteenth-century campaign to ban abortion was not only concerned with protecting unborn life, but, as Justice Alito recounted, they argued that laws “were enacted for illegitimate reasons”: “important motives for the laws were the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to ‘shir[k their] maternal duties.’”²²² His response to these claims about the historical record? Denial, in the form of a rhetorical question: “Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women? There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being.”²²³

By setting up a false choice—either the laws were motivated by “hostility to Catholics and women” *or* by “a sincere belief that abortion kills a human being”—Justice Alito refused to deal with the historical record in which the laws gathered in the appendix are rooted.²²⁴ Through this false choice, Justice Alito excused himself

²¹⁹ *Dobbs*, 142 S. Ct. at 2246–54.

²²⁰ *Id.* at 2252–53.

²²¹ *Id.* at 2285–300.

²²² *Id.* at 2255 (quoting Brief for Amici Curiae American Historical Ass'n).

²²³ *Dobbs*, 142 S. Ct. at 2256.

²²⁴ His bifurcated model is at odds with our experience of the abortion debate today, in which persons who sincerely believe that abortion kills a human being regularly oppose abortion on the basis of role-based beliefs about women. The Court's last two abortion cases concerned restrictions justified as protecting *both* women *and* the unborn. See Siegel, *supra* note 189, at 308, 314 (showing that proponents of admitting privileges law defended its purpose as protecting both women and the unborn).

from considering how prevailing beliefs about gender shaped the campaign to ban abortion, which occurred at a time when law so regularly enforced these gender role divisions that the Supreme Court itself authorized states to bar women from voting²²⁵ and to deny women the right to practice law.²²⁶ Similarly, Justice Alito refused to consider the nativism of the campaign's leader, Horatio Storer,²²⁷ even though the campaign to ban abortion unfolded at a time when America was rife with religious, ethnic, and racial reasoning, and doctors advocating for abortion restrictions coupled

Justice Alito's whole framework is clearly rooted in politics and not historical inquiry. Justice Alito rejects the possibility that constitutionally suspect considerations of gender, race, or religion might have shaped the reasoning of nineteenth-century Americans who opposed abortion. Exactly as he does so, he introduces the possibility that "proponents of liberal access to abortion" might be "motivated by a desire to suppress the size of the African-American population," and only after reciting the allegations, asserts that, "[f]or our part, we do not question the motives of either those who have supported or those who have opposed laws restricting abortions." *Dobbs v.*, 142 S. Ct. at 2256 n. 41. For the political genealogy of this allegation in the contemporary abortion debate, see Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021).

Inconveniently for Justice Alito some nineteenth-century advocates of banning abortion invoked concerns about immigrants replacing native Americans, including, but not limited to the leader of the campaign, and Americans responded, as I show in my discussion of the Ohio legislative record. *See infra* notes 227–236 and accompanying text. For examples of antiabortion advocates *today* who embrace replacement theory, see David Gilbert, *CPAC Head Promotes Abortion Ban to Stave Off 'Great Replacement'*, VICE NEWS (June 24, 2022), <https://www.vice.com/en/article/qjb7ad/cpac-head-promotes-abortion-ban-to-stave-off-great-replacement> [<https://perma.cc/STR7-QJDP>]; Reva Siegel & Duncan Hosie, *Trump's Anti-Abortion and Anti-Immigration Policies May Share a Goal*, TIME (Dec. 13, 2019, 4:35 PM), <https://time.com/5748503/trump-abortion-immigration-replacement-theory/> [<https://perma.cc/4UVA-95B4>].

²²⁵ *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874).

²²⁶ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872).

²²⁷ Justice Alito refers to Dr. Horatio Storer as just "one prominent proponent" of the mid-nineteenth-century antiabortion campaign, *Dobbs*, 142 S. Ct. at 2255, even though Storer was actually its leader. *See* Brief for Amici Curiae American Historical Ass'n, *supra* note 216, at 18 ("Abortion restrictions accelerated in the 1860s because of a national campaign initiated by gynecologist Dr. Horatio Storer in 1857."). Storer frequently invoked nativism to justify his position, warning that "foreign immigrants' large families were poised to overwhelm the white Protestant 'American' population." *Id.* at 22 (citing Horatio Robinson Storer, *On the Decrease of the Rate of Increase of Population Now Obtaining in Europe and America*, 43 AM. J. SCI. & ARTS 141 (1867)). For discussion of Storer's additional similar comments, see *infra* note 228. Storer was also far from the sole proponent of these nativist sentiments. As I have previously explained, "[i]n nearly all antiabortion tracts, doctors emphasized that abortion was most frequently practiced by married women, particularly those of the so-called 'native' middle class." Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 297 (1992) [hereinafter *Reasoning from the Body*]; *id.* at 297–99 (describing, in addition to Storer's remarks, James Whitmire's, Augustus Gardner's, and H.S. Pomeroy's remarks designed to "channel[] wide-ranging social concern into the act of reproduction itself").

arguments for protecting unborn life with arguments for protecting the ethno-religious character of the nation.²²⁸

It was not easy to persuade Americans—who continued to reason from customary and common law views of quickening—to ban abortion from conception. Those who sought to ban abortion often embedded arguments about protecting unborn life in arguments that criminal bans were needed to enforce women’s maternal and marital duties, and to protect the ethno-religious character of the nation.²²⁹ Arguments for protecting unborn life were not free-standing, as Justice Alito claimed, but instead were deeply entangled in arguments that today we would clearly judge unconstitutional, as documents from the period make clear.

To appreciate how deeply the “history and tradition” of banning abortion was forged through constitutionally objectionable modes of reasoning, consider an [1867 Ohio Senate Report](#)²³⁰ that opponents of abortion often cite as evidence that Americans at the time of the Fourteenth Amendment’s ratification believed in punishing abortion as murder.²³¹ In fact, the Ohio report provides much evidence to the contrary: this very document demonstrates that at the time of the Fourteenth Amendment’s ratification, Americans continued to credit customary and common law views about quickening. Legislators complained that “[t]he erroneous opinion prevails

²²⁸ The nineteenth-century antiabortion campaign unfolded during an era of nativist, anti-immigrant, anti-Catholic feeling. See ERIKA LEE, *AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES* 42–44 (2019). Horatio Storer, the campaign’s leader, and others blamed abortion for the differences in birth rate between “native” (i.e., Protestant) women and “foreign” women. See HORATIO ROBINSON STORER, *WHY NOT?: A BOOK FOR EVERY WOMAN* 62–63 (1866) (linking abortion rates with low “native” birthrates); *id.* at 64–65 (observing that “abortions are infinitely more frequent among Protestant women than among Catholic [women]”); see also, e.g., William McCollom, *Criminal Abortion*, *TRANSACTIONS VT. MED. SOC’Y*, 1865 AT 40, 42 (“Our own population seem to have a greater aversion to the rearing of families than . . . the French, the Irish and the Germans.”); L.C. Butler, *The Decadence of the American Race, As Exhibited in the Registration Reports of Massachusetts, Vermont [and Rhode Island]; the Cause and the Remedy*, 77 *BOS. MED. & SURGICAL J.* 89, 93–94 (1867) (comparing Protestant and Catholic doctrine on abortion with attention to the relevant reproductive rates of Protestants and Catholics).

In the campaign’s popular tract, *Why Not?*, Storer tied Protestant families’ declining size to Protestant women exercising reproductive autonomy; he sought abortion bans to increase the number of Protestants. He questioned whether “the great territories of the far West, just opening to civilization, and the fertile savannas of the South” would be filled by “our own children or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation.” STORER, *supra*, at 85. Storer’s appeal to anxieties about ethnic replacement and enforcing gender roles moved his audience. His language is repeated in the Ohio Senate Report. See *infra* text accompanying note 236.

²²⁹ See Siegel, *Reasoning from the Body*, *supra* note 227, at 280–323; Brief for Amici Curiae American Historical Ass’n, *supra* note 216, at 21

²³⁰ 1867 OHIO SENATE J. APP’X 233.

²³¹ See *infra* note 236.

very generally that a woman can throw off the product of conception, especially in the early stages, without moral guilt, and without danger to herself.”²³² Americans’ persisting belief in quickening was, in short, an obstacle to the campaign to ban abortion. Those who wanted to change the common law rule needed *additional reasons*, beyond the argument that abortion was life-taking, to persuade legislators to change the law.

Endeavoring to persuade men to raise penalties on abortion throughout pregnancy, advocates for banning abortion supplemented their arguments about protecting unborn life with arguments that abortion bans could address nativist anxieties about the high birthrates of immigrant families and that abortion bans could enforce wives’ marital and maternal obligations. Banning abortion would protect the unborn, enforce women’s roles, *and* prevent ethnic replacement. Repeatedly citing the work of Horatio Storer,²³³ the leader of the national campaign to criminalize abortion²³⁴ whose historical influence Justice Alito disparaged,²³⁵ the 1867 Ohio Report exhorted the people of the state:

The demands of society and fashionable life; the desire of freedom from care and home duties and responsibilities; and the absence of a

²³² 1867 OHIO SENATE J. APP’X 233, 233–35. The Ohio Senate Report shows that in the era of the Fourteenth Amendment’s ratification, Americans continued to reason from the common law’s understanding of quickening. Other advocates for reform pointed to these persisting customary and common law understandings. A member of the Vermont medical society recommending passage of an 1867 state law banning abortion observed, “there is a period previous to [quickening], which neither law, nor general opinion, nor any Protestant standard covers. And on this point, opinions among medical men are divided.” Butler, *supra* note 228, at 93. “[T]he notion has somehow become prevalent among so-called intelligent women, that miscarriage or abortion at less than three months is a matter of small consequence. There is no life at that period, they say and consequently nothing is destroyed, and no wrong or crime is committed.” *Id.* The author tried to devise some method of deterring abortion, against the backdrop of “strong sentiment in favor of” the same. *Id.* at 96–99.

Far from illustrating some shared understanding that abortion before quickening was murder, the New England article and Ohio Report show the opposite: most Americans held fast to the quickening distinction (much to the chagrin of the sources’ authors). *See also* REAGAN, *supra* note 216, at 6 (“Private discussions among family and friends, conversations between women and doctors, and the behavior of women (and the people who aided them) suggest that traditional ideas that accepted early abortions endured into the twentieth century.”); Brief for Amici Curiae American Historical Ass’n, *supra* note 216, at 27 (observing that at the time of the Fourteenth Amendment’s ratification “the common-law view persisted in American law and popular opinion”).

²³³ *See* 1867 OHIO SENATE J. APP’X 233, 233–34.

²³⁴ *See* Siegel, *supra* note 227, at 289–92. Storer reasoned systematically from women’s bodies and women’s roles. *See, e.g., id.* at 294 (“In his popular antiabortion tract *Why Not?*, Storer lectured his audience: ‘Intentionally to prevent the occurrence of pregnancy, otherwise than by total abstinence from coition, intentionally to bring it, when begun, to a premature close, are alike disastrous to a woman’s mental, moral, and physical well-being.’” (quoting Storer, *supra* note 228, at 76)).

²³⁵ *See supra* note 227 and accompanying text.

proper understanding of the dangers and criminality of the act, lead our otherwise amiable sisters to the commission of this crime. *Do they realize that in avoiding the duties and responsibilities of married life, they are, in effect, living in a state of legalized prostitution? Shall we permit our broad and fertile prairies to be settled only by the children of aliens?* If not, we must, by proper legislation, and by the diffusion of a correct public sentiment, endeavor to suppress a crime which has become so prevalent.²³⁶

²³⁶ 1867 OHIO SENATE J. APP’X 233, 235 (emphasis added). For accounts of this law, see Siegel, *Reasoning from the Body*, *supra* note 228, at 314–18; see also MOHR, *supra* note 216, at 200.

Antiabortion advocates frequently rely on the Ohio report to argue about beliefs about abortion at the time of the Fourteenth Amendment’s ratification because of a 1985 article by James Witherspoon that selectively recounts the report’s reasoning in ways that support the antiabortion cause. James Witherspoon observes that two of the state senators who voted in support of the report had voted to ratify the Fourteenth Amendment. He recounts arguments in the report attacking belief in quickening, calling abortion “child-murder,” and recounts the report’s conclusion that “the willful killing of a human being, at any stage of existence, is murder.” James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L.J. 29, 61–63 (1985) (quoting 1867 OHIO SENATE J. APP’X 233, 233–34). John Keown used Witherspoon’s analysis of the Ohio report to “confirm[] [nineteenth-century] legislation’s purpose of fetal protection.” John Keown, *Back to the Future of Abortion Law: Roe’s Rejection of America’s History and Traditions*, 22 ISSUES IN L. & MED. 3, 26–28 (2006) (citing Witherspoon, *supra*).

Today, Witherspoon’s (and Keown’s) argument is often cited to support an originalist case for overturning *Roe*. Yet these originalist arguments increasingly rely on the Ohio report without acknowledging that the Ohio report (1) documented the public’s persisting belief in quickening and (2) grounded its attack on abortion in nativist replacement arguments and gender-role anxiety. The report’s case for criminalizing abortion does not present “child-murder” as a stand-alone justification. The report in fact opens with a lengthy nativist justification for restricting abortions, suggesting that banning abortion is important in light of the respective reproductive rates of different social classes. Throughout, the report entangles claims about protecting unborn life with arguments for enforcing women’s roles and preserving the nation’s ethnic character. 1867 OHIO SENATE J. APP’X 233, 235. This constitutionally suspect reasoning is glaringly absent from Witherspoon’s and others’ accounts. Witherspoon’s account of the Ohio report is selective, and misleading. Without understanding the full range of arguments that Ohio legislators made on behalf of restricting abortion, we are certainly in no position to draw inferences about the public’s beliefs about abortion at the time of the Fourteenth Amendment’s ratification, as he did and encouraged others to do. See Witherspoon, *supra*, at 61–64. A reader of Witherspoon would not appreciate that the Ohio legislators were complaining that the public did not share the legislators’ beliefs about abortion, or understand that Ohio legislators were advocating banning abortion to control women and to shape the demographic characteristics of the nation.

Antiabortion advocates are now using Witherspoon’s sanitized version of the Ohio report to make originalist claims about the Fourteenth Amendment. Joshua Craddock—an affiliate of the conservative James Wilson Institute—wrote a student note concluding that the Ohio report’s view of the “personhood of unborn children” should “shape an originalist understanding of the [Fourteenth] Amendment.” Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL’Y 539, 558–59 (2017). In a 2021 concurrence, Judge John Bush of

In urging the criminalization of abortion to ensure that married women did not live in a state of “legalized prostitution,” the Ohio report was reiterating antiabortion attacks on women seeking “voluntary motherhood”—abolitionists and suffragists who argued that a wife had a right to her body and to say no to sex, hence to control the frequency and timing of birth.²³⁷ And in warning that women who resisted their marital duties would allow the prairies to be settled by children of aliens, the report was invoking fears of ethnic replacement, a threat emphasized by Horatio Storer, the campaign’s leader, as well as by other antiabortion advocates.²³⁸ Even as

the Sixth Circuit asserted that the Ohio report shows “that the Fourteenth Amendment’s original meaning allows a state to prohibit eugenic abortions,” *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 546 (6th Cir. 2021) (Bush, J., concurring), contrary to the report’s own distaste for “the children of aliens.” 1867 OHIO SENATE J. APP’X 233, 25. John Finnis invoked the Ohio report in arguing that the original meaning of the Fourteenth Amendment’s due process and equal protection clauses prohibited abortion. John Finnis, *Abortion is Unconstitutional*, FIRST THINGS, April, 2021, <https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional>. The Ohio report also featured prominently in several amicus briefs filed in *Dobbs*. See, e.g., Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis & Robert P. George in Support of Petitioners at 19–23, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (citing the report, Witherspoon, and Keown to argue that “any legally informed reader . . . would have understood equality of fundamental rights for ‘any person’ to include the unborn”); Brief of Amicus Curiae the March for Life Education and Defense Fund in Support of Petitioners at 19–21, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (citing Craddock to conclude that, “contemporaneous to the ratification of the Fourteenth Amendment, legislatures also recognized that life began at conception”).

²³⁷ Abolitionists and suffragists asserted claims for voluntary motherhood before and after the Civil War. They contended that a marriage in which a woman could be coerced into sex and to labor for her lifetime for the barest of support was little better than “legalized prostitution.” See Siegel, *supra* note 227, at 304–08. While woman’s rights advocates attacked the laws that structured the social relations in which wives conceived and raised children, advocates of banning abortion argued that wives had a duty to submit to sex for procreation, and to bear and rear children. On competing critiques of marriage as “legalized prostitution” and the debate over voluntary motherhood that took place during the antiabortion campaign, see *id.* at 308–14.

Woman’s rights advocates demanded changes in laws structuring the social relations in which women conceived, bore, and raised children; they were not then seeking abortion rights. On voluntary motherhood and abortion, see *id.* at 307 (footnotes omitted): “Given their view of the conditions of conception and maternity, many feminists publicly condemned, yet tacitly condoned, women who turned to abortion. Some even argued that wives compelled to submit to marital relations were justified in aborting, characterizing abortion as an act of self-defense under prevailing conditions of ‘forced motherhood.’” (For more on voluntary motherhood, see *infra* notes 294–298 and accompanying text.)

By contrast, Storer argued that while all women seeking abortions should be subject to criminal penalty, married women should be punished *more* harshly. HORATIO STORER & FRANKLIN FISKE HEARD, *CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW* 145 (1868). Ohio nearly adopted such a law, failing passage by one vote. See Siegel, *supra* note 227, at 317 & n.234.

²³⁸ For discussion, see *supra* notes 227–228 and accompanying text (discussing nativism of Storer and other doctors leading campaign). As the Ohio report acknowledges, Storer is the source of its

the report condemned abortion as life-taking, it opened and closed by arguing that banning abortion would enforce women's roles and preserve the ethnic character of the nation.

As we have seen, Justice Alito refused to acknowledge that arguments of this kind played any significant role in the campaign to criminalize abortion.²³⁹ In a quest to find (or invent) a past to which he could defer, Justice Alito waved away all the evidence of unconstitutional motivation and focused only on constitutional motivation; he counted—and in all likelihood significantly *overcounted*—the states that banned abortion before quickening as of 1868;²⁴⁰ and then, seeming to omit reference to quickening (and 1868) altogether, he concluded “that a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.”²⁴¹ *Dobbs* employed this whitewashed and selective account of America’s history and traditions to define the reach of the Fourteenth Amendment’s liberty guarantee.

Perhaps one day there will be a Court to revisit the historical claims on which *Dobbs* rests, much as the Court revisited the historical premises of *Bowers v. Hardwick*²⁴² in *Lawrence v. Texas*.²⁴³ There is so very much—of constitutional consequence—to

arguments. Storer employed the legalized prostitution and fertile savannas arguments in his popular antiabortion tract, *Why Not?*, published one year earlier, and cited in earlier version in the report. See STORER, WHY NOT?, *supra* note 228, at 14 (legalized prostitution) and 85 (fertile savannas). On Storer’s influence on the Ohio report, see Siegel, *supra* note 227, at 316–17.

²³⁹ See *supra* text at note 223.

²⁴⁰ *Dobbs*, 142 S. Ct. at 2252–53. In an important new study Professor Aaron Tang has shown that quickening standards persisted in many states that the *Dobbs* opinion reports as banning abortion as of 1868. See Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. (forthcoming 2023), available at <https://ssrn.com/abstract=4205139> (showing significant errors in the ways that *Dobbs* characterized and counted nineteenth-century abortion laws). This story about Americans’ persisting belief in quickening coheres with other evidence this Article has presented on quickening’s persistence. See *supra* note 232 and accompanying text. Professor Tang has challenged Justice Alito’s claim that “[b]y 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.” *Dobbs*, 142 S. Ct. at 2252–53. Professor Tang counters that a large number of the states the majority counts as banning abortion in 1868 in fact continued to permit abortion under common law quickening standards. The wide variety of problems that Professor Tang identifies with the majority’s count suggests that if we are going to rely on statements about state law in characterizing our traditions, the counts need to be performed with attention to a context that includes, at a minimum, all relevant statutes and judicial opinions interpreting and enforcing them—as it appears in *Dobbs* they were not.

²⁴¹ *Dobbs*, 142 S. Ct. at 2253–54.

²⁴² 478 U.S. 186 (1986).

²⁴³ 539 U.S. 558, 567–73 (2003). See George Chauncey, *What Gay Studies Taught the Court: The Historians’ Amicus Brief in Lawrence v. Texas*, 10 GLQ 509 (2004).

correct. Until then, persons of all interpretive persuasions can ask: what do the statutes in the decision's appendix have to do with the Fourteenth Amendment? Alito's opinion never discusses the Fourteenth Amendment's larger historical context or animating aims or purposes. *Dobbs* does not instruct us about the original public meaning or even the expected application of the Fourteenth Amendment's liberty guarantee, as academic originalists emphasize.²⁴⁴ The Court instead determined the reach of the Fourteenth Amendment's liberty guarantee under substantive due process doctrine, employing a (new) history-and-traditions standard and counting laws stripped from context.²⁴⁵ These changes do serve the ends of *movement-identified* originalists—in particular, the Justices appointed by Republican Presidents with the express goal of overruling *Roe* and discrediting other cases hostile to family values. The Justices have employed “history and tradition” to justify these changes—through these constitutional memory frames promising to cleanse the Constitution of politics and restore the Constitution as law. This is surely not the original public meaning originalism that academic originalists practice, but it is a species of family-values traditionalism that movement originalists have practiced since the Reagan era.

To justify *Roe*'s overruling, *Dobbs* assembled a statutory appendix and recounted the story of an “unbroken tradition,”²⁴⁶ suppressing evidence that does not serve the constitutional-memory ends of family-values traditionalism. Those who are not invested in this constitutional-memory project have little reason to accept this account.

A tradition consists in more than statutes, as Justice Alito indirectly concedes. To characterize the nation's history and traditions, one needs to know more about the conditions under which nineteenth-century abortion bans were enacted and enforced. As the Ohio record shows, the abortion bans served the ends of social control; they were efforts to *change* popular belief and conduct.²⁴⁷ For this reason, records of the campaign to criminalize abortion yield rich evidence that the public continued to credit common law and customary beliefs in quickening at the time of the Fourteenth Amendment's ratification.²⁴⁸ This gap between law on the books and public belief suggests that there was resistance to law—which an account of tradition should include if it is to reflect the beliefs and actions of those who lacked authority to make the law. Their inclusion might be especially salient given the kinds of liberty at stake in this case. At the same time that we ask about how we characterize a tradition, we

²⁴⁴ See *supra* notes 164–170 and accompanying text.

²⁴⁵ For discussion on how the *Dobbs* Court changed the standard governing due process cases and even changed the *Glucksberg* standard itself, see *supra* note 213.).

²⁴⁶ *Dobbs*, 142 S. Ct. at 2253. For problems with statutory count on which this claim rests, see *supra* note 240.

²⁴⁷ See *supra* note 232 and accompanying text.

²⁴⁸ *Id.*

can also ask what aspects of that tradition we find respect-worthy—sufficiently in accord with contemporary understandings of citizenship and community that Americans today should tie their constitutional freedoms to it.

Now that we have sampled a bit of the debate leading to legislation in the decision's appendix we can pose a fundamental question that *Dobbs* evades: Why should nineteenth-century antiabortion laws limit the ways we now understand the Constitution's liberty guarantee any more than the history and traditions of segregation limit the way we understand the Constitution's equality guarantee? There is no good reason. The problem with anchoring the meaning of our commitments to this past, as Justices Stephen G. Breyer, Sonia Sotomayor and Elena Kagan put it succinctly in dissent, is that "the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens."²⁴⁹ Do those justices who joined the *Dobbs* majority? Apparently not.

The *Dobbs* majority signed on to an opinion in which decisions and laws written by men were presented as America's history and traditions, without a single woman's voice represented;²⁵⁰ and which claimed those traditions were sufficient to justify stripping women today of a half century of constitutional rights. This is not an account of history that is "conceptually quite separate from the preferences of the judge himself."²⁵¹ Instead, as I observed earlier, the reverse is the case: In *Dobbs*, originalist judges ventriloquize historical sources. It is history that expresses judicial preferences as the nation's traditions.

III. PATHWAYS OF RESISTANCE: DEMOCRATIZING VOICE

As this Article has shown, when we consider *Dobbs* in historical perspective, its originalism is a form of living constitutionalism. The Court overturned *Roe* by employing a history-and-traditions standard that threatens the very rights whose constitutional legitimacy was called into question in Judge Bork's confirmation hearing²⁵² and by *The Constitution in the Year 2000*.²⁵³

²⁴⁹ *Dobbs*, 142 S. Ct. at 2329. (Breyer, Sotomayor & Kagan, JJ., dissenting)

²⁵⁰ See Siegel, *supra* note 6.

²⁵¹ Scalia, *supra* note 13, at 864.

²⁵² See *supra* text accompanying note 139.

²⁵³ See *supra* text accompanying note 115.

Other judicial decisions justified on originalist grounds can also be explained as dynamic or living constitutionalism.²⁵⁴ I have located *District of Columbia v. Heller*²⁵⁵ in the law-and-order and gun-rights movements of the late twentieth century.²⁵⁶

But more is at stake than “outing” movement conservatives for practicing the very form of interpretation they claim to revile.²⁵⁷ The problem is that *Dobbs*’s originalism is a practice of living constitutionalism *that makes our constitutional order less democratic*. *Dobbs* repudiates law concerned about protecting equal membership. *Dobbs* authorizes coercive state action against women and declares the injuries that result are not judicially cognizable or of constitutional consequence.²⁵⁸

The political practice of originalism—the movement that originated in the New Right of the Republican Party of the 1980s—exacerbated the Constitution’s democratic deficits along three axes,²⁵⁹ and all of these tendencies are vividly expressed in the *Dobbs* opinion.

First, *Dobbs* restricts and threatens rights that enable equal participation of members of historically marginalized groups.²⁶⁰ Though John Hart Ely could not grasp this, the early abortion speak outs, like practices of coming out, contested the shape of our constitutional democracy, posing questions about the conditions necessary to secure the equal membership of women and caregivers. Speak-outs tied abortion access to other intersectional inequalities—in health care, in law making roles, and in family roles, pointing to the consequences of pregnancy and caregiving for women, given the organization of education, market, and politics.²⁶¹ Where the *Casey* Court

²⁵⁴ See *supra* note 15.

²⁵⁵ 554 U.S. 570 (2008).

²⁵⁶ See Siegel, *Dead or Alive*, *supra* note 15.

²⁵⁷ See Clarence Thomas, *How to Read the Constitution*, WALL ST. J. (Oct. 20, 2008, 12:01 AM), <https://www.wsj.com/articles/SB122445985683948619> [<https://perma.cc/T7Z9-UQWL>] (“[T]here are really only two ways to interpret the Constitution -- try to discern as best we can what the framers intended or make it up. . . . [U]nless interpretive methodologies are tied to the original intent of the framers, they have no more basis in the Constitution than the latest football scores.”); Bruce Allen Murphy, *Justice Antonin Scalia and the ‘Dead’ Constitution*, N.Y. TIMES (Feb. 14, 2016), <https://www.nytimes.com/2016/02/15/opinion/justice-antonin-scalia-and-the-dead-constitution.html> [<https://perma.cc/9382-GJHT>] (quoting Justice Scalia as saying that “[t]he only good Constitution is a dead Constitution”).

²⁵⁸ See *supra* notes 31–32 and accompanying text.

²⁵⁹ See *supra* notes 23–24 and accompanying text.

²⁶⁰ *Dobbs* employs a history-and-traditions standard to overturn *Roe* and threaten the many of the same rights attacked in Judge Bork’s confirmation hearing and in *The Constitution in the Year 2000*, including rights to contraception, abortion, and same-sex intimacy.

²⁶¹ For this reading of Ely, see NeJaime & Siegel, *supra* note 87. For a glimpse of the many ways that early abortion speak-outs made claims on our democracy, see *id.* at 1922–33. For an account of how laws regulating intimate and family life shape democratic participation, see *id.* at 1944–49. *Cf. id.* at 1946 (“Just as Ely understands decisions protecting rights to voting, speech, and school integration as integral

repeatedly expressed concern about the real-world social conditions in which women exercise abortion rights,²⁶² the *Dobbs* Court dismissively waved away real-world concerns about depriving women of constitutional rights as “speculative”²⁶³ and deemed questions concerning the “empirical . . . effect of the abortion right on society and in particular the lives of women” something that the “Court has neither the authority nor the expertise to adjudicate.”²⁶⁴ As the Supreme Court deprived constitutional rights holders of protection against coercive state action, it claimed not to know, or seemingly to care, about what would happen to those coerced²⁶⁵—in Mississippi, overwhelmingly women of color.²⁶⁶ The right the Court abrogated in

to membership in a democracy, so too are decisions about intimate and family relations.” (citation omitted)).

²⁶² See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893–94 (1992) (recognizing that a “spousal notification requirement is . . . likely to prevent a significant number of women from obtaining an abortion” and that such a requirement is likely to deter women “as surely as if the Commonwealth had outlawed abortion in all cases”).

²⁶³ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2277 (2022).

²⁶⁴ *Id.*

²⁶⁵ Is the Court’s refusal to consider state action in social context a feature of originalist methodology generally, or only this Court’s claim it is beyond a court’s competence to ascertain the impact of state action—the social conditions in which government coerces pregnancy and the bearing of children?

The Court’s refusal to consider social context is especially egregious given that there seems to be an inverse correlation between jurisdictions interested in restricting abortion and jurisdictions interested in helping people avoid unwanted pregnancy or choose wanted pregnancies. See Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why it Matters in Law and Politics*, 93 *IND. L.J.* 207, 214–18 (2018) (finding that states with the with the most severe abortion restrictions had the weakest policies promoting sex education, contraceptive access, healthcare, and financial resources for mothers). For sources examining the safety-net policies of so-called pro-life jurisdictions, see Emily Badger, Margot Sanger-Katz & Claire Cain Miller, *States With Abortion Bans Are Among Least Supportive for Mothers and Children*, *N.Y. TIMES* (July 28, 2022), <https://www.nytimes.com/2022/07/28/upshot/abortion-bans-states-social-services.html> [<https://perma.cc/V2ZK-MWGG>]; Dylan Scott, *The End of Roe Will Mean More Children Living in Poverty; How “Pro-Life” States Are Failing New Parents and Babies*, *VOX* (June 24, 2022, 10:53 AM), <https://www.vox.com/policy-and-politics/23057032/supreme-court-abortion-rights-roe-v-wade-state-aid> [<https://perma.cc/BK4G-K9A6>]; Chris Stein, *After Roe, Are Republicans Willing to Expand the Social Safety Net?*, *GUARDIAN* (July 5, 2022), <https://www.theguardian.com/us-news/2022/jul/05/roe-v-wade-abortion-republicans-social-safety-net> [<https://perma.cc/6E4B-CGF6>]. For the forms of animus these policy choices may reflect, see Reva Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 *COLUM. J. GENDER & L.* (forthcoming 2023).

²⁶⁶ On the racial impact of abortion bans, see Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 *HARV. L. REV.* 23, 54–55 (2022) (observing that “[w]hen this Foreword gives a eulogy to Roe that describes with clarity the racial injury that Dobbs inflicts, it imagines a Court, in a faraway future, that considers the catastrophic racial harms that result when abortion is inaccessible” and “a Court that interprets the Due Process Clause, or other parts of the Constitution, to protect abortion rights in order

Dobbs is like the others the *Dobbs* decision discredits: They signal who counts among We the People.

Second, as we have seen, *Dobbs* is antidemocratic because it locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies.²⁶⁷ And third, as we have seen, *Dobbs* presents its contested value-judgments as expert claims of law and historical fact to which the public owes deference.²⁶⁸

In the words of Robert Cover, “[l]egal interpretive acts signal and occasion the imposition of violence upon others.”²⁶⁹ This concluding Part focuses on constitutional memory as a terrain of constitutional conflict and begins to ask questions about how claims on our constitutional past might be democratized, in arguments unfolding both inside and outside of originalism.

Subpart III(A) calls for new conversations about originalism in law. We need a measure of realism in describing the forms of authority originalists exercise in the American legal system. With this grounding, it might be possible to revive an old debate about originalism’s democratic deficits and to explore possibilities of argument in institutions that originalists now dominate. 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.²⁷⁰ In these and other ways,

to avoid producing this racial injury” (footnotes omitted)). In 2017, the year before HB 1510 was passed in Mississippi, there were 4,289 abortions performed on Mississippi residents. Black individuals had 76.2 percent of those abortions, more than three times the amount whites had. See *MSTAHRS Pregnancy Table Query*, MISS. STATE DEP’T HEALTH, <https://mstahrs.msdh.ms.gov/forms/pretable.html> [https://perma.cc/V7B9-6WSF].

²⁶⁷ See *supra* section II(B)(2).

²⁶⁸ See *supra* text accompanying notes 213–218.

²⁶⁹ See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986). As Cover explained:

Legal interpretation takes place in a field of pain and death. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.

Id. (footnote omitted).

²⁷⁰ Through dictionaries and other text-centric modes of ascertaining law, originalism can legitimate evolving meanings, yet preserve a hierarchy between foundational lawmaking and the struggles responsible for creating the basic infrastructure of democratic participation that enable so many Americans to identify with the Constitution of the Founding and Reconstruction eras as their Constitution. Cf. Dean Reuter, Amy Coney Barrett, Michael C. Dorf, Saikrishna B. Prakash & Richard H. Pildes, *Why, Or Why Not, Be an Originalist?* 69 CATH. U. L. REV. 683, 703 (2020) (quoting Michael C. Dorf commenting on the distinction between interpretation and construction).

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.

Subpart III(B) focuses on constitutional memory as a field of constitutional conflict. Might there be ways to democratize our claims on constitutional memory—to depict the plural sources of the nation’s history and traditions, inside originalism and, most importantly, outside of originalism?

A. Changing Who Talks About Originalism, and How

Of the many questions about originalism this Article raises, one urgently demands more systematic airing. Is there a role in the legal academy—and not only in political science or history²⁷¹—for work that examines the relationship of originalism to political power?²⁷² Why, with a handful of important exceptions, are so many of the scholars writing about the relationship of originalism and politics located outside the law schools²⁷³ when originalists are now dominating the federal judiciary and directing the exercise of our law?

This Article has asked: What is obscured when academics provide a “best lights” or idealized reconstruction of judicial originalism that omits discussion of how originalist judges are appointed and how they decide cases? Given that there is now a functioning majority of Justices on the Supreme Court with power to threaten constitutional rights and to strike down large bodies of legislation, it is time that persons trained in law reason about originalism with even some of the political realism that other disciplines have mustered.²⁷⁴

This kind of critical scholarship is necessary, but of course it is not sufficient. It can train a spotlight on the exercise of power, but it will not, standing alone, change the ways we argue about the Constitution’s meaning. Nothing that this Article says is likely to alter how movement-identified originalists make claims about the Constitution. They, after all, have declared *Dobbs* “magnificently correct” and “masterly.”²⁷⁵ But the Article may have something to say to the many scholars and

²⁷¹ See *supra* note 40.

²⁷² Professor Ganesh Sitaraman posed an analogous question some years ago when he asked why constitutional law professors never examine the relationship of constitutional interpretation and economic power. See Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016).

²⁷³ For Professor Ziegler’s work on originalism, see Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869 (2014) and Mary Ziegler, *Grassroots Originalism: Judicial Activism Arguments, the Abortion Debate, and the Politics of Judicial Philosophy*, 51 U. LOUISVILLE L. REV. 201 (2012). For the work of scholars who have tried to democratize originalism’s methods, see *infra* Subpart III.B.

²⁷⁴ See *supra* notes 39–40 and accompanying text.

²⁷⁵ See *supra* notes 173–174.

advocates who are not movement-identified originalists but now find themselves constrained to make originalist arguments because of the shape of our judiciary and our law. As the Court requires outsiders to join the practice, might outsiders change the practice, even at the margins? Can originalist argument be democratized at all? Many may conclude the answer is self-evidently no and refuse to join the practice. Others may aspire to change the practice through participation rather than critique.

Might it be possible to reopen questions that reach back to the very origins of originalism in the Reagan years? At that time there were regular conversations about the ways originalism as a method of constitutional interpretation exacerbates the democratic deficits of the American constitutional order; concerns expressed that an exclusive focus on the Constitution's moments of making would bake-in status inequalities of the Founding and Reconstruction eras—objections that Professor Paul Brest and Justice Thurgood Marshall raised in their very first critiques of originalism in its inaugural years.²⁷⁶

Liberal critics tired of raising the issue, as subsequent generations of originalists employed formalism to blunt and marginalize these objections. A number of prominent originalists have argued that consent is simply not relevant to a Constitution's legitimacy,²⁷⁷ or have alternately posited constructive consent to the constitutional order.²⁷⁸ These rejoinders rest on idealizations. They go so far as to claim that “the defects of the founding have been eliminated” by developments such as the Reconstruction Amendments, the Nineteenth Amendment, and the Voting Rights

²⁷⁶ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229–30 (1980); Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987). One can see the Meese Justice Department defending itself from these very arguments here in OLP's sourcebook. See OFFICE OF LEGAL POL'Y, *supra* note 119, at 30.

²⁷⁷ Randy Barnett countered the critique as well as all other “dead hand” arguments against originalism by distinguishing the Constitution from a “contract” that requires the consent of all involved. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 636 (1999). According to Barnett, a constitution differs from a contract in that it “purports to govern even those who did *not* consent to it at the founding—women, children, former slaves, resident aliens, disenfranchised prisoners, future generations, etc.” *Id.* at 637. Rather than identifying consent as that which legitimizes a constitution, Barnett argues that such a constitution is instead legitimized by “the merits of the lawmaking process it establishes.” *Id.* at 639. As such, the American Constitution “is not undercut, except indirectly, by the fact that women, slaves, children, resident aliens, convicts, or all of us now living were excluded from the ratification process.” *Id.* at 652.

²⁷⁸ Michael McConnell rejected the “dead hand” objection by suggesting that the Constitution “derives its continued authority from the implicit consent of the people in each subsequent generation,” including those “whose predecessors were excluded from voting on the original Constitution . . .” Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132 (1998). He observes: “No one now alive was represented in 1787, and blacks and women today are no more inclined than any other portions of the population to jettison the Constitution.” *Id.* at 1132–33 (citing Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761 (1997), “[o]n the subject of what she calls ‘blacks’ astonishing fidelity to the Constitution”).

Act, so that “original meaning as amended” is a legitimate basis for constitutional interpretation.²⁷⁹ For example, Professors John McGinnis and Michael Rappaport have asserted that the democratic critique is “less powerful” with respect to women, who were “virtually represented” by male relatives and who sometimes “believed that they should not have the right to participate.”²⁸⁰

Dobbs exposes the inadequacies of these defenses of originalism and illustrates how employing a particular interpretive method can exacerbate the democratic deficits of the American constitutional order. Women had rights under the United States Constitution for a half century—until the Constitution was interpreted through an originalist lens, and then . . . they did not. Originalist interpretation abolished abortion rights, has threatened a host of other rights, and has left women’s liberties in 2022 tied to a body of law enacted in the Civil War era in which women had no vote or say.

Any meaningful response to *Dobbs* requires that we contest the character of our constitutional tradition in numerous arenas, by numerous methods, as we seek to take back the Constitution from the Court. For those inclined to engage in originalist methods of argument, I begin with some brief observations about originalism, and then move beyond.

B. *Contesting Originalist Claims on Constitutional Memory: Recovering Excluded Voices*

In *Dobbs*, when Justice Alito invoked the nation’s history and traditions, he pointed to a collection of abortion bans he has appended to the decision.²⁸¹ Until *Dobbs*, this collection of laws did not represent the nation’s understanding of liberty—and now, in the eyes of the law, it does. In fact, the appendix does not make for compelling reading and is not likely to capture the public’s imagination. Other sources from the nation’s past might be more compelling. There is an opportunity here to incorporate into briefs other evidence of liberty’s meaning—to democratize the resources decision makers have to tell the Nation’s story.

It is important to contest the conventions that govern how advocates and judges make claims on constitutional memory, in arguments inside and of originalism. Whether we reason from a history-and-traditions standard or make an equal protection

²⁷⁹ John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 395 (2007).

²⁸⁰ *Id.*; see also JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 106–07 (2013) (noting that although “the original Constitution allowed African Americans and women to be excluded from participation in its enactment . . . judicial correction of the Constitution currently would be worse than enforcing the amended Constitution according to its original terms”).

²⁸¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2285–300 (2022). See also *supra* note 240 (discussing forthcoming study analyzing errors in *Dobbs*’s statutory count).

argument, as the Court did in *United States v. Virginia*,²⁸² the crucial question is whose experience, whose voice will count in the pages of the *United States Reports*. In the long run, incorporating new voices makes it possible to tell new law stories.²⁸³

There are a handful of originalist practitioners who have called on originalism to democratize its own sources of authority. No doubt provoked by attacks on originalism as antidemocratic, this new generation of originalists has called for developing more inclusive models of the demos. Professor Cristina Mulligan offered a model of “diverse originalism” that would respond to democratic critiques by “incorporating more diverse populations into the corpus of evidence and founding-era meaning.”²⁸⁴ Professor James Fox seeks an alternative approach to originalism that takes a more “inclusive approach” by embracing a series of “counterpublics” rather than a single “unitary entity.”²⁸⁵ Fox asserts that such counterpublic originalism would give “historically excluded voices some degree of authority in contemporary legal discourse” and avoid the “reductionism” of mainstream originalism.²⁸⁶ Putting this concept into practice, Fox has drawn on the nineteenth-century Black Convention Movement to foreground a “Black public sphere” with implications for constitutional questions like the permissibility of affirmative action.²⁸⁷

It was likely the work of Professor Peggy Cooper Davis—a non-originalist—who spurred this democratizing turn within originalism, as her own work calls for recovering of alternative voices and architects of the constitutional order and for drawing upon these authorities in all modalities of constitutional interpretation.

The critical move is to democratize the sources of constitutional memory—the authority—we draw on when we engage in constitutional argument. It is important to engage in this work within originalism—but it is urgent that we extend it beyond originalism, to every practice of constitutional argument, inside and outside of courts.

In her 1997 book *Neglected Stories: The Constitution and Family Values*,²⁸⁸ Professor Davis argued that the history of the antislavery movement and of Reconstruction

²⁸² See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.”).

²⁸³ For my most recent work exploring the politics of constitutional memory—focusing in particular on the erasure and recovery of women’s voices in the American constitutional tradition, see Siegel, *supra* note 6.

²⁸⁴ Cristina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 401–02 (2018).

²⁸⁵ James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 679 (2016).

²⁸⁶ *Id.* at 681–82.

²⁸⁷ James W. Fox, Jr., *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 J. CONST. L. 267, 270, 348–49 (2021).

²⁸⁸ PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997).

ought to play a more significant role in constitutional interpretation.²⁸⁹ She identified ways in which the participants in slavery, abolition, and Reconstruction were underappreciated architects of the Constitution's meaning.²⁹⁰

Professor Davis's work identified narratives about family and freedom that had been overlooked in the standard accounts of the Reconstruction Amendments. She showed how the struggles of ordinary people helped forge stories about the meaning of the Reconstruction Constitution's key guarantees that contemporary interpreters can draw on. She recently spoke about the stories that antislavery activists told of "celibacy, contraception, abortion, and infanticide" to summon the ways that, among other things, the struggle against slavery was a struggle for reproductive autonomy.²⁹¹

Dobbs defines liberty by looking back to nineteenth-century lawmaking. But traditions are not always reduced to legislation—especially laws like mid-nineteenth century abortion bans, which employed the criminal law as instrument of social control, to change public beliefs about abortion. To democratize the ways we define traditions so that we incorporate the voice and views of those whose past disfranchisement we no longer seek to perpetuate, we need to enlarge the evidentiary sources of tradition. The disfranchised engage in practices other than lawmaking that can express values. The stories of freedom struggles, of resistance to law, can inscribe

²⁸⁹ *Id.* at 4–5. For additional discussion of this argument, see Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 J. CONST. L. 1373, 1373 (2009); Peggy Cooper Davis, *Neglected Stories and the Sweet Mystery of Liberty*, 13 TEMP. POL. & CIV. RTS. L. REV. 769, 769–70 (2004); Peggy Cooper Davis, *A Response to Justice Amy Coney Barrett*, HARV. L. REV. BLOG (June 14, 2022), <https://blog.harvardlawreview.org/a-response-to-justice-amy-coney-barrett> [<https://perma.cc/4S6T-QDBN>] [hereinafter *A Response to Justice Barrett*]. For other bottom-up accounts, outside originalism, see Malla Pollack, *Dampening the Illegitimacy of the United States' Government: Reframing the Constitution from Contract to Promise*, 42 IDAHO L. REV. 123, 162–66 (2005); William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEXAS L. REV. 1065, 1065–66, 1090 (2021).

²⁹⁰ See Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 54 (2019) (“Abolitionists fought for the amended Constitution to embody their radical constitutional vision and to install a ‘second founding’ of the nation built on equal citizenship and freedom of labor.”). There is a growing body of historical work on popular sources of the Reconstruction Constitution to support this project. See, e.g., MARTHA JONES VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL (2020); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION, TO RECONSTRUCTION (2021).

²⁹¹ See *A Response to Justice Barrett*, *supra* note 289.

values.²⁹² That is Professor Davis’s point. Constitutional memories of this kind can fund contemporary arguments for reproductive justice.²⁹³

If we look outside the record of lawmaking, there are other chapters of our nation’s history in which we can find public claims about the proper structure of family life. Demands for reproductive autonomy were passionately expressed not only in the abolitionist movement, but also in women’s demands for the vote, as I have shown in a recent article *The Politics of Constitutional Memory*: “It is very little to me to have the right to vote, to own property . . . if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now, & so long as she suffers this bondage, all other rights will not help her to her true position,” wrote Lucy Stone in the years before the Civil War.²⁹⁴ She like so many others sought voting rights to secure voluntary motherhood—to change the law of marriage to recognize a wife’s right to say no to sex, hence to control the spacing of children.²⁹⁵ Those seeking votes for women viewed the law of marriage as depriving women of “self-ownership” in sex and motherhood, and thus forcing women into economic dependency on men; with this understanding, “some condoned, even as they condemned, abortion.”²⁹⁶ This quest for voluntary motherhood and the democratization of the family did not stop with the Nineteenth Amendment’s ratification, but instead recurred from generation to generation, changing idiom and practical expression across class and circumstance.²⁹⁷

²⁹² See HARRIET ANN JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 119 (L. Maria Child ed., 1861) (“When they told me my new-born babe was a girl, my heart was heavier than it had ever been before. Slavery is terrible for men; but it is far more terrible for women. Superadded to the burden common to all, they have wrongs, and sufferings, and mortifications peculiarly their own.” (emphasis omitted)); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 49 (1997) (recounting the story of *Beloved* in which Sethe, “a former slave who is haunted by the spirit of the daughter she killed as captors approached, explains, ‘I stopped him. . . . I took and put my babies where they’d be safe’” (quoting TONI MORRISON, *BELOVED* 164 (1987))).

²⁹³ Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html> [<https://perma.cc/ZDN7-7PT8>].

²⁹⁴ Siegel, *supra* note 6, at 38–39.

²⁹⁵ *Id.* at 38 & n.93.

²⁹⁶ *Id.* at 39; see also Reva Siegel & Stacie Taranto, *What Antiabortion Advocates Get Wrong About the Women Who Secured the Right to Vote*, WASH. POST (Jan. 22, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/01/22/what-anti-abortion-advocates-get-wrong-about-women-who-secured-right-vote> [<https://perma.cc/H5UP-848B>] (observing that even those denouncing abortion as “a most monstrous crime” opposed efforts to criminalize abortion given the injustice of marriage laws).

²⁹⁷ See Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 454 (2020) (“Women’s quest for the vote engendered a tradition of argument about the family that shaped debate over the Fourteenth, Fifteenth, and Nineteenth Amendments, continued across generations, and is ongoing in law and politics today.” (footnote omitted)).

Americans have always struggled for the authority and resources to shape their intimate and family lives. In some circumstances that meant asserting themselves to say no to childbearing, while in others, yes.²⁹⁸ These struggles cut across the axes of gender, class, race, religion, and sexuality and helped to transform the nation's understanding of freedom and equality, from bottom up as well as top down. Those who struggled for freedom and equality to shape their intimate and family lives may have been denied by law the authority to do so, but there is no good reason for us today to affirm and perpetuate these inequalities as our own.²⁹⁹ *Roe's* roots lie in struggles of this kind.³⁰⁰

Recovering voices such as these will never persuade the Court that decided *Dobbs* to reverse its ruling. But struggles to democratize constitutional memory are still worth waging as they begin the process of taking back the Constitution from the Court. Doing that requires us to begin to reconstruct and to relocate our own understanding of our history and traditions—to remember the many ways that the Constitution emanates from the people themselves. Drawing upon a much wider array of memories to depict We the People may begin to reshape our understanding of our own law.

We can begin by uncovering the vernacular claims that shaped the world in which the Court decided *Roe*—remembering that the right that the Court just reversed in *Dobbs* was not wholly court-made, but grew, bottom up, from popular actions that showed why liberty and equality were at stake in decisions about abortion.³⁰¹ As we recover the roots of *Roe* in popular conviction, we can create a new historical context for the Court's ruling in *Dobbs*, and a new understanding of our own “history and traditions.” It becomes clearer that the Court cannot wholly destroy what it did not solely create.

By democratizing our claims on constitutional memory, we enable struggle over the Constitution's past, and its future.

CONCLUSION

²⁹⁸ See Maya Manian, *Coerced Sterilization of Mexican American Women: The Story of Madrigal v. Quilligan* in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 97, 98–99, 113 (Melissa Murray, Katherine Shaw & Reva Siegel eds., 2019) (recounting sterilization abuse and its legacy); Murray, *supra* note 224, at 2041–45 (recounting debates about abortion within the Black community in the years before *Roe*).

²⁹⁹ See Siegel, *supra* note 6, at 57–58 (arguing for incorporating the voices of generations of women excluded from constitutional memory into our constitutional tradition).

³⁰⁰ See Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875 (2010).

³⁰¹ For some recent accounts of *Roe* and many other movement-based actions and cases of the era, see Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of Roe v. Wade*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 53 (Melissa Murray, Katherine Shaw & Reva Siegel eds., 2019); Murray, *supra* note 224, at 2042–49; NeJaime & Siegel, *supra* note 87, at 1922–28.

Exposing the structure and logic of originalist argument is as much part of resistance work as are struggles over the Court's composition. And while changing the Court's composition could take decades, it is possible to begin engaging with originalism as a politics *now*. It is empowering for Katniss to learn where values-based arguments live in the originalist memory games and whom they seek to kill.³⁰² It is empowering for Dorothy to learn that there is just a "man behind the curtain," and she has the resources within herself to find her own way home.³⁰³ Because originalists make brilliant use of cultural capital, there is much to learn from originalist practice. Every form of constitutional argument appeals to constitutional memory, and the resources of our shared pasts *can* be turned to democratizing ends.³⁰⁴

³⁰² See SUZANNE COLLINS, *THE HUNGER GAMES* (2008) (telling the story of Katniss Everdeen, who is thrust into a battle for her life and left to defend herself against trained adversaries seeking to kill her).

³⁰³ See *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939). Dropped into a strange world, Dorothy goes on a quest in search of the storied Wizard of Oz, in the hopes he will have the power to bring her home. But she finally reaches Oz only to learn that there is nothing but a "man behind a curtain," with no real power, and Dorothy must rely on herself to get back home. Jamie Jordan, *The Radical Feminist Behind the Curtain*, MS. MAG. (Mar. 29, 2021), <https://msmagazine.com/2021/03/29/wizard-of-oz-matilda-joslyn-gage-suffrage-feminist> [<https://perma.cc/FU8W-HUST>]. It turns out that Oz novelist Frank Baum was a woman's rights suffragist deeply influenced by his mother-in-law Matilda Joslyn Gage, one of the authors of *The History of Woman's Suffrage*. *Id.*

³⁰⁴ See DAVIS, *supra* note 288; Siegel, *supra* note 6.