

Reconstructing the Reconstruction: Equality, Liberty, Method and Interpretation

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The U.S. Supreme Court’s reliance on “history and tradition” in Dobbs v. Jackson Women’s Health Organization reinvigorated long-standing debates about the Court’s use of what it claims is originalism. The Court’s selective view of which history matters manifests throughout the Dobbs opinion, dismissing Antebellum, Reconstruction, and Jim Crow histories altogether and engaging in opportunistic and ahistoric originalism. The methodology used in Dobbs serves as a troubling precedent and method for the potential dismantling of other civil liberties and civil rights. For this reason, we argue that reimagining judicial review is critically important to the future of constitutionalism and Supreme Court jurisprudence.

Specifically, this Article calls for two enhancements to judicial review. First, it argues for reassociating the Reconstruction with judicial review, including its legal and social precursors. We recognize the value in relating the fight against involuntary reproductive servitude to the Reconstruction and elevating this crucial political era in judicial review, such that the true meaning and associations connected to the Thirteenth, Fourteenth, and Fifteenth Amendments are imbued and embedded in judicial review. Second, the Article argues that full dismissal of certain histories disserves the call for justice, constitutionalism, and accountability on matters related to human rights, civil rights, and civil liberties. The compelling criticisms against originalism and the persuasive argument that it is no methodology at all are not incompatible with our view that history serves an important function in legal review. Thus, the Article concludes with a thought experiment involving a mixed-method review of constitutional disputes—one that turns to history while not excluding the learned position of a living constitution.

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INTRODUCTION

The U.S. Supreme Court's reliance on "history and tradition" in *Dobbs v. Jackson Women's Health Organization*¹ reinvigorated long-standing debates about the Court's use of what it claims is originalism. The Court's selective view of which histories matter manifests throughout the *Dobbs* opinion. The Court dismisses Antebellum, Reconstruction, and Jim Crow histories altogether, engaging in opportunistic and ahistoric originalism, "whereby the Court implies its commitment to text, original meaning, and long, unbroken ties to tradition, but seriously veers from that methodology or performs its adjudication in such a neglectful and unsystematic manner that it belies fidelity to the methodology."² As such, the methodology used in *Dobbs* serves as a troubling precedent and method for the potential dismantling of other civil rights and civil liberties. For this reason, we argue that reimagining judicial review is critically important to the future of constitutionalism and Supreme Court jurisprudence.

Dobbs, which gutted nearly fifty years of precedent by overturning the constitutional right to abortion³ established in *Roe v. Wade*⁴ and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵ serves as a touchstone case for querying the U.S. Constitution and the rule of law. Specifically, it offers a lens to reflect on how the Court relied upon the Reconstruction Amendments not to uphold, but rather to strip people of their civil rights and civil liberties. By revealing the historical roots of the Fourteenth Amendment that protect bodily autonomy, we ask: How did an originalist Court rely upon its interpretation of that crucial civil rights and civil liberties amendment to *undermine* women's civil rights and civil liberties? No matter the methodology used, we believe the Court seriously erred in its application and understanding of this Reconstruction Amendment and its historical origins.

In *Dobbs*, the Court dismantled the constitutional right to abortion and dismissed nearly fifty years of precedent as meaningless and seemingly inconvenient to its analysis.⁶ The majority's opportunistic originalism exposes an inherent problem with the current Court's originalist methodology: it overlooks inconvenient facts—even those that are glaring. It dismisses history that does not align with its viewpoint. What counts as "original" depends on the principle or narrative that the Court wishes to embrace regardless of timeframe.⁷

1. 597 U.S. 215, 240 (2022).

2. Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women's Health Organization*, 2022 SUP. CT. REV. 111, 114.

3. See 597 U.S. at 302.

4. 410 U.S. 113, 154 (1973).

5. 505 U.S. 833, 869 (1992).

6. See *Dobbs*, 597 U.S. at 260 (criticizing the dissent for failing to conjure authority for *Roe* in any "state constitutional provision or statute," or "federal or state judicial precedent," or "a scholarly treatise").

7. See Goodwin, *supra* note 2, at 123 (noting that "the Court's deference to the past is selectively, if not opportunistically, deployed with outcomes seemingly predetermined").

To situate our argument, briefly consider important touchpoints in the *Dobbs* decision. The majority opinion, authored by Justice Samuel Alito, claimed to be guided by five factors that “weigh[ed] strongly in favor of overruling *Roe* and *Casey*.”⁸ Specifically, the Court claimed that the nature of *Roe*’s error was “egregiously wrong and deeply damaging,” “the quality of [*Roe*’s] reasoning” was “exceptionally weak,” and the rules imposed by *Roe* and *Casey* were not “workab[le]” but rather “disruptive . . . on other areas of the law.”⁹ Finally, the Court inferred that no meaningful reliance interests existed such as to require preserving the precedent established in *Roe*,¹⁰ explaining that “[w]e have long recognized . . . that *stare decisis* is ‘not an inexorable command,’”¹¹ and it “is at its weakest when we interpret the Constitution.”¹² The Court acknowledged that “overruling a precedent is a serious matter” and “not a step that should be taken lightly,”¹³ but then nevertheless proceeded to disruptively do so by mistakenly claiming “the absence of [women’s] concrete reliance” on abortion access.¹⁴ Justice Alito opined that *Roe*, which decriminalized abortion in 1973, was “egregiously wrong from the start.”¹⁵

The harms of the Court’s fundamentally flawed historical analysis in *Dobbs* are compounded by the Court’s dismissal and disregard of health and science data and empirics, historically or in contemporary times. The Court ignored social science research that would have answered the question of whether women relied on the right to abortion since 1973.¹⁶ The Court’s majority also did not engage with peer-reviewed medical literature in its opinion.¹⁷ Even the Mississippi State Department of Health—the state from which the *Dobbs* case originated—has

8. *Dobbs*, 597 U.S. at 268.

9. *Id.* at 268–70.

10. *Id.* at 287–90.

11. *Id.* at 264 (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)).

12. *Id.* at 264 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). The Court further explained, “in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.” *Id.*

13. *Id.* at 266–67.

14. *Id.* at 268; see Caitlin Knowles Myers & Morgan Welch, *What Can Economic Research Tell Us About the Effect of Abortion Access on Women’s Lives?*, BROOKINGS INST. (Nov. 30, 2021), <https://www.brookings.edu/articles/what-can-economic-research-tell-us-about-the-effect-of-abortion-access-on-womens-lives> [<https://perma.cc/USG8-UBDW>] (compiling and analyzing research and concluding that, “[t]he fact is clear: women continue to rely on abortion access to determine their reproductive lives”).

15. *Dobbs*, 597 U.S. at 231.

16. See Brief of Amici Curiae Economists in Support of Respondents at 6–34, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) (arguing that review of the evidence shows the important reproductive, economic, and social effects abortion access has had on women’s lives and accordingly, the potential negative impacts of overruling *Roe* and *Casey* and limiting that access); Myers & Welch, *supra* note 14.

17. Instead, the majority cites “common-law authorities” including Sir Matthew Hale. *Dobbs*, 597 U.S. at 242 (quoting *Kahler v. Kansas*, 589 U.S. 271, 279 (2020)). Sir Matthew Hale was a seventeenth-century jurist who presided over witch trials and wrote in support of the marital rape exception. See Ken Armstrong, *Draft Overturning Roe v. Wade Quotes Infamous Witch Trial Judge with Long-Discredited Ideas on Rape*, PROPUBLICA (May 6, 2022, at 13:50 ET), <https://www.propublica.org/article/abortion-ro-wade-alito-scotus-hale> [<https://perma.cc/SUW4-EABK>].

recognized and reported on the tragic consequences of pregnancy and childbirth in that state.¹⁸

Indeed, the Court's focus on early British and American history and attitudes towards abortion¹⁹ fails to address the unsightliness of women's deaths due to the unavailability of legal abortions prior to *Roe* or the detrimental health effects stemming from illegal abortions, including infertility in the United States.²⁰ By explicitly dismissing *Roe*'s review of history as "constitutionally irrelevant,"²¹ the Court renders women's historic and contemporary lived experience invisible in a case central to their constitutional personhood and citizenship. It compounds the harm by stating that *Roe*'s "cataloging" of "a wealth of other information" pertinent to women's lives and their health and safety has "no bearing on the meaning of the Constitution."²²

But were the concerns articulated by Justice Blackmun related to maternal mortality and morbidity, as well as coerced pregnancy and parenthood addressed in *Roe* somehow irrelevant almost fifty years later? A bounty of medical, scientific, sociological, and legal evidence proves not. In our estimation, the Court dangerously misreads and misremembers historical facts and precedents. Simply put, *Dobbs* reflects opportunistic originalism. Yet, the Court is equally neglectful of contemporary facts and data that illuminate the progress in women's rights and well-being enabled by *Roe* and its progeny.

The Court's flawed methodology is especially apparent when set against the historical record. In the decade preceding *Roe*, "[illegal] abortion-related deaths accounted for nearly half, or 42.1 percent, of the total maternal mortality in New York City."²³ The exact number of illegal and frequently dangerous abortions prior to *Roe* remains unknown, but estimates suggest nearly one million.²⁴ According to a policy brief from the Guttmacher Institute, "[t]he toll the nation's abortion laws took on women's lives and health in the years before *Roe* was substantial."²⁵ Unquestionably, these deaths were avoidable, given that legal abortions are as safe as a penicillin shot and far less risky than pregnancy and childbirth.²⁶

18. See MICHELLE OWENS, MISS. STATE DEP'T OF HEALTH, MISSISSIPPI MATERNAL MORTALITY REPORT: ANNUAL REPORT: REVIEW OF 2019-2023 MATERNAL DEATHS 6 (2025), <https://msdh.ms.gov/page/resources/21452.pdf> ("Maternal mortality in Mississippi remains an urgent public health crisis . . .").

19. See *Dobbs*, 597 U.S. at 242–49 (citing various historical authorities including "Henry de Bracton's 13th-century treatise," "Sir Edward Coke's 17th-century treatise," "English cases dating all the way back to the 13th century," and "the few cases available from the early colonial period").

20. See NARAL PRO-CHOICE AM., THE SAFETY OF LEGAL ABORTION AND THE HAZARDS OF ILLEGAL ABORTION 1–2 (2017), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-distorting-science-safety-legal-abortion.pdf> [<https://perma.cc/BW4W-LW4A>].

21. *Dobbs*, 597 U.S. at 226.

22. *Id.* at 227.

23. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 214 (1997).

24. See Symposium, *Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 420–21 (1968) (statement of Dr. Alan F. Guttmacher).

25. Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER POL'Y REV. 8, 8 (2003).

26. See WHO, UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008, at 14 (6th ed. 2011), <https://iris.who.int/server/api/core/bitstreams/749eb301-cf02-4b8c-8463-2ca36a53c85e/content> ("In the United States . . . the death

Leslie Reagan, author of the landmark work, *When Abortion Was a Crime: Women, Medicine, and Law in the United States*, explains that “[p]hysicians and nurses at Cook County Hospital saw nearly one hundred women come in every week for emergency treatment following their abortions.”²⁷ In far too many cases, “[s]ome barely survived the bleeding, injuries, and burns; others did not.”²⁸ At various medical centers throughout the United States, including at Cook County Hospital, entire medical wards were designated for “abortion-related complications,” affecting “[t]ens of thousands of women every year.”²⁹

Prior to *Roe*, maternity medical wards doubled as emergency care units, caring for women and girls after back-alley and illegal abortions.³⁰ Unsurprisingly, the burdens of abortion restrictions were not shared equally across demographics. As Reagan explains, “[t]he racial differences in abortion-related deaths and access to safe therapeutic abortions mirrored the racial inequities in health services in general and in overall health,” and as such, the “[m]aternal mortality rates of black women were three to four times higher than those of white women.”³¹ According to Justice Harry Blackmun, even if women were to survive such arduous conditions, “[m]aternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child.”³² Threads of these concerns resurface in the wake of *Dobbs*, as women die after being refused medical care, suffer during miscarriages, and flee abortion-restrictive states in a desperate search for medical care.³³

Yet, according to Justice Alito, the Justices in *Roe* and *Casey* had “fall[en] prey to . . . an unprincipled approach” that ignored history, tradition, and ordered liberty.³⁴ In a glaring reproach of *Roe*’s 7–2 majority and *Casey*’s plurality, Justice Alito discredits those Courts as having “usurp[ed] authority that the Constitution entrusts to the people’s elected representatives.”³⁵ The result, Justice Alito stated, is a decision laden with “exceptionally weak” reasoning and

rate from induced abortion is 0.6 per 100[,000] procedures, making it as safe as an injection of penicillin.” (citing RACHEL BENSON GOLD, STANEY K. HENSHAW & LAURA DUBERSTEIN LINDBERG, *ABORTION AND WOMEN’S HEALTH: A TURNING POINT FOR AMERICA?* (1990)); Michele Goodwin & Allison M. Whelan, *Constitutional Exceptionalism*, 2016 U. ILL. L. REV. 1287, 1295 (noting that “[r]esearch shows that a woman is fourteen times more likely to die during her pregnancy and childbirth than when having an abortion”).

27. REAGAN, *supra* note 23, at 210.

28. *Id.*

29. *Id.* at 209–10.

30. *See id.* at 210–11.

31. *Id.* at 213.

32. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

33. *See, e.g.,* Lizzie Presser & Kavitha Surana, *A Third Woman Has Died Under Texas’ Abortion Ban as Doctors Reach for Riskier Miscarriage Treatments*, TEX. TRIB. (Nov. 27, 2024, at 05:00 CT), <https://www.texastribune.org/2024/11/27/texas-abortion-death-porsha-ngumezi/> [<https://perma.cc/5XEM-VDZL>] (“Porsha Ngumezi bled to death as she was miscarrying after her doctor opted against an emergency procedure used to end pregnancies.”).

34. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 240 (2022).

35. *Id.* at 239–40.

“damaging consequences.”³⁶ Justice Alito surmised that “far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.”³⁷ And, as such, “*Roe* and *Casey* must be overruled.”³⁸

To remedy these perceived wrongs, Justice Alito implored that the Court must be “guided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty.”³⁹ In other words, there must be “respect for the teachings of history,” which restrains Justices by imposing appropriate limits.⁴⁰ The majority ignores how preserving rights rooted in precedent also serves the function of judicial restraint and the portended goals of originalism as a method.

The majority credits itself with a faithful and “careful analysis” and adherence to “the history of the right at issue,”⁴¹ while placing *Roe* on par with the infamous 1896 decision in *Plessy v. Ferguson*.⁴² The *Dobbs* majority claims fidelity to the meaning found in the Fourteenth Amendment.⁴³ However, this claim of a deeper, more rigorous understanding of the Fourteenth Amendment and presumably its historical legal, social, and cultural foundations is hard to countenance. The Court avoids all mention of social conditions, political realities, and legal concerns present at the time of ratification in 1868—a mere three years following the abolition of slavery and two years before the Fifteenth Amendment extended voting rights to men of all races and fifty-two years before the Nineteenth Amendment guaranteed women the right to vote.⁴⁴

The duplicity lodged in *Dobbs* cannot be unseen. Interpretive deceit seeks to mask its opportunism and professed fidelity to history and rule of law. For example, the Court claims a thorough review of history, including the Fourteenth Amendment, yet makes no reference to Antebellum conditions, slavery, inequality, coerced or forced parenthood, or former Confederate states’ interference with, and denial of, Black family bonds, all of which served as triggers for the Amendment’s passage and ratification.⁴⁵ These words and concepts: “*slavery*,”

36. *Id.* at 231.

37. *Id.* at 231–32.

38. *Id.* at 231.

39. *Id.* at 240.

40. *Id.* (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

41. *Id.* at 238.

42. *See id.* at 268 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)) (referring to *Plessy* and *Roe* both as decisions that were “egregiously wrong”). As explained by Michele Goodwin, “The Court [in *Dobbs*] resurrected *Plessy* seemingly as an analogue to *Roe*, dangerously tying an odious history of race and sex discrimination and suppression known as Jim and Jane Crow that included myriad horrific laws and state-sanctioned violence targeted at Black women, men, and their families to the reproductive liberation of all women, and particularly Black women” Goodwin, *supra* note 2, at 118 (footnotes omitted).

43. *See Dobbs*, 597 U.S. at 237–40 (discussing the need to turn to “history and tradition” to determine whether the Fourteenth Amendment protects certain categories of substantive rights).

44. U.S. CONST. amends. XV, XIX; *see also* Goodwin, *supra* note 2, at 184–85 (“[T]he Court’s interpretation of the Fourteenth Amendment [in *Dobbs*] neuters its meaning and origins in combatting the vestiges and badges of American slavery, which included matters of family life, bodily autonomy, and reproductive freedom of privacy.”).

45. *See generally* PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997) (arguing that the Fourteenth Amendment was intended to protect family autonomy,

“*involuntary servitude*,” “*forced pregnancy*,” “*forced birth*,” and the like do not appear in its ruling. Furthermore, the Court excludes basic concepts, terms, and legal arguments relevant at ratification and essential to Reconstruction, including “*abolition*,” “*bondage*,” and “*indenture*.”⁴⁶ Ironically, for a case that addresses history, reproductive freedom, and substantive due process, the majority references “*property*” only once and in doing so only in relation to the reliance interests of those who could *own* property and contract for it, which would not include the women and their offspring subjugated to the statuses of property and merchandise.⁴⁷

We observe, for example, that absent in a case brought by Mississippi, a state formerly and deeply involved and invested in slavery,⁴⁸ are the words “Black women” and “Black woman.”⁴⁹ In our review of Mississippi’s Secession documents, the lawmakers from that state made clear: “Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world. Its labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth.”⁵⁰ Mississippi lawmakers considered it dangerous to release Black women from bondage, as it could subvert the state to “ruin.”⁵¹ Because the Court avoids any engagement with these terms,

drawing on the experiences of formerly enslaved people to show that family rights, including marriage, procreation, parenting, and sexuality, are fundamental to liberty and citizenship).

46. *See, e.g.*, Goodwin, *supra* note 2, at 184 (“The Court shed no ink to illustrate Black women’s advocacy and fight for their bodily autonomy dating back to the earliest slave ships docking on these shores, holding captive kidnapped and soon-to-be trafficked Black girls and women whose forced physical and sexual labor would become central to the burgeoning economies of the colonies and what would later become the United States.”).

47. *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. at 288 (“*Casey*’s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in ‘cases involving property and contract rights.’” (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991))).

48. *See generally* EQUAL JUST. INITIATIVE, SLAVERY IN AMERICA: THE MONTGOMERY SLAVE TRADE (2018), <https://eji.org/wp-content/uploads/2020/07/slavery-in-america.pdf> [<https://perma.cc/6UDW-5VBB>] (highlighting Mississippi’s historical involvement with slavery and violence against Black people in the Deep South). According to one statistic, in 1860, enslaved persons made up over fifty-five percent of Mississippi’s population in 1860, one of the highest percentages among southern states at the time. *Statistics on Slavery*, WEBER STATE, https://faculty.weber.edu/kmackay/statistics_on_slavery.htm# [<https://perma.cc/MM4M-3T56>] (last visited Mar. 27, 2026).

49. *Dobbs* originated as a challenge to the constitutionality of Mississippi’s Gestational Age Act, which prohibited abortions after fifteen weeks’ gestation except in the case of a medical emergency or severe fetal abnormality. *Dobbs*, 597 U.S. at 232. The District Court granted summary judgment in favor of Jackson Women’s Health Organization, a Mississippi clinic that provided abortions, and permanently enjoined enforcement of the Act, reasoning that “‘viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions’ and that 15 weeks’ gestational age is ‘prior to viability.’” *Id.* at 233–34 (citing *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 539–40 (S.D. Miss. 2019)). The Supreme Court then granted certiorari to directly answer the question of whether to overturn *Roe* and *Casey*. *See id.* at 235.

50. *Confederate States of America - Mississippi Secession: A Declaration of the Immediate Causes Which Induce and Justify the Secession of the State of Mississippi from the Federal Union*, YALE L. SCH.: AVALON PROJECT https://avalon.law.yale.edu/19th_century/csa_missec.asp [<https://perma.cc/8UE8-UGM9>] (last visited Mar. 27, 2026).

51. *Id.* Note that the Declaration does not reference Black women specifically, but it references slavery generally, which inherently includes Black women and their role in slavery.

issues, and concerns, while at the same time purporting historical review, whether it views these matters as “constitutionally irrelevant” remains uncertain.⁵²

Our argument is that the Court’s methodology weaponizes claims of adherence to history and Reconstruction while avoiding America’s more ugly history of enlisting Black women’s bodies in the service of forced sex, coerced birth, and involuntary reproduction.⁵³ The Court harnesses the tools of liberation—the Reconstruction—while backsliding on civil liberties and civil rights. This method, which lacks historical rigor and commitment to the rule of law, not only poses a harm to abortion rights, but also to other concerns regarding sex, race, gender, religion, and class equality.⁵⁴ Despite its blistering critiques and condemnation of *Roe* and *Casey*, the *Dobbs* Court poorly performs its alleged historical review and, in doing so, exposes its craft and deceit. The originalism to which the Court adheres allows the country’s early penholders—land-holding white men—to dictate today’s rights and liberties.⁵⁵ In doing so, it ignores the powerful and important narratives of others whose voices may have been unheard but were nevertheless pivotal to our nation’s “history and tradition.”⁵⁶

In our view, *Dobbs* is a burning house. The opinion presents a powerful warning about the instability of the rule of law on the Roberts Court and the weaponization of history as a proxy for dismantling hard-won civil liberties and civil rights protected by the Reconstruction Amendments. It reflects an abrogation of the principles of fair and transparent legal process and adjudication, equality before law, respect for individual rights, accountability, avoidance of arbitrariness, and an independent judiciary that are enshrined in the U.S. Constitution.⁵⁷

In Part I, we turn to originalism. We note that while some aspect of reading history into judicial opinions has been present in American jurisprudence dating back to *Marbury v. Madison*,⁵⁸ the adoption of the term “originalism” is a relatively new practice and not deeply rooted in history nor embraced by drafters of

52. *Dobbs*, 597 U.S. at 226.

53. See Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191, 204 (2022).

54. See *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (recommending that the Court reconsider other substantive due process precedent that provides rights to various groups including *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*); Allison M. Whelan, *Aggravating Inequalities: State Regulation of Abortion and Contraception*, 46 HARV. J.L. & GENDER 131, 162 (2023) (noting that “at least one Justice appears ready and willing to reconsider the right to contraceptives, and more”).

55. Baynard Woods, *The Supreme Court’s Originalism Is White Supremacy*, NBC NEWS: THINK (July 2, 2022, at 05:30 EDT), <https://www.nbcnews.com/think/opinion/supreme-courts-originalism-white-supremacy-rcna36409> [<https://perma.cc/6CBB-QDQC>].

56. See *id.* (“[O]riginalist judges express a belief that we should interpret the U.S. Constitution according to the legal opinions of 18th century white men – the same white men who denied the right to vote or own property to anyone but themselves.”); Goodwin, *supra* note 2, at 159 (utilizing originalism, “[t]he Court may cherry-pick eras in history that tailor to their analysis and desired outcomes while dismissing or neglecting other periods, historical texts, documents, and truths”).

57. See, e.g., U.S. CONST. amends. I–X (the Bill of Rights); *id.* art. III, § 2 (power of an independent judiciary).

58. See 5 U.S. 137 (1803) (“If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body,

the Constitution or the nation's Founders.⁵⁹ Nevertheless, we acknowledge the value of historical review and provide a descriptive account of the various branches of contemporary originalism. Our objective is not the embrace or advancement of originalism. Rather, this Article recognizes and asserts a value in constitutional truth-telling as a means of detecting and acknowledging historical, social, and legal mistreatment of vulnerable communities and identifying the constitutional correction in the Reconstruction.

Part II brings to the forefront the neglected history of Reconstruction, rendering the political arguments, social conditions, and lives of women visible. This Part addresses the void in *Dobbs*. It argues that the conditions of forced pregnancies, states' interference with family, and racial inequality triggered the drafting and ratification of the Thirteenth and Fourteenth Amendments. Part III turns to the Supreme Court's disordered liberty in the wake of *Dobbs*. It issues a warning about the vulnerability of women's rights, LGBTQ+ equality, and voting rights in the wake of *Dobbs* and the Court's so-called historical methodology. Part IV concludes by recommending a new concept of mixed methodological judicial review.

I. ORIGINALISM

Part I unpacks the origins and strands of originalism. The Court's implicit, if not explicit, interest in, and commitment to, originalism in its deliberation and adjudication on matters of civil liberties and civil rights motivates our interest in identifying and examining its contours.

What exactly is originalism? Arguably, evidenced by the disagreement among originalists on the Court, the method does not constitute one thing, nor does it represent one approach to judicial review. The Court reveals its originalist inconsistencies in matters of gun control,⁶⁰ Establishment Clause

it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested.”).

59. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (noting that “[a]t least since *Marbury*, in which Chief Justice Marshall emphasized the significance of our Constitution’s being a written document, originalism in one form or another has been a major theme in the American constitutional tradition” (footnote omitted)); Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 13 (Grant Huscroft & Bradley W. Miller eds., 2011) (noting that the earliest appearances of the term “originalism” did not appear in scholarship until the early 1980s).

60. Even across matters where there are majority wins for the originalists on the Court, their concurrences reveal instability in their frameworks and core alignments. *New York State Rifle & Pistol Ass’n v. Bruen* demonstrates multiple purportedly originalist justices writing different opinions to overturn a more than century-old gun control law. Compare 597 U.S. 1, 8–71 (2022) (Thomas, J., majority opinion) (overturning a more-than-century-old gun control law), with *id.* at 71–79 (Alito, J., concurring) (writing to specifically address the dissent), *id.* at 79–81 (Kavanaugh, J., concurring) (elaborating a distinct framework for interpreting the Second Amendment to justify overturning the law), and *id.* at 81–83 (Barrett, J., concurring) (writing separately “to highlight two methodological points that the Court does not resolve”). Professor José Joel Alicea argues that Justices Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett, Clarence Thomas, and Samuel Alito all “subscribe[.]” to originalism. J. Joel Alicea, *The Supreme Court Is Divided in More Ways than You’d Think*, N.Y. TIMES (June 9, 2025), <https://www.nytimes.com/2025/06/09/opinion/originalism-supreme-court-conservative.html>.

cases,⁶¹ sex discrimination,⁶² and reproductive rights.⁶³ Given these inconsistencies, some commentators have suggested that originalism is either political practice and not methodology⁶⁴ or sophistry parading as methodology, deserving both “rigor and rage.”⁶⁵

Former Yale Law School Dean Robert Post and Professor Reva Siegel surmised two decades ago that originalism is the “Right’s living constitution.”⁶⁶ Their observation that originalism is “a powerful vehicle for conservative mobilization”⁶⁷ can clearly be seen in recent Supreme Court terms. That is, Warren Court decisions now give way to dismantling under the Court’s active filtering and decisionmaking through originalism.⁶⁸ The problem, as they note, is not conservatives’ consideration of original understanding of the Constitution’s text and intention of the Framers, but rather the orthodoxy that it is “the *only* legitimate way of interpreting the Constitution,” and that “all other approaches to constitutional interpretation

61. See Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 619 (2019) (analyzing the Supreme Court’s opportunistic and inconsistent use of originalism in Establishment Clause cases).

62. Compare *Bostock v. Clayton County*, 590 U.S. 644, 649–83 (2020) (Gorsuch, J., majority opinion) (holding that sex discrimination under Title VII includes discrimination on the basis of gender identity), with *id.* at 683–734 (Alito, J., dissenting), and *id.* at 780–805 (Kavanaugh, J., dissenting). The Court declined to extend *Bostock*’s reasoning when considering whether a Tennessee ban on gender-affirming care for transgender youth discriminated on the basis of sex. *United States v. Skrmetti*, 605 U.S. 495, 520 (2025). Chief Justice Roberts wrote for the majority, and Justices Thomas, Barrett, and Alito authored separate concurrences, which did not cohere. See *id.* at 526–47 (Thomas, J., concurring) (joined by no other Justices) (arguing that *Bostock*’s logic should not be engaged in constitutional challenges, and discussing the role of state legislatures in access to medical treatments); *id.* at 553 (Barrett, J., concurring) (joined by Justice Thomas) (arguing that “transgender status does not define a suspect class”); *id.* at 557–58 (Alito, J., concurring) (joined by no other Justices) (“I would assume for the sake of argument that the law classifies based on transgender status, but I would nevertheless sustain the law because such a classification does not warrant heightened scrutiny.”).

63. In *Dobbs*, for example, Justice Thomas’ method of originalism would go further than Justice Alito, as Justice Thomas argues that all substantive due process cases should be revisited. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring).

64. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 554 (2006) (noting that “[s]ince the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement. . . . The structure of this participation flatly contradicts originalism’s own professed jurisprudential principles”); see also *id.* at 549 & n.17 (citing sources that “express[] doubts about originalism as a methodology”).

65. See MADIBA K. DENNIE, *THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK* xii, 11–12 (2024) (deriding the Court’s “à la carte approach to history” and “Goldilocks-esque reasoning” in cases like *Bruen* and *Dobbs*).

66. See generally Post & Siegel, *supra* note 64. The term “living Constitution” essentially refers to the idea that the meaning of the U.S. Constitution evolves with society to address contemporary issues and is not fixed to the original intent of the Founders. See David A. Strauss, *The Living Constitution*, U. CHI. L. SCH. (Sep. 27, 2010), <https://www.law.uchicago.edu/news/living-constitution> [<https://perma.cc/5RJH-G5JL>]. But see William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) (suggesting that the phrase “living Constitution . . . is really a shorthand expression that is susceptible of at least two quite different meanings”).

67. Post & Siegel, *supra* note 64, at 546.

68. *Id.* at 552 (“Disagreements within the contemporary Court . . . are ‘usually over how far and how fast the Court should go in correcting the excesses of the Warren and immediately post-Warren Courts.’” (quoting Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 931 (1996))).

[are] improper and unprincipled.”⁶⁹ As a result, consultation of “case law, custom, structure . . . common sense,” legislation, and legislative history, among other things, seems a deterrent to the implicit, if not explicit, goal of originalism, which Post and Siegel argue is “widespread and sustained mobilization of conservatives.”⁷⁰

Other scholars offer a blunter critique. Legal advocates like Madiba Dennie argue that originalism essentially amounts to “policy preferences of the conservative legal movement rather than the principles of the Constitution.”⁷¹ Skeptical of originalism’s legitimacy or the Court’s claims that it is adherent to an objective review of history, Dennie argues that “[n]o constitutional clause says future would-be interpreters of the document must first walk a mile in a plantation owner’s shoes.”⁷² Berkeley Law Dean Erwin Chemerinsky argues that originalism is “worse than nothing” and a “dangerous fallacy.”⁷³

In Part I, we introduce originalism, the different strands of originalism, and how originalism has evolved over time into the opportunistic and ahistorical originalism of today’s Supreme Court. In doing so, we also expose that even while the most recent misuses of originalism and history have furthered conservative causes, this is not just a conservative or far-right problem.

A. ORIGINALISM AS DEFINED, IDENTIFIED, AND DISTINGUISHED

Black’s Law Dictionary defines “originalism” as “[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted” and “the canon that a legal text should be interpreted through the *historical ascertainment* of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect.”⁷⁴ This definition, or something like it, is what a first year law student or member of the general public may think of when they hear the term “originalism.”

Originalism is often considered synonymous with history and legal conservatism.⁷⁵ And while “originalism in one form or another has been a major theme in

69. *Id.* at 547.

70. *Id.* at 547–48.

71. DENNIE, *supra* note 65, at 12.

72. *Id.* (“There’s nothing that requires the Supreme Court to limit its inquiry to the Founding. The Court could just as easily consider how the law was interpreted over time, or—stick with me here—not lock themselves into a strictly historical analysis at all. It’s of the utmost importance that we recognize this, because right-wing legal elites act as though Moses himself descended from a mountaintop and hand-delivered a tablet to the Supreme Court onto which the fundamental originalist precept had been carved: ‘Things shall not be if they have not already been.’”).

73. See generally ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022) (discussing originalism as a rhetoric that originalist judges use as a mask to impose their own values).

74. *Originalism*, BLACK’S LAW DICTIONARY (12th ed. 2024) (emphasis added).

75. See, e.g., Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 J. CONST. L. 1201, 1225 (2009) (“[I]t is a fact that originalism and conservatism often are fellow travelers”); Jennifer Simon, *Red Herring History: An Analysis of Why Dobbs Is Not Originalism*, 21 GEO. J.L. & PUB. POL’Y 595, 596 (2023) (“Many people conflate history with originalism”); Elizabeth Mohn, *Originalism*, EBSCO (2024), <https://www.ebsco.com/research-starters/law/originalism> [<https://perma.cc/WPN2-TPSF>] (“The philosophy of originalism gained prominence in the late twentieth century, aligning with conservative legal thought”).

the American constitutional tradition,⁷⁶ the term itself is relatively new.⁷⁷ Its use and application in law and legal decisions are far more complicated than the Black's Law Dictionary definition would suggest. In fact, it was not until 1980 that the terms "originalism" and "originalist" were introduced within legal vernacular and applied to judicial philosophy by Stanford Law Professor (and later Dean) Paul Brest in his *Boston University Law Review* article, *The Misconceived Quest for the Original Understanding*.⁷⁸ Brest defined "originalism" as "the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters."⁷⁹

Ironically, Brest originated or popularized the term in an article discrediting and disapproving of the doctrine's use.⁸⁰ He took particular issue with what he called "strict textualism" and "strict intentionalism," both of which he viewed as forms of originalism.⁸¹ Strict textualists were scholars and judges whose goals were to "construe words and phrases very narrowly and precisely" when interpreting constitutional provisions, while for "strict intentionalist[s], 'the whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent of its framers and the people who adopted it.'"⁸²

Brest highlighted a major problem with strict intentionalism in that it "rests on the questionable assumption that the adopters of constitutional provisions intended them to be applied in this manner."⁸³ As he observed, "even if this were true, the interpreter confronts historiographic difficulties of such magnitude as to make the aim practicably unattainable."⁸⁴ In other words—as Brest pointed out shrewdly—"[s]trict originalism cannot accommodate most modern decisions under the Bill of Rights and the fourteenth amendment, or the virtually plenary scope of congressional power under the commerce clause."⁸⁵

Astute scholarly criticisms channeled deep tunnels through the foundation and tenets of intentionalism, exposing its deep structural flaws. Nevertheless, the

76. Brest, *supra* note 59, at 204.

77. See Joel Alicea, *Originalism and the Rule of the Dead*, 23 NAT'L AFFS. 149, 150 (2015) ("Originalism emerged as a distinct jurisprudential movement in the 1960s and '70s in response to the rulings of the Warren and Burger Courts.").

78. See Brest, *supra* note 59, at 204; see also JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 89 (2024) (noting that Brest was the first to use the term "originalist").

79. Brest, *supra* note 59, at 204.

80. *Id.* at 238 ("[O]ne can better protect fundamental values and the integrity of democratic processes by protecting them than by [utilizing originalism and] guessing how other people meant to govern a different society a hundred or more years ago.").

81. *Id.* at 204.

82. *Id.* (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting)). As suggested by Brest, there are different forms of originalism. Section I.B. unpacks further some of the common strands of originalism.

83. *Id.* at 222.

84. *Id.* at 222–23.

85. *Id.* at 223 (alterations omitted).

observations and analyses of Brest, Post, Siegel, and others seemed to have limited, if any, effect in dissuading its application to civil rights and civil liberties concerns of the modern era. Rather, defense of the term and its selectively applied principles gave way to what is today a key factor in the Supreme Court's contemporary deliberations.⁸⁶

An early and highly "visible embrace" of originalism came from Edwin Meese III, Attorney General during President Ronald Reagan's second term.⁸⁷ In his 1985 address to the American Bar Association, Meese asserted that constitutional jurisprudence "should be a Jurisprudence of Original Intention."⁸⁸ According to Meese, use of this jurisprudence would ensure that the Court would "judge policies in light of principles, rather than remold principles in light of policies" and "avoid both the charge of incoherence *and* the charge of being either too conservative or too liberal."⁸⁹ Meese continued his defense of originalism, stating: "A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection. This belief in a Jurisprudence of Original Intention also reflects a deeply rooted commitment to the idea of democracy."⁹⁰

Yet, what Meese was acceding to is the subject of two of the more searing criticisms of originalism. First, originalism is political practice and discourse parading as interpretive judicial methodology.⁹¹ Second, originalism can function as a tool for conservatives to achieve policy objectives through judicial selection that they could not secure through democratic processes, such as overturning affirmative action or banning abortion.⁹²

According to Meese, "[t]he Constitution represents the consent of the governed to the structures and powers of the government," and as such, "[t]he Constitution is the fundamental will of the people."⁹³ Arguably, to Meese, "the will of the people" enlivening judicial review was "fundamental" to law.⁹⁴ He surmised,

86. *See supra* notes 60–62 and accompanying text (discussing the Court's recent use of originalism across a variety of cases).

87. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 9 (2018).

88. Edwin Meese III, Att'y Gen., Speech Before the American Bar Association (July 8, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1, 9 (1986).

89. *Id.*

90. *Id.*

91. *See* Chris Hall, *Originalism Is Political, Not Judicial, Philosophy, Post Says*, UNIV. OF VA. SCH. OF L. (Apr. 3, 2007), <https://www.law.virginia.edu/news/200704/originalism-political-not-judicial-philosophy-post-says> [<https://perma.cc/VX2H-KYAV>] (referring to originalism as "a highly effective political strategy").

92. *See id.* ("Originalism becomes a means of arousing voters on the right who then come out and vote for a president who appoint the right sort of justices who will create the 'right' sort of law." (quoting Robert Post, Professor at Yale Law School)).

93. Meese III, *supra* note 88, at 9.

94. *Id.*

To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened. A constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.⁹⁵

And, nevertheless, the courts became the political center of the far-right's project.⁹⁶ Meese's observation with civil rights struggles in the backdrop is a chilling premise. After all, racial discrimination did not cease after the Warren Court's ruling that struck down racially discriminatory laws. To the contrary, the will of powerful Southern white elites and non-elites was to continue to disenfranchise Blacks on various matters critical to their citizenship⁹⁷ decades after *Brown v. Board of Education*,⁹⁸ including in the 1980s when originalism was proffered as a methodology for judicial review. The persistence of discrimination was evidenced and copiously documented in housing,⁹⁹ education,¹⁰⁰

95. *Id.*

96. See Hall, *supra* note 91.

97. See generally T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 40 (2002) (describing the Warren Court's approach to citizenship and the reaction).

98. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

99. See, e.g., Jan Ondrich, Alex Stricker & John Yinger, *Do Real Estate Brokers Choose to Discriminate? Evidence from the 1989 Housing Discrimination Study*, 64 S. ECON. J. 880, 880 (1998) (focusing "on racial and ethnic discrimination in qualitative actions by real estate brokers," finding patterns of "widespread discrimination," and finding "that brokers discriminate based on personal prejudice and the prejudice of white clients."); George Galster, *Racial Discrimination in Housing Markets During the 1980s: A Review of the Audit Evidence*, 9 J. PLAN. EDUC. & RSCH. 165, 165 (1990); John Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 AM. ECON. REV. 881, 881 (1986) (surveying housing discrimination in the 1980, providing "a direct measure of racial discrimination in housing," and exposing the lingering impacts of racial discrimination). Note that these issues extended beyond the American South. See, e.g., Judith D. Feins & Rachel G. Bratt, *Barred in Boston: Racial Discrimination in Housing*, 49 J. AM. PLAN. ASS'N. 344, 344 (1983) (study "demonstrat[ing] the persistence of housing discrimination in Boston").

100. According to Amistad Digital Resource for Teaching African American History, "Beginning in the 1980s, a strong white backlash to the civil rights movement expressed itself in opposition to school desegregation in the North, hostility to increased integration in higher education and professional occupations through affirmative action programs, and resurgence of racial violence." *Social and Economic Issues of the 1980s and 1990s*, AMISTAD DIGIT. RES., https://www.amistadresource.org/the_future_in_the_present/social_and_economic_issues.html [<https://perma.cc/YF8G-V8RZ>] (last visited Mar. 28, 2026); see also Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099, 1104 (2004) (explaining that "[d]uring the 1950s and 1960s, under pressure from [B]lack leaders, churches, and civil rights organizations, white liberals pressed for desegregation, especially in the South. By the 1970s, however, most white liberals were backtracking on commitments to substantial desegregation. Backtracking has been widespread since the 1980s due to the rise of presidential administrations and courts controlled by conservatives"); Charles R. Lawrence, "One More River to Cross"—*Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 49, 53 (Derrick Bell ed., 1980).

employment,¹⁰¹ accommodations,¹⁰² shopping,¹⁰³ recreation,¹⁰⁴ voting,¹⁰⁵ and

101. Researchers note, “In 1982, over 30 percent of the total [B]lack labor force was jobless at some period during that year. In June 1982, Congress reduced federal assistance programs by 20 percent and cut federal assistance to state and municipal governments.” *Social and Economic Issues of the 1980s and 1990s*, *supra* note 100 (“The Reagan Administration terminated the Comprehensive Employment and Training Act program, a successful job training program that had been funded in 1982 at \$3.1 billion; eliminated \$2 billion from the federal food stamps program; reduced federal support for child nutrition programs by \$1.7 billion over a two-year period; and closed down the Neighborhood Self Help and Planning Assistance programs, which provided technical and financial help to inner cities. In the first year of the Reagan Administration, the real median income of all black families fell by 5.2 percent. The number of Americans living below the federal government’s poverty line grew by over two million in a single year.”).

102. *See generally* ALTON HORNSBY JR., *ECON. POL’Y INST., LOOKING BACK ON THE FIGHT FOR EQUAL ACCESS TO PUBLIC ACCOMMODATIONS* (2014), <https://files.epi.org/2014/Hornsby-07-02-2014a.pdf> [<https://perma.cc/246G-BDUZ>].

103. *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709, 1709 (1993) (analyzing, in part, how “whiteness became the basis of racialized privilege—a type of status in which white racial identity provided the basis for allocating societal benefits both private and public in character”); Regina Austin, “*A Nation of Thieves*”: *Securing Black People’s Right to Shop and Sell in White America*, 1994 *UTAH L. REV.* 147, 147 (1994) (“[I]n so very many areas of public life, [B]lacks in general are treated like an outlaw people. Blacks are condemned and negatively stereotyped for engaging in activities that white people undertake without a second thought. Among the most significant of these activities is buying and selling goods and services.”).

104. *See, e.g.*, Richard Lowy, *Yuppie Racism: Race Relations in the 1980s*, 21 *J. BLACK STUD.* 445, 449 (1991) (defining the concept of “yuppie racism,” and highlighting “changes in the American stratification system which involve forms of dominant White participation which are disproportionately unavailable to Blacks and other ethnic minorities”); Steven F. Philipp, *Are We Welcome? African American Racial Acceptance in Leisure Activities and the Importance Given to Children’s Leisure*, 31 *J. LEISURE RSCH.* 385, 398 (1999) (“[A] large gap exists between the perceptions of middle-class European Americans and middle-class African Americans concerning the degree of ‘welcomeness’ or acceptance African Americans might expect to feel in numerous leisure activities. African Americans, when compared to European Americans, felt they would be significantly less welcome in 80% of the leisure activities examined in the present investigation . . .”).

105. *See* NAACP, *DeKalb Cnty. Chapter v. Georgia*, 494 F. Supp. 668, 670 n.2, 673 (N.D. Ga. 1980); Steven L. Lapidus, Note, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 *FORDHAM L. REV.* 93, 94 (1983) (“In DeKalb County, Georgia, where over 80 percent of whites and less than 25 percent of blacks were registered in 1980, the League of Women Voters and the NAACP were temporarily authorized to conduct registration drives at more convenient hours and locations than were otherwise provided by the county election board. After successful efforts in early 1980, however, the election commission abruptly discontinued authorizing such drives.”) (footnotes omitted); *see also* *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980) (finding that the Fifteenth Amendment “prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote,” despite the discriminatory impact of Mobile, Alabama’s at-large elections system that resulted in the lack of election of a Black City Commissioner); *United States v. Dallas Cnty. Comm’n*, 548 F. Supp. 875, 888–90 (S.D. Ala. 1982) (finding that the voter registration procedures in Dallas County did not discriminate against Black citizens despite evidence that the Board of Registrars met at inconvenient times, discouraged voters, and failed to appoint a deputy registrar to assist in registering voters); *Clark v. Marengo County*, 469 F. Supp. 1150, 1163–65 (S.D. Ala. 1979) (finding that Black citizens have not “been denied access to the political system,” despite evidence of oppression, brevity of registration hours, and denial of ballot position); Daniel Perez, *Voter Suppression Makes the Racist and Anti-Worker Southern Model Possible*, *ECON. POL’Y INST.* (Oct. 1, 2024), <https://www.epi.org/publication/rooted-racism-voter-suppression> (highlighting that “the Jim Crow era . . . was the genesis of many of the modern tactics of voter suppression”).

even transportation¹⁰⁶ during the 1970s and 1980s.

Notably, at odds with, and quite likely the target of Meese’s viewpoint, was the great civil society and interventions of courts against Jim Crow-era segregationist and separate-but-equal laws.¹⁰⁷ Among a deepening conservative movement, the Supreme Court Justices “were seen as unduly activist—too willing to exercise the power of judicial review and nullify state and federal policies,”¹⁰⁸ including those policies that explicitly denied equal protection under the law or suppressed voting rights. These laws, largely obscured by the nation’s more myopic attention on *Brown*¹⁰⁹ or the brave strategies of Rosa Parks in desegregating public transportation,¹¹⁰ affected every aspect of African American life. Copiously documented by Dr. Pauli Murray in a seminal legal treatise, *States’ Laws on Race and Color*,¹¹¹ these Jim Crow-era laws relegated African Americans to an unfair and indecent caste system in which policies and practices rendered them to virtual second-class citizenship at the will of white southerners—in spite of the Constitution—not only in education and seating on buses, but also in a litany of other conditions, including dining,¹¹² housing,¹¹³ myriad aspects of transportation,¹¹⁴ recreation,¹¹⁵ marriage,¹¹⁶ and more.¹¹⁷ Extensive in its detail, “the treatise chronicles thousands of laws and codes explicitly excluding, segregating, and subordinating Black people based on

106. devin michelle bunten, Ellen Fu, Lyndsey Rolheiser & Christopher Severen, *The Problem Has Existed Over Endless Years: Racialized Difference in Commuting, 1980–2019*, J. URB. ECON., May 2024, at 1.

107. As noted by Professor Keith E. Whittington, “The first wave of the modern originalist literature came in response to the constitutional decisions of the Warren Court and early Burger Court, and was developed from a critical stance.” Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 375, 392 (2013). “[T]he Reagan Administration embraced originalism as a check on judicial activism.” *Id.* at 375.

108. *Id.* at 392.

109. 347 U.S. 483 (1954) (holding that segregation in schools on the basis of race is unconstitutional).

110. See Arlisha Norwood, *Rosa Parks (1913–2005)*, NAT’L WOMEN’S HIST. MUSEUM (2017), <https://www.womenshistory.org/education-resources/biographies/rosa-parks> [<https://perma.cc/BM95-U4VM>] (discussing how Rosa Parks’s decision to sit at the front of a bus instead of the back, which was designated for African Americans, “set in motion one of the largest social movements in history, the Montgomery Bus Boycott”).

111. See generally PAULI MURRAY, *STATES’ LAWS ON RACE AND COLOR AND APPENDICES* (1951) (surveying state laws that “have in some measure determined racial patterns and practices throughout the nation”).

112. See *id.* at 615, 627 (discussing laws in Birmingham, Alabama and Atlanta, Georgia allowing for segregation in restaurants); Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261, 302–03 (2021) (same).

113. See Goodwin, *supra* note 112, at 303–05 (discussing discriminatory laws in New Orleans, Louisiana and Birmingham, Alabama that prevented white and Black people from living in the same residential areas).

114. See *id.* at 305–06 (discussing laws in Houston and Dallas, Texas, Birmingham and Mobile, Alabama, Atlanta, Georgia, Jacksonville, Florida, and New Orleans, Louisiana that enforced strict segregation laws related to transportation, including allowing police officers to enforce segregation policies).

115. See *id.* at 306–07 (discussing ordinances in Birmingham, Alabama and Houston, Texas that permitted segregation in recreational areas, including public parks).

116. *Id.* at 274–79 (referencing anti-miscegenation laws that prohibited and criminalized interracial marriage).

117. See Michele Goodwin, *The Thirteenth Amendment’s Punishment Clause: A Spectacle of Slavery Unwilling to Die*, 57 HARV. C.R.-C.L. L. REV. 47, 49 (2022) (highlighting that “[t]he path to substantive civil liberties and civil rights—and freedom in a meaningful sense—include[s] dismantling

their politically construed race—state by state and, in some instances, by city.”¹¹⁸ This type of venerated “will of the people” that had become vulnerable to civil rights activism and modern judicial review included laws making it illegal to “conduct a restaurant” wherein “the two races” shall be served “within the same room or . . . anywhere under the same license” in Atlanta, Georgia.¹¹⁹ Additionally, it included laws, like this one in Birmingham, Alabama:

It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher . . .¹²⁰

These laws mirrored others in counties across the nation,¹²¹ demonstrating a strange commitment to the legalized debasement and inequality of Black Americans, which ran counter to the vision of Reconstruction Framers.¹²² Most tellingly, a principle rooted in the will of the people, which explicitly denied or suppressed voting rights to Blacks, unequivocally conflicted with the Reconstruction Amendments and the vision of its framers. Yet a political agenda to dismantle civil rights gains, buttressed by a history of gerrymandering, might suggest that Blacks in racially hostile towns, cities, counties, and states who successfully petitioned the Court for redress were simply politically powerful minorities effectively manipulating or even abusing the political process.

In fact, this became the argument wielded by Justice Antonin Scalia in matters addressing human dignity and civil rights for gay Americans. Just one year after Meese’s memorable speech, on September 26, 1986, Justice Scalia took his seat as an Associate Justice on the U.S. Supreme Court.¹²³ Justice Scalia—well known for acerbic judicial statements and “vigorous” dissents, particularly on matters of LGBTQ+ discrimination¹²⁴—became most recognizable as “the leading judicial

discrimination in” areas including healthcare, food access, and criminal justice); Goodwin, *supra* note 112, at 298–306.

118. Goodwin, *supra* note 112, at 299.

119. MURRAY, *supra* note 111, at 627.

120. *Id.* at 615.

121. *See generally id.* (cataloguing discriminatory and segregationist laws throughout the nation).

122. As stated by Senator Charles Sumner, a primary drafter of the Fourteenth Amendment, “Equality is where all are alike. A substitute can never take the place of equality.” Cong. Globe, 42d Cong., 2d Sess. 242 (1872); *see also* Areto Imoukhuede, *The Walk Away from Racial Equality*, 20 Nw. J.L. & SOC. POL’Y 1, 9 (2025) (citing more of Sumner’s statements that “demonstrate the driving intent behind the Reconstruction Amendments: achieving racial equality”).

123. *Scalia, Antonin*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/scalia-antonin> [https://perma.cc/4686-2EEK] (last visited Mar. 28, 2026).

124. *See Romer v. Evans*, 517 U.S. 620, 637–38 (1996) (Scalia, J., dissenting) (comparing gay and lesbian couples to “long-time roommate[s],” and defending Colorado’s constitutional amendment that precluded protected status for LGBTQ+ people). In *Romer*, Scalia wrote,

The amendment prohibits *special treatment* of homosexuals, and nothing more. It would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the State or any municipality from making death-benefit payments to the “life partner” of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee.

theorist and advocate of originalism of his era.”¹²⁵ In what remains a remarkable dissent in *Romer v. Evans*, a case that ruled a Colorado constitutional amendment forbidding official protections to gay people violated the Fourteenth Amendment, Justice Scalia wrote,

The constitutional amendment before us here is not the manifestation of a “bare . . . desire to harm” homosexuals . . . but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.¹²⁶

According to Justice Scalia, “[s]ince the Constitution of the United States says nothing about [LGBTQ+ rights and issues], it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions.”¹²⁷ In *Lawrence v. Texas*, a case striking down laws criminalizing same-sex intimacy, Justice Scalia dissented, comparing laws criminalizing same-sex intimacy to “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”¹²⁸ He argued that antidiscrimination gains for gay Americans consistent with equal protection principles were the product of a “homosexual agenda” that placed a thumb on the scale of political influence.¹²⁹

Meese’s defense of originalism, and Justice Scalia’s appointment to the Supreme Court shortly thereafter, set off a debate among judges and academics over originalism and expanded discourse as to other theories of interpretation¹³⁰

Id. at 638; see also *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

125. Michael D. Ramsey, *Beyond the Text: Justice Scalia’s Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1945 (2017).

126. 517 U.S. at 636 (Scalia, J., dissenting).

127. *Id.*

128. 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

129. See *id.* at 602.

130. See Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 741 (1982) (“The nihilism of today is largely a reaction to this reconstructive effort of the sixties. . . . and coincides with a number of contemporary phenomena—the transfer of the judicial power from the Warren Court to another institution altogether; a social and political culture dominated by the privatization of all ends; and a new movement in literary criticism and maybe even in philosophy called deconstructionism, which expands the idea of text to embrace all the world and at the same time proclaims the freedom of the interpreter.”); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 S.D. L. REV. 823, 823 (1986) (arguing that “original intent is the only legitimate basis for constitutional decisionmaking”); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987) (noting judicial use of separate tools of constitutional interpretation, including plain or historical meaning, doctrinal arguments, judicial precedent, value arguments based on social policy, and original intent of the Framers); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1989) (discussing “new textualism” and how it “posits that once the Court has ascertained a statute’s plain meaning, consideration of the legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text. Such confirmation comes, if any is needed, from examination of the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction”); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*,

with great intellectual intensity that remains to this day.¹³¹ Again, Brest foreshadowed these debates, setting forth an alternative to originalism, which he called “nonoriginalism.”¹³² According to Brest, “nonoriginalism” is a doctrine that “accord[s] the text and original history presumptive weight, but do[es] not treat them as authoritative or binding.”¹³³ It recognizes that the “presumption is defeasible over time in the light of changing experiences and perceptions.”¹³⁴

Similarly, Professor Jack Balkin’s theory of “framework originalism,” also referred to as “living originalism,”¹³⁵ aligns with early articulations from Brest. According to Balkin,

As the name implies, framework originalism argues that the Constitution creates a basic framework or plan for politics that is not complete at the outset but must be filled out and built on by later generations. And as the [term] “living originalism” implies, I believe that originalism and living constitutionalism are fully compatible positions. You do not have to be one or the other. You can be both. And not only can you be both, but that is the best and the most attractive understanding of the American constitutional tradition.¹³⁶

Theories of constitutional interpretation include “living constitutionalism,” which Professor Balkin defines as “the view that we must interpret the Constitution in accordance with changing times and circumstances. As the nation grows and changes,

50 U. CHI. L. REV. 800, 817 (1983) (calling for judges to interpret statutes utilizing “imaginative reconstruction.” “The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) (“[F]oundationalism is a flawed strategy for theorizing about statutory interpretation and that a more modest approach, grounded upon ‘practical reason,’ is both more natural and more useful.”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (“In a world of language skepticism, every attempt to ‘construe’ a statute is a transfer of a substantial measure of decision-making authority from the speaker to the interpreter It is therefore worthwhile to demand that, before courts begin the process of ‘construction,’ they ascertain that the legislature has conferred the power of interpretation.”). Further, it is worth noting that as early as the 1970s, conservative scholars and judges were arguing that the appropriate method of judicial review was to embrace the “language and intent” of the original drafters of the constitution. See generally Rehnquist, *supra* note 66, 694–97 (1976).

131. See Barnett & Bernick, *supra* note 87, at 4, 9 (“Meese’s address created quite a stir. At a conference at Georgetown University Law Center, Justice William Brennan took the opportunity to reply to the Attorney General. Echoing Brest, Brennan declared: ‘[I]t is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states—or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states.’”) (quoting William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986)); see also Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL’Y 479, 479 (1996) (critiquing Justice Brennan’s commentary on originalism and stating, “[t]he belief that originalism implies outmoded solutions to today’s problems is wrong. The core original prescription is organization of the government as an indirect, representative democracy.”).

132. Brest, *supra* note 59, at 205.

133. *Id.*

134. *Id.*

135. See BALKIN, *supra* note 78, at 97. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

136. BALKIN, *supra* note 78, at 97.

so too does the practical meaning of the Constitution, even if its text does not change.”¹³⁷

From our point of view, quite simply, a faithful and inclusive remembrance, rather than *misremembrance* of history, provides opportunities to advance equality and justice across methods of judicial interpretation. The opportunistic and ahistoric originalism that has evolved and been adopted by a majority of the Supreme Court today should be discarded in favor of a faithful and inclusive remembrance of history that includes the lived experiences and truths of *all* Americans. A remembered history with moral commitments to uncomfortable truths will provide a more credible means of analyzing law. An accurately recalled history reveals that which is hidden, excavates the buried, and brings to the surface the submerged and forgotten voices not only of citizens but also of Reconstruction lawmakers.

B. STRANDS OF ORIGINALISM

Debates about originalism occur not only between originalists and non-originalists, but also within and between originalists themselves.¹³⁸ Indeed, Brest’s identification of originalism as a legal and judicial philosophy recognized that originalism itself is not one thing but rather a philosophy that can be construed and applied in different ways.¹³⁹ Recent use of certain originalist modalities by the Supreme Court in cases like *Dobbs* makes it imperative to “renew conversations about what originalism is and what it might portend for the nation.”¹⁴⁰ To do this well, however, necessitates avoiding reductive connotations such that there is only one originalism. Instead, in this Section, the Article aims to assess strands of originalism and explain what originalism is, what originalism is not, and “how not to do originalism.”¹⁴¹ This exercise strives to understand how the current Court manipulates originalism, giving rise to the “opportunistic” and “ahistoric” originalism discussed in Section I.C.

In identifying originalism, it can be easy to assert—as Justice Potter Stewart famously said about pornography—“I know it when I see it.”¹⁴² But that would be far too simplistic and reductive. Brest’s early article again provides an

137. *Id.* at 65–66; *see also*, William Brennan, *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 2, 3 (1985) (“[C]onsequences flow from a justice’s interpretation in a direct and immediate way. A judicial decision respecting the incompatibility of Jim Crow with a constitutional guarantee of equality is not simply a contemplative exercise in defining the shape of a just society. It is an order—supported by the full coercive power of the state—that the present society change in a fundamental aspect.”)

138. *See supra* Part I (“Arguably, evidenced by the disagreement among originalists on the Court, the method does not constitute one thing, nor does it represent one approach to judicial review.”).

139. *See Brest, supra* note 59, at 222–24 (highlighting the flexibility of originalist interpretation and identifying two forms of originalism: “strict” and “moderate” originalism).

140. Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1131 (2023).

141. Evan D. Bernick, Paul Gowder & Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 CORN. L. REV. ONLINE 101, 106–20 (2025) (highlighting the critiques of originalism, current approaches, and the failures of each).

142. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

appropriate starting point for unpacking strands of originalism, each of which can be found reflected in works of more contemporary constitutional scholars. In addition to delineating between “strict” and “moderate” originalism,¹⁴³ Brest proceeded to further differentiate between strands of originalism.

The first strand is “interpretation of the text of the Constitution,” or textualism.¹⁴⁴ Brest defines textualism as a method of interpretation that,

[T]akes the language of a legal provision as the primary or exclusive source of law (a) because of some definitional or supralegal principle that only a written text can impose constitutional obligations, or (b) because the adopters intended that the Constitution be interpreted according to a textualist canon, or (c) because the text of a provision is the surest guide to the adopters’ intentions.¹⁴⁵

Exemplary of textualism is the “plain meaning rule,” a canon of interpretation that, perhaps circuitously, provides that “otherwise-relevant information about statutory meaning is forbidden when the statutory text is plain or unambiguous.”¹⁴⁶ “The plain meaning of a text is the meaning that it would have for a ‘normal speaker of English’ under the circumstances in which it is used.”¹⁴⁷ The plain meaning can be derived from both linguistic and social contexts.¹⁴⁸

The principle of “original public meaning” (or simply “original meaning”) becomes relevant when considering the use and application of textualism. In short, original public meaning “seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”¹⁴⁹

Second, and in contrast to textualism, is “interpretation of the intentions of [the] adopters,” or intentionalism for short.¹⁵⁰ Brest describes intentionalism as involving the interpretation of “a provision by ascertaining the intentions of those who adopted it,” that is, the Framers of the Constitution or Founding Fathers. And while the text can guide the determination of intentions, other sources can be used such as historical documents and debates, to uncover the framers’ intentions.¹⁵¹

143. See Brest, *supra* note 59, at 222–24 (identifying two forms of originalism: “strict” and “moderate” originalism).

144. *Id.* at 205.

145. *Id.* (footnote omitted).

146. William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 541 (2017); see also King v. Burwell, 576 U.S. 473, 486 (2015) (“If the statutory language is plain, we must enforce it according to its terms.” (citing *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010))).

147. Brest, *supra* note 58, at 206 (quoting Holmes, *The Theory of Interpretation*, 12 HARV. L. REV. 417, 419 (1899)).

148. *Id.* (“A tenable version of the plain meaning rule must take account of both [linguistic and social] contexts.”). As described by Brest, “[t]he linguistic context refers to vocabulary and syntax. The social context refers to a shared understanding of the purposes the provision might plausibly serve.” *Id.*

149. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 94–95 (2004).

150. Brest, *supra* note 58, at 205, 209–17.

151. *Id.* at 209 (noting that “the text does not enjoy a favored status over other sources”).

Yet even Brest's distinction between "textualists" and "intentionalists" could be further delineated to reveal greater complexity. As recently observed by Professor Logan Sawyer, "[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."¹⁵²

In the first history, Professor Sawyer identifies two "tracks" of the history of originalism. The first track—"New Originalism"—focuses on original public meaning, which aligns more closely with Brest's definition of textualism.¹⁵³ The second track—"Old Originalism"—is "an interpretive method that emphasizes the intentions of the Constitution's framers," and thus aligns best with Brest's intentionalism, which focuses on the intentions of the Framers.¹⁵⁴

The second history of originalism looks to its political past. It investigates "originalism as political practice" and "ask[s] why interest groups chose to deploy originalist arguments, how originalism is related to the goals of the conservative movement, and what lessons originalism's success can teach progressives."¹⁵⁵ While the first history focuses on the legal academy, this second history focuses on politicians and interest groups and how these actors use originalism to advance specific political and ideological interests.¹⁵⁶ According to Professors Robert Post and Reva Siegel, originalism, at its core, is an effort "to alter the Constitution so as to infuse it with conservative political principles."¹⁵⁷

This second history of originalism, and the idea of originalism that has been, and continues to be used as a vehicle to promote conservative political principles, leads us to naming the emergence of "opportunistic originalism," a form of originalism that is not necessarily consistent with originalism's early origins or intentions.¹⁵⁸ Before unpacking opportunistic originalism, it must be acknowledged that while most think of conservatism when they hear the term originalism, non-conservative methodologies of originalism exist as well.

According to former Georgetown University Law Center Dean William Treanor, for example, "originalism, taken seriously, is very far from providing support for a fundamentalist [or conservative] political agenda."¹⁵⁹ Instead, Treanor argues that

152. Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198, 199 (2017) (footnotes omitted).

153. See *id.* at 201. For a more fulsome description of "New Originalism," see generally Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004). Contemporary scholars that align themselves with "New Originalism" include Johnathan O'Neill, Keith Whittington, Lawrence Solum, Randy Barnett, and others. Sawyer III, *supra* note 152, at 201.

154. Sawyer III, *supra* note 152, at 201 (citing Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683 (2012)).

155. *Id.* at 203 (citation omitted).

156. *Id.*

157. Post & Siegel, *supra* note 64, at 561.

158. See *infra* Section I.C.

159. William Michael Treanor, *Process Theory, Majoritarianism, and the Original Understanding*, 75 FORDHAM L. REV. 2989, 2991 (2007).

when taken seriously, originalism is closer to “majoritarianism,” which essentially asserts that courts give the elected branches of government the benefit of the doubt, “deferr[ing] to the constitutional judgments of legislatures” in accordance with theories of representative democracy.¹⁶⁰

In fact, the allegedly “bad results” that some attribute to self-proclaimed originalists are “not actually consistent with originalism.”¹⁶¹ Under Treanor’s view of progressive originalism, “[a]n honestly originalist court . . . would not take a crabbed view of the powers of Congress; it would not be hostile to gun control legislation; it would not embrace the regulatory takings doctrine,” and it is even possible “that a thorough-going originalist might be favorable to a privacy right.”¹⁶²

Treanor points out another important aspect of progressive originalism in response to the Court’s 2022 decisions on abortion rights, gun rights, and religious freedom. Treanor argued that despite the Court’s apparent reliance on originalism in these decisions, “each failed to recognize a critical element of how the founders understood the Constitution: the founders believed courts should defer to precedent.”¹⁶³ To support this contention, Treanor relies on *Federalist No. 78*, authored by Alexander Hamilton.

Federalist No. 78 focused on the role of the judiciary and “stressed that following precedent was crucial to judicial legitimacy.”¹⁶⁴ According to Hamilton, “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”¹⁶⁵ We note, and Treanor would likely agree, that absolute adherence to precedent without the serious exercise of judicial review would truncate the Court’s ability to discern and judge.¹⁶⁶

In other words, while the Court cannot be blindly bound to precedent, the necessity of overturning *Plessy v. Ferguson* in *Brown v. Board of Education* being one strong example, the Court is also entrusted to adhere to the rule of law. Simply put, “the decision to overturn precedent cannot be based on a jurisprudence of original meaning.”¹⁶⁷

“Progressive originalism” has most recently been associated with Justice Ketanji Brown Jackson.¹⁶⁸ During her confirmation hearing, Justice Jackson

160. *Id.* at 2989.

161. *Id.* at 2991.

162. *Id.* at 2993–94.

163. William M. Treanor, *Why This “Originalist” Supreme Court Would Disappoint the Founders*, SLATE (July 19, 2022, at 17:34 ET), <https://slate.com/news-and-politics/2022/07/originalist-supreme-court-would-disappoint-founders.html> [<https://perma.cc/K4R8-2R66>].

164. *Id.*

165. THE FEDERALIST NO. 78 (Alexander Hamilton).

166. See Treanor, *supra* note 163 (“If originalism is to have any credible claim to principled judicial decision-making, originalist judges have to apply an originalist methodology that reflects how the founders understood the Constitution. Originalist judges must follow precedent.”).

167. Treanor, *supra* note 163.

168. See *The Future of Progressive Originalism: Justice Ketanji Brown Jackson’s Interpretation of the Constitution*, COLUM. UNDERGRADUATE L. REV. (Dec. 27, 2022), <https://www.culawreview.org/journal/the->

described herself as an originalist.¹⁶⁹ By asserting originalist tendencies and then backing them up in oral arguments, Justice Jackson has “offer[ed] liberals in the country a new perspective,” particularly on cases dealing with race.¹⁷⁰ “By reading the Constitution in a race-conscious manner, the ideologically liberal Justices could argue that voting rights of minority groups should be protected, as intended by the architects of the Fourteenth Amendment.”¹⁷¹

Unsurprisingly, progressive originalism, particularly as articulated by Treanor, has attracted criticism. One critique from those who adhere to the conservative brand of originalism is that Treanor’s “hedg[ing]” on cases like *Brown* and *Plessy* raises questions about how to distinguish cases like *Plessy*, which, according to Treanor, the Court was “right” to overturn, from *Roe*, which the Court was “wrong” to overturn.¹⁷² These critics claim that Treanor offers “no rule, no principle, [and] no criteria” for answering that question.¹⁷³ His critics thus circle back to an oft-used justification for their brand of “non-progressive” originalism: “that it offers something that living constitutionalists never could (although they tried hard): an external constraint on judges that is more objective than any contemporary vision of justice, progressive or otherwise.”¹⁷⁴ In short, originalism can often be boiled down to “something is better than nothing.” Others contend that “progressive originalism’s promise is largely illusory”

future-of-progressive-originalism-justice-ketanji-brown-jacksons-interpretation-of-the-constitution [https://perma.cc/83ML-UTCM].

169. *Id.*; see also Damon Root, *Ketanji Brown Jackson and the Future of Progressive Originalism*, REASON (Dec. 15, 2022, at 12:20 ET), <https://reason.com/2022/12/15/ketanji-brown-jackson-and-the-future-of-progressive-originalism> [https://perma.cc/L9UH-F4XP] (noting that Justice Jackson told Senator Ben Sasse that she believes “it is appropriate to look at the original intent, original public meaning of the words when one is trying to assess [a constitutional provision]”).

170. *The Future of Progressive Originalism*, *supra* note 168. For example, at oral argument for *Allen v. Milligan*, where Black voters sued Alabama for racially discriminatory congressional district mapping, Justice Jackson suggested that a “normal assessment of the Constitution” involved “look[ing] at the history and tradition of the Constitution at what the framers and founders thought.” Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 U. PA. J. CONST. L. 1241, 1241–42 (2023) (citation omitted). She believed the Reconstruction Amendments’ framers adopted the amendments in a “race conscious way” so that “people who had been discriminated against . . . were actually brought equal to everyone else in the society.” *Id.* (citation omitted). At the time of this writing, the Supreme Court has heard oral arguments in a case concerning state laws that ban transgender athletes from participating in sports aligned with their gender identity and will address whether such bans violate the Fourteenth Amendment’s Equal Protection Clause or Title IX. See Amy Howe, *Supreme Court Appears Likely to Uphold Transgender Athlete Ban*, SCOTUSBLOG (Jan. 13, 2026, at 19:45 ET), <https://www.scotusblog.com/2026/01/supreme-court-appears-likely-to-uphold-transgender-athlete-bans> [https://perma.cc/K2E8-4FPA]. The Court also heard arguments in a challenge to “conversion therapy” bans for LGBTQ+ youth, which argues that ban violates counselor’s First Amendment rights to free speech and free exercise of religion. See Amy Howe, *Majority of Court Appears Skeptical of Colorado’s “Conversion Therapy” Ban*, SCOTUSBLOG (Oct. 7, 2025, at 16:52 ET), <https://www.scotusblog.com/2025/10/majority-of-court-appears-skeptical-of-colorados-conversion-therapy-ban> [https://perma.cc/VTP3-RXQ7]. A liberal view of originalism would consider such discriminatory bans as antithetical to the Framers’ view of instilling nationwide equality for all in the Reconstruction Amendments, as Justice Jackson articulated in the context of race.

171. *The Future of Progressive Originalism*, *supra* note 168.

172. GianCarlo Canaparo & Thomas Jipping, *Getting Originalism Wrong*, HERITAGE FOUND. (Aug. 8, 2022), <https://www.heritage.org/courts/commentary/getting-originalism-wrong> [https://perma.cc/P77S-6U4H].

173. *Id.*

174. *Id.*

and “unlikely to achieve substantive change” before “a Court that only engages in originalist analysis some of the time.”¹⁷⁵ Or, as we argue further in the following Section, it engages in *opportunistic* originalism, as recently illustrated in *Dobbs*.

C. OPPORTUNISTIC AND AHISTORIC ORIGINALISM IN DOBBS

There is significant value in exploring history and the law, and how one can inform the other. The problem, however, arises when theories of interpretation are misused or inconvenient facts and history are ignored. And while the most recent misuses of originalism and history have furthered conservative causes, this is not just a conservative or far-right problem. Liberals and conservatives may be resistant to acknowledging facts inconvenient to their side—including American history that reveals a troubling past of violent and chilling racism, sexism, brutality, cruel homophobia—and thus may be guilty of at least uninformed and ahistorical analysis.¹⁷⁶ Liberals, too, may be less informed or cherry-pick facts or history for reasons similar to conservatives, even if the ultimate decision in their opinions might differ.¹⁷⁷ For example, in *Brown v. Board of Education*, while the Court overturned the so-called “separate but equal” framework in education, it failed to shed light, analyze, or grapple with the more torrid, violent history that undergirded African American exclusion in education that dated back to the nation’s founding.¹⁷⁸ In *Dobbs*, the liberal dissent failed to engage with the telling

175. Michael L. Smith, *The False Promise of Progressive Originalism*, 56 N.M. L. REV. (forthcoming 2026) (manuscript at 4).

176. See Louis Jacobson, *The Age of Cherry-Picking*, POLITIFACT (Feb. 5, 2018), <https://www.politifact.com/article/2018/feb/05/age-cherry-picking> [<https://perma.cc/TPU3-4E7Z>]

177. *Id.*

178. See 347 U.S. 483, 495 (1954); see also, e.g., VA. CODE, tit. 54, ch. 198, § 32 (1849) (“If a white person assemble with negroes for the purpose of instructing them to read or write, or if he associate with them in an unlawful assembly, he shall be confined in jail not exceeding six months and fined not exceeding one hundred dollars.”). In 1831, North Carolina also criminalized the teaching of reading or writing to enslaved persons by free persons, with far harsher punishments for infractions by free people of color:

An act to prevent all persons from teaching slaves to read or write, the use of figures excepted:

Whereas the teaching of slaves to read and write, has a tendency to excite dissatisfaction in their minds and to produce insurrection and rebellion, to the manifest injury of the citizens of this State: Therefore,

Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That any free person, who shall hereafter teach, or attempt to teach, any slave within this State to read or write, the use of figures excepted, or shall give or sell to such slave or slaves any books or pamphlets, shall be liable to indictment in any court of record in this State having jurisdiction thereof; and upon conviction, shall, at the discretion of the court, if a white man or woman, be fined not less than one hundred dollars, nor more than two hundred dollars, or imprisoned; and if a free person of color, shall be fined, imprisoned, or whipped, at the discretion of the court, not exceeding thirty nine lashes, nor less than twenty lashes.

II. Be it further enacted, That if any slave shall hereafter teach, or attempt to teach, any other slave to read or write, the use of figures excepted, he or she may be carried before any justice of the peace, and on conviction thereof, shall be sentenced to receive thirty nine lashes on his or her bare back[.]

III. Be it further enacted, That the judges of the Superior Courts and the justices of the County Courts shall give this act in charge to the grand jurors of their respective counties.

of Reconstruction history that was sparked by the sexual violence and forced reproduction imposed on Black women.¹⁷⁹

In recent years, the Court, along with some scholars, has seemingly strayed from more traditional methods of originalism, without naming the fact that they are doing so. Instead, they use what we call “opportunistic originalism, whereby the Court implies its commitment to text, original meaning, and long, unbroken ties to tradition, but seriously veers from that methodology or performs its adjudication in such a neglectful and unsystematic manner that it belies fidelity to the methodology.”¹⁸⁰ This has also been described as “law office history,” which Balkin describes as “historical arguments that are opportunistic, anachronistic, and unsophisticated.”¹⁸¹

Opportunistic originalism was on full display in *Dobbs*.¹⁸² The Court did not use the term “originalism” or “textualism” in *Dobbs*, but its analysis and reasoning make clear that the majority adopted a form of originalism to reach its conclusion.¹⁸³ The opportunism of the methodology adopted in *Dobbs* is further displayed by the Court’s unprincipled use of originalism and history. In their blistering response to *Dobbs*, Supreme Court journalist Dahlia Lithwick and law professor Neil S. Siegel asked the important question: “Why is *Dobbs* not just wrong, but *lawless*?”¹⁸⁴ Their answer?—“Because it is utterly unprincipled. It articulates a reason for overruling *Roe* out of one side of its mouth, then repeatedly protests that it will not be bound by this reason out of the other side of its mouth.”¹⁸⁵

If the Court’s version of originalism and use of history truly required overturning *Roe*, then that same judicial methodology would also require overturning other foundational civil rights cases like *Loving v. Virginia*,¹⁸⁶ *Griswold*

179. Goodwin, *supra* note 53, at 210–14 (highlighting the horrific history of involuntary reproductive servitude faced by Black women and how “in *Dobbs*, the majority claim[ed] to canvass history to inform its understanding of the debate involving substantive due process within the reproductive context . . . [but] the Court neglect[ed] the U.S. Antebellum and Reconstruction histories”); see *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 359–423 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

180. Goodwin, *supra* note 2, at 114.

181. Jack M. Balkin, *Lawyers and Historians Argue about the Constitution*, 35 CONST. COMMENT. 345, 345 (2020). The phrase “law-office history” appears to have been coined by Alfred H. Kelly in a 1965 article. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122, 122 n.13 (“By ‘law-office’ history, I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.”).

182. See 597 U.S. at 240–46 (noting that the Court was “guided by . . . history and tradition that map the essential components of our Nation’s concept of ordered liberty” but simultaneously only focusing on specific history including the historical animosity toward and criminalization of abortion); Goodwin, *supra* note 2, at 118 (classifying *Dobbs* as a case of opportunistic originalism as well as “a case of omissions and neglect of historical and contemporary facts as well as social and legal concerns”).

183. See Goodwin, *supra* note 2, at 114.

184. Dahlia Lithwick & Neil S. Siegel, *The Lawlessness of the Dobbs Decision*, SLATE (June 27, 2022, at 14:58 ET), <https://slate.com/news-and-politics/2022/06/dobbs-decision-glucksberg-test-lawlessness.html> [https://perma.cc/539F-U3HH].

185. *Id.*

186. 388 U.S. 1, 12 (1967) (striking down Virginia’s ban on interracial marriage because “[t]he Fourteenth Amendment requires that freedom of choice to marry not be restricted by invidious racial discriminations”).

v. Connecticut,¹⁸⁷ *Lawrence v. Texas*,¹⁸⁸ and *Obergefell v. Hodges*.¹⁸⁹ And while the *Dobbs* majority seeks to assure that its analysis in *Dobbs* does not “call[] into question” these cases, the dissent written by Justices Breyer, Kagan, and Sotomayor raises serious questions about that assertion.¹⁹⁰ As noted by the dissenting Justices, “the majority could write just as long an opinion” using its reasoning and analysis in *Dobbs*—based largely on the conclusion that abortion is not “deeply rooted in this Nation’s history and tradition”—to conclude “that until the mid-20th century, ‘there was no support in American law for a constitutional right to obtain [contraceptives].’”¹⁹¹ To their point, Justice Thomas, in concurrence, signaled that he is ready and willing to reconsider a number of rights, stating: “[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*”¹⁹²—cases that established rights to contraceptives, same-sex intimacy, and same-sex marriage, respectively.¹⁹³

The potential consequences of opportunistic originalism extend further to other Reconstruction-era rights. For example, opportunistic and ahistoric originalism have more recently been used by scholars to put forth other problematic and dangerous arguments about what many view as long-settled interpretations on key Reconstruction amendments. One glaring example arises from President Trump’s 2025 inauguration-day order that would redefine birthright citizenship, asserting that children born in the United States are precluded from citizenship if their mothers are unlawfully within the country or lawfully within the country, but only temporarily.¹⁹⁴ Trump’s order marked a significant attack on how birthright citizenship has been applied for more than 150 years in the United States.¹⁹⁵

187. 381 U.S. 479, 484–85 (1965) (ruling that a Connecticut law criminalizing the use of contraceptives violated the right to marital privacy, which the Court found could be inferred from several amendments in the Bill of Rights).

188. 539 U.S. 558, 578 (2003) (striking down a Texas law criminalizing homosexual conduct, ruling that the Fourteenth Amendment protects the right of consenting adults to engage in intimate conduct in the privacy of their homes).

189. 576 U.S. 644, 681 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).

190. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 238, 295, 362–63 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (highlighting that “no one should be confident that this majority is done with its work”).

191. *Id.* at 363 (Breyer, Sotomayor & Kagan, JJ., dissenting).

192. *Id.* at 332 (Thomas, J., concurring).

193. *See supra* notes 187–189.

194. Exec. Order No. 14610, 90 Fed. Reg. 8449 (Jan. 20, 2025).

195. *See* Raul Pinto & Laila Khan, *Breaking Down Trump’s Attempt to End Birthright Citizenship*, AM. IMMIGR. COUNCIL (Feb. 7, 2025), <https://www.americanimmigrationcouncil.org/blog/breaking-down-trump-end-birthright-citizenship> [<https://perma.cc/N2TV-R6FH>] (noting that “[t]he United States [previously] adopted unrestricted birthplace-based citizenship—like the vast majority of other countries in the western hemisphere—meaning anyone born within U.S. territory is automatically a citizen at birth”); Thomas Wolf, *Presidents Can’t End Birthright Citizenship*, BRENNAN CTR. JUST. (Dec. 5, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/presidents-cant-end-birthright-citizenship> [<https://perma.cc/8WMG-GBSD>] (“Trump’s executive order is unconstitutional, in direct

The constitutional provision implicated by this order is the Birthright Citizenship Clause of the Fourteenth Amendment, which states, in relevant part: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹⁹⁶ Litigation immediately ensued, with a number of federal judges issuing preliminary injunctions against the order.¹⁹⁷ In June 2025, the Supreme Court issued its decision in *Trump v. CASA, Inc.*, holding that federal courts may not issue universal (or nationwide) injunctions,¹⁹⁸ which are orders that block the application of a law or an executive branch action to anyone who might be harmed by it, not just the plaintiffs in the case before the Court.¹⁹⁹ The Court did not address the constitutional validity of the order, but in September 2025, the Trump Administration asked the Supreme Court to specifically address the order’s constitutionality.²⁰⁰ As this Article goes to press, the Supreme Court is evaluating the constitutionality of the Trump birthright citizenship executive order.

Shortly after Trump issued the order, a small, but vocal cohort of law professors took to social media to suggest that the “academic consensus on birthright citizenship is more fragile than many believe.”²⁰¹ Professor Ilan Wurman posted on X, opining that “there is an entire literature that disagrees” with Judge Coughenour’s assertion that the order was “blatantly unconstitutional.”²⁰² Professor Kurt Lash agreed, asserting that “historical scholarship on the birthright citizenship is on-going

conflict with the plain language of the 14th Amendment and over a century’s worth of Supreme Court case law.”).

196. U.S. CONST. amend. XIV, § 1.

197. *See, e.g.*, Order, *Washington v. Trump*, 764 F. Supp. 3d 1050 (W.D. Wash. Jan. 23, 2025) (No. C25-0127); Memorandum of Decision on Motions for Preliminary Injunction, *Doe v. Trump*, 766 F. Supp. 3d 266 (D. Mass. Feb. 13, 2025) (No. 25-10135); Memorandum of Decision on Motions for Preliminary Injunction, *New Jersey v. Trump*, 766 F. Supp. 3d 266 (D. Mass. Feb. 13, 2025) (No. 25-10139); Preliminary Injunction, *N.H. Indonesian Cmty. Support v. Trump*, 765 F. Supp. 3d 102 (D.N.H., Feb. 11, 2025) (No. 25-cv-38); *CASA, Inc. v. Trump*, 763 F. Supp. 3d 723 (D. Md., Feb 5, 2025).

198. *Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025). Specifically, the Court granted the Government’s applications for partial stays of the preliminary injunctions “but only to the extent that the injunctions are broader than necessary to provide complete relief to each plaintiff with standing to sue.” *Id.*

199. *See* Scott Neuman, *What Is a Universal Injunction and How Did the Supreme Court Limit Its Use?*, NPR (June 27, 2025, at 15:26 ET), <https://www.npr.org/2025/06/27/nx-s1-5448821/universal-injunction-supreme-court-executive-order-birthright> [https://perma.cc/24Q4-JHRU].

200. Petition for Writ of Certiorari, *Trump v. Washington*, No. 25-364 (Sep. 2025); *see* Amy Howe, *Trump Urges Supreme Court to Decide Whether to End Birthright Citizenship*, SCOTUSBLOG (Sep. 26, 2025, at 22:21 ET), <https://www.scotusblog.com/2025/09/trump-urges-supreme-court-to-decide-whether-to-end-birthright-citizenship> [https://perma.cc/9PP2-PJUUV] (discussing the Trump Administration’s September 2025 petitions for certiorari, asking the Court to weigh in on the constitutionality of the birthright citizenship executive order). At the time of this writing, oral arguments have been held and a decision is pending.

201. Ilan Wurman (@ilan_wurman), X (Mar. 28, 2025, at 11:44 ET), https://x.com/ilan_wurman/status/1905647115675517010 [https://perma.cc/U8EW-JAE9].

202. Ilan Wurman (@ilan_wurman), X (Jan. 23, 2025, at 14:12 ET), https://x.com/ilan_wurman/status/1882506699963253196 [https://perma.cc/U8EW-JAE9]; *see also* Anna Hickey, *Federal Judge Blocks Trump’s Birthright Citizenship Executive Order Nationwide*, LAWFARE (Jan. 23, 2025, at 14:57 ET), <https://www.lawfaremedia.org/article/federal-judge-blocks-trump-s-birthright-executive-order-nationwide> [https://perma.cc/8HYJ-826L].

and seriously debated.²⁰³ These social media posts turned into blogs,²⁰⁴ op-eds,²⁰⁵ and finally a full-length draft of a law review article.²⁰⁶

While we disagree with the substantive premise and conclusion that birthright citizenship was intended exclusively for the formerly enslaved and that the scope of its reach was limited to the conditions and pronouncements in 1868, this Article does not purport to engage in a critique of the assertion by these authors about birthright citizenship. Rather, it aims to call attention to how claims of originalism continue to be used to advance and provide a sense of legitimacy for certain conservative viewpoints and ideals. These birthright citizenship arguments have been roundly criticized by a number of constitutional scholars and historians who take issue with the authors' claims that what they are doing is "originalism."²⁰⁷ The birthright citizenship debate, like the *Dobbs* opinion, reaffirms the importance of thinking through questions about originalism, its use to justify problematic legal arguments and outcomes, and whether and how scholars and jurists can reclaim and reimagine history in a way that promotes, rather than hinders, justice.

II. REVISIONIST RECONSTRUCTIONISM AND CROOKED CONSTITUTIONALISM

In Part II, this Article calls attention to the revisionist reconstructionism expressed in *Dobbs*. Despite its lofty claims of engaged history-seeking and fidelity to constitutionalism and ordered liberty, the case betrays a credible chronicling of the past. The case calls into question the majority's understanding and interpretation of "liberty," "liberty interests," and "ordered liberty." For example, while the majority demands that "we must ask what the *Fourteenth Amendment* means by the term 'liberty,'"²⁰⁸ the Court ignores prevailing and persistent racial discrimination against millions of Black women in the forms of intergenerational sexual assaults, coerced pregnancies, forced parenthood, as well as legislative and abolitionist debates that drove its ratification.²⁰⁹ Ironically, what the Reconstruction Ratifiers boldly and unequivocally brought to light,²¹⁰ the *Dobbs* majority shamefully represses, shrouding history in darkness.

203. Kurt Lash (@kurtlash1), X (Jan. 25, 2025, at 10:38 ET), <https://x.com/kurtlash1/status/1883177625268466060> [<https://perma.cc/2J4S-A7C4>].

204. See Richard Epstein, *The Case Against Birthright Citizenship*, CIVITAS INST. (Jan. 28, 2025), <https://www.civitasinstitute.org/research/the-case-against-birthright-citizenship> [<https://perma.cc/R3V8-XE97>].

205. See Randy E. Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), <https://www.nytimes.com/2025/02/15/opinion/trump-birthrightcitizenship.html> (pointing out that Trump's executive order does "not necessarily" conflict with the plain language of the Fourteenth Amendment).

206. See generally, Kurt T. Lash, *Prima Facie Citizenship: Birth, Allegiance and the Fourteenth Amendment's Citizenship Clause*, 101 NOTRE DAME L. REV. (forthcoming 2026).

207. See, e.g., Bernick, Gowder & Kreis, *supra* note 141, at 114–20 (discussing Barnett, Wurman, and Lash's arguments in depth and specific issues related to each theory).

208. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 240 (2022).

209. See Goodwin, *supra* note 53, at 204.

210. *Id.* at 208–14 (noting in part that "[f]ramers of the Reconstruction were not silent on their observations of the involuntary sexual exploitation and violence experienced by Black women. Their writings built a more accurate record of the debates and thinking of members of Congress would go on to draft and defend the Reconstruction Amendments" (citing Ronald G. Walters, *The Erotic South:*

In *Dobbs*, crooked constitutionalism—the manipulation of constitutional norms and history to achieve specific ends—characterizes the majority’s holding—one in which superficial pageantry parades as rigorous historical review. The crookedness becomes even more glaring when the Court’s analysis in *Dobbs* is contrasted with *New York State Rifle Pistol Association, Inc. v. Bruen*,²¹¹ a case issued just one day prior to *Dobbs* wherein the Court references slavery, Jim Crow, and the shameful past of disregarding Black male bodily autonomy. Thus, while the majority warns against an “unprincipled approach” to judicial review,²¹² it traffics in the same. In the same breath, the Court cautions that prior precedents ignore “our Nation’s concept of ordered liberty”²¹³ while disregarding the substantive liberty interests brought to life in the Reconstruction, namely freedoms from involuntary reproductive servitude and forced pregnancy, as well as the fundamental, constitutional right to bodily autonomy. In other words, what did the Ratifiers seek to remedy in the passage and ratification of the Reconstruction Amendments?

This Part briefly addresses conditions precipitating the radical transformation of the Constitution and ratification of the Thirteenth and Fourteenth Amendments. In Section II.A, we address the analytical gap that emerges from the Court’s failure to engage with the Reconstruction, given its relevance to originalism. Section II.B takes up involuntary reproductive servitude, shining a light on forced pregnancy and coerced childbirth.

A. RECONSTRUCTING THE RECONSTRUCTION

The constitutional credibility of *Dobbs* breaks down in its failure to engage with the Reconstruction era. It is not the case that the Court finds no value in the purpose and meaning of the Reconstruction. In *Bruen*, the Court (split 6–3 along ideological lines) more than concedes its importance in advancing its view that the Second Amendment protects individual rights to gun ownership. Nevertheless, in *Dobbs*, perhaps finding this history “irrelevant” or inconvenient, the Court dodges matters of ordered liberty in the lives of women generally, and particularly Black women. As a result, a constitutional crookedness surfaces in its profound neglect of American Antebellum social practices and legal history. The Court’s illiteracy—or even intentional disregard—of the Reconstruction era in *Dobbs* cannot be denied. It is reflected in the Court’s lack of analytical engagement with, or accounting for, slavery when referencing history, liberty, and the Fourteenth Amendment.²¹⁴

Comparatively, this analytical gap would rival overlooking or skipping the discussion of guns and militias in constitutional discourse on the history of the Second Amendment. Indeed, the day preceding the release of *Dobbs*, the

Civilization and Sexuality in American Abolitionism, in AFFECT AND POWER: ESSAYS ON SEX, SLAVERY, RACE AND RELIGION 3 (D.J. Libby, P. Spickard & S. Ditto, eds., 2005)).

211. 597 U.S. 1 (2022).

212. *Dobbs*, 597 U.S. at 240.

213. *See id.*

214. *See id.* at 240–50 (finding no right to abortion deeply rooted in this Nation’s history or ordered liberty).

Supreme Court issued its opinion in *Bruen*, a New York gun control case.²¹⁵ In the opinion authored by Justice Thomas, the Court searches for “evidence from around the adoption of the Fourteenth Amendment” to “support respondents’ position.”²¹⁶ The majority finds that a “short review of the public discourse surrounding Reconstruction is useful.”²¹⁷ The Court searches the writings in *Dred Scott v. Sandford*²¹⁸ to find historical meaning on the matter of Black citizenship and the right to keep and carry arms.²¹⁹ It references the Civil War as relevant to the exercise of fundamental rights “by freed slaves” and declares that, at least as to gun access, such rights were “systematically thwarted.”²²⁰

Bruen’s attention to slavery, the Civil War, and Reconstruction in advancing the Court’s holding that struck down New York’s century-old gun control law dramatically contrasts the Court’s approach in *Dobbs*. Where the *Bruen* Court’s prologue references militias,²²¹ slavery,²²² equality and “equal benefit of all laws,”²²³ “antebellum America,”²²⁴ and the vulnerability of Black men in defending themselves and their bodily autonomy against the forces of racism,²²⁵ no such consideration exists in *Dobbs*. No parallels can be drawn for the Court’s consideration of Black women in relation to bodily autonomy, freedom, liberty, or citizenship. In other words, in *Bruen*, unlike *Dobbs*, the majority “think[s] a short review of the public discourse surrounding Reconstruction is useful.”²²⁶

Our point is not to find agreement in the *Bruen* decision. To the contrary, we find the case analytically faulty and insufficient in its historical accounting and rigor.²²⁷ Yet the decision achieves for Black men that which is denied Black

215. 597 U.S. 1 (2022).

216. *Id.* at 60 (urging that “[a] short prologue is in order. Even before the Civil War commenced in 1861, this Court indirectly affirmed the importance of the right to keep and bear arms in public”).

217. *Id.*

218. 60 U.S. 393 (1856).

219. *See Bruen*, 597 U.S. at 60 (In *Dred Scott*, “Chief Justice Taney offered what he thought was a parade of horrors that would result from recognizing that free blacks were citizens of the United States” and would thus be entitled to the privileges and immunities of citizens, including the right to keep and bear arms).

220. *See id.*

221. Some discussion of or reference to “militia” or “militias” occurs four times in the decision. *Id.* at 20, 22, 64, 68.

222. Indeed, “slave” or “slaves” is mentioned seven times in the case. *Id.* at 21, 49, 60–61.

223. *Id.* at 62.

224. *Id.*

225. *Id.* at 60–64.

226. *Id.* at 62.

227. *See, e.g.,* Andrew R. Morral, Rosanna Smart & Darrell A. H. Miller, *State Gun Regulations Are a Messy Patchwork. The Supreme Court’s Bruen Decision Won’t Help*, RAND (Aug. 22, 2022), <https://www.rand.org/pubs/commentary/2022/08/state-gun-regulations-are-a-messy-patchwork-the-supreme.html> [<https://perma.cc/BMT8-BCZK>] (noting that even though the *Bruen* Court suggested “historical analogues should guide these decisions . . . early America was filled with examples of gun carriage restrictions, going back to the early common law”); Jacob Charles, *By the Numbers: How Disruptive Has Bruen Been*, DUKE CTR. FIREARMS L. (Mar. 27, 2023), <https://firearmslaw.duke.edu/2023/03/by-the-numbers-how-disruptive-has-bruen-been> [<https://perma.cc/Q5C3-RQYP>] (highlighting how *Bruen* has been “disruptive” to the Second Amendment constitutional framework and how lower courts are now declaring more laws invalid under the Second Amendment); Clara Fong, Kelly Percival & Thomas

women in *Dobbs*. That is, glaringly absent from *Dobbs* is the acknowledgement and recognition of Black women's personhood. On full display in these two cases is the Court's use of opportunistic originalism.

In *Dobbs*, the Court fails not only to consider that ending slavery was an essential force of Reconstruction, but also why it became an urgent moral necessity to end that illegitimate economic and legal system. American slavery affected the lives of four million Black people.²²⁸ It flourished on the predatory hunting, kidnapping, trading, and trafficking of children, women, and men.²²⁹ It not only denied freedom but also disrupted family bonds and ties.²³⁰ This blind spot deserves American legal history, constitutional law, and the Court's jurisprudence more generally because it implies something other than slavery as triggering Reconstruction, which allows for misreading and misremembering. The result in *Dobbs* is a misleading account of history as relates to ordered liberty, bodily autonomy, and reproductive freedom.

By stripping slavery from the Reconstruction and stripping the Reconstruction from the Fourteenth Amendment, the Court renders the horrors of forced physical and reproductive labor invisible. By casting out or failing to read these histories into the canons of constitutional jurisprudence, the Court neglects the entirely relevant experiences of Black women, men, and families during Reconstruction. This failure to take slavery into account also ignores the compelling interests and intents of Reconstruction Ratifiers who believed slavery to be a profound moral problem in need of a significant legal remedy, as they were regularly confronted with its ills. As one commentator wrote in 1860:

The man who holds his fellow-man in slavery, treats him as a chattel, breeds from him with as little regard for marriage ties as if he were an animal, is a

Wolf, *Judges Find Supreme Court's Bruen Test Unworkable*, BRENNAN CTR. FOR JUST. (June 26, 2023), <https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable> [<https://perma.cc/4ZLL-J5XJ>] (discussing critiques of *Bruen* and how "history is an unworkable basis for deciding constitutional questions that push courts toward unreliable, unreasonable, and unjust conclusions"); Scott Burris, *One Year On, Bruen Really Is as Bad as it Reads*, THE REGUL. REV. (Aug. 2, 2023), <https://www.theregview.org/2023/08/02/burris-one-year-on-bruen-really-is-as-bad-as-it-reads> [<https://perma.cc/P4W5-DZKF>] (noting that the new test for Second Amendment rights established in *Bruen* "placed a straitjacket of historicism on regulations seeking to address the epidemic of gun violence in society today"); Lisa Vicens & Samuel Levander, *The Bruen Majority Ignores Decision's Empirical Effects* (July 8, 2022), <https://www.scotusblog.com/2022/07/the-bruen-majority-ignores-decisions-empirical-effects> [<https://perma.cc/E6N6-E5X6>] (highlighting how "*Bruen* will have a detrimental effect on the safety and well-being of New Yorkers and Americans").

228. *From Slavery to Freedom*, NAT'L MUSEUM OF AFRICAN AM. HIST. & CULTURE, <https://nmaahc.si.edu/explore/stories/slavery-freedom> [<https://perma.cc/J49K-CHMG>] (last visited Mar. 28, 2026).

229. See generally, JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (1972) (documenting abuse and hardship inflicted on Black enslaved people in the American, Antebellum South); RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH 1820-1860* (1964) (providing a broader account of American slavery by exploring urban slave life in southern cities).

230. See generally DAVIS, *supra* note 45 (explaining the Fourteenth Amendment's redress of broken family ties); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

moral outlaw; society may find, or fancy it finds, its interest in protecting his life and his “property” but it does so at its own peril. Before long a certain retribution overtakes it. In all ages of the world men have acknowledged rights which are older than civil society, and immutable.²³¹

The trade in Black people was persistent. A *New York Times* article dated February 1, 1860, noted that “[f]or more than half a century this odious commerce has withstood the denunciations of successive philanthropists; the proscriptive legislation of mighty States; the incessant surveillance, and destructive attacks of hostile squadrons—yet it is still prosperous, still flourishing.”²³² Its only end, including securing constitutional equality and liberty for Black people, as history teaches, was through Reconstruction as all else failed.

Simply put, the sex and labor trafficking of Black people persisted because it fueled American life and was economically profitable. It was so profitable that political scientists, sociologists, and economists have yet to fully calculate “the capital stored in slaves.”²³³ However, economists recognize that the wealth generated from enslavement “exceeded the combined value of all the nation’s railroads and factories.”²³⁴ These economic benefits extended beyond agrarian economics to include financial investments in the north to maintain it.²³⁵ Foreign speculation “underwrote the expansion of plantation lands in Louisiana and Mississippi.”²³⁶ As Sven Becker and Seth Rockman explain, the “highest concentration of steam power in the United States was . . . along the Mississippi rather than on the Merrimack.”²³⁷

The Court’s selective attention to Reconstruction in *Bruen*, contrasted with its disregard in *Dobbs*, makes clear that the Court is not merely ignorant of history. The Court does not just know history; it also knows how to manipulate and reconstruct history to help reach a particular end. As the next Section explains, this point is further underscored when attention is paid to the rampant involuntary reproductive servitude that occurred during slavery in the time leading up to Reconstruction.

B. INVOLUNTARY REPRODUCTIVE SERVITUDE: A PRECURSOR TO RECONSTRUCTION

*The horror began when African women were forced aboard slave ships, where white “officers [were] permitted to indulge their passions” in ways that “disgrace human nature.”*²³⁸

231. *The Issue in the United States—The North and Slavery*, N.Y. TIMES (Jan. 18, 1860), <https://www.nytimes.com/1860/01/18/archives/the-issue-in-the-united-statesthe-north-and-slavery.html>.

232. *The Slave-Trade Still Prosperous*, N.Y. TIMES (Feb. 1, 1860), <https://www.nytimes.com/1860/02/01/archives/the-slavetrade-still-prosperous.html>.

233. SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 1 (Sven Beckert & Seth Rockman eds., 2016).

234. *Id.*

235. *Id.* at 2.

236. *Id.* at 1.

237. *Id.* at 1–2.

238. Brief for Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae Supporting Respondents, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392), at 4 (quoting HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 66 (2006)).

As demonstrated above in Section II.A, the Reconstruction antecedents have a throughline to *Dobbs* in that Antebellum slavery hoisted its flanks on the terrifying subjugation of Black women and girls.²³⁹ The Court's failure in *Dobbs* to address this throughline reflects a major blind spot in the opinion, allowing historic harms to Black women and girls to continue in the present day, albeit in less blatant and obvious ways than abject slavery.

The conditions of slavery were inherently cruel, deliberate, and importantly, in plain sight, unhidden from view, such that Ratifiers were not blind to them. In fact, in a series of speeches, lawmakers such as Charles Sumner, Joshua Giddings, and Horace Mann, among others, decried the conditions of slavery, including the harms to Black women and girls.²⁴⁰

In a speech entitled "The Barbarism of Slavery," Charles Sumner took specific aim at Mississippi, the state that, over a century later, was successful in requesting the Supreme Court to overturn *Roe*.

The Senator from Mississippi [Mr. Brown], galled by the comparison between Slavery and Polygamy, winces. I hail this sensibility as the sign of virtue. Let him reflect, and he will confess that there are many disgusting elements in Slavery, not present in Polygamy, while the single disgusting element of Polygamy is more than present in Slavery. By the license of Polygamy, one man may have many wives, all bound to him by marriage-tie, and in other respects protected by law. By the license of Slavery, a whole race is delivered over to prostitution and concubinage, without the protection of any law. Surely, Sir, is not Slavery barbarous?²⁴¹

Joshua R. Giddings made similar observations, bringing attention to the sexually violent nature of Antebellum slavery in a speech to Congress:

You, sir, lately saw an advertisement in the leading Whig paper of this District, in these words: "*For sale, a handsome and accomplished lady's maid, aged just sixteen years.*" Except in this city and New Zealand, I do not think any Government within the bounds of civilization, would have permitted such an outrage upon decency. I speak of New Zealand without intending any

239. See generally THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH (Catherine Clinton & Michele Gillespie eds., 1997) (providing a historical account of sexual assaults and violence commonly inflicted on Black women trapped in Antebellum conditions.).

240. Joshua R. Giddings, U.S. Representative, Annual Message of the President (Dec. 9, 1850), in SPEECHES IN CONGRESS 438 (Boston, J. P. Jewett & Co. 1853); Horace Mann, Massachusetts Secretary of Education, Speech on the Fugitive Slave Law, Delivered at Lancaster, Massachusetts (May 19, 1851), in SLAVERY: LETTERS AND SPEECHES 510–11 (1851); Joshua R. Giddings, U.S. Representative, The Compromise Measures (Mar. 16, 1852), in SPEECHES IN CONGRESS 483 (Boston, J. P. Jewett & Co. 1853); Charles Sumner, U.S. Senator, New Outrage for the Sake of Slavery, Letter to Passmore Williamson, in Moyamensing Prison (Aug. 11, 1855), in 5 CHARLES SUMNER: HIS COMPLETE WORKS 56 (George Frisbie Hoar ed., Statesman ed. 2015) (1872).

241. Charles Sumner, U.S. Senator, The Barbarism of Slavery, Speech in the Senate, on Bill for the Admission of Kansas as a Free State (June 4, 1860), in 6 CHARLES SUMNER: HIS COMPLETE WORKS 133 (George Frisbie Hoar ed., Statesman 2015) (1872).

disrespect to the people of that island by comparing their habits with ours. They buy men and women for food only. The object is far more honorable and Christian-like than that for which the young women of this city are advertised and sold. Mr. Chairman, General Scott and General Pierce are both pledged to maintain this traffic in the bodies of women, and the advocates of liberty are asked to aid in electing them.²⁴²

In other words, Reconstruction Ratifiers sought to address this sexual violence and involuntary reproductive servitude as much as they did physical labor. American capital flourished on slavery²⁴³ and slavery in turn thrived on the sexual exploitation of Black women and girls.²⁴⁴

Lessons in this can be learned from the Founders. According to Thomas Jefferson, significant economic gains to his plantation emerged from the reproductive bondage and sexual exploitation of Black women and girls. In his epistle to John Wayles Epps on June 30, 1820, Jefferson wrote,

I know no error more consuming to an estate than that of stocking farms with men almost exclusively. I consider a woman who brings a child every two years as more profitable than the best man of the farm. [W]hat she produces is an addition to the capital, while his labors disappear in mere consumption.²⁴⁵

Further, matrilineality codes shielded white men from financial and legal responsibilities tied to their Black children.²⁴⁶ Such laws, dating back to 1662, provided that,

Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly*, that all children born in this country shall be held bond or free only according to the condition of the mother.²⁴⁷

242. Joshua R. Giddings, The Baltimore Platforms—Slavery Question, in the House of Representatives at 3 (June 23, 1852).

243. See generally SLAVERY'S CAPITALISM, *supra* note 233 (arguing for slavery's centrality to the emergence of American capitalism in the decades between the Revolution and the Civil War).

244. Steven J. Micheletti et al., *Genetic Consequences of the Transatlantic Slave Trade in the Americas*, 107 AM. J. HUM. GENETICS 265, 266–73 (2020) (discussing a genetic study that found that “[d]espite more than 60% of enslaved people brought to each region of the Americas being men, comparisons of ancestry . . . revealed a bias toward African female contributions to gene pools across all of the Americas.” The study also notes that these results in part can likely be attributed to the fact that in places like the United States, “enslaved women were incentivized to reproduce with the promise of freedom following the birth of many children” (citing STEVEN DEYLE, CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AMERICAN LIFE (2005)).

245. Letter from Thomas Jefferson, President, to John Wayles Epps, U.S. Senator (June 30, 1820) (archived at <https://tjrs.monticello.org/letter/380#>; [<https://perma.cc/DTT9-QYP4>]).

246. See THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 170 (William Waller Hening ed., 1823).

247. *Id.*

In other words, baked both into early American law and the DNA of Black Americans are the cruel pasts that our legal, social, and cultural histories cannot ignore. The Court in *Dobbs*, however, did just that, refusing to acknowledge a history that should have been clear by its own review of history or, at the least, recognized when presented to the Court directly.

Indeed, the *Dobbs* Court blatantly overlooked or ignored amicus briefs from experts that provided the Court with the history of the Reconstruction era.²⁴⁸ In an amicus brief submitted to the Supreme Court on behalf of Respondents in *Dobbs*, the Howard University School of Law Human and Civil Rights Clinic explains, “[s]ince their arrival on American shores more than four centuries ago, Black women have been subjected to invasive state regulation of their reproductive functions.”²⁴⁹ For example, in the period of American enslavement, “Black women were denied all bodily autonomy; the law expressly endorsed the notion that they lacked humanity and could be ‘bred’ for their owner’s profit.”²⁵⁰

As amici explain:

The import of kidnapped African women to the Virginia colony in 1619 marked the beginning of centuries of systemic, state-sanctioned denial of reproductive freedom for Black women. Few parts of human anatomy have been subject to more depraved brutality and government regulation than Black women’s reproductive systems. From bondage in chattel slavery, where they were forced to bear children that the law regarded as property of their masters, through compulsory sterilization, where they were forced into infertility, Black women were robbed of any sense of bodily autonomy.²⁵¹

As authors of the Howard amicus brief note, “[t]he American institution of slavery was fundamentally incompatible with humanity.”²⁵² That is, “individuals who owned slaves and the government institutions that supported them . . . acted to destroy any notion of Black personhood.”²⁵³ Indeed, coerced reproduction was a fundamental aim of American slavery from the start. In short, by refusing to engage with the uncomfortable historical record of slavery and involuntary reproductive servitude as further delineated by amici with historical expertise, the Court failed to do justice to both history and living expertise of that history.

III. DISORDERED LIBERTY: THE PERILS OF OPPORTUNISTIC AND AHISTORIC ORIGINALISM

Debates involving opportunistic and ahistoric originalism should be understood as more than a mere academic exercise, given the breadth and scope of civil

248. See, e.g., Brief for Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae Supporting Respondents, *supra* note 238.

249. *Id.* at 3.

250. *Id.*

251. *Id.* at 4.

252. *Id.*

253. *Id.*

rights and civil liberties at risk by the Court's embrace of these approaches to judicial interpretation and review. We argue that the way in which the Court has weaponized originalism places at risk important constitutional liberties buttressed by substantive due process, liberty, and privacy, including interracial marriage, women's rights, LGBTQ+ rights (e.g., same-sex intimacy, same-sex marriage, same-sex parentage, gender-affirming care), voting rights, and more.²⁵⁴ A common thread weaves through all of these rights that now are at risk: all implicate the liberty and equality interests of historically marginalized populations that, either directly or indirectly, were meant to be protected by the Constitution, and specifically the liberty interests and substantive due process that emerge from the Fourteenth Amendment.

To this end, our view aligns with Bryan Stevenson as he observes, “[t]he power of the federal courts is that with life tenure, they’re supposed to be immune from the political preferences.”²⁵⁵ Normatively, they should do “what the Constitution requires.”²⁵⁶ On the other hand, this means “with a more political court, you see a court that’s more responsive to majoritarian preference. You see a court that’s more responsive to the will of the powerful, the will of the many.”²⁵⁷ A different view, one that we share alike with Stevenson is the belief that the Court should be “the refuge of the powerless, the refuge of those who are the minority whose rights are being challenged.”²⁵⁸ This was the pathway of *Brown*,²⁵⁹ *Loving*,²⁶⁰ *United States v. Virginia*,²⁶¹ and *Obergefell*.²⁶²

A spate of alarming, recent Court decisions, along with the second Trump Administration's bold rejection of the rule of law and disregard for separation of powers,²⁶³ create the conditions that demand reflection. What is the Roberts Court's fidelity to the Constitution? Thus far, rather than promoting any “concept

254. See *supra* notes 186–189 and accompanying text; *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (declaring § 4(b) of the Voting Rights Act of 1965 unconstitutional, meaning “[t]he [coverage] formula in that section [could] no longer be used as a basis for subjecting jurisdictions to preclearance”).

255. *At the Legacy Museum, Facing America's Racist Past is a Path, Not a Punishment*, NAT'L PUB. RADIO (Mar. 25, 2026), <https://www.npr.org/transcripts/nx-s1-5753780> [<https://perma.cc/3X87-93TM>].

256. *Id.*

257. *Id.*

258. *Id.*

259. 347 U.S. 483 (1954) (holding that separate but equal educational facilities for racial minorities is inherently unequal and in violation of the Equal Protection Clause of the Fourteenth Amendment).

260. 388 U.S. 1 (1967) (holding that laws banning interracial marriage violate the Equal Protection Clause of the Fourteenth Amendment).

261. 518 U.S. 515 (1996) (finding that Virginia Military Institute's policy of only admitting and serving males was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment).

262. 576 U.S. 644 (holding that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects and that this right applies to same-sex couples).

263. Many legal scholars, commentators, and advocates have sounded the alarm about the second Trump Administration's attacks on democracy, the Constitution, and the current, or at least impending, constitutional crisis. See, e.g., Deirdre Schifeling & Sarah Longwell, *How Trump's Attacks on Democracy Put the Constitution at Risk*, ACLU (Sep. 17, 2025), <https://www.aclu.org/news/civil-liberties/how-trumps-attacks-on-democracy-put-the-constitution-at-risk> [<https://perma.cc/2KQJ->

of ordered liberty” as it claims,²⁶⁴ the Court’s opportunistic originalism has set in motion *disordered* liberty that undermines the rule of law. Indeed, “[t]he use of ordered liberty in *Dobbs* leads to an answer that does not abide by . . . history or precedent.”²⁶⁵ On the contrary, it results in “arbitrary rulemaking that ordered liberty is meant to protect against and that originalists claim to avoid with their method of interpretation.”²⁶⁶ This Part describes recent trends from the Court that give reason to be concerned about whether the current Court can or will fulfill its role in our constitutional system of government, using women’s rights, LGBTQ+ rights, and voting rights as case studies.²⁶⁷

A. WOMEN’S RIGHTS

As noted in Part I, the majority’s reasoning in *Dobbs* could easily be adapted to curtail the right to contraception for married couples established in *Griswold v. Connecticut*,²⁶⁸ which was later extended to single individuals in *Eisenstadt v. Baird*.²⁶⁹ According to the *Dobbs* majority, “when the Fourteenth Amendment was adopted [in 1868], three-quarters of the States made abortion a crime at all stages of pregnancy.”²⁷⁰ Applying that same logic to contraception, a number of state laws, along with the federal Comstock Act, banned contraceptives until 1965 or later. Like abortion, “[t]he Constitution makes no reference to” contraception, and wide-ranging prohibitions on contraception at the time the Fourteenth Amendment was adopted would, at least according to the current Court, mean that the right to contraception is not “deeply rooted in this Nation’s history and tradition” nor “implicit in the concept of ordered liberty.”²⁷¹

Attacks on women’s rights in a post-*Dobbs* era do not stop at abortion or contraception. The Court’s opportunistic originalism at work in *Dobbs* has important, real-world downstream consequences for women, including the most fundamental of them all: the right to life.²⁷² Eliminating the constitutional right to abortion,

WS3H]; *Are We Headed for a Constitutional Crisis? Kennedy School Scholars on the Trump Administration and the Rule of Law*, HARV. KENNEDY SCH. (Feb. 25, 2025), <https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/are-we-headed-constitutional-crisis-kennedy> [https://perma.cc/7LVY-5V6T]; Ilya Somin, *Trump’s ‘Emergencies’ Are Pretexts for Undermining the Constitution*, LAWFARE (May 15, 2025, at 09:54 ET), <https://www.lawfaremedia.org/article/trump-s-%27emergencies%27-are-pretexts-for-undermining-the-constitution> [https://perma.cc/S8S5-288Z]; Adam Liptak, *Trump’s Actions Have Created a Constitutional Crisis, Scholars Say*, N.Y. TIMES (Feb. 10, 2025), <https://www.nytimes.com/2025/02/10/us/politics/trump-constitutional-crisis.html>.

264. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 240, 256 (2022).

265. Amanda Trau, *The Superficial Application of Originalism in Dobbs: Could a More Comprehensive Approach Protect Abortion Rights?*, 50 FORDHAM URB. L.J. 867, 889 (2023).

266. *Id.*

267. The cases and issues discussed in this Part are illustrative, not exhaustive.

268. 381 U.S. 479, 485 (1965).

269. 405 U.S. 438, 454 (1972).

270. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022).

271. *Id.*

272. According to the Guttmacher Institute in 2024, two years after *Dobbs*, “an increasingly robust body of evidence is emerging that illustrates the myriad harms caused and exacerbated by the [*Dobbs*] decision,” which includes “tragic stories of pregnant women desperately seeking emergency care to protect their own lives and health.” Kelly Baden, Joerg Dreweke & Candace Gibson, *Clear and Growing Evidence That*

thereby returning it to the states, did nothing to promote “ordered liberty.” On the contrary, it opened the door to *disordered* liberty, leaving women’s health and life to hang in the balance and dependent on arbitrary factors like their geographic location and financial and physical ability to travel.

The recent and unsettled fight over abortion and the Emergency Medical Treatment and Labor Act (EMTALA) places the consequences of opportunistic originalism in stark relief.²⁷³ EMTALA is a federal law passed in 1986 that requires Medicare-participating hospitals—which include most hospitals in the United States—that offer emergency services to provide a medical screening examination as well as “necessary stabilizing treatment” to any patient with an emergency condition, including active labor, that seriously threatens the patient’s life or health.²⁷⁴ Since the George W. Bush Administration, the U.S. Department of Health and Human Services (HHS) interpreted EMTALA to require the termination of pregnancy if it represents the stabilizing care necessary to save the pregnant patient’s life or prevent grave harm to health.²⁷⁵

Before the right to abortion was overturned in *Dobbs*, HHS’s interpretation went unquestioned, as states could generally not prohibit abortion in the circumstances where EMTALA would require pregnancy termination.²⁷⁶ But post-*Dobbs*, a few states, including Idaho and Texas, prohibit abortion even in the emergency situations where EMTALA would require it: when the patient’s *health*, not just *life*, is in “serious jeopardy.”²⁷⁷

This raised the question: Does EMTALA preempt such restrictive state abortion laws? In July 2022, shortly after *Dobbs*, HHS reiterated its longstanding

Dobbs Is Harming Reproductive Health and Freedom, GUTTMACHER INST. (May 2024), <https://www.guttmacher.org/2024/05/clear-and-growing-evidence-dobbs-harming-reproductive-health-and-freedom> [<https://perma.cc/KK5D-QVKK>]. Media outlet, ProPublica, has also been tracking women’s deaths caused by, or at least related to, state abortion bans. See, e.g., Cassandra Jaramillo & Kavitha Surana, *A Woman Died After Being Told it Would Be a “Crime” to Intervene in Her Miscarriage at a Texas Hospital*, PROPUBLICA (Oct. 30, 2024, at 05:00 ET) [hereinafter *A Woman Died After Being Told it Would Be a “Crime”*], <https://www.propublica.org/article/josseli-barnica-death-miscarriage-texas-abortion-ban> [<https://perma.cc/RWU5-XW3Q>]; Lizzie Presser & Kavitha Surana, *A Pregnant Teenager Died After Trying to Get Care in Three Visits to Texas Emergency Rooms*, PROPUBLICA (Nov. 1, 2024, 06:00 ET) [hereinafter *Pregnant Teenager Died in Texas*], <https://www.propublica.org/article/nevaeh-crain-death-texas-abortion-ban-emtala> [<https://perma.cc/M3FR-BW9W>]; Lizzie Presser & Kavitha Surana, *A Third Woman Died Under Texas’ Abortion Ban. Doctors Are Avoiding D&Cs and Reaching for Riskier Miscarriage Treatments.*, PROPUBLICA (Nov. 25, 2024, at 06:00 ET) [hereinafter *A Third Woman Died*], <https://www.propublica.org/article/porshangumezi-miscarriage-death-texas-abortion-ban> [<https://perma.cc/5XEM-VDZL>]; Kavitha Surana, *Afraid to Seek Care Amid Georgia’s Abortion Ban, She Stayed at Home and Died*, PROPUBLICA (Sep. 18, 2024, at 06:00 ET) [hereinafter *Afraid to Seek Care Amid Georgia’s Abortion Ban*], <https://www.propublica.org/article/candi-miller-abortion-ban-death-georgia> [<https://perma.cc/RRS3-GC33>].

273. See 42 U.S.C. § 1395dd.

274. See *id.*

275. Brief for Former HHS Officials as Amici Curiae Supporting Respondent at 13, *Moyle v. United States*, 603 U.S. 324 (2024) (No. 23-726).

276. Under *Roe*, the State could prohibit abortion post-viability “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Roe v. Wade*, 410 U.S. 113, 165 (1973).

277. 42 U.S.C. § 1395dd(e)(1)(A)(i); see *infra* notes 278–285 and accompanying text (describing the challenges to the abortion bans in Texas and Idaho with respect to EMTALA).

interpretation of EMTALA in a letter to healthcare professionals, stating that if abortion represents the treatment necessary to stabilize a patient experiencing an emergency medical condition, a state law that prohibits abortion in that situation is preempted.²⁷⁸ Litigation ensued, with conflicting opinions from federal district courts in Texas and Idaho.²⁷⁹ In Texas, the court held that EMTALA did not preempt Texas's restrictive abortion law.²⁸⁰ In Idaho, however, the court sided with the federal government and enjoined Idaho from enforcing its abortion law to the extent it conflicted with EMTALA.²⁸¹ The U.S. Supreme Court granted certiorari in the Idaho case and allowed the state law to go into effect pending judicial resolution.²⁸² As the law went into effect, emergency medical flights for pregnant patients rose sharply in the state.²⁸³

On June 27, 2024, the Supreme Court issued a one-sentence, unsigned per curiam opinion, dismissing the case as “improvidently granted.”²⁸⁴ In other words, the Court decided that it was wrong to accept the case in the first instance. The Court also vacated its earlier decision that allowed Idaho's abortion ban to go into full effect pending judicial resolution.²⁸⁵ As a result, the case returned to the Ninth Circuit for further litigation, during which time Idaho was prohibited from enforcing its abortion ban when the termination of a pregnancy is medically necessary to prevent serious harm to a pregnant person's health (that is, when the law conflicts with EMTALA).²⁸⁶

278. See Letter from Xavier Becerra, Sec'y of the Dep't of Health & Hum. Servs. to Health Care Providers (July 11, 2022), available at <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf> [<https://perma.cc/J4FF-57M3>].

279. See *Texas v. Becerra*, 623 F. Supp. 3d 696, 726 (N.D. Tex. 2022) (noting in part that “[t]he text of EMTALA recognizes a presumption of non-preemption. It claims preemption only where a state law requirement ‘directly conflicts’ with EMTALA requirements.” (citation omitted)); *United States v. Idaho*, 623 F. Supp. 3d 1096, 1117 (D. Idaho 2022) (enjoining the State of Idaho from taking criminal prosecutorial action or punishing those medical providers that provide abortions under EMTALA); Michelle M. Mello, *Resuscitating Abortion Rights in Emergency Care*, JAMA HEALTH F., Sep. 2022, at 1, <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2796297> (“On August 23 and 24, 2022, respectively, federal district court judges James Wesley Hendrix of Texas and B. Lynn Winmill of Idaho issued conflicting decisions. Hendrix held that EMTALA did not preempt Texas's laws, whereas Winmill held that it did preempt Idaho's law.”).

280. *Becerra*, 623 F. Supp. 3d at 26–27.

281. *Idaho*, 623 F. Supp. 3d at 1117.

282. *Moyle v. United States*, 603 U.S. 324, 327 (2024) (Kagan, J., concurring) (noting the grant of certiorari and the stay of the lower court's injunction); Amy Howe, *Justices Take Up Abortion Case Pitting State Against Federal Law*, SCOTUSBLOG (Jan. 5, 2024), <https://www.scotusblog.com/2024/01/justices-take-up-abortion-case-pitting-state-against-federal-law> [<https://perma.cc/9KXX-3P96>].

283. See Kelcie Moseley-Morris, *Loss of Federal Protection in Idaho Spurs Pregnant Patients to Plan for Emergency Air Transport*, IDAHO CAP. SUN (Apr. 23, 2024, at 04:30 ET), <https://idahocapitalsun.com/2024/04/23/loss-of-federal-protection-in-idaho-spurs-pregnant-patients-to-plan-for-emergency-air-transport>. At one of the state's largest hospitals, emergency air transport out of state for pregnancy complications rose from one in all of 2023, to six in just the first four months of 2024. *Id.*

284. *Moyle*, 603 U.S. at 325 (per curiam).

285. See *id.*

286. See Amy Howe, *Supreme Court Allows Emergency Abortions, For Now, in Idaho*, SCOTUSBLOG (June 27, 2024), <https://www.scotusblog.com/2024/06/supreme-court-allows-emergency-abortions-for-now-in-idaho> [<https://perma.cc/8ETQ-MSGF>] (noting that as a result of the

Returning the case to the Ninth Circuit while prohibiting Idaho from enforcing its abortion ban in full did not mean pregnant patients in Idaho would have access to necessary emergency care. Healthcare professionals in Idaho and elsewhere continued to grapple with vague laws that make it difficult to know when a pregnant patient's health or life is in enough danger to justify an abortion under the state's law.²⁸⁷ Moreover, the back-and-forth judicial decisions sow confusion, leaving healthcare professionals unsure whether to follow state or federal law.²⁸⁸ And importantly, the minimal reprieve provided to Idaho citizens and healthcare professionals did not apply to other states, namely all in the Fifth Circuit—which covers Texas, Louisiana, and Mississippi—that have abortion bans with life, but not health, exceptions.²⁸⁹

By refusing to decide the federal preemption question, the Court's decision guarantees that for at least the foreseeable future, the lower court decision upholding the Texas abortion ban against a preemption challenge will remain in full effect. Roughly two million people in Idaho "benefit" from the Court's non-decision.²⁹⁰ Yet almost thirty-nine million remain subject to the Fifth Circuit's decision.²⁹¹ Those who find themselves pregnant and in the emergency rooms at hospitals may face tragic consequences, left in the same position as if the Court had decided the case on the merits in favor of Idaho.

We recognize two problems in the Court's decision-making. First, the Court's failure to decide the issue, resulting in the avoidable consequences outlined

Court's dismissal of the case, left in place was the "order by a federal judge in Idaho that temporarily blocks the state from enforcing its abortion ban . . . to the extent that it conflicts with [EMTALA]".

287. Kelcie Moseley-Morris, *Appeals Court Considers Next Step for Emergency Abortion Care in Idaho*, IDAHO CAP. SUN (Dec. 11, 2024, at 09:18 ET), <https://idahocapitalsun.com/2024/12/11/appeals-court-considers-next-step-for-emergency-abortion-care-in-idaho> ("Without further clarity written into the law, doctors [in Idaho] have said they can't confidently assess when to safely intervene to save someone's life and what constitutes a 'good faith' judgment.")

288. As noted by Justice Ketanji Brown Jackson writing in partial dissent in *Moyle*, "While this Court dawdles and the country waits, pregnant people experiencing emergency medical conditions remain in a precarious position, as their doctors are kept in the dark about what the law requires." *Moyle*, 603 U.S. at 345 (Jackson, J., concurring in part and dissenting in part).

289. For example, Louisiana's Human Life Protection Act bans nearly all abortions, and medical providers may only "prevent the death or substantial risk of death" of the pregnant person. LA. STAT. ANN. § 40:1061(F) (2022); see also MISS. CODE ANN. § 41-41-45(3) (2007) (abortion exceptions only for rape and a pregnant person's life). The dismissal of *Moyle v. Idaho* left in place an order by a federal judge in Idaho that blocked Idaho from enforcing its abortion ban to the extent it conflicts with EMTALA. That order only applies to states within the Ninth Circuit, leaving states in other Circuits, like the Fifth Circuit, free to enforce their abortion laws even if they conflict with EMTALA. See *supra* note 286 and accompanying text.

290. According to the U.S. Census Bureau, Idaho's population as of July 1, 2024, was estimated to be 2,001,619. *QuickFacts: Idaho*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/ID/PST045224> (last visited Mar. 28, 2026).

291. See *QuickFacts: Louisiana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/LA/PST045224> (last visited Mar. 28, 2026) (estimating Louisiana's population as of July 1, 2024, to be 4,597,740); *QuickFacts: Mississippi*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/MS/PST045224> (last visited Mar. 28, 2026) (estimating Mississippi's population as of July 1, 2024, to be 2,943,045); *QuickFacts: Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/TX/PST045224> (last visited Mar. 28, 2026) (estimating Texas's population as of July 1, 2024, to be 31,290,831).

above. Second, the Court's failure to provide a reasoned explanation for its decision—as it now so often does through the use of its emergency docket²⁹²—fuels disordered liberty. As Justice Jackson declared, the “Court had a chance to bring clarity and certainty to this tragic situation, and we have squandered it.”²⁹³

And now that Trump has taken office for a second time, the future of EMTALA is more precarious than ever. In March 2025, the Trump Administration dismissed the legal challenge initially brought by the Biden Administration against Idaho.²⁹⁴ Then in May 2025, the Trump Administration rescinded guidance that reaffirmed hospitals' obligations under EMTALA to provide health- and life-saving abortion care to patients experiencing medical emergencies.²⁹⁵ In place of the U.S. Department of Justice in the litigation, St. Luke's Health System, the largest Idaho-based nonprofit health system, has taken up the case and, as of this writing, has obtained a temporary restraining order blocking Idaho from enforcing its ban when abortion care is required by EMTALA at St. Luke's hospitals.²⁹⁶ This order, however, is limited to St. Luke's hospitals and their providers and, therefore, does not protect women who seek emergency abortion care at other hospitals in the state.²⁹⁷

By refusing to decide the case on the merits to affirm that pregnant people have the right to emergency abortion care to protect their health and their lives, the Court sends a dire message. Essentially, women and persons capable of pregnancy do not enjoy the same right to life as men. After all, these consequences are no longer hypothetical. Women's documented experiences, research studies, and maternal mortality investigations make clear that women are dying or facing serious health conditions as a result of abortion bans and restrictions. Put simply, abortion bans have chilled the ability of healthcare professionals to provide their patients with best practice care.²⁹⁸

292. For further discussion of what some scholars and court commentators refer to as the “shadow docket,” see generally STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

293. *Moyle*, 603 U.S. at 345 (Jackson, J., concurring in part and dissenting in part).

294. See Julie Luchetta, *DOJ Dismisses Biden-Era Lawsuit Challenging Idaho's Strict Abortion Ban*, NPR (Mar. 6, 2025, at 04:14 ET), <https://www.npr.org/2025/03/06/nx-s1-5318769/doj-dismisses-biden-era-lawsuit-challenging-idahos-strict-abortion-ban> [<https://perma.cc/5KH6-9C98>].

295. See Memorandum from Dirs., Quality, Safety & Oversight Grp. (QSOG) and Surv. & Operations Grp. (SOG), Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Hum. Servs., to State Survey Agency Dirs. (rescinded May 29, 2025), <https://www.cms.gov/files/document/qso-22-22-hospitals-rescinded-05292024.pdf> [<https://perma.cc/SL4R-EWHQ>].

296. See *St. Luke's Health Sys., Ltd. v. Labrador*, 782 F. Supp. 3d 953, 983–84 (D. Idaho 2025).

297. *Id.* at 986 (holding that the order applies only to St. Luke's hospitals and its providers).

298. See, e.g., Lizzie Presser, Andrea Suozzo, Sophie Chou & Kavitha Surana, *Texas Banned Abortion. Then Sepsis Rates Soared.*, PROPUBLICA (Feb. 20, 2025, at 05:00 ET), <https://www.propublica.org/article/texas-abortion-ban-sepsis-maternal-mortality-analysis> [<https://perma.cc/SDQ8-DZRQ>] (reporting that the rate of sepsis increased more than fifty percent for women hospitals in Texas when they lost their pregnancies in the second trimester); Bracey Harris, *Why Idaho's Hospitals Are Having Pregnant Patients Airlifted Out of State*, NBC NEWS (Apr. 25, 2024, at 12:54 EDT), <https://www.nbcnews.com/news/us-news/idahos-abortion-emergency-supreme-court-airlifted-rca148828> [<https://perma.cc/6QJR-H8AW>]; Moseley-Morris, *supra* note 287; *A Woman Died After Being Told it*

As we have said elsewhere, the EMTALA case, set in motion by *Dobbs*, “is a warning”²⁹⁹:

If lawmakers who today disfavor lifesaving or urgently needed care for pregnant patients, who will be next? EMTALA serves to protect *all* US residents from discrimination and being turned away from receiving urgent and necessary health care, regardless of their personal status or ability to pay. Yet once a law’s protections become weaker for [one] population, it sets a precedent for a broader group. This is clearly foreshadowed by Supreme Court Justice Clarence Thomas in his *Dobbs* concurrence, where he calls for the elimination of the substantive due process rights to contraception, same-sex relations, and same-sex marriage.³⁰⁰

In the years to come, courts will likely grapple with fetal personhood. Should such a case reach the Supreme Court, the conservative majority will likely consider whether fetal personhood is “deeply rooted in this Nation’s history and tradition.”³⁰¹ Worryingly, if the current Court’s approach to judicial review and originalism provides any guide, its review of fetal personhood and fetal rights challenges will likely be subjected to opportunistic and ahistoric originalism methods.³⁰²

Ignoring the real-world consequences of the opportunistic originalism at work in *Dobbs* leaves the health and lives of women and all persons capable of pregnancy—particularly those of color—to hang in the balance. A faithful historical analysis—one that includes fidelity to the Reconstruction Amendments—would result in conclusions that protect the very populations these Amendments sought to protect. Without any doubt, opportunistic originalism’s jurisprudential and real-world consequences cannot be papered over and should not be ignored.

B. LGBTQ+ RIGHTS

Opportunistic originalism also leaves a bevy of LGBTQ+ rights at risk of total dismantling, whether all at once or death by multiple cuts, an outcome put on the fast track by a number of recent Trump Administration executive orders.³⁰³

Would Be a “Crime”, *supra* note 272; *Pregnant Teenager Died in Texas*, *supra* note 272; *A Third Woman Died*, *supra* note 272; *Afraid to Seek Care Amid Georgia’s Abortion Ban*, *supra* note 272.

299. See Michele B. Goodwin, Allison M. Whelan & Lawrence O. Gostin, *The Supreme Court and the Emergency Medical Treatment and Labor Act—A Dangerous Time for Us All*, 332 J. AM. MED. ASS’N 1233, 1234 (2024).

300. *Id.*

301. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022).

302. Some scholars and lawyers have already laid the groundwork for forms of originalism that could advance fetal rights. In fact, Josh Craddock, who was recently appointed Deputy Assistant Attorney General at the Department of Justice’s Office of Legal Counsel, has long taken the position that “as a matter of original public meaning, the word *person* in the Fourteenth Amendment applied to the unborn child.” MARY ZIEGLER, *PERSONHOOD: THE NEW CIVIL WAR OVER REPRODUCTION* 195 (2025); see also Josh Craddock, *CTR. FOR REPRODUCTIVE RTS.*, <https://reproductiverights.org/agency-watch/josh-craddock> [https://perma.cc/2LSJ-WQUH] (last visited Mar. 28, 2026).

303. See, e.g., *Protecting Children from Chemical and Surgical Mutilation*, WHITE HOUSE (Jan. 28, 2025), <https://www.whitehouse.gov/Presidential-Actions/2025/01/Protecting-Children-From-Chemical-And-Surgical->

Future use of opportunistic originalism and “dubious history” to deny or even retract rights of the LGBTQ+ community would not be without precedent.³⁰⁴ These include rights with precedential grounding, like same-sex intimacy and marriage, and those at the heart of ongoing debates, like gender-affirming care.

1. Same-Sex Intimacy and Marriage

The majority in *Dobbs* attempts to assure that its decision does not “call[] into question” decisions like *Lawrence* and *Obergefell*, which established the constitutional right to same-sex intimacy and same-sex marriage.³⁰⁵ Yet Justice Thomas, in concurrence, makes clear that taking the Court’s decision in *Dobbs* a step further to reconsider other substantive due process decisions, including *Lawrence* and *Obergefell*, would not be difficult.³⁰⁶ Indeed, under a Court that engages in opportunistic originalism, same-sex intimacy and same-sex marriage remain at risk for a few key reasons.

First, like contraception, existing constitutional protections for same-sex intimacy and same-sex marriage could be subjected to the same fate as abortion in *Dobbs*.³⁰⁷

Mutilation [<https://perma.cc/FSX3-QWZP>] (order directing agencies and programs to limit access to gender affirming care for individual under nineteen); *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government> [<https://perma.cc/4FU9-2M7C>] (defining sex as an “immutable” binary biological classification as either male or female, and removing recognition of the concept of gender identity); *Initial Rescissions of Harmful Executive Orders and Actions*, WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions> [<https://perma.cc/NA5L-SEFH>] (rescinding a number of executive orders and actions issued by the Biden Administration, including some that addressed LGBTQ+ equity and discrimination); see also Lindsey Dawson & Jennifer Kates, *Overview of President Trump’s Executive Actions Impacting LGBTQ+ Health*, KAISER FAM. FOUND. (Feb. 25, 2026), <https://www.kff.org/other-health/overview-of-president-trumps-executive-actions-impacting-lgbtq-health> [<https://perma.cc/Z7WW-B87U>] (tracking and overiewing the Trump Administration’s executive actions impacting LGBTQ+ health and rights).

304. As noted by Professor Aaron Tang,

Dobbs is not the first time the Supreme Court has relied on dubious history to reject a constitutional right of profound importance. The Court did the same thing in 1986, when it held in *Bowers v. Hardwick* that the Constitution does not confer a “fundamental right upon homosexuals to engage in sodomy.” The *Bowers* Court reached that conclusion by asking, much like *Dobbs* asked, whether the claimed right was “deeply rooted in this Nation’s history and tradition.” Such a claim, *Bowers* smugly asserted, was “at best, facetious” given that “[i]n 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.”

Aaron Tang, *Lessons from Lawrence: How “History” Gave Us Dobbs—And How History Can Help Overrule It*, 133 YALE L.J. F. 65, 66–67 (2023) (footnotes omitted) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 190, 192–94 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003)).

305. See *Dobbs*, 597 U.S. at 295.

306. See *id.* at 332 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous’, we have a duty to ‘correct the error’ established in those precedents.” (citations omitted)).

307. See Sydney Jackson, *Dobbs’ Impact on LGBTQ+ Rights: Where Do We Go from Here?*, 101 U. DET. MERCY L. REV. 43, 55 (2023); Tobias Barrington Wolff, *The Rights of Same-Sex Couples in the Coming Administration*, THE REGUL. REV. (Dec. 16, 2024), <https://www.theregview.org/2024/12/16/wolff-the-rights-of-same-sex-couples-in-the-coming-administration> [<https://perma.cc/GG9S-HU8D>].

This is because, among other reasons, “when the Fourteenth Amendment was adopted [in 1868],” many, if not most, states criminalized sodomy and none recognized the concept of same-sex marriage.³⁰⁸ The Court would have little difficulty applying its “history and tradition” analysis to gut these rights, at which time many states would reinforce old or enact new restrictions on rights that many have come to rely upon. In fact, a number of states still have such laws on the books and could be reinforced in short order if *Lawrence* and *Obergefell* are overruled.³⁰⁹

Second, although the majority’s recent decision in *United States v. Skrmetti*, in which the Supreme Court held that bans on gender-affirming care for minors do not violate the Equal Protection Clause, did not rely on a “history and tradition” analysis,³¹⁰ at least three Justices suggest, in concurring opinions,³¹¹ “that a group had to experience a history of discrimination to be considered a quasi-suspect class.”³¹² These Justices then “explained that trans people did not experience such a history of discrimination,” illustrating their view that histories of sexism and transphobia are distinct and suggesting “that future trans-rights, Equal Protection cases” may require establishing “a history of discrimination[] if they are going to convince the Court that trans people should be considered a quasi-suspect class.”³¹³ Brianne Felsher’s astute analysis and critique of anti-trans judges and litigants, however, illuminates another instance of ahistoric originalism. In short, they adopt a view that trans people did not exist prior to the late twentieth century, a conclusion that does not comport with a faithful and

But see Christopher Sean Krimmer, *As I See It Dobbs and Same-Sex Marriage in the U.S.*, STATE BAR OF WIS. (Dec. 9, 2022), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=95&Issue=11&ArticleID=29483> [<https://perma.cc/QBD6-2RMJ>] (setting forth reasons why the analytical methodology used in *Dobbs* might not make same-sex marriage meet the same fate as the right to abortion).

308. *See Criminal Sodomy Statutes in Effect in 1868*, OR. QUEER HIST. COLLECTIVE: SODOMY L. (Nov. 7, 2003), <https://www.glapn.org/sodomylaws/history/history02.htm> [<https://perma.cc/WH96-YN7Y>].

309. *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-101(C); FLA. STAT. ANN. § 741.212 (same-sex marriage); GA. CODE ANN. § 19-3-3.1 (same-sex marriage); LA. STAT. ANN. § 14:89 (same-sex relations); KY. REV. STAT. ANN. § 510.100 (same-sex relations); MISS. CODE ANN. § 97-29-59 (same-sex relations); TEX. PENAL CODE ANN. § 21.06 (same-sex relations); *see also* Sophie Clark, *Sodomy Laws Remain in 12 States. Race to Avoid Roe vs Wade Repeat Begins*, NEWSWEEK (Jan. 24, 2025, at 21:16 ET), <https://www.newsweek.com/sodomy-laws-twelve-states-race-avoid-roe-wade-repeat-2019776> (reporting that “12 states in the U.S. still have ‘zombie’ anti-sodomy laws on their books”); Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, STATELINE (July 7, 2022), <https://stateline.org/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans> (noting that “[t]hirty-five states ban same-sex marriage in their constitutions, state law, or both”).

310. 605 U.S. 495, 522 (2025).

311. *Id.* at 576–77 (Alito, J., concurring in part and concurring in judgment); *id.* at 556–57 (Barrett, J., concurring). Justice Thomas joined Justice Barrett’s concurrence. *Id.* at 547.

312. Brianne Felsher, “*Sex Changed by a Court’s Decree*”: *The History and Tradition of Gender Transitions in the United States*, 114 GEO. L.J. 909, 920 (2026); *see also* 605 U.S. at 554 (Barrett, J., concurring) (suggesting that groups must establish a history, or “longstanding pattern,” “of discrimination in the law”); 605 U.S. at 566 (Alito, J., concurring in part) (reasoning that “transgender status does not qualify under our precedents as a suspect or ‘quasi-suspect class’” because, among other reasons, “transgender individuals have not been subjected to a history of discrimination that is comparable to past discrimination against the groups we have classified as suspect or ‘quasi-suspect’”).

313. Felsher, *supra* note 312, at 920–21.

inclusive telling of history. Drawing upon original archival research, Felsher illustrates,

That not only were trans people conceivable in the 1800s-1950s, [] they frequently turned to the law to actualize their gender transitions. Trans people changed their legally recognized sexes, obtained name changes, sought gender-affirming care and bodily modifications, donned new clothes, and adopted gendered familial and community roles. As they did so, they sought both public and legal recognition for their gender, attempting to participate in social and community life. Trans people's ability to garner both legal and social support played an important role in their battles against public censure, discrimination, and even criminalization. They hoped that a court decree, a name change, or a marriage certificate could protect from the interference of family members . . . , harassment from police, or even incarceration. Throughout the 1800s and early 1900s, legal authorities were often, but not always, willing to recognize trans people's genders and allow them to exercise gendered rights. Both trans people and their allies defended transition-ing as an expression of liberty and gender equality.³¹⁴

This truthful retelling of history will be imperative to protecting trans rights under an equal protection or due process analysis.³¹⁵ Third, opportunistic originalism's dismantling of LGBTQ+ rights through the use of "history and tradition" is bolstered by the reinvigoration of religious freedom by the current Court and the Trump Administration. The emphasis on religious freedom seen in recent years at the Court does not necessarily require nor rely upon opportunistic originalism, but it nevertheless comports with a related trend of "*opportunistic jurisprudence*," by which we mean the Court's decision to exercise its discretion to take up cases on certain topics and at certain times, which may be influenced by factors beyond the merits of the case itself to shape the Court's future jurisprudence.³¹⁶

With respect to religious freedom, both scholars and critics of the Court contend that the religion that matters most to the current majority, and now the Trump Administration, is Christianity.³¹⁷ And more specifically, Christian

314. *Id.* at 916 (internal citations omitted).

315. *Id.* at 982–86.

316. See, e.g., Alvaro Bustos & Tonja Jacobi, *Judicial Choice Among Cases for Certiorari*, 27 SUP. CT. ECON. REV. 117, 137 (2019) (showing that the Court takes cases that will most significantly shape future lower case outcomes in the direction that the Court prefers); VLADECK, *supra* note 292 (discussing the Court's dramatically expanded use of the "shadow" or emergency docket to decide extremely consequential cases). This practice has been criticized by some of the Court's own Justices. See, e.g., Dep't of Educ. v. California, 604 U.S. 650, 654 (2025) (Jackson, J., dissenting) ("It is beyond puzzling that a majority of Justices conceive of the Government's application as an emergency. . . . This application should have been denied for numerous obvious and independent reasons, and the Court does itself—and the legal process—no favors in deciding to grant it.").

317. See, e.g., Daniel Mach, *The Supreme Court Cares About Religious Animus – Except When It Doesn't*, ACLU (June 26, 2018), <https://www.aclu.org/news/immigrants-rights/supreme-court-cares-about-religious-animus-except-when-it-doesnt> [<https://perma.cc/Q4QS-EUHQ>] (criticizing the Court's divergent approach to anti-religious hostility in a Christian-focused case on the one hand, and a Muslim-focused case, on the other); Ian Millhiser, *The Supreme Court Is Leading a Christian Conservative Revolution*, VOX (Jan.

nationalism.³¹⁸ According to the Center for American Progress, conflicts over religious liberty today

[M]ost often arise from Christian nationalism, the anti-democratic notion that America is a nation by and for Christians alone . . . Christian nationalism is [] a contributing ideology in the religious right’s misuse of religious liberty as a rationale for circumventing laws and regulations aimed at protecting a pluralistic democracy, such as nondiscrimination protections for LGBTQI+ people, women, and religious minorities. These issues will only draw more attention in the years ahead, since the 6–3 conservative majority on the U.S. Supreme Court appears eager to hear more religious liberty cases advancing Christian nationalist arguments than in previous years.³¹⁹

In recent years, a number of Supreme Court decisions have shown a trend that seems to prioritize religious freedom over LGBTQ+ rights, allowing businesses and organizations to refuse services based on religious objections, even when those objections discriminate against LGBTQ+ individuals. Consider two recent cases involving religious freedom and LGBTQ+ rights: *Fulton v. City of Philadelphia*³²⁰ and *303 Creative v. Elenis*.³²¹

First, in 2021, the Court decided *Fulton v. City of Philadelphia*.³²² In this case, a state-licensed foster care agency affiliated with the Roman Catholic Archdiocese and three foster parents affiliated with the agency brought a § 1983 action against the city and city departments, alleging that the city’s refusal to contract with the agency unless it agreed to certify same-sex couples as foster parents violated the Free Exercise and Free Speech Clauses of the First Amendment.³²³ In a surprisingly unanimous decision, the Court held that Philadelphia violated

30, 2022, at 08:00 EST), <https://www.vox.com/22889417/supreme-court-religious-liberty-christian-right-revolution-amy-coney-barrett> [<https://perma.cc/J74R-WLQU>] (criticizing the Supreme Court for “leading a Christian conservative revolution”); Natalie Demaree, *Does Trump’s Anti-Christian Bias Executive Order Favor One Religion? What Experts Say*, MIA. HERALD (Apr. 29, 2025, at 13:59 ET), <https://www.miamiherald.com/news/nation-world/national/article300055854.html> [<https://perma.cc/EH4S-2FNP>] (citing Caroline Corbin, professor at the University of Miami School of Law, who “said the preference for Christianity seen in this context does raise constitutional problems about favoring one religion over another”).

318. See Guthrie Graves-Fitzsimmons & Maggie Siddiqi, *Christian Nationalism s ‘Single Biggest Threat’ to America’s Religious Freedom*, CTR. FOR AM. PROGRESS (Apr. 13, 2022), <https://www.americanprogress.org/article/christian-nationalism-is-single-biggest-threat-to-americas-religious-freedom>; see also Rob Boston, *A New Supreme Court Case Could Spur Christian Nationalist Meddling in Public Schools*, AM. UNITED FOR SEPARATION OF CHURCH & STATE (Jan. 21, 2025), <https://www.au.org/the-latest/articles/a-new-supreme-court-case-could-spur-christian-nationalist-meddling-in-public-schools/> [<https://perma.cc/U7QJ-H5UP>]; Jace Woodrum, *The Danger of Christian Nationalism*, ACLU S.C. (Nov. 13, 2023, at 12:45 ET), <https://www.aclusc.org/news/danger-christian-nationalism> [<https://perma.cc/F9VT-HP8M>].

319. Graves-Fitzsimmons & Siddiqi, *supra* note 318.

320. 593 U.S. 522 (2021).

321. 600 U.S. 570 (2023).

322. 593 U.S. 522 (2021).

323. *Id.* at 526–31.

the First Amendment rights of the foster care agency.³²⁴ This decision was narrow, however, limiting its scope and ability to be used to justify widespread discrimination against LGBTQ+ populations. In short, the decision was limited to the way the Court read Philadelphia's foster care contract.³²⁵

Then, in 2023, the Court ruled in favor of a Christian web designer who refused to create a website for same-sex weddings, holding that forcing her to do so would violate her First Amendment Rights.³²⁶ Depending on who you ask, this case either does or does not create a license to discriminate.³²⁷

The Court's 2024 term provided additional opportunities for the Court to either limit or expand religious freedoms in ways that could directly or indirectly impact the rights of LGBTQ+ persons.³²⁸ *Mahmoud v. Taylor* represented another closely watched First Amendment case.³²⁹ This case involved whether public schools burden parents' religious exercise when they compel elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out.³³⁰ The district court denied the parents' motion for a preliminary injunction, finding that the parents failed to demonstrate a cognizable burden to their religious freedom.³³¹ The parents filed an interlocutory appeal, and the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's denial.³³² In discussing the history of parental rights, the district court acknowledged that parents "no doubt . . . have substantial rights under the Due Process Clause," yet nevertheless concluded that "plaintiffs' asserted due process right to direct their children's upbringing by opting out of a public-school curriculum that conflicts with their religious views is not a fundamental right. Rational basis review is the appropriate level of scrutiny."³³³

This case provided a clear opportunity for the Court to continue its trend of opportunistic and ahistoric originalism, as the petitioners directly contended that

324. *Id.* at 542.

325. See Jacqueline J. Drohan, Christopher R. Riano, Joseph R. Williams & Sam Buchbauer, *Fulton v. City of Philadelphia: What It Really Means*, N.Y. ST. BAR ASS'N (July 9, 2021), <https://nysba.org/fulton-v-city-of-philadelphia-what-it-really-means> [<https://perma.cc/PRV7-SAX9>]; *Supreme Court Decision Does Not Create a License to Discriminate*, ACLU (June 17, 2021, at 11:15 ET), <https://www.aclu.org/press-releases/supreme-court-decision-does-not-create-license-discriminate> [<https://perma.cc/ZA8G-K6B4>].

326. *303 Creative*, 600 U.S. at 580, 603.

327. Compare David D. Cole, "We Do No Such Thing": *303 Creative v. Elenis and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 *YALE L.J. F.* 499, 524 (2024) ("The majority did not license identity-based discrimination, and the dissent did not suggest that states can require businesses to offer expressive services that they would not otherwise offer to anyone."), with Christopher J. Manettas, *A License to Discriminate? 303 Creative v. Elenis and Where the Supreme Court May Go*, 39 *TOURO L. REV.* 539, 552 (2024) (arguing that "[a] win for Ms. Smith [the wedding website designer] allows the Court to grant a license to discriminate, and such a license can lead to hatred, bigotry, and a country whose citizens are on an unequal playing field").

328. See also *infra* Section III.B.2 for a discussion of *United States v. Skrametti*.

329. 606 U.S. 522 (2025).

330. Petition for a Writ of Certiorari, at 1–2, *Mahmoud v. Taylor*, 606 U.S. 522 (2025) (No. 24-297).

331. *Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 301–02, 307 (D. Md. 2023).

332. *Mahmoud v. McKnight*, 102 F.4th 191, 217 (4th Cir. 2024).

333. *Mahmoud*, 688 F. Supp. 3d at 303, 306.

“[t]he Fourth Circuit’s rule—that parents essentially surrender their right to direct the religious upbringing of their children by sending them to public schools—contradicts centuries of our *history and traditions*. . . . [including] parents’ right to protect their children’s innocence and direct their religious upbringing.”³³⁴ It also provided yet another opportunity for the Court to justify discriminating against LGBTQ+ populations under the guise of religion.

On June 27, 2025, the Court handed down its decision in *Mahmoud*, reversing and remanding the case.³³⁵ In a 6–3 decision split along ideological lines, the Court held that the parents were entitled to a preliminary injunction because the school board’s policy posed “a very real threat of undermining” the religious beliefs and practices parents wish to instill.³³⁶ The Court also held that strict scrutiny applies.³³⁷ The majority did not use the terms “history and tradition” in its analysis, beyond mentioning the “enduring American tradition” of “recogniz[ing] the rights of parents to direct ‘the religious upbringing’ of their children.”³³⁸

Justice Thomas, concurring, went further with the history and tradition argument, illustrating the illogic of “history and tradition” originalism as applied and interpreted by certain members of the Court.³³⁹ As Justice Sotomayor noted in dissent, Justice Thomas “argues that the strict scrutiny analysis should require schools to identify a ‘history and tradition’ of teaching the relevant subject or material,” i.e., “LGBTQ+-inclusive teaching.”³⁴⁰ Justice Sotomayor astutely notes the illogic of using this test when reviewing educational policies, as it

[F]ails to appreciate the constantly evolving nature of education. Classes on computer literacy, robotics, and film studies, to take just a few examples, are modern developments. In the early 19th century, moreover, “the common curriculum usually included a handful of elementary subjects,” such as “reading, writing, and arithmetic.” Under Justice Thomas’s test, it appears, schools may have no compelling interest in teaching anything beyond those topics.³⁴¹

According to Justice Sotomayor, “[i]t is not clear, either, how far back Justice Thomas would have courts look.”³⁴² For example, she queried, “[s]hould courts limit their inquiry to the founding era or the 19th century for guidance on which topics schools have a sufficiently compelling interest in teaching for purposes of this ‘history and tradition’ test?”³⁴³ We see her warnings as prescient, particularly as “[i]t is inconceivable that learning should be shackled to a moment in time.”³⁴⁴

334. Petition for a Writ of Certiorari at 3, *Mahmoud v. Taylor*, 606 U.S. 522 (2025) (No. 24-297) (emphasis added).

335. *Mahmoud v. Taylor*, 606 U.S. 522, 570 (2025).

336. *Id.* at 543 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

337. *Id.* at 565.

338. *Id.* at 547 (quoting *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 486 (2020)).

339. *Id.* at 580–592 (Thomas, J., concurring).

340. *Id.* at 628 n.16 (Sotomayor, J., dissenting).

341. *Id.* (quoting *W. REESE, AMERICA’S PUBLIC SCHOOLS* 28 (2005)).

342. *Id.*

343. *Id.*

344. *Id.*

Future cases involving LGBTQ+ rights,³⁴⁵ in which the Court may or may not engage in an originalist analysis, raise the question: If the Court were truly and honestly originalist, does the Constitution—either by original text or intent—support the notion that the First Amendment’s protection for freedom of expression provides a “‘free pass’ for discrimination?”³⁴⁶ We have elsewhere answered a similar question in the negative, arguing that conscientious refusal laws involving abortion, contraception, and other healthcare services amount to religious-based discrimination that targets sex and penalizes pregnant and contraceptive-seeking women based on their status.³⁴⁷ This “carv[es] out unconstitutional distinctions between men and women,” which “undermines women’s constitutional rights to be treated as equal citizens, secure in their bodies. . . . [T]he Free Exercise Clause does not create an exception nor does it grant a right to impose harmful conditions and injuries on others, including women.”³⁴⁸ The same or similar argument could be applied to religion as a basis for discrimination against LGBTQ+ communities.

2. Gender-Affirming Care

In future terms, the Court may be asked to address the issue of parental rights and gender-affirming care, giving the Court another opportunity to engage or not engage in originalism. Its decision on this point may further illustrate the opportunistic nature of the Court’s choice of judicial theory. This future opportunity is due to the Court’s June 2025 decision in *United States v. Skrmetti*, which did *not* address the parental rights questions involved in a Tennessee ban on certain medical treatments for transgender minors.³⁴⁹ Instead, that case was limited to whether the law violated the Equal Protection Clause of the Fourteenth Amendment.³⁵⁰ On June 18, 2025, by a 6–3 vote along ideological lines, the Court upheld Tennessee’s ban on gender-affirming care for minors, concluding that it does not

345. The Supreme Court has agreed to hear a case concerning state laws that ban transgender athletes from participating in sports aligned with their gender identity and will address whether such bans violate the Fourteenth Amendment’s Equal Protection Clause or Title IX. See Amy Howe, *Supreme Court Agrees to Hear Cases on Transgender Athletes*, SCOTUSBLOG (July 3, 2025), <https://www.scotusblog.com/2025/07/supreme-court-agrees-to-hear-cases-on-transgender-athletes> [<https://perma.cc/RE9H-FP7V>]. And as this Article was being finalized, the Court handed down its decision in *Chiles v. Salazar*, holding that Colorado’s law banning conversion therapy, as applied to the petitioner’s talk therapy, regulated speech based on viewpoint. The Court remanded the case back to the lower courts to apply a new standard—strict scrutiny—to determine whether the law violates the First Amendment as applied to the petitioner. *Chiles v. Salazar*, No. 24-539 (Mar. 31, 2026). In doing so, the “Court also strongly hinted that the ban would fail that test.” Amy Howe, *Supreme Court Sides With Therapist in Challenge to Colorado’s Ban on “Conversion Therapy”*, SCOTUSBLOG (Mar. 31, 2026), <https://www.scotusblog.com/2026/03/supreme-court-sides-with-therapist-in-challenge-to-colorados-ban-on-conversion-therapy/> [<https://perma.cc/N4AB-PLNJ>].

346. Goodwin & Whelan, *supra* note 26, at 1322.

347. *See id.*

348. *Id.* at 1293; *see also* Emily London & Maggie Siddiqi, *Religious Liberty Should Do No Harm*, CTR. FOR AM. PROGRESS (Apr. 11, 2019), <https://www.americanprogress.org/article/religious-liberty-no-harm> [<https://perma.cc/D4AC-5WWR>].

349. *See generally* *United States v. Skrmetti*, 605 U.S. 495 (2025).

350. Question Presented, *United States v. Skrmetti*, No. 23-477, <https://www.supremecourt.gov/qp/23-00477qp.pdf>.

discriminate on the basis of sex, is not subject to heightened scrutiny, and survives rational basis review.³⁵¹

The challengers in this case were three transgender minors receiving gender-affirming care.³⁵² These teens, along with their parents and a doctor who treats transgender patients, filed the lawsuit against Tennessee officials.³⁵³ The Biden Administration joined the case under a federal law that allows the government to intervene in private cases alleging violations of equal protection.³⁵⁴ The district court ruled that the challengers lacked standing to contest the state's ban on gender-transition surgery because none had indicated they wanted or sought to undergo such surgeries, but the court put the rest of the ban on hold while litigation continued. In doing so, the court agreed that (1) "parents have a fundamental right to direct the medical care of their children, which naturally includes the right of parents to request certain medical treatments on behalf of their children;"³⁵⁵ and (2) the ban violated the Equal Protection Clause of the Fourteenth Amendment because it prohibited medical procedures for transgender adolescents that it would allow for other non-transgender adolescents.³⁵⁶

A divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed the district court and reinstated the Tennessee ban.³⁵⁷ The Supreme Court granted certiorari to address whether the Tennessee law, "which prohibits all medical treatments intended to allow 'a minor to identify with, or live as, a purported identity inconsistent with the minor's sex' or to treat 'purported discomfort or distress from a discordance between the minor's sex and asserted identity' . . . violates the Equal Protection Clause of the Fourteenth Amendment."³⁵⁸

In the courts below, the minors' parents alleged that the law violated their fundamental rights as parents to direct the medical care of their minor children.³⁵⁹ The district court held that the parents were likely to succeed on that claim,³⁶⁰ but because the United States intervened under a law that applies to suits "seeking relief from the denial of equal protection of the laws," the Court would not address that separate due process claim.³⁶¹ Perhaps ironically, the government's intervention in this case may have hurt, rather than helped, the petitioner's

351. See *Skrmetti*, 605 U.S. at 510, 522.

352. *Id.* at 507; Petition for Writ of Certiorari at 10, *United States v. Skrmetti*, 605 U.S. 495, No. 23-477.

353. L.W. *ex rel.* *Williams v. Skrmetti*, 83 F.4th 460, 469 (6th Cir. 2023).

354. *Skrmetti*, 605 U.S. at 507–08.

355. L.W. *ex rel.* *Williams v. Skrmetti*, 679 F. Supp. 3d 668, 684 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023).

356. *Id.* at 698.

357. *Skrmetti*, 83 F.4th at 491.

358. Question Presented, *United States v. Skrmetti*, No. 23-477, <https://www.supremecourt.gov/qp/23-00477qp.pdf> [<https://perma.cc/T34U-NBAC>].

359. *Skrmetti*, 679 F. Supp. at 680.

360. *Id.* at 685.

361. The Attorney General only has the authority to intervene in an equal protection case. See 42 U.S.C. § 2000h-2.

case.³⁶² Given the current Court’s alleged adherence to originalism, which arguably should include adherence to a long history and jurisprudence of respecting a parent’s right to control the “care” and “custody” of their children—as alluded to by the majority in *Mahmoud*³⁶³—the parental rights argument may have stood a better chance of acceptance by the Court.

Yet if or when the Court considers whether the Constitution protects a parent’s right to decide whether their child can obtain gender-affirming care, the Court’s opportunistic originalism may not necessarily bode well for parents and their children who seek access to such care, as illustrated by the Sixth Circuit’s decision in *Skrmetti*.³⁶⁴ As noted by Professor Reva Siegel, “[c]onservative judges now deploying *Dobbs* in the federal courts show they understand its history-and-tradition method is an instrument for achieving conservative ends.”³⁶⁵ In reversing the district court’s decision in *Skrmetti*, for example, the Sixth Circuit held that “[p]arental rights do not alter this conclusion because parents do not have a constitutional right to obtain reasonably banned treatments for their children.”³⁶⁶ The court acknowledged that,

At one level of generality, [plaintiffs] are right. Parents usually do know what’s best for their children But becoming a parent does not create a right to reject democratically enacted laws. The key problem is that the claimants overstate the parental right by climbing up the ladder of generality to a perch—in which the parents control all drug and other medical treatments for their children—that the case law and our traditions simply do not support.³⁶⁷

362. After taking office, the Trump Administration notified the Supreme Court that it was no longer contesting the Tennessee law, stating, “The Department [of Justice] has now determined that [the Tennessee law] does not deny equal protection on account of sex or any other characteristic. Accordingly, the new Administration would not have intervened to challenge [the law]—let alone sought this Court’s review of the court of appeals’ decision reversing the preliminary injunction against [the law].” Letter from Curtis E. Gannon, Deputy Solicitor General, to Hon. Scot S. Harris, Clerk, Supreme Court of the United States (Feb. 7, 2025), https://www.supremecourt.gov/DocketPDF/23/23-477/342223/20250207133625781_Letter%2023-477.pdf [<https://perma.cc/3GPK-VAQN>]. The government nevertheless “counsel[ed] against seeking to dismiss its case” because, among other reasons, “[t]he Court’s prompt resolution of the question presented will bear on many cases pending in the lower courts.” *Id.*

363. See *Mahmoud v. Taylor*, 606 U.S. 522, 546 (2025) (“[W]e have long recognized the rights of parents to direct ‘the religious upbringing’ of their children.” (quoting *Espinoza v. Montana Dep’t. of Revenue*, 591 U.S. 464, 486 (2020))); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *Wisconsin v. Yoder*, 406 U.S. 205, 207–08, 234–35 (1972) (holding that Wisconsin’s compulsory education law violated an Amish father’s right to remove his fourteen- and fifteen-year-old children from school to complete their education in Amish ways at home); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530, 534–35 (1925) (striking down an Oregon statute requiring children to attend public schools, reasoning it interfered with parent’s right to select private or parochial schools).

364. *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023).

365. Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs’s Method (and Originalism) in the Defense of Segregation*, 133 *YALE L.J. F.* 99, 145 (2023).

366. *Skrmetti*, 83 F.4th at 475.

367. *Id.*

In the coming weeks, months, and years, lower courts, and likely the Supreme Court, will be asked to address these unresolved issues, as well as the numerous executive orders issued by Trump that impact the LGBTQ+ population, giving the Court the opportunity to illustrate whether or not it will uphold the rule of law.³⁶⁸

C. VOTING RIGHTS

The Fifteenth Amendment of the U.S. Constitution—the final of the Reconstruction Amendments—declares that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”³⁶⁹ The legislative history surrounding the Reconstruction Amendments reveals that their framers harbored a deliberate, if contested, intent to expand political participation to formerly enslaved African Americans and to fundamentally alter the racial hierarchy that had characterized American democracy since its founding.³⁷⁰

The congressional debates preceding the adoption of the Fifteenth Amendment illuminate the transformative aspirations of the Radical Republicans who championed voting rights for Black citizens.³⁷¹ During the debates in the 40th and 41st Congresses, proponents of Black suffrage articulated both pragmatic and principled justifications for extending the franchise. Senator Edmund Ross argued that without the ballot, the freedmen would remain vulnerable to the “machinations” of enslavement, lacking any meaningful mechanism to protect their newly recognized rights.³⁷² Senator William Stewart similarly contended that suffrage constituted “the only measure that will really abolish slavery” by providing formerly enslaved persons with the political power necessary to safeguard their freedom.³⁷³ These statements reflect a legislative intent not merely to prohibit explicit racial discrimination in voting, but to affirmatively secure political power for a population that had been systematically excluded from the polity.

368. For a list and discussion of the various orders that impact LGBTQ+ populations, see, for example, sources cited *supra* note 303; Ricardo Martinez, *Making Sense of the Trump Administration's Anti-LGBTQ+ Executive Orders*, GLAD L. (Feb. 4, 2025), <https://www.glad.org/making-sense-of-the-trump-administrations-anti-lgbtq-executive-orders> [<https://perma.cc/DE7B-QGX7>]; Geoff Mulvihill, *6 Ways Trump's Executive Orders Are Targeting Transgender People*, PBS: NEWSHOUR (Feb. 1, 2025, at 16:01 EDT), <https://www.pbs.org/newshour/politics/6-ways-trumps-executive-orders-are-targeting-transgender-people> [<https://perma.cc/5FB6-9M88>]; *Trump Anti-LGBTQ+ Executive Order Litigation Tracker*, NAT'L LGBTQ+ BAR ASS'N, <https://lgbtqbar.org/programs/trump-executive-order-tracker> [<https://perma.cc/Q3C6-4UHC>] (last visited Mar. 29, 2026).

369. U.S. CONST. amend. XV, § 1.

370. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 115–42 (1988); XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910*, at 23–45 (1997) (discussing the history leading up the Fourteenth Amendment and the aims of the Amendment's key supporters).

371. WANG, *supra* note 370, at 2 (describing “radical Republicans” as those who “argued that the existence of slavery and legal discrimination against blacks contradicted the republican principle that government was founded on the consent of the governed”).

372. CONG. GLOBE, 40th Cong., 3d Sess. 983 (1869) (statement of Sen. Ross).

373. CONG. GLOBE, 40th Cong., 3d Sess. 668 (1869) (statement of Sen. Stewart).

The Amendment, however, as ultimately ratified, employed negative rather than affirmative language, prohibiting discrimination on specific grounds rather than positively guaranteeing the right to vote.³⁷⁴ This choice thus preserved some state control over voter qualifications, provided such qualifications did not explicitly invoke race, color, or previous servitude. Voting rights thus remain subject to attack from a variety of angles, giving federal courts, including the Supreme Court, ample opportunity to defend or curtail fair representation for all Americans, regardless of race. As articulated by the Brennan Center for Justice,

Over the last 20 years, states have erected barriers to the ballot box by imposing strict voter ID laws, cutting early voting times, restricting registration, and purging voter rolls too aggressively. These efforts received a boost when the Supreme Court weakened the Voting Rights Act in 2013, and they've surged since the 2020 election. Such antidemocratic measures have kept significant numbers of eligible voters from the polls, especially among racial minorities, poor people, and young and old voters.³⁷⁵

And while voting rights established in the Constitution and bolstered by the Voting Rights Act (VRA) of 1965³⁷⁶ have been under near constant attack for decades, a new era began in 2013, when the Supreme Court issued its decision in *Shelby County v. Holder*.³⁷⁷ In that case, the Court struck down the VRA's "preclearance process" used to determine which states and localities should be required to obtain permission from the federal government before implementing changes to voting policies to ensure that they are not racially discriminatory.³⁷⁸ The impact of that decision was immediate. On the same day the Court released its decision, Texas announced it would implement the most restrictive voter identification law, which had been blocked by the VRA's pre-clearance requirement.³⁷⁹ And while that law would later be struck down as racially

374. U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

375. *Voter Suppression: Why It Matters*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voter-suppression> [<https://perma.cc/MR75-M7SH>] (last visited Mar. 29, 2026).

376. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965).

377. 570 U.S. 529 (2013).

378. *Id.* at 537–38, 557. The preclearance requirement applied to "[s]tates or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election." *Id.* at 537. Put more plainly, preclearance was likely to apply to certain jurisdictions with a history of discriminatory voting practices.

379. *Effects of Shelby County v. Holder on the Voting Rights Act*, BRENNAN CTR. FOR JUST., (June 21, 2023), <https://www.brennancenter.org/our-work/research-reports/effects-shelby-county-v-holder-voting-rights-act> [<https://perma.cc/W4FQ-459V>]; Jasleen Singh & Sara Carter, *States Have Added Nearly 100 Restrictive Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, BRENNAN CTR. FOR JUST. (June 23, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights> [<https://perma.cc/M9MF-CJLB>].

discriminatory,³⁸⁰ it was the first of many state laws restricting voting rights and the first in a series of Supreme Court cases that would curtail protections for voting rights.³⁸¹

The Court's most recent review of voting rights, *Louisiana v. Callais*, assesses a pair of appeals for a district court decision that "struck down a map that created a second majority-Black congressional district in [Louisiana]."³⁸² A group of self-described "non-African American" voters challenged a 2024 map that created a second majority-Black district in the state.³⁸³ They argued that the new map was an unconstitutional racial gerrymander because it sorted voters primarily based on race.³⁸⁴ A three-judge federal district court agreed and barred the state from using the map in future elections.³⁸⁵ The Supreme Court put the district court's decision on hold, allowing the map to be used in the 2024 election.³⁸⁶ The Court announced on June 27, 2025, that it would not decide this term whether Louisiana violated the Constitution when it enacted the congressional map.³⁸⁷ The Justices will hear new arguments in the case during the Court's 2025–2026 term, and did not give a reason for their decision not to resolve the dispute this term.³⁸⁸

Shelby County and the Court's other recent voting rights cases provide another opportunity to analyze the Court's opportunistic originalism and mis- or dis-remembering of the Reconstruction Amendments, namely, the Fifteenth Amendment. In the majority and dissenting opinions, we see constitutional interpretation at work. The majority and dissent focus on interpretations of the Tenth and Fifteenth Amendments, respectively, with the majority holding that portions of the VRA violated the Tenth Amendment's principle of "equal sovereignty" among the states,³⁸⁹ and the dissent arguing that the original public understanding of the Fifteenth Amendment's "appropriate legislation" provision empowered Congress to abrogate that sovereignty.³⁹⁰

Chief Justice Roberts' *Shelby County* opinion has been criticized as "ahistoric" and accused of "flout[ing] the text and history of the Fifteenth Amendment, which expressly gives to Congress broad powers to prevent and deter all forms of

380. Singh & Carter, *supra* note 379; *see also* Veasey v. Abbott, 830 F.3d 216, 265 (5th Cir. 2016) (finding that SB 14 has a "discriminatory effect on minorities' voting rights in violation of Section 2 of the Voting Rights Act").

381. *See Effects of Shelby County v. Holder on the Voting Rights Act*, *supra* note 379.

382. Amy Howe, *Supreme Court Will Hear Case on Second Majority-Black District in Louisiana Redistricting*, SCOTUSBLOG (Nov. 4, 2024), <https://www.scotusblog.com/2024/11/supreme-court-will-hear-case-on-second-majority-black-district-in-louisiana-redistricting> [<https://perma.cc/6ELF-NWVS>].

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. Amy Howe, *Supreme Court Punts Decision on Louisiana's Congressional Map to Next Term*, SCOTUSBLOG (June 27, 2025), <https://www.scotusblog.com/2025/06/supreme-court-punts-decision-on-louisianas-congressional-map-to-next-term> [<https://perma.cc/ZUK7-63QK>].

388. *Id.*

389. *See Shelby County v. Holder*, 570 U.S. 529, 544 (2013).

390. *See id.* at 567–68 (Ginsburg, J., dissenting).

racial discrimination in voting.”³⁹¹ Professor Richard Hasen, an expert in election law and voting, astutely points out that the majority opinion fails to appreciate how Reconstruction Amendments “changed the state-federal balance of power and the scope of the Tenth Amendment.”³⁹² The majority ignores “this crucial history” and instead

[P]laces almost all of its doctrinal weight on the Tenth Amendment and the view that the Tenth Amendment protects not just state sovereignty—absent *specific* federal power otherwise recognized in the Constitution—but also a principle of “*equal* sovereignty,” requiring Congress to treat all states the same absent some compelling reason . . . [This] argument simply highlights the ahistoricism of the *Shelby County* majority. Not only does the Court fail to point to anything in the history of the Tenth Amendment which requires that all states be treated equally, the [Reconstruction] amendments betray a history requirement of equal treatment—former slave and confederate states needed to do much more to assure equality on the basis of race in voting than the other states.³⁹³

In an apparent attempt to promote the conservative originalist ideal of a “color-blind” or “race-neutral” Constitution,³⁹⁴ the Court engages in opportunistic and ahistoric originalism that, in reality, runs roughshod over the original intent of the Reconstruction Amendments.

IV. REMEMBERING AND RECLAIMING THE RECONSTRUCTION

This Article advocates for a distinctive mixed methodology of judicial review that utilizes a historically rooted, empirically rigorous, and justice-centered constitutional interpretation. Like mixed methods in sociological review that bring together results from both qualitative and quantitative studies within the same study, the application of dual approaches in jurisprudence would achieve important goals.³⁹⁵ In sociology, mixed qualitative and quantitative methods result in a sharpened understanding of both the scope and scale of laws and policies.³⁹⁶ It elevates the lived and real-world experiences of those subjected to laws and

391. *CAC Reacts to Supreme Court Opinion Striking Down Part of Iconic Voting Rights Act*, CONST. ACCOUNTABILITY CTR. (June 25, 2013), <https://www.theusconstitution.org/news/cac-reacts-to-supreme-court-opinion-striking-down-part-of-iconic-voting-rights-act-2> [<https://perma.cc/4FKL-5FHU>].

392. Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL OF RTS. J. 713, 732 (2014).

393. *Id.*

394. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 232, 242 (2023) (Thomas, J., concurring) (“[W]rit[ing] separately to offer an originalist defense of the colorblind Constitution.”).

395. See Alysia Blackham, *When Law and Data Collide: The Methodological Challenge of Conducting Mixed Methods Research in Law*, 49 J.L. & SOC’Y 87, 88 (2022) (defining mixed methods methodology).

396. See Khadijah Mohamed, *Combining Methods in Legal Research*, 11 SOC. SCIS. 5191, 5194 (2016) (explaining that using social science research methods can lead to a more nuanced understanding of the impact of various laws and policies in society).

conditions, examining motivations and revealing complexity while also providing data-driven analysis that provides for measurement, comparison, forecasting, and prediction. Our approach to judicial mixed methods equally recognizes the complexity of social and legal problems.

This project initiates this theoretical framework. We concede from the start that our project does not attempt the work of micro-level delineation. Subsequent articles and essays will lay additional flesh to the anatomy we offer here. This Article identifies and builds the preliminary foundation for future scholarship based on both mixed-method and constitutional review. At its core, it takes up constitutional experimentation and innovation much like the drafters of “originalism” and strict “intentionalism.”

In Section IV.A, we briefly address prominent approaches or methods to judicial review. In Section IV.B, we describe and analyze mixed methods as a tool to address and study complex problems. In Section IV.C, we turn to mixed methods for judicial review.

A. CONSTITUTIONAL APPROACHES TO JUDICIAL REVIEW

There are multiple approaches to judicial review, and we, for purposes of this Article, do not advocate that one method should necessarily dominate. We propose the recentering of Reconstruction history to inform judicial review not as a restraint on judges, but rather as a critically important source of information and an urgently needed moral foundation for American judicial review. The period prior to Reconstruction revealed America’s blights: slavery;³⁹⁷ white supremacy;³⁹⁸ horrific,

397. See generally SLAVERY’S CAPITALISM, *supra* note 233; ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974) (providing an illuminating and rigorous account of the economics of American slavery); RICHARD C. WADE, SLAVERY IN THE CITIES: THE SOUTH, 1820–1860 (1967) (detailing enslavement in southern cities, expanding the sociological and anthropological literature on slavery to urban environments); JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH (1972) (documenting social, political, and cultural aspects of slavery, providing an empirical account of violence and hardships inflicted on Blacks in the Antebellum south); Austin Steward, *Twenty-Two Years a Slave, and Forty Years a Freeman*, in NATIONAL HUMANITIES CENTER RESOURCE TOOLBOX, “SHOULD ANYONE VENTURE TO DISOBEY THIS LAW”: SLAVES AND THE SLAVE PATROL, 1 THE MAKING OF AFRICAN AMERICAN IDENTITY 1, 1 (2007) (“Slaves are never allowed to leave the plantation to which they belong, without a written pass. Should anyone venture to disobey this law, he will most likely be caught by the *patrol* and given thirty-nine lashes. This patrol is always on duty every Sunday, going to each plantation under their supervision, entering every slave cabin, and examining closely the conduct of the slaves; and if they find one slave from another plantation without a pass, he is immediately punished with a severe flogging.”).

398. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 150–51 (1785) (“I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind This unfortunate difference of [color], and perhaps of faculty, is a powerful obstacle to the emancipation of these people.”); FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 2 (1855) (“Not only is slavery on trial, but unfortunately, the enslaved people are also on trial. It is alleged, that they are, naturally, inferior; that they are [*so low*] in the scale of humanity, and so utterly stupid, that they are unconscious of their wrongs, and do not apprehend their rights.”); ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 214–15 (2006) (“Even the most gentlemanly and prominent owners inflicted brutal, often sadistic punishments.”).

normalized acts of sexual violence routinely inflicted on enslaved Black women and girls;³⁹⁹ and colonialism,⁴⁰⁰ its multiple trails of tears,⁴⁰¹ and the eradication of Indigenous tribes.⁴⁰² Reconstruction did not serve as a permanent salve or fix to the concerns that preceded the Civil War. Certain contemporary civil rights, civil liberties, and human rights concerns were not acknowledged, addressed, or resolved at

399. See, e.g., HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 22 (Univ. N.C. at Chapel Hill 2003) (L. Maria Child ed., 1861) (a memoir detailing life as an enslaved girl, including being bequeathed as a child to a five-year old child as a gift, and exposing the sexual assaults and physical violence inflicted on the enslaved girl: “My young mistress was still a child, and I could look for no protection from her”).

400. See, e.g., Matthew L.M. Fletcher, *The Law of Genocide and Indigenous Peoples*, 77 NAT’L LAWS. GUILD REV. 38, 39 (2020) (reviewing LAURELYN WHITT AND ALAN W. CLARKE, NORTH AMERICAN GENOCIDES: INDIGENOUS NATIONS, SETTLER COLONIALISM, AND INTERNATIONAL LAW (2019)) (highlighting multiple ways in which the United States attempted to eradicate Indigenous tribes including “implement[ing] a land allotment scheme that divested American Indian nations of more than two-thirds of their lands” in the latter half of the nineteenth century); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006) (“The restrictive racial classification of Indians straightforwardly furthered the logic of elimination. . . . The logic of elimination not only refers to the summary liquidation of Indigenous people, though it includes that. In common with genocide as Raphaël Lemkin characterized it, settler colonialism has both negative and positive dimensions. Negatively, it strives for the dissolution of native societies. . . . In its positive aspect, elimination is an organizing principal of settler-colonial society rather than a one-off (and superseded) occurrence.”); Angelique Townsend EagleWoman (Wambdi A. WasteWin), *The Ongoing Traumatic Experience of Genocide for American Indians and Alaska Natives in the United States: The Call to Recognize Full Human Rights as Set Forth in the UN Declaration on the Rights of Indigenous Peoples*, 3 AM. INDIAN L.J. 424, 431 (2015) (“In a letter dated September 7, 1783 from George Washington to James Duane following the colonial rebellion from Great Britain, Washington set forth his views on how to establish new western states as part of the United States and at the same time to claim those lands from Native Americans.”); Angelique Townsend EagleWoman (Wambdi A. WasteWin), *Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms*, 39 WM. MITCHELL L. REV. 486, 517 (2013) (describing the lynching of dozens of Dakota Sioux men); Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 32–37 (1990) (describing the horrific executions of Dakota men, and the events leading up to their deaths).

401. See Rebecca Onion, *America’s Other Original Sin*, SLATE (Jan. 18, 2016, at 05:30 ET), https://www.slate.com/articles/news_and_politics/cover_story/2016/01/native_american_slavery_hist_rians_uncover_a_chilling_chapter_in_u_s_history.html [<https://perma.cc/89Z4-X8NW>] (“In 1741, an 800-foot-long coffle of recently enslaved Sioux Indians, procured by a group of Cree, Assiniboine, and Monsoni warriors, arrived in Montreal, ready for sale to French colonists hungry for domestic and agricultural labor. And in 1837, Cherokee Joseph Vann, expelled from his land in Georgia during the era of Indian removal, took at least 48 enslaved black people along with him to Indian Territory.”); *Thomas Jefferson, to William Henry Harrison, 27 February 1803*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-39-02-0500> [<https://perma.cc/R2AL-G7HY>] (last visited Mar. 29, 2026). (“[T]o promote this disposition to exchange lands which they have to spare [and] we want, for necessities, . . . we shall push our trading houses, and be glad to see the good [and] influential individuals among them run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop th[em off] by a cession of lands”); Howard J. Vogel, *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland*, 39 WM. MITCHELL L. REV. 538, 546 (2013) (highlighting multiple treaties that lead to “great cession[s]” of land for the Dakota that ultimately led to their inability to sustain themselves).

402. See *supra* note 400 and accompanying text.

the time. For women, this includes concerns related to physical and sexual violence and reproductive servitude.

That said, engagement with the Reconstruction promotes a more honest and accurate judicial review. A Reconstruction-centered mixed-method approach lends itself toward incorporation with other constitutional review approaches, whether pragmatic constitutionalism,⁴⁰³ living constitutionalism,⁴⁰⁴ prudence and consequences,⁴⁰⁵ or other methods of judicial review as briefly described below.

1. Pragmatic Constitutionalism

Pragmatic constitutionalism examines the potential effects or real-world consequences of a judicial decision.⁴⁰⁶ Its principal characteristics include “an insistence that judicial review can and should be undertaken with close reference to active liberty and to democratic goals,”⁴⁰⁷ “the need to evaluate theories of legal interpretation with close reference to their consequences,”⁴⁰⁸ “an emphasis on the centrality of ‘purposes’ to legal interpretation,”⁴⁰⁹ the search for the optimal outcome,⁴¹⁰ and a belief in the adaptability of the Constitution to address modern problems and concerns.⁴¹¹ According to constitutional pragmatists, law should not be bound to strictures of the past, which are not well-suited to address contemporary problems. For example, “[i]n contrast to textualist and some originalist approaches to constitutional interpretation, which generally focus on how the

403. See generally STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* (2024) (arguing for a method of constitutional interpretation that focuses on real-world outcomes and practical consequences over a textualist approach).

404. See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION (INALIENABLE RIGHTS)* (2010) (arguing for a method of constitutional interpretation that evolves with changing times rather than strictly follows the Founders’ original intent); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U.L. REV. 1243 (2019) (analyzing the definitional and conceptual differences between originalism and living constitutionalism).

405. See Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 2 (1993) (“The basic idea is this: because constitutional norms represent the political beliefs of the American people, those norms bear a comparative strategic advantage to ones we might select through more abstract processes, such as moral philosophy or economic analysis.”).

406. Cass R. Sunstein, *Justice Breyer’s Democratic Pragmatism*, 115 YALE L.J. 1719, 1719–20 (2006) (explaining that Justice Breyer’s pragmatism was influenced by his important work as an administrative law professor. According to Sunstein, “[o]ne of Breyer’s major innovations lay in an insistence on evaluating traditional doctrines not in a vacuum, but in light of the concrete effects of regulation on the real world”).

407. *Id.* at 1720.

408. *Id.*

409. *Id.*

410. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 5 (1982) (“The framework is built upon a simple axiom for creating and implementing any program: determine the objectives, examine the alternative methods of obtaining these objectives, and choose the best method for doing so.”); BRANDON J. MURRILL, *CONG. RSCH. SERV., LSB10679, THE MODES OF CONSTITUTIONAL ANALYSIS: PRAGMATISM (PART 5)* 1 (2021) (“One flavor of pragmatism weighs the future costs and benefits of an interpretation to society or the political branches, selecting the interpretation that may lead to the perceived best outcome.”).

411. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 34 (2006) (“[T]his constitutional understanding helps interpret the Constitution—in a way that helps to resolve problems related to modern government.”).

words of the Constitution are understood, pragmatist approaches consider the likely practical consequences of particular interpretations of the Constitution.⁴¹²

Pragmatic constitutionalists prioritize examination of the concrete externalities that emerge from their decisions.⁴¹³ They do not rely solely on text in their judicial review, nor on historical intent.⁴¹⁴ Instead, they consider the impact their decisions might have on society, the economy, the environment, and politics. This method of review, often associated with Justice Stephen Breyer, has been described as flexible and adaptable.⁴¹⁵

Cases such as *United States v. Leon*⁴¹⁶ and *Baker v. Carr*⁴¹⁷ have been described as rooted in pragmatic constitutionalism.⁴¹⁸ *Leon* represents the “flavor of pragmatism [that] weighs the future costs and benefits of an interpretation to society or the political branches, selecting the interpretation that may lead to the perceived best outcome.”⁴¹⁹ In *Leon*, the 6–3 majority held that the exclusionary rule, which bars the admission of illegally obtained evidence in a criminal trial, must be balanced against potential harms to society.⁴²⁰ According to the Court,

[i]f a single principle may be drawn from this Court’s exclusionary rule decisions, from *Weeks v. United States* through *Mapp v. Ohio* . . . to the decisions handed down today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.⁴²¹

In other words, to the Court, the “marginal or nonexistence benefits produced by” adopting a broader or indiscriminate application exclusionary rule “cannot justify the substantial costs of exclusion.”⁴²² These costs include allowing “some guilty defendants [to] go free or receive reduced sentences” and “disrespect for the law and administration of justices.”⁴²³ Yet, as noted in his dissent, Justice Brennan

412. MURRILL, *supra* note 410, at 1.

413. See Sunstein, *supra* note 406, at 1720.

414. See BREYER, *supra* note 411, at 18 (highlighting Justice Breyer’s view that “[s]ince law is connected to life, judges, in applying a text in light of its purpose, should look to *consequences*, including ‘contemporary conditions, social, industrial, and political, of the community to be affected’” (citations omitted)).

415. See Paul Gerwitz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1676 (2006) (describing how Justice Breyer’s “behavior as a judge” illustrates a view that “[j]udging is a pragmatic and purposeful activity in which interpretation and decision must always be attentive to the purposes of legal provisions, the multiplicity of factors involved in specific cases, and the practical consequences of judicial decisions, and should not focus exclusively on textual exegesis and uncovering original understandings”).

416. 468 U.S. 897, 926 (1984).

417. 369 U.S. 186, 226 (1962).

418. MURRILL, *supra* note 410, at 1.

419. *Id.* at 13.

420. See *Leon*, 468 U.S. at 913.

421. *Id.* at 928.

422. *Id.* at 922.

423. *Id.* at 907–08.

reminded the Court that “[w]hen such faulty scales are used, it is little wonder that the balance tips in favor of restricting the application of the rule.”⁴²⁴

In *Baker*, the Court addressed whether the Supreme Court had jurisdiction on matters related to state legislative apportionment,⁴²⁵ illustrating the pragmatist approach that “consider[s] the extent to which the judiciary [should] play a constructive role in deciding [] question[s] of constitutional law.”⁴²⁶ The case concerned the claims of certain Tennessee voters, who argued that their votes were diluted under a 1901, Jim Crow-era law.⁴²⁷ The voters argued that the Tennessee legislature neglected to reapportion the state’s districts consistent with the state’s constitution, thereby denying them “equal protection of the laws accorded them by the Fourteenth Amendment . . . by virtue of the debasement of their votes.”⁴²⁸ In a 6–2 decision, the Court held that it had authority to review the question presented in the case and that legislative apportionment was a justiciable issue subject to Equal Protection analysis.⁴²⁹

In an opinion written by Justice Brennan, he explained, “[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if, on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”⁴³⁰ The majority held that “[a]n unbroken line of our precedents sustains the federal courts’ jurisdiction of the subject matter of federal constitutional claims of this nature.”⁴³¹ Justice Frankfurter, in dissent, took the opposite view, emphasizing the importance of “avoiding federal judicial involvement in matters traditionally left to legislative policy making.”⁴³²

As we explain in Section IV.C, a Reconstruction-grounded approach to judicial review is distinct and furthers the pursuit of justice, while showing respect for the rule of law. Unlike opportunistic originalism, it acknowledges history as a guide rather than wielding it as a sword. Its principles draw from Reconstruction constitutionalism, which anchored equality, due process, liberty, and freedom as part of its core. The first part provides important context about the mixed methods approach and then proposes application of that methodology to judicial review.

424. *Id.* at 951 (Brennan, J., dissenting); *see also id.* at 950 (“[R]ecent studies have demonstrated that the ‘costs’ of the exclusionary rule—calculated in terms of dropped prosecutions and lost convictions—are quite low. Contrary to the claims of the rule’s critics that exclusion leads to ‘the release of countless guilty criminals,’ . . . these studies have demonstrated that federal and state prosecutors very rarely drop cases because of potential search and seizure problems.” (citation omitted)).

425. *Baker v. Carr*, 369 U.S. 186, 198–204 (1962).

426. MURRILL, *supra* note 410, at 14.

427. *See Baker*, 369 U.S. at 192–95.

428. *Id.* at 187–95.

429. *Id.* at 186.

430. *Id.* at 226.

431. *Id.* at 201.

432. *See id.* at 277 (Frankfurter, J., dissenting); *see also id.* at 267 (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”).

2. Living Constitutionalism

Living constitutionalism is a theory of constitutional interpretation imbued with the principle that it is the people who give meaning to the Constitution.⁴³³ As such, constitutional meaning should evolve over time to meet the demands and interests of society and the circumstances that govern their lives. In other words, a living Constitution “is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.”⁴³⁴ According to David Strauss, “there’s no realistic alternative to a living Constitution.”⁴³⁵ Living constitutionalists rightfully point out that “[o]ur written Constitution, the document under glass in the National Archives, was adopted 220 years ago,” and while it can be amended, that “process is very difficult.”⁴³⁶

In a pivotal speech given at Georgetown University on October 12, 1985, Justice Brennan articulated the importance and value of “contemporary ratification” or what might be described today as “living constitutionalism.”⁴³⁷ Justice Brennan explained, “[o]ur amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline.”⁴³⁸ He noted that “[t]he phrasing is broad, and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure.”⁴³⁹ Because of this, the Constitution’s “ambiguity of course calls forth interpretation, the interaction of reader and text” in the contemporary day and time.⁴⁴⁰ An undeniable realism defined Justice Brennan’s interpretation of living constitutionalism. For example, he argued that

A judicial decision respecting the incompatibility of Jim Crow with a constitutional guarantee of equality is not simply a contemplative exercise in defining the shape of a just society. It is an order—supported by the full coercive power of the State—that the present society change in a fundamental aspect.⁴⁴¹

Strauss argues that the “world has changed in incalculable ways” since the time of the original drafting of the Constitution, as well as the Reconstruction.⁴⁴² This growth or evolution affects nearly every aspect of society and a person’s life, from travel and technology to employment and the economy. According to Strauss, “it is just not realistic to expect the cumbersome amendment process to keep up with these changes.”⁴⁴³ To avoid an “old” Constitution from becoming a bad fit for society, ignored, or a “hindrance, a relic that keeps us from making

433. BALKIN, *supra* note 78 at 97.

434. Strauss, *supra* note 66.

435. *Id.*

436. *Id.*

437. *See generally* Brennan, *supra* note 137.

438. *Id.* at 2.

439. *Id.*

440. *Id.*

441. *Id.* at 3

442. *Id.*

443. *Id.*

progress and prevents our society from working in the way it should,⁴⁴⁴ living constitutionalism serves as a bulwark against these very probable concerns.

Examples of living constitutionalism can be found throughout the Court's nearly 240-year history. The most apparent examples of the Court's living constitutionalism can be found in a string of cases striking down sex discrimination laws in the 1970s and 1980s,⁴⁴⁵ the Court's jurisprudence on contraception⁴⁴⁶ and abortion,⁴⁴⁷ and cases overturning racially discriminatory laws.⁴⁴⁸

Critics of living constitutionalism typically claim that it is a form of judicial activism parading as methodology.⁴⁴⁹ They argue that it can be less predictable. Responding to an evolving society may place courts at odds with precedent, rendering *stare decisis* less central to judicial review. Living constitutionalism may also present other problems related to inconsistent application.

3. Structuralism

Structuralism is described as,

[One] of the most common modes of constitutional interpretation. . . . Drawing inferences from the Constitution's design gives rise to some of the most important relationships the Constitution establishes—the relationships among the three branches of the federal government (commonly called *separation of powers* or *checks and balances*); the relationship between the federal and state governments (known as *federalism*); and the relationship between the government and the people.⁴⁵⁰

444. *Id.*

445. See *Califano v. Goldfarb*, 430 U.S. 199, 216–17 (1977) (holding that gender-based requirements for survivor's benefits under a provision of the Social Security Act violated the Due Process Clause of the Fifth Amendment); *Craig v. Boren*, 429 U.S. 190, 208–09 (1976) (holding that an Oklahoma state establishing different drinking ages for men and women violated the Fourteenth Amendment's Equal Protection Clause); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (striking down, under the Fifth Amendment's Due Process Clause, a federal law that required different qualification criteria for male and female military spousal dependency); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (holding that the Idaho Probate Code, which provided a preference for males over females in appointing administrators of estates, violated the Equal Protection Clause of the Fourteenth Amendment).

446. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (establishing the right of married couples to buy and use contraceptives, based on a right to privacy inferred from the Constitution); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (extending the holding in *Griswold v. Connecticut* to unmarried persons).

447. See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (establishing a constitutional right to abortion); *Doe v. Bolton*, 410 U.S. 179, 197–99 (1973) (holding Georgia's abortion law unconstitutional); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 69, 74 (1976) (striking down provisions of Missouri's abortion law that required spousal or parental consent to obtain an abortion).

448. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

449. As explained by David A. Strauss, Professor at University of Chicago Law School,

“a living Constitution is, surely, a manipulable Constitution. If the Constitution is not constant—if it changes from time to time—then someone is changing it, and doing so according to his or her own ideas about what the Constitution should look like. The ‘someone,’ it's usually thought, is some group of judges. So a living Constitution becomes not the Constitution at all; in fact it is not even law any more. It is just some gauzy ideas that appeal to the judges who happen to be in power at a particular time and that they impose on the rest of us.”

Strauss, *supra* note 66.

450. BRANDON J. MURRILL, CONG. RSCH. SERV., LSB10685, THE MODES OF CONSTITUTIONAL ANALYSIS: STRUCTURALISM (PART 7) 1 (2022).

Structural constitutionalists contend that interpreters can avoid moral judgments in hard cases by reflecting on the structures of government, i.e., the Constitution's overall arrangement of offices, powers, and relationships.⁴⁵¹ Structuralists are concerned with the power invested in institutions and how that power translates to the people.⁴⁵² Structuralists query the role of federalism not only in the interplay between the roles of federal and state government but also those of local government.⁴⁵³

Structural arguments depend on considering “the entire Constitutional text rather than one of its parts.”⁴⁵⁴ When interpreting vague Constitutional provisions, structuralists contend that their approach can produce clearer justifications than reliance on facts or text alone.⁴⁵⁵ Proponents also suggest that structuralism can provide a firmer basis for personal rights than alternative interpretive methods like textualism.⁴⁵⁶ Consider *Crandall v. Nevada*,⁴⁵⁷ where “the Court struck down a state law imposing a tax on people leaving or passing through the state.”⁴⁵⁸ In reaching this decision, “the Court inferred an individual right to travel among the states from the structural relationship the Constitution establishes between citizens and the federal and state governments.”⁴⁵⁹ Even though the Constitution does not provide for a right to travel among and between the states explicitly, “because citizens of the United States might need to travel among the states to exercise other constitutional rights, the Court inferred a right to travel from the Constitution viewed in its entirety.”⁴⁶⁰

B. MIXED METHODS

Mixed methods research (MMR) lacks a single definition. In the social sciences, it represents an “innovative and increasingly popular approach . . . designed to bridge the gap between qualitative and quantitative research paradigms.”⁴⁶¹ More generally, a mixed methods approach simply implies the utilization of multiple methods to explore a research problem. The term was reportedly first used

451. See, e.g., SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 117–33 (2007) (explaining the “structuralism” approach to constitutional interpretation).

452. See *id.*

453. See *id.*

454. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 74 (1982).

455. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13, 22 (1969).

456. *Id.* at 46.

457. 73 U.S. 35, 49 (1867).

458. MURRILL, *supra* note 450, at 2.

459. *Id.*

460. *Id.*

461. Purohit Saraswati & Aswathy Devi, *Mixed Methods-Research Methodology an Overview*, 5 MATHEWS J. NURSING & HEALTH CARE 1, 1 (2023); see also Rob Timans, Paul Wouters & Johan Heilbron, *Mixed Methods Research: What It Is and What It Could Be*, 48 THEORY & SOC'Y 193, 193–94 (2019) (noting MMR as known for “combining methods” and “rapidly spread[ing] through the social and behavioural sciences”); JOHN W. CRESWELL, ANN CARROLL KLASSEN, VICKI L. PLANO CLARK & KATHERINE CLEGG SMITH, OFF. OF BEHAVIORAL & SOC. SCI. RSCH., BEST PRACTICES FOR MIXED METHODS RESEARCH IN THE HEALTH SCIENCES 4 (2011).

by Jennifer C. Greene, Valerie J. Caracelli, and Wendy F. Graham in their 1989 article, *Toward a Conceptual Framework for Mixed-Method Evaluation Designs*.⁴⁶²

A key benefit of mixed methods is that it involves “intentionally integrating or combining [multiple] methods to draw on the strengths of each,” with the goal of drawing conclusions in which we can have more confidence.⁴⁶³ Greene and her colleagues set forth five purposes for the use of mixed methods:

- (1) *Triangulation*, which “seeks convergence, corroboration, [and] correspondence of results from the different methods,” in order “[t]o increase the validity of constructs and inquiry results by counteracting or maximizing the heterogeneity of irrelevant sources of variance attributable especially to inherent method bias but also to inquirer bias, bias of substantive theory, biases of inquiry context.”⁴⁶⁴
- (2) *Complementarity*, which “seeks elaboration, enhancement, illustration, clarification of the results from one method with the results from the other method.”⁴⁶⁵ Here, the goal is to increase “interpretability, meaningfulness, and validity of constructs and inquiry results by both capitalizing on inherent method strengths and counteracting inherent biases in methods and other sources.”⁴⁶⁶
- (3) *Development*, which “seeks to use the results from one method to help develop or inform the other method, where development is broadly construed to include sampling and implementation, as well as measurement decisions,” which can “increase the validity of constructs and inquiry results by capitalizing on inherent method strengths.”⁴⁶⁷
- (4) *Initiation*, which “seeks the discovery of paradox and contradiction, new perspectives of frameworks, the recasting of questions or results from one method with questions or results from the other method.”⁴⁶⁸ Initiation can “increase the breadth and depth of inquiry results by analyzing them from the different perspectives of different methods and paradigms.”⁴⁶⁹
- (5) *Expansion*, which “seeks to extend the breadth and range of inquiry by using different methods for different inquiry components,” which “increase[s] the

462. Jennifer C. Greene, Valerie J. Caracelli & Wendy F. Graham, *Toward a Conceptual Framework for Mixed-Method Evaluation Designs*, 11 *EDUC. EVAL. & POL’Y ANALYSIS* 255, 255 (1989); see also David L. Morgan, *Mixed Methods Research*, in *THE CAMBRIDGE HANDBOOK OF SOCIOLOGY* 153, 153 (Kathleen Odell Korgen ed., 2017) (attributing first use of the term “mixed methods” to Greene et al.).

463. CRESWELL, KLASSEN, CLARK & SMITH, *supra* note 461, at 4; Leslie Booren, *Q&A: What is Mixed Methods Research & Why More Scholars Should Use It*, *UNIV. VA. SCH. OF EDUC. & HUM. DEV’T.* (May 6, 2024), <https://education.virginia.edu/news-stories/qa-what-mixed-methods-research-why-more-scholars-should-use-it>.

464. Greene et al., *supra* note 462, at 259.

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

scope of inquiry by selecting the methods most appropriate for multiple inquiry components.⁴⁷⁰

Despite drawbacks such as the added time to perform MMR effectively, the need to engage multiple analytical approaches, and the want for heightened expertise, the methodology can “provide a comprehensive understanding of complex research questions.”⁴⁷¹ It recognizes that remaining chained to one methodology inhibits the ability to answer the most complex of questions.

C. MIXED METHOD JUDICIAL REVIEW

In the wake of the Roberts Court’s surgical dismantling of significant civil rights priorities, some commentators have wondered *why have judicial review at all?*⁴⁷² In other words, why rely on the courts? Put simply by an escalating chorus, “the courts will not save us.”⁴⁷³

Our mixed method judicial review (MMJR) does not take up the debate on the limited judicial power and authority during exceedingly lawless regimes. This Article is narrow in its scope. It recognizes an opportunity in scholarly legal discourse and judicial review, as well as flaws in the now dominant approach to judicial review on the Court. For decades, prior to the application of originalism in judicial review in the United States, the priorities centered on the legitimacy of judicial review.⁴⁷⁴ We do not argue that the Court has always been committed to the aims of justice. To the contrary. Apart from the Warren years, the Court has had a mixed record at best of promoting the type of interpretive goals we articulate below, as demonstrated across a series of troubling cases: *Dred Scott v. Sandford*,⁴⁷⁵ *The Civil Rights Cases*,⁴⁷⁶

470. *Id.*

471. Saraswati & Devi, *supra* note 461, at 2; see also CRESSWELL, KLASSEN, CLARK & SMITH, *supra* note 461, at 8–9 (describing some of the challenges with mixed methods research).

472. See Ryan Cooper, *The Case Against Judicial Review*, AM. PROSPECT (July 11, 2022), <https://prospect.org/justice/the-case-against-judicial-review> [<https://perma.cc/J2PR-9UXT>].

473. See Stephen I. Vladeck, *The Courts Alone Can’t Save Us*, N.Y. TIMES (Mar. 20, 2025), <https://www.nytimes.com/2025/03/20/opinion/trump-courts-disrupt-break.html>; Maya Sen, *Why Federal Courts Are Unlikely to Save Democracy from Trump’s and Musk’s Attacks*, HARV. KENNEDY SCH.: ASH CTR. FOR DEM. GOVERNANCE & INNOVATION (Feb. 12, 2025), <https://ash.harvard.edu/articles/why-federal-courts-are-unlikely-to-save-democracy-from-trumps-and-musks-attacks> [<https://perma.cc/MU43-WNE4>]; Tom Clark, *When The Courts Can’t Save Us, Who Can?*, THE HILL (Mar. 21, 2025, at 07:30 ET), <https://thehill.com/opinion/judiciary/5205275-authoritarian-threat-democracy-courts> [<https://perma.cc/C3UJ-DPPK>]; Nikolas Bowie, *Courts Are Useful, But We Cannot Depend On Them to Save Democracy*, L. & POL. ECON. PROJ. (Mar. 4, 2025), <https://lpeproject.org/blog/courts-are-useful-but-we-cannot-depend-on-them-to-save-democracy> [<https://perma.cc/JW28-TRCC>].

474. See Alvin B. Rubin, *Judicial Review in the United States*, 40 LA. L. REV. 67, 68–69 (1979) (discussing questions related to judicial review dating back to 1803 and how those questions have translated to today).

475. See 60 U.S. 393, 406, 426–27 (1856) (finding that enslaved persons were not American citizens and thus were not afforded the rights and privileges of the Constitution).

476. See 109 U.S. 3, 17–18, 25 (1883) (determining Congress did not have the power to prohibit discrimination by private actors).

Plessy v. Ferguson,⁴⁷⁷ *Buck v. Bell*,⁴⁷⁸ and *Korematsu v. United States*.⁴⁷⁹

More recently, the Court demonstrated its antipathy toward Reconstruction values on matters of race and sex. On race, consider its rulings in *McCleskey v. Kemp*,⁴⁸⁰ *Shelby County v. Holder*,⁴⁸¹ and *Students for Fair Admission v. Harvard*,⁴⁸² to name a few.

Nor has the Court shown a commitment to constitutional interpretation that advances fidelity to justice that reaches the concerns of women or other historically marginalized populations. Justice as a concept can be difficult to define succinctly, but we understand it to be rooted in the secured liberties of historically marginalized populations. Yet even while it is rooted in history, justice is also malleable and fluid, changing over time to embrace liberties for more people, rather than less. The Court's approach in *Dobbs*, therefore, which removed an established right, is at odds with our view of justice.

This infidelity to justice is on display in cases such as *Ledbetter v. Goodyear Tire & Rubber Co.*,⁴⁸³ *Wal-Mart Stores, Inc. v. Dukes*,⁴⁸⁴ *Burwell v. Hobby Lobby Stores, Inc.*,⁴⁸⁵ *Our Lady of Guadalupe School v. Morrissey-Berru*,⁴⁸⁶ and *Dobbs*,⁴⁸⁷ which represent the Court's broad disregard, if not contempt, for the constitutional equality and citizenship of women.

Our approach to the aspirations of judicial review loosely maps onto that of the late Judge Alvin Rubin, who served on the U.S. Court of Appeals for the Fifth Circuit. In *United States v. McDaniels*,⁴⁸⁸ he wrote “[h]owever elusive the

477. See 163 U.S. 537, 540, 550–51 (1896) (upholding a statute that required “equal but separate” accommodations for white and Black passengers because it did not violate the Fourteenth Amendment).

478. See 274 U.S. 200, 205, 207 (1927) (finding that forced sterilization of “mental defectives” did not violate the Fourteenth Amendment).

479. See 323 U.S. 214, 217, 219–20 (1944) (upholding the exclusion of people of Japanese descent during World War II because of the alleged threat of espionage and sabotage).

480. See 481 U.S. 279, 289, 297, 299 (1987) (rejecting the use of a study showing substantial disparities existed in the penalties imposed on homicide defendants based on race as support for an equal protection violation).

481. See 570 U.S. 529, 545, 551, 557 (2013) (holding the preclearance formula of the Voting Rights Act, which was previously justified by the “blight of racial discrimination in voting,” unconstitutional because “[t]here is no longer [a compelling] racial disparity”).

482. See 600 U.S. 181, 213 (2023) (finding that the consideration of race in college admissions violates the Equal Protection Clause).

483. See 550 U.S. 618, 632 (2007) (holding that petitioner's discrimination claim was foreclosed by Title VII's 180-day statute of limitations because the employment practice was the result of an intentional discriminatory act that occurred outside the charging period).

484. See 564 U.S. 338, 343, 359–60 (2011) (dismissing a class action lawsuit of 1.5 million female employees alleging sex discrimination on the grounds the class was improperly certified).

485. See 573 U.S. 682, 689–91 (2014) (holding that regulations that require for-profit companies to provide health insurance coverage for contraception regardless of the religious beliefs held by the corporations' owners violate the Religious Freedom Restoration Act).

486. See 591 U.S. 732, 737–38 (2020) (determining that the “ministerial exception” to the First Amendment foreclosed judicial review of employment discrimination claims made by two teachers at a Catholic school).

487. See 597 U.S. 215, 302 (2022) (finding that the Constitution does not protect the right to an abortion).

488. 379 F. Supp. 1243, 1249 (E.D. La. 1974).

concept may be, there is a universal human feeling, not confined to philosophers, lawyers, or judges, that there is a quality known as justice, and that it is the aim of legal institutions to achieve it.”⁴⁸⁹ According to Judge Rubin, “[t]he Constitution invokes that sense and sentiment in its first purposive phrase: it is ordained ‘to establish justice.’”⁴⁹⁰ Quoting *Federalist No. 51*, he noted that Madison believed justice should be pursued until liberty is achieved or the pursuit of justice exhausted in the effort to achieve it.⁴⁹¹

Yet, unlike the era in which Madison wrote and Justice Alito seemingly seeks to resurrect in *Dobbs*, our strong sense is that justice cannot exclude women. Rather, as noted by Judge Rubin, “[t]his feeling that justice is a supreme goal, this sense that it is a predicate to organized society, is no mere yearning, for it is only in a fair proceeding, one that comports with our sense of justice, that we can with any legitimacy call another human being to account.”⁴⁹²

Our view is that justice should reside at the heart of judicial review. This must be firmly grounded not only in the outcomes of decisions, but also in the perception and performance of adjudication. In other words, it “must be seen to be done.”⁴⁹³ While reaching objectively accurate results is important, the pursuit of justice must not be only that. Indeed, the flipping of a coin might achieve the right results some percentage of the time, just as a clock reaches the same result twice in a day. We aspire for a judicial review and methodology that neither relies on roulette and chance, nor on prostration and supplication. Instead, in marking the tenth anniversary of *Obergefell v. Hodges*,⁴⁹⁴ the case that granted marriage equality, we are reminded of Justice Kennedy’s statement that petitioners only sought “equal dignity in the eyes of the law.”⁴⁹⁵ According to Justice Kennedy, the “Constitution grants them that right.”⁴⁹⁶

We believe that courts should be committed to and prioritize the pursuits of fairness, truth, justice, and the rule of law. We believe the results will be judicial and government accountability, judicial independence from the political process, stability and predictability, and limited arbitrariness and abuse of power. Tantamount to our approach is responding to the call for justice rather than cowering from it.

Our view is that the pursuit of these principles need not conflict with pragmatism. To this end, MMJR incorporates two components. First, it involves consultation with Reconstruction history and understanding. As such, it resurrects the interests of the reformed Constitution. Second, it demands empirical analysis, borrowing from law and society methodology. That is, it demands grappling with

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.*

494. 576 U.S. 644 (2015).

495. *Id.* at 681.

496. *Id.*

the real-world consequences of laws and policies.⁴⁹⁷ It gives little if any weight to minority rule or majoritarian politics, mindful that majorities can engage in corrupt behavior toward minorities and equally well-equipped, powerful minorities can unleash apartheid-type lawmaking and social conditions on vulnerable populations.

MMJR has four specific goals: eliminating the vestiges and badges of slavery, reincorporating the Reconstruction, embracing and supporting judicial independence, and preventing discrimination. These goals, as detailed below, map onto the deprioritized and overlooked constitutional interests of the Reconstruction and Civil Rights agenda of the 1960s.

1. Eliminating The Vestiges and Badges of Slavery

First, these goals include eliminating the lingering vestiges and badges of slavery, a priority of the Reconstruction that persists in society.⁴⁹⁸ Politically rabid, unyielding interests of the defanged Confederacy persisted such that the goals of Reconstruction were truncated and undercut by separate but equal laws and policies barely twenty years after the ratification of the Thirteenth Amendment.

2. Reincorporating the Reconstruction

Second, MMJR is an interpretive methodology that takes the call of Reconstruction drafters seriously to prohibit slavery and involuntary servitude. At the time of Reconstruction, slavery and involuntary servitude included forms of labor, sex, forced pregnancy, coerced reproduction, or other types of involuntary coercion, service, and abuse.⁴⁹⁹ This reading of prohibitions on involuntary servitude would have direct intervention in current laws that force women to remain pregnant against their will and interests.

Equally, MMJR's attention to the sociolegal and law and society would ask whether contemporary, existing, or proposed labor standards fit into this vision of constitutionalism. For example, contemporary discourse regarding farmers "owning" migrant workers would be filtered through the goals of MMJR.

3. Judicial Independence

A third goal of MMJR is judicial independence. While we recognize that "judicial independence means different things to different people,"⁵⁰⁰ we view it as

497. Of note,

"The study of law and society rests on the belief that legal rules and decisions must be understood in context. . . . [T]he law and society perspective . . . point[s] to ways in which law is socially and historically constructed, how law both reflects and impacts culture, and how inequalities are reinforced through differential access to, and competence with, legal procedures and institutions."

Lynn Mather, *Law and Society*, in *THE OXFORD HANDBOOK OF POLITICAL SCIENCE* 289, 289 (Robert E. Goodin ed., 2009).

498. See *supra* notes 122, 240–241 and accompanying text describing the goals and concerns of Reconstruction Amendment drafters.

499. See Goodwin, *supra* note 53, at 204.

500. See Mira Gur-Arie & Russell Wheeler, *Judicial Independence in the United States: Current Issues and Relevant Background Information*, in *GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY* 133, 133 (2012).

crucial to orderly government and democracy. Indeed, the rule of law is almost impossible to achieve and maintain without an independent judiciary. Without the rule of law, governments may act in arbitrary ways and inflict discriminatory practices against disfavored and vulnerable groups in society.⁵⁰¹ Judicial autonomy shields judges and courts from the political process and even the perception of corrupt interest.⁵⁰² MMJR embraces this goal. This third goal incorporates our interests in the search for justice by judges avoiding arm-twisting by political branches of government. It promotes the view that impartiality is a strong value for courts as it advances the goals of fairness and arms-length distance deliberations on matters involving government interests.⁵⁰³ An independent judiciary “is perhaps most important in enabling judges to protect individual rights even in the face of popular opposition.”⁵⁰⁴

4. Antidiscrimination

MMJR seeks to promote government accountability and, as such, vindicate individual rights and the protection of groups from government bias, stereotypes, stigmas, and abuse. Judicial review can be a powerful mechanism in advancing equality in society.⁵⁰⁵ However, we recognize that it can also be an obstacle, as noted in the Roberts Court’s adoption of opportunistic and selective originalism, which appears outcome-determinative with the aim and ambition to limit civil liberties and civil rights. Unlike originalism, the goal of MMJR is the pursuit of antidiscrimination as fostered in the Reconstruction Amendments and Civil Rights Act, Voting Rights Act, and other antidiscrimination legislation.

MMJR offers important advantages lacking in originalism. Namely, it would offer enlightenment. It would avoid “doctrinaire incarnation,” which “demands that [J]ustices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them.”⁵⁰⁶ Reconstruction history is largely lost on the Supreme Court. Whether strategically, opportunistically, or simply blindly and in ignorance, the Court debates matters of the Fourteenth Amendment seemingly oblivious to the arguments, debates, and records of American slavery and the political, economic, and other conditions of that enterprise.

501. See David Boies, *Judicial Independence and the Rule of Law*, 22 WASH. U. J.L. & POL’Y 57, 57 (2006) (highlighting that “[t]he rule of law provides two basic protections against arbitrary or discriminatory government action. It provides that the rule applied to a particular case must be reasonably predictable. And it provides that the rule must be predictable without regard for the identity of the parties.”).

502. See *id.* at 63 (noting that “it is important for lawyers to defend judicial independence in the face of a public uproar over an unpopular decision”).

503. Gur-Arie & Wheeler, *supra* note 500, at 145 (highlighting that “courts are to be impartial, regardless of the parties and the issues, and must enforce the rights of individuals against the government, even when it may be unpopular to do so”).

504. *Id.* at 133.

505. See Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 800 (2024) (discussing potential appreciation for the democracy-enhancing value of judicial review as it allows “certain constituencies to participate in the polity as equal citizens”).

506. Brennan, *supra* note 137, at 4.

Just as many social science research questions involve complex and intricate questions, so too do many questions raised before the courts. Excessive loyalty to one method of judicial review or constitutional interpretation can imperil the rule of law and wreak havoc on civil rights and civil liberties. We believe that adherence to one method of review is neither necessary nor appropriate for the most complex and important legal questions.

A mixed method approach to judicial review would provide an analytical basis to vindicate the civil rights and civil liberties interests rooted in the reformed and reconstructed Constitution. At the same time and notwithstanding our view of a more capacious Reconstruction, a mixed method approach to judicial review will provide a platform to meaningfully redress concerns unforeseen at the time of Ratification. For example, originalism can be combined with pragmatism, living constitutionalism, and historical analysis in a way that acknowledges the Constitution's meaning as it was understood by the drafters, while also recognizing the need to extrapolate or *expand* that meaning to the present day in ways that best serve contemporary society. The proposed method rejects the denial of constitutional rights based on lack of enumeration in the Constitution or specific textual reference, which could be weaponized to deny abortion, contraception, interracial marriage, same-sex unions, gender-affirming care, education, and basic healthcare.

A mixed methodology in judicial review sets preserving and protecting the rule of law as its primary goal. Specifically, it seeks to reduce harm and maximize human value and worth. As to addressing history, a mixed methodology to some extent already occurs in the Court's review of precedent. Yet, we worry that, as in *Dobbs*, where an opportunistic Court foils or denies a liberty interest based on the supposed missing record in history, exclusive reliance on history, whether conservative or progressive originalism, will undermine the goals of civil rights and undercut civil liberties.

In our view, a mixed methodology of judicial review must turn to and incorporate Reconstruction history. When thinking about "history and tradition," for example, a mixed method approach would require reviewing a variety of historical narratives, not just the narrative of those who wielded the most power at the time the narrative was written. This helps "counteract inherent biases"⁵⁰⁷ in the current Court's opportunistic originalism. Using a mixed methods approach, judicial review cannot start and stop at the founding, and it cannot recoil and shrink from it in advancing the causes of justice. It is our belief that the remembered Reconstruction and specific attention to the Thirteenth, Fourteenth, and Fifteenth Amendments—not just the Constitution as originally drafted—offer pathways for not only protecting reproductive freedoms but also sorting and responding to other important civil liberties and civil rights claims into the future. We predict the Reconstruction's relevance to ongoing debates related to voting rights, sex equality, reproductive freedom, religious liberty, and concerns arising in immigration and birthright citizenship.

507. Greene et al., *supra* note 462, at 256.

However, unlike conservative or progressive originalism, we embrace close examinations of history not as constraints on advancing justice, but rather as evidence of unequal treatments deserving review and correction. In other words, a review of *Dobbs* through a historical lens that remembers and reclaims the Reconstruction portends a dramatically different outcome. Simply put, history can serve to inform claims of discrimination and the denial of rights.

Indeed, chief among the failures in *Dobbs* is not only the majority's opportunistic sophistry and purported review of history, which resulted in a devastating holding, but also the dissent's lack of engagement with the history and interests bound in Reconstruction and the Reconstruction Amendments.⁵⁰⁸ That is, neither the majority nor dissent ultimately meet the task of situating Antebellum concerns and Black women's personhood in their reading, review, and application of the Fourteenth Amendment. Only once in the dissent are Black women mentioned, despite the relevance of the Mississippi legislation under review in *Dobb* to their health, lives, and well-being.⁵⁰⁹ In other words, if *Dobbs* does not relate to women, if it does not relate to racial discrimination, what does it relate to?

The project of remembering and reclaiming the Reconstruction will serve five important functions and purposes. First, it will restore recognition of race and the stamping out of racism in the Constitution. Supreme Court decisions in recent decades have either ignored, misapplied, or neutered original meaning on matters of racial discrimination, relegating ending racism to the dustbins of history. *Shelby County*,⁵¹⁰ as discussed in Section III.C, as well as *Students for Fair Admissions*,⁵¹¹ offer compelling examples of this. Reclaiming the Reconstruction rereads remedies for redressing racial discrimination into American history and law. It treats patterns of racism as matters deserving legal remedy and redress within the umbrella of constitutional law and civil rights statutes.

Second, remembering and reclaiming the Reconstruction reads important concerns related to women and reproductive freedom into constitutional jurisprudence. For instance, among his various speeches decrying forced reproduction and sexual servitude of Black girls and women, including *The Barbarism of Slavery: Senate Speech on the Bill for the Admission of Kansas as a Free State*, Senator Charles Sumner makes this point clear.⁵¹² He extolls, "Slavery paints itself again in its complete *abrogation of marriage*, recognized as a sacrament by the church, and recognized as a contract wherever civilization prevails."⁵¹³ Further, "[u]nder the law of Slavery, no such sacrament is respected, and no such

508. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 359–423 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

509. *Id.* at 396 (noting that "[e]xperts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase").

510. *Shelby County v. Holder*, 570 U.S. 529 (2013).

511. *Students for Fair Admissions, Inc. v. Harvard Coll.*, 600 U.S. 181 (2023).

512. Charles Sumner, Senator, U.S.S., Speech of Hon. Charles Sumner, On the Bill for the Admission of Kansas as a Free State (Jun. 4, 1860), in *THE BARBARISM OF SLAVERY*, 1863.

513. *Id.*

contract can exist,” because “[t]he ties that may be formed between slaves are all subject to the selfish interests or more selfish lust of the master, whose license knows no cheek.”⁵¹⁴

Notably, it would be a mistake to read the Thirteenth Amendment’s powerful condemnation of involuntary servitude as applying only to private individuals and not also the state. To the contrary. Reconstruction applied not only to private parties, but also against states that sought to perpetuate human bondage and reproductive servitude into the future.

Third, revisiting and reclaiming voting rights from the past as secured in the Fifteenth Amendment can serve to address the backsliding of voting rights in contemporary cases involving voter suppression. Fourth, remembering and reclaiming Reconstruction offers insights related to birthright citizenship. And fifth, remembering the Reconstruction and its amendments furthers the cause of LGBTQ+ equality and bodily autonomy liberty interests.

Attention to what the Reconstruction Amendments promote and are intended to protect against provides a template for reordering and reframing liberty interests. Of great importance is the acknowledgment that the Constitution was reconstructed by abolitionists in Congress in direct response to the myriad predations attending legalized human enslavement and the Civil War.⁵¹⁵

CONCLUSION

In Justice Brennan’s 1985 Georgetown University speech, *The Constitution of the United States: Contemporary Ratification*, he explained that his engagement with text was “inescapably public,” and “open to critical scrutiny from all quarters.”⁵¹⁶ He explained, and we agree, that “consequences flow from a Justice’s interpretation in a direct and immediate way.” Indeed, judicial power itself “resides in the authority to give meaning to the Constitution,” and as such debates about methodology and interpretation are important thought experiments as to “how to read the text,” and “about constraints on what is legitimate interpretation.”

In this Article, we argue that arrogance and double-speak manifests throughout the *Dobbs* opinion in a way that undermines concepts of ordered liberty and promotes ahistorical jurisprudential analysis and conclusions. Justice Alito accuses the *Roe* Court of many things. He claims the Court is not merely wrong, but “egregiously wrong.”⁵¹⁷ Further, he contends that *Roe*’s analysis of history is “plainly incorrect.”⁵¹⁸ He claims that the sources relied on by Justice Blackmun

514. *Id.*

515. See FREEDMEN’S INQUIRY COMMISSION, 38TH CONG., 65 (1863-1864).

516. Brennan, *supra* note 137, at 3.

517. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) (emphasis added); see also *id.* at 293 (“The dissent’s foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can ‘poin[t] to major legal or factual changes undermining [the] decision’s original basis.’”).

518. *Id.* at 226.

are “constitutionally irrelevant.”⁵¹⁹ He excessively criticizes Blackmun and the *Roe* majority as having “catalog[ed] a wealth of other information having no bearing on the meaning of the Constitution.”⁵²⁰ This logic begs the question: *If harm to women has no bearing on the meaning of the Constitution, then what does?*

To answer that question, we set forth an innovation for method, interpretation, and review: mixed method judicial review (MMJR). First MMJR at its core embraces the exercise of reflecting on and engaging with Reconstruction history as part of judicial method, interpretation, and review. Second, it calls for empirical analysis. In the law and society tradition, it demands wrestling with real-life, concrete repercussions of legislation, policies, executive orders, regulations, and even court opinions. We argue that an intrinsic value in MMJR is that it intentionally engages multiple methods to elevate the strengths of each, with the objective to discern and adjudicate with greater integrity, transparency, and focus on the rule of law.

In this Article, we also speak to the deceit found in the ad-hoc and opportunistically applied method that “demands that Justices discern exactly what the Framers thought about the question under consideration.”⁵²¹ Justice Brennan described this as “a view that feigns self-effacing deference to the specific judgements of those who forged our original social compact.”⁵²² In reality, “it is little more than arrogance cloaked as humility.”⁵²³

Even with our investment in reconstructing the Reconstruction and MMJR, we recognize certain challenges. For example, revelatory sources that would enlighten contemporary debates may be sparse. Materials may be difficult to retrieve and limited in the scope and scale necessary to inform judicial review, depending on the issue at hand. Disagreements among Reconstruction ratifiers may and did exist (not all abolitionists shared the same view on what should be the status of the newly freed and formerly enslaved).

That said, our mixed method approach sharpens rather than dulls the blade of justice. It demands judicial accountability found in grappling with real-world conditions. Moreover, the purpose in the search for justice is not obscured by cherry-picking history, but rather by consulting the direct debates that secured freedom, liberty, equality, substantive due process, and voting rights. For the first time in the Constitution, women were granted freedom with the passage and ratification of the Thirteenth Amendment, birthright citizenship was gained for the formerly enslaved and all future persons born in the United States. The Constitution’s radical reframing reflected principles forged not only in the halls of Congress and ratified in the states, but also in a war that tested the nation’s ability to be unified and democratically ruled.

519. *Id.*

520. *Id.* at 227.

521. Brennan, *supra* note 137, at 4.

522. *Id.*

523. *Id.*

The overturn of *Roe* in the *Dobbs* decision brings us to this point. The majority selectively culls historical accounts and narratives, citing Sirs Blackstone and Hale as credible guides and witnesses to America's historical and constitutional legacy—despite both their deaths preceding the Civil War and the reconstructed Constitution.⁵²⁴ The opinion dismisses Reconstruction history with equal effort, thereby engaging in opportunistic and crooked originalism.

Worryingly, the overturn of *Roe* now serves as precedent, providing a method for the potential dismantling of other civil rights and civil liberties. The gains brought about in the last half-century through judicial review are now vulnerable to the opportunistic originalism laid bare in that case. The goal to dismantle other constitutional protections not specifically detailed in the Constitution was foreshadowed by Justice Thomas in his concurring opinion in *Dobbs*. If taken seriously, and if the opportunities present before the Court, other civil rights are in jeopardy, including contraceptive access, LGBTQ+ protections in general, and same-sex and interracial marriage.

For these reasons, we argue that reimagining judicial review is critically important to the future of constitutionalism and Supreme Court jurisprudence. Specifically, this Article calls for two enhancements to judicial review. First, reassociating Reconstruction with its legal and social precursors. We recognize the value in relating the fight against racism and involuntary reproductive servitude to the Reconstruction and elevating the Reconstruction in judicial review, such that true meaning association. Second, the Article calls for a mixed-method review of constitutional disputes—one that turns to history while not excluding the learned position of a living constitution.

524. See *Dobbs*, 597 U.S. at 238, 242–45, 251, 272; see also David Eryl Corbet Yale, *Sir Matthew Hale*, BRITANNICA, <https://www.britannica.com/biography/Matthew-Hale> [https://perma.cc/EF7G-DLYY] (last visited Mar. 29, 2026) (listing Hale's date of death as December 25, 1676); *Sir William Blackstone*, BRITANNICA, <https://www.britannica.com/biography/William-Blackstone> [https://perma.cc/45GY-47P7] (last visited Mar. 29, 2026) (listing February 14, 1780 as his date of death).