The Critical Role of History after Dobbs

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2 J.AM.CON.HIST. 171 (2024)

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Available at: https://doi.org/10.59015/jach.NXYK8697
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Recommended Citation: 2 J. AM. CON. HIST. 171 (2024).
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The Critical Role of History after *Dobbs*

Serena Mayeri*

Abstract

The *Dobbs* majority’s reliance on a flawed and impoverished account of “history and tradition” to deny fundamental freedoms today may tempt us to despair of appealing to the past as a source of constitutional rights or principles. But the problem with *Dobbs* is not its discussion of history per se; rather, it is how and for what purposes the Court looks to the past. History need not preserve archaic values; it can counsel against past errors and justify affirmative approaches to protecting rights and combating inequality.

This essay explores critical roles for history in legal, constitutional, and political arguments about reproductive freedom and democracy.

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* Arlin M. Adams Professor of Constitutional Law and Professor of History (by courtesy), University of Pennsylvania Carey Law School. I am grateful to Amna Akbar, Aziza Ahmed, Khiala Bridges, David Cohen, Patricia Cline Cohen, Kristin Collins, Angus Corbett, Nancy Cott, Peggy Cooper Davis, Martha Davis, Rebecca L. Davis, William Ewald, Cary Franklin, Jean Galbraith, Smita Ghosh, Michele Goodwin, Sarah Barringer Gordon, Linda Greenhouse, Nicole Huberfeld, Christen Hammock Jones, Seth Kreimer, Zain Lakhani, Sophia Z. Lee, Harriet Mayeri, Sandra Mayson, Linda McClain, Melissa Murray, Christopher Muhaw, Kimberly Mutcherson, Amy Myrick, Shaun Ossei-Owusu, Laura Portuondo, Haley Pritchard, Rachel Rebouché, Dorothy Roberts, Bertrall Ross, Ted Ruger, Hillary Schneller, David Schwartz, Genevieve Scott, Kate Shaw, Reva Siegel, Cynthia Soohoo, Aaron Tang, Karen Tani, Alice Wang, and Mary Ziegler for generative conversations and comments. This project has benefited from the insights of participants in the Reproductive Rights and Justice Roundtable; in the Penn Carey Law faculty workshop; in my Spring and Fall 2023 seminars; and in panel discussions during the 2023 American Society for Legal History annual meeting and the NYU School of Law/Birnbaum Women’s Leadership Center symposium on the Reconstruction Amendments in honor of Peggy Cooper Davis. Emily Gabos and Victoria Wang provided superb research assistance as well as astute comments, and Jennifer Hanrahan lent editorial prowess. All errors are mine.
after *Dobbs*. These critical approaches define differently the historical voices and sources that matter; the constitutional principles and lessons to be drawn from the past; and the roles that history and tradition should play in shaping our present and future. Critical histories read the Reconstruction Amendments as a mandate for emancipation and for the eradication of all forms of bodily and reproductive coercion. They elevate the voices of those who long were excluded from political participation and place abortion restrictions in a longer history of reproductive control and anti-democratic political traditions. Critical histories can and do inform the interpretation of state as well as federal constitutional provisions in and outside of court. From courtrooms, legislatures, and campuses to workplaces, street protests, and dinner tables, these histories play a more crucial role than ever in informing legal and political discourse about reproductive justice and the future of democracy.

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INTRODUCTION

Reading Dobbs v. Jackson Women’s Health Organization (2022), it is tempting to jettison any methodology that looks to the past as a source of rights or of relevant constitutional principles today. Justice Samuel Alito’s majority opinion employs a narrow version of “history and tradition” that tethers twenty-first century constitutional rights to the cramped imagination of white male propertied elites who excluded most Americans from the polity. Alito invokes authorities such as Henry de Bracton, Sir Matthew Hale, and William Blackstone to support his assertion of “an unbroken tradition” of “criminal punishment” for abortion from “the earliest days of the common law” that should dictate the current scope of substantive due process rights.¹

The idea that Englishmen who condoned witch-hunting, marital rape, coverture, and all manner of misogyny should be the arbiters of twenty-first century Americans’² ability to control their reproductive lives strikes many as absurd.³ The sensibilities of lawmakers who enacted abortion restrictions at a time when human enslavement was perfectly constitutional, Native peoples were not citizens, and even free women could not vote or hold office or control their person or property after marriage seem similarly inapposite. As Justices Sotomayor, Kagan, and Breyer write in dissent, “When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to

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² The capacity for pregnancy is not limited to women, but includes persons of all genders. This essay strives to use gender-inclusive language where possible, but often speaks of “women” when referring to the persons historically targeted by pregnancy regulations.
³ So much so that it was the subject of a Saturday Night Live skit in May 2022. See https://www.youtube.com/watch?v=mLMp-1NdzR&t=86s.
second-class citizenship.” If the majority’s method is what passes for historical analysis, it may seem futile and even counterproductive to embrace any role for history in constitutional law.

Dobbs should not lead us to reject history’s relevance to constitutional law or to political discourse about reproductive rights and justice, however. Claims about and understandings of the past are an inescapable part of any theory of constitutional interpretation, and they are critical to our understanding of our political community today. The question is not whether but how we talk about history in legal and constitutional argument, and in politics. The Dobbs majority’s narrow version of history and tradition is only one of many ways that claims about the past can play a role in debates about constitutional interpretation, law, and policy in the present.7

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4 Dobbs, 597 U.S. at 373 (Breyer, Sotomayor, and Kagan JJ., dissenting) [hereinafter Dobbs dissent]. See also, e.g., Khiara Bridges, Foreword, 2021 Supreme Court Term, “Race in the Roberts Court,” 136 Harv. L. Rev. 23, 37 (2022) (“[A] decision to privilege any historical moment prior to the era in which social movements challenged traditional gender norms is a decision to read the Constitution as silent on abortion rights.”); Reva B. Siegel, “How ‘History and Tradition’ Perpetuates Inequality: Dobbs on Abortion’s Nineteenth-Century Decriminalization,” 60 Houston L. Rev. 901, 906 (2023) (“The method the Court employs is gendered in the simple sense that it ties the Constitution’s meaning to lawmaking from which women were excluded and in the deeper sense that the turn to the past provides the Court resources for expressing identity and value drawn from a culture whose laws and mores were more hierarchical than their own.”).

5 Reva Siegel’s theory of constitutional memory, on which this essay draws, distinguishes “constitutional history”—what happened in the past—from “constitutional memory”— “the ways that Americans make claims on the past as they argue about the Constitution’s meaning.” Reva B. Siegel, “The Politics of Constitutional Memory,” 20 Georgetown J. L. & Pub. Pol’y 19, 31 (2022). She explains the damage done when “constitutional memory systematically diverges from constitutional history,” such as in the erasure of women’s struggles for equality. Id. at 19, 24. See also Reva B. Siegel, “Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance,” 101 Tex. L. Rev. 1127 (2023).


7 See Siegel, “Politics of Constitutional Memory,” 22 (“[C]laims on the past play wide-ranging roles in our constitutional law and are not confined to one ‘originalist’ or historical modality of argument.”). See also Jack Balkin, Memory and Authority: The Uses of History in Constitutional Interpretation 15 (2024) (“[T]he predominant focus on originalism has had a cost: it has diverted our attention from the vast realm of history that is irrelevant to originalism.”).
If anything, the *Dobbs* majority’s flawed approach to history makes a reckoning with the past and its relationship to law today and beyond all the more imperative. Even on its own terms, *Dobbs’s* history is infirm. The majority cherry-picks sources of original meaning and historical evidence, rejecting the considered opinions of nearly every professional historian who has studied and published on abortion law and practice in early America. These distortions of historical fact should not go unchallenged. Neither should *Dobbs’s* approach to “history and tradition” in constitutional interpretation—a method designed to bind us to archaic values while claiming neutrality.

Indeed, challenges both to *Dobbs’s* method of constitutional interpretation and its factual premises are already underway on many fronts, in and outside of court. These challenges do not reject the past as a source of constitutional meaning or value-driven legal and political argument. Rather, they define differently the historical voices and sources that matter; the constitutional principles and lessons to be drawn from the past; and the roles that history and tradition should play in shaping our present and future.

Narrow and selective invocations of the past that privilege the authors of historical exclusion and naturalize inequalities can limit constitutional protections, as they do in *Dobbs*. But reckoning with history also can have the opposite effect: history can provide a point of departure for overcoming entrenched injustices. History need not preserve moribund values; it can counsel against past errors, provide negative examples, and justify affirmative approaches to protecting rights and combating inequality. Historical context can highlight contingency and illuminate paths not taken; it can discredit as well as legitimate.

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10 Peggy Cooper Davis’s classic 1997 work modeled an approach to history in constitutional interpretation that takes seriously the voices of both the framers of the Reconstruction Amendments and the disenfranchised Americans whom these amendments were enacted to protect. See Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* (1997). For more, see infra Part II.
Historical evidence can correct the factual record and inform analyses that challenge the normative significance of accepted narratives.

Critical approaches to history inform very different methods of constitutional interpretation than those embraced by Dobbs. These approaches see the Reconstruction Amendments as a fundamental rewriting of the founding documents, not merely an endpoint but the beginning of a new era. These constitutional provisions, rooted in a deliberate and hard-won break from a tradition of enslavement and oppression, express values such as liberation, bodily autonomy, and equal citizenship. They honor a set of principles meant to overcome rather than to entrench the laws and practices of the past.

The Supreme Court’s current composition means that critical approaches to history are unlikely to take hold there, at least in the context of reproductive rights and justice. But the Dobbs approach to history and tradition cannot go unanswered. Rather, it must be challenged at every turn—to expose and correct the majority’s flawed historical analysis and spurious claims to neutrality; to provide critical accounts of the past and its relevance to constitutional interpretation; and to mobilize political resistance. Correcting factual errors, distortions, and omissions prevents the Court’s account from becoming the nation’s uncontested collective memory. Moreover, grappling with the past is not just a defensive or reactive response. It is essential to our national self-understanding, to shaping our constitutional principles and moral commitments, and to building a future of our own deliberate making.

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11 See Davis, Neglected Stories. Davis observed long before Dobbs that “[d]espite the urgency and clarity with which people involved in antislavery struggle and in Reconstruction politics spoke of family rights, the connections have never been drawn [between those debates] and the meaning of the Fourteenth Amendment.” Id. at 5.

12 See Davis, Neglected Stories, 216 (“The words of support for the Reconstruction Amendments make clear that they were inspired by the rejection and repudiation of slavery, in turn the product of a successful political movement led by slaves, former slaves, and other antislavery advocates.”).

13 Siegel explains that the erasure of constitutional memory “can legitimate authority by generating the appearance of consent to contested status relations and by destroying the vernacular of resistance.” Siegel, “Politics of Constitutional Memory,” 24; see also Balkin, Memory and Authority, 13 (“If people refuse to claim memory and tradition for themselves, they will be governed by other people’s versions”); id. at 176 (“[W]hat is often at stake in debates over constitutional interpretation is whose version of history will shape political and legal discussion and whose memory of the past will be heard.”).

14 See Siegel, “Politics of Constitutional Memory,” 22 (“A nation forges its future through these claims on its past.”); id. (“Constitutional memory is . . . a field of meaning in which we continuously negotiate who we are and what we are to do together.”); Reva B. Siegel,
Historical arguments remain integral to debates about the federal constitution, in and outside of court. And judges interpreting the federal constitution are only one of many audiences for historical arguments and narratives. Critical understandings of history and its relevance to law can empower state courts, legislators at all levels of government, civil society and social movement actors, and ordinary Americans to step into the void left by the Court majority’s retreat from rights protection. Reckoning with the past half-century of U.S. political and legal history and the movement strategies that produced today’s landscape is crucial to grasping the stakes of the current constitutional moment.

This essay explores some of the critical roles that history can and does play in post-*Dobbs* debates about reproductive rights and the future of American democracy. But first, Part I briefly dissects the *Dobbs* approach to history-and-tradition: its tainted origins; its selective and inaccurate account of historical facts; its disingenuous assertion that history provides a value-neutral source of constitutional meaning; its departure from recent approaches to history’s role in constitutional decisionmaking; and its inconsistent and results-driven application.

Part II explores critical roles for history in constitutional and political arguments about reproductive rights and justice. These histories offer a starkly different orientation to the past through approaches to constitutional interpretation that are grounded in values of equality, autonomy, and liberty as well as privacy and due process. They read the Reconstruction Amendments as a mandate for emancipation and for the eradication of all forms of bodily and reproductive coercion. They elevate the voices of those who long were excluded from political participation but whose liberation is the raison d’être of these constitutional provisions. They place abortion restrictions in a longer history of reproductive control and anti-democratic political traditions. In so doing, they counter historical narratives on the right that portray discrimination and inequality as a relic of the past. They expose and refute distorted accounts that frame abortion rights as eugenics and that depict constitutional protection for reproductive freedom as an affront to democracy rather than its prerequisite.

*Dobbs*’s approach to history-and-tradition need not bind us in any forum. Already, powerful counter-narratives, constitutional protections, legislative innovations, and political interventions have emerged in many arenas—including in states, where *Dobbs* ostensibly leaves the abortion question. Part III surveys

history’s critical role in defending reproductive rights in the states after *Dobbs*. Critical histories support expansive interpretations of state as well as federal constitutional provisions; discredit abortion restrictions passed for constitutionally suspect reasons or under undemocratic conditions; and bolster religious freedom claims. They also spotlight how the Right has used abortion to realign the parties and to promote a broader reactionary agenda, drawing attention to the tight connections between attacks on reproductive freedoms and assaults on democratic norms and institutions. Finally, a brief conclusion reflects on how history can inform legal and political discourse about reproductive justice and the defense of democracy.

I. **Dobbs’s History and Tradition**

All methods of constitutional interpretation look to the past in some way, explicitly or implicitly. The *Dobbs* majority’s history-and-tradition analysis is both factually and methodologically flawed, but its appeal to history is not inherently problematic or even conservative. Justice Alito begins from the premise that constitutional protection under the due process clause depends on whether a right is “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” Framing the inquiry in this way did not dictate Alito’s conclusion, however: past substantive due process decisions considered how history and tradition might evolve over time, responsive to changing conditions, to insights gained from experience, and to new understandings and values.

Many recent decisions defined rights at a higher level of generality, asking not whether the law protected a right to contraception or to same-sex intimacy or marriage but rather whether the ability to decide whether and when to conceive a child or choose a sexual or romantic partner was fundamental to individual liberty. Justice Alito’s particular brand of history and tradition analysis instead asks whether Anglo-American common law recognized a right to abortion, whether states in 1868 (when the Fourteenth Amendment was ratified) criminalized abortion, and whether anyone suggested during this period that states lacked the authority to regulate abortion. This method, its proponents contend, divorces constitutional interpretation from the policy preferences of judges and vests authority in stable, unchanging, objective
measures: how abortion was regulated at ratification sets the boundaries of constitutional rights today.\textsuperscript{15}

The problem, then, is not that Justice Alito looks to the past to inform his analysis, or even that he derives constitutional principles from historical experience. Rather, it is \textit{how} Alito appeals to history, how he imbues the past with legal significance, and how he falsely claims neutrality and freedom from value-driven choices in his method of constitutional interpretation. \textit{Dobbs}'s history-and-tradition analysis—like all methods of constitutional interpretation—is inherently value-driven. Which questions constitutional interpreters ask of the past inevitably shape the answers they find and the conclusions they draw about constitutional meaning in the present.

This Part briefly identifies the flaws in \textit{Dobbs}'s selective and inaccurate account of historical facts about abortion and its regulation. It then describes the deficiencies of \textit{Dobbs}'s method of interpreting the constitution based on a selective, inconsistent, and motivated approach to history and tradition that entrenches constitutional meaning in state laws passed at a time when women and people of color were excluded from the polity.

\textit{A. Dobbs's Flawed Account of the Past}

Surveying English authorities from Coke and Bracton to Sir Matthew Hale and William Blackstone, the \textit{Dobbs} majority concludes that the “eminent common law authorities” all regarded abortion as a crime.\textsuperscript{16} According to Justice Alito, if the law ever distinguished between abortions pre- and post-quickening (the moment when a pregnant person first felt fetal movement), that “rule was abandoned in the 19\textsuperscript{th} century,”\textsuperscript{17} and by 1868 three-quarters of U.S. states criminalized even pre-quickening abortion—an “overwhelming consensus”

\textsuperscript{15} See \textit{Dobbs}, 597 U.S. at 216 (“[H]istorical inquiries are essential whenever the Court is asked to recognize a new component of the ‘liberty’ interest protected by the Due Process Clause. . . . [because] the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court’s own ardent views about the liberty that Americans should enjoy.”) See also Siegel, “Memory Games,” 1131 (quoting Antonin Scalia, “Originalism: The Lesser Evil,” 57 U. Cin. L. Rev. 849, 864 (1989) (arguing that originalism “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”)).

\textsuperscript{16} \textit{Dobbs}, 597 U.S. at 243.

\textsuperscript{17} \textit{Dobbs}, 597 U.S. at 247.
that “endured until the day Roe was decided.” In short, according to the majority, “an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.”

Even if one accepts his metrics as proper indicators of constitutional protection, Justice Alito’s historical narrative is inaccurate and misleading at best, distorted and disingenuous at worst. Amicus briefs from the leading professional organizations of American historians, which synthesized a half-century of research and scholarship, tell a very different story. Available primary source evidence suggests that pre–quickening abortion was widely practiced in the colonial period and the early republic, with little interference from legal or medical authorities until the mid-nineteenth century. Information about methods for ending a pregnancy—often framed as restoration of the menses—remained available to anyone with access to a newspaper, where purveyors routinely advertised abortifacients.

The original impetus for more stringent legal prohibitions on abortion appears to have been publicity about the deaths of women—often portrayed sympathetically as innocent unmarried girls seduced by unscrupulous men—from procedures gone awry. The first such provision, enacted by Connecticut in 1821, included substances that caused abortion in an anti-poisoning statute after a “local minister impregnated a 17-year-old and then forced her to

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18 Dobbs, 597 U.S. at 249.
19 Dobbs, 597 U.S. at 250.
20 Prosecutions that implicated fetal injury or death during the pre-1700 period concerned “unwanted assaults that harmed a woman and endangered or ended her pregnancy”—battery, not consensual abortion. AHA/OAH brief, Dobbs, 12.
21 This was to some degree true even after passage of the Comstock Act, which outlawed communications and devices related to contraception and abortion, though over time some authors censored their published writing. See Joanna Grossman & Lawrence Friedman, “The Ghost of Anthony Comstock and the Abortion Wars,” Verdict, Mar. 8, 2023; Alicia Puglionesi, “Your Whole Effort Has Been to Create Desire: Reproducing Knowledge and Evading Censorship in the Nineteenth-Century Subscription Press,” 88 Bulletin of the History of Medicine 463, 469-73 (2015); Janet Farrell Brodie, Contraception and Abortion in Nineteenth-Century America 253 (1994).
22 See AHA/OAH brief, Dobbs, 16; Patricia Cline Cohen, “The Dobbs Decision Looks to History to Rescind Roe. But the History It Relies On is Not Correct,” Washington Post, June 24, 2022 (“The number of abortion statutes that states passed shot up between 1845 and the 1860s—and this pattern closely tracked with a sudden groundswell of newspaper reports about young women dead from bungled abortions . . . These highly publicized incidents usually involved the death of an unmarried woman, viewed sympathetically. The newspapers portrayed such women as innocent victims of seduction, desperate to ‘hide their shame’ of illicit premarital sex.”).
ingest an abortion-inducing potion.”23 As this example suggests, concerns about coercion likely inflected these early laws. By the 1840s, developments in journalism put before the public many more sensational accounts of women’s deaths. Still, public opinion lagged behind criminalization efforts. After the enactment of new restrictions in New York and Massachusetts, for example, only a small handful of cases went to trial, a tiny fraction of which resulted in conviction. Even the occasional guilty verdicts produced short sentences, usually no more than a few months.24

Beginning in 1857, a physicians’ campaign led by Boston gynecologist Dr. Horatio Storer sought to increase legal penalties and enforce criminal laws against individuals who performed or induced abortions. Historians and legal scholars have documented the various motives and rationales underpinning Dr. Storer’s campaign: not only to protect fetal life but also to enhance the stature of regular physicians and consolidate power vis-à-vis irregular practitioners and midwives; to protect the ethnoreligious character of the nation from an influx of Catholic immigrants by shoring up birthrates among white, married, affluent, native-born Protestant women; and to ensure that these women fulfilled their divinely and biologically ordained destinies as wives and mothers.25 Historians also have shown how despite the doctors’ best efforts, and indications that they influenced lawmakers who passed and strengthened criminal abortion laws, their campaign succeeded only partially in persuading the public that women should not be permitted to end pre-quickened pregnancies.26

Justice Alito dismisses evidence of constitutionally suspect motives as “statements made by a few supporters” of the nineteenth-century laws and scoffs at the notion that “the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women.”27 Rather, Alito claims that “passage of these laws was instead spurred by a sincere belief that

23 AHA/OAH brief, Dobbs, 14.
24 AHA/OAH brief, Dobbs, 16-17; Cohen, “The Dobbs Decision.” Indeed, nineteenth-century anti-abortion campaigners frequently lamented the lack of enforcement and the persistence of permissive public attitudes toward abortion. For some of Cohen’s findings, see Patricia Cline Cohen, “Married Women and Induced Abortion in the United States, 1820-1860” (Aug. 25, 2022), on SSRN.
27 Dobbs, 597 U.S. at 254.
abortion kills a human being.”28 Notably, historians do not question the sincer-
ity of anti-abortion physicians’ beliefs about fetal life but rather recognize that
they coexisted and were inextricably intertwined with other beliefs and mo-
tives, including nativist, anti-Catholic, and paternalistic or misogynistic
views.29 Reva Siegel and Cary Franklin explain: “Abortion bans were dualist in
structure: they enforced judgments about protecting the unborn and sex-role
judgments about women.”30

In any case, the historical evidence certainly belies the Dobbs majority’s as-
sertion of “an unbroken tradition” of criminalization. Even the majority’s count
of states that prohibited abortion in 1868 is open to serious question: Aaron
Tang’s research suggests that as few as 16 states—far short of the 26 claimed in
Dobbs—banned pre-quickening abortions in 1868.31 Moreover, myriad evi-
dence from primary sources suggests a wide chasm between the law on the
books and the social practice of abortion.32 Further, as Tang has shown, Alito is
wrong to assert that “[u]ntil the latter part of the 20th century,” the “right to
abortion” was “entirely unknown in American law.”33 Tang uncovers, among
other sources, an 1854 medical guide in which the author—who apparently op-
posed abortion—nevertheless “advocated . . . as a matter of legal right” that a
pregnant woman “alone has a right to decide whether she will continue the
being of the child she has begun.”34 Another author writing in the 1850s simi-
larly argued that “no woman ought to be compelled to bear a child against her
wishes; and no principle is more clear or undeniable, than that every woman

28 Dobbs, 597 U.S. at 254 (emphasis added)
29 See, e.g., Siegel, “Reasoning from the Body.”
30 Cary Franklin & Reva B. Siegel, “Equality Emerges as a Ground for Abortion Rights in
and After Dobbs, in Roe v. Dobbs: The Past, Present, and Future of a Constitutional Right to Abor-
tion (Lee Bollinger & Geoffrey R. Stone eds., forthcoming 2024). They write: “One of the most
striking features of Justice Alito’s opinion in Dobbs is its denial of the dual focus of abortion law
and its insistence that restrictions on abortion are, and always have been, exclusively about pro-
tecting fetuses.” Id. at 28; see also Siegel, “Reasoning from the Body.”
Abortion Ban,” 75 Stan. L. Rev. 1091, 1099 (2023); Aaron Tang, “The Supreme Court Flunks
Abortion History,” L.A. Times, May 5, 2022; Aaron Tang, “Lessons from Lawrence: How ‘His-
32 For more, see Tang, “Lessons from Lawrence,” 85–86 (describing Patricia Cline Cohen’s
research in progress).
33 Dobbs, 597 U.S. at 231; see also id. at 241 and 251 (repeating the assertion).
34 Tang, “Lessons from Lawrence,” 88–89 (quoting, inter alia, Dr. W.C. Lispenard’s Practical
Private Medical Guide 4 (Rochester 1854)).
has the inherent and inalienable right to choose.”  

Even on its own terms, then, Justice Alito’s account of the past is deeply flawed.

B. Dobbs’s Flawed Method of Constitutional Interpretation

Dobbs not only gives a partial and inaccurate account of the past; how it imbues the past with normative and constitutional significance is similarly in- firm. The version of history and tradition embraced in Dobbs determines Americans’ constitutional rights today by looking to laws enacted by white propertied men who enslaved people of African descent in a system built on terror, sexual violence, forced childbirth, and family separation; colonized and expropriated Native lands and eviscerated tribal sovereignty; and limited all women’s legal, political, and personal freedoms and prerogatives. Dobbs’s narrow appeal to history and tradition anchors contemporary constitutional law in archaic values and understandings from the enactment period, all while claiming neutrality. This has predictable consequences for those excluded from full citizenship in 1868. As Reva Siegel observes, Dobbs’s “tradition-entrenching methods . . . elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law.” Critics of Dobbs’s brand of “history and tradition” have exposed its suspect origins; inconsistent

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38 See, e.g., Linda K. Kerber, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship (1998); Siegel, “Politics of Constitutional Memory.” To originalists, Balkin writes, “those persons who did not participate in the framing and adoption of the Constitution, including those who could not have participated, like women and enslaved people, are not constitutional meaning makers.” Balkin, Memory and Authority, 199.


40 Siegel, “How ‘History and Tradition’ Perpetuates Inequality,” 101. The Roberts Court’s “history-and-tradition method provides new justifications for enforcing old forms of status inequality.” Id. at 101–02.
application over time and across contexts; selective and sometimes false accounts of the past; and motivated, results-driven reasoning.

1. The Tainted Origins of *Dobbs's* History and Tradition

*Dobbs*’s version of history-and-tradition revives a mode of analysis with ignominious origins, long since abandoned by the Court. Far from a neutral principle divorced from values or policy preferences, counting 1868 state laws is a method developed by segregationists to defend *Plessy*, as Reva Siegel has shown. Segregationists argued that the Fourteenth Amendment could not possibly prohibit Jim Crow, since many states engaged in racial segregation at the time of the amendment’s ratification. As Siegel points out, this historical pedigree highlights the absurdity of gauging the scope of the Reconstruction Amendments’ protection by asking how many states saw fit to protect a right at the moment of ratification. After all, the states that “count” under this method include states that had only just fought a war to preserve the prerogative to enslave human beings and that ratified the Amendment not because they disavowed enslavement or white supremacy, but as a condition of readmission to the Union. Moreover, the amendments targeted state laws—existing or easily foreseeable ones—that would violate the legal rights broadly defined in the amendments, since their framers anticipated the retrenchment to come. State-counting, rejected in *Brown*, resurfaced later in Justice Rehnquist’s dissent in *Roe v. Wade* (1973), in the Reagan administration’s case for overruling *Roe*, and as a rationale for upholding sodomy laws against constitutional challenge in *Bowers v. Hardwick* (1986).

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42 Siegel, “History of History and Tradition,” 111.
43 In *Brown*, the Court said: “[W]e cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” *Brown v. Board of Ed.*, 347 U.S. 483, 492–93 (1954).
44 *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003); Siegel, “History of History and Tradition,” 7. As Siegel explains, “Counting states can serve different ends. It can support or restrict evolving application of constitutional guarantees and it can expand the authority of the national government or the states.” *Id.* at 4.
Its proponents claim that Dobbs’s version of history and tradition provides a stable reference point, fixing in time the original meaning of text and offering an objective measure of how framers understood constitutional provisions at the time of enactment. As Siegel emphasizes, Dobbs “proclaimed that it was cleansing the law of politics. But in fact Dobbs was playing ‘memory games’ in which ‘originalist judges ventriloquize historical sources’” to “justify the Court’s decision to overrule Roe.” Dov Fox and Mary Ziegler’s work reveals that the vision of history and tradition embraced in Dobbs was neither a foregone conclusion nor a stable, consistent commitment of the Right. Rather, it grew out of fierce contestation among shifting coalitions and internecine negotiations between various conservative factions. Fox and Ziegler detail a long history of social movement struggle over history and tradition, with visions of constitutional rights as static or “entrenched” competing with theories that see traditions as “evolving” to gradually support more expansive freedoms.

Like the originalism that crystallized during the Reagan administration and triumphed in Dobbs, the majority’s version of history and tradition is anything but neutral, despite its claims otherwise. Dobbs “presents its contested value judgments as expert claims of law and historical fact to which the public owes deference,” in Siegel’s words. But like originalism itself, Dobbs’s history and tradition is a “goal-oriented conservative political practice” disguised as an objective method of constitutional interpretation. Siegel shows how “overturning Roe was the defining goal of originalism as a political practice—and not the result of applying originalism as a value-neutral interpretive method.”

Dobbs’s version of history and tradition elevates the views and acts of men who made laws under radically undemocratic conditions and ignores both the voices of those excluded from lawmaking and the fact of their

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45 Siegel, “Dobbs, the Politics of Constitutional Memory, and the Future of Reproductive Justice.”

46 Dov Fox & Mary Ziegler, “The Lost History of ‘History and Tradition’” (unpublished manuscript on file with the author).

47 Siegel, “Memory Games,” 1128 (describing Justice Scalia’s and Ed Meese’s defenses of originalism).


49 Siegel, “Memory Games,” 1148.
disenfranchisement. Strikingly, the Dobbs majority opinion does not even briefly probe the ideas and intentions of lawmakers who fought for the Fourteenth Amendment’s enactment, much less those who could not participate in congressional debates or in electing representatives who did. At a minimum, Jack Balkin observes, “If you want to know what a constitutional provision should mean in practice and how we might apply its principles today, it might be good to consult the views of those who fought for its adoption over many decades.” As Michele Goodwin writes, “the legal authorities cited by [the Dobbs majority] played no role in dismantling slavery. They were not the Framers or ratifiers of the Reconstruction Amendments.” The majority “references Blackstone over a dozen times, while not once offering mention of abolition or those who inspired that legal movement.”

The Dobbs majority not only disclaims (in dicta) the relevance of the equal protection clause but also ignores the background conditions of women’s subordination—enslaved and freedwomen as well as women with greater privilege who nevertheless remained subject to coverture and disenfranchisement. And the Court entirely disregards subsequent constitutional developments, such as the Nineteenth Amendment and the decades of struggle for women’s equal citizenship that preceded and followed its ratification.

2. Dobbs’s Methodological Departure

As recently as 2015, the Court seemed to have left the narrow, entrenched version of history and tradition realized in Dobbs behind for good and adopted instead a dynamic, evolving approach that asked very different questions of the past. In decisions such as Lawrence v. Texas (2003) and Obergefell v. Hodges (2015), the Court interpreted the Fourteenth Amendment “transformatively, reasoning about the nation’s traditions at a high level of generality to vindicate understandings of liberty and equality that those who ratified [the amendment] did not all share,” as Siegel explains. Justice Kennedy’s individual rights opinions, for instance, invoked history to justify and power a dynamic approach to

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51 Balkin, Memory and Authority, 219.
53 See Siegel, “The Politics of Constitutio

54 Siegel, “History and Tradition,” 106. See also Tang, “Lessons from Lawrence,” 74–76 (explaining the role history played in the Court’s decision to overrule Bowers v. Hardwick).
constitutional interpretation. “The nature of injustice is that we may not always see it in our own times,” Kennedy wrote in Obergefell. The framers of the Bill of Rights and the Fourteenth Amendment “did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”

More restrictive versions of history and tradition, such as those articulated by the majorities in Bowers and in Washington v. Glucksberg (1997), and by Justice Scalia’s plurality opinion in Michael H. v. Gerald D. (1989), ask whether a specific right has enjoyed protection in the past. The dynamic approach to history and tradition embraced in Lawrence and Obergefell instead allows for understandings of a right’s scope to expand over time and frames the right in more abstract, general terms (a right to sexual intimacy with one’s chosen partner, for example, rather than a right to engage in “homosexual sodomy”).

Dobbs’s deference to a past tainted by injustice and oppression also disparages principles of equality that imbued recent individual rights decisions from Planned Parenthood v. Casey (1992) to Lawrence and Obergefell. Under the post-Brown equal protection clause, the past often appears as a cautionary tale: a history of discrimination and subordination, of denying rights and liberties, provides a rationale to protect them today. Casey did not rely explicitly on the equal protection clause, but equality values suffused the Court’s joint opinion. Justices O’Connor, Kennedy, and Souter recognized “a time, not so long ago,” when common-law traditions vested in husbands authority over married women’s lives. But because these traditions were “repugnant to our present

55 Obergefell v. Hodges, 576 U.S. at 664. See also Lawrence, 539 U.S. at 578–79 (the due process clauses’ framers “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”); Dobbs dissent, 597 U.S. at 374–75 (“[T]he Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers’ invitation. It has kept true to the Framers’ principles by applying them in new ways, responsive to new societal understandings and conditions.”).


understanding of marriage and of the nature of the rights secured by the Constitution,” the Court struck down Pennsylvania’s requirement that women notify their husbands before ending a pregnancy.59

Obergefell combined a dynamic approach to history and tradition with equal protection’s critical orientation to the past.60 The opinion swept away the already eroding distinction between how due process and equal protection respectively treat the relevance of history: Justice Kennedy’s opinion considers evolving understandings and values as integral to both. “If rights were defined by who exercised them in the past,” Kennedy wrote, “then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”61 Notably, Obergefell credits historians’ briefs that detailed the history of discrimination against gay and lesbian Americans and how the institution of marriage evolved over time in response to changing social conditions, including new understandings of individual liberty and sex equality.62 Both due process and equal protection precedents ground Obergefell’s result. Dobbs, in sharp contrast, rigidly adheres to the particular brand of history-and-tradition analysis that Siegel traces back to defenses of segregation and Plessy.63 Dobbs also relies in part on (an inaccurate account of) the common law to anchor women’s reproductive rights in the era of coverture.

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60 As Kenji Yoshino has written, even expansive due process opinions such as Roe and Lawrence have “thrown sops to tradition . . . underscor[ing] the imperative to reason from history.” Kenji Yoshino, “A New Birth of Freedom?: Obergefell v. Hodges,” 129 Harv. L. Rev. 147, 152 (2016). See also Tang, Lessons from Lawrence,” 75 (explaining how Lawrence “squarely rejected an approach to substantive due process that focuses myopically on what states criminally punished in 1791 or 1868: ‘History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.’”) (quoting Lawrence, 539 U.S. at 572).

61 Obergefell, 576 U.S. at 671.


63 Siegel, “History of History and Tradition.”
Indeed, to reach its desired result, the *Dobbs* majority had to disregard a half-century of constitutional sex equality as well as substantive due process precedents. Justice Alito not only abandons a dynamic approach to history and tradition; he brushes aside the equal protection clause as a source of reproductive rights.\(^64\) Alito’s dismissive disregard—in dicta, since there was no equal protection claim before the Court—reflects equality arguments’ power rather than their weakness: Taking seriously equal protection arguments and the precedents on which they relied would pose an insurmountable obstacle to the reasoning and the result in *Dobbs*, as Reva Siegel, Melissa Murray, and I have detailed elsewhere.\(^65\)

For now, suffice it to say that *Dobbs’s* approach to the past also departs dramatically from past treatments of history in constitutional sex equality cases. For example, the Court’s 1996 decision in *United States v. Virginia*—one of several key equal protection rulings ignored by Justice Alito—articulates a starkly different relationship between history-and-tradition and constitutional rights than that posited by the *Dobbs* majority. In *Virginia*, Justice Ruth Bader Ginsburg referred to the Nation’s “long and unfortunate history of sex discrimination” as a reason to apply “skeptical scrutiny” to a sex-based classification that subordinated women based upon stereotypes about physical and psychological differences that ostensibly precluded women’s admission to the Virginia Military Institute (VMI).\(^66\) There, the history and tradition of excluding women (and in earlier years, men of color) from VMI and many other prestigious institutions of higher learning weighed in favor of rather than against recognizing women’s rights in the present day.\(^67\) Indeed, constitutional sex equality law

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\(^{64}\) *Dobbs*, 597 U.S. at 236–37.


\(^{67}\) Mary Ziegler identifies the analysis in *Dobbs* as a departure from a “pluralist” history and tradition analysis, the product of internal social movement contestation over several decades. See Mary Ziegler, “The History of Neutrality: *Dobbs* and the Social Movement Politics of History and Tradition,” Yale L.J. Forum, Nov. 6, 2023. As Rev. Siegel has noted, in other contexts (guns, religious liberty), Justices Thomas and Alito have taken a very different approach to the history of racism and nativism, one much more akin to a “constitution of aspiration.” See Siegel, “How ‘History and Tradition’ Perpetuates Inequality,” 912–24. On the Roberts Court’s
depends on seeing the past as “negative precedent”—a history of discrimination and oppression is what justifies the application of heightened scrutiny to laws that seemed perfectly constitutional to many of the men who participated in the framing and ratification of the Fourteenth Amendment.  

3. The Roberts Court’s Selective Application of History and Tradition

Trenchant commentary that reaches across doctrinal fields highlights the Roberts Court’s inconsistent and motivated applications of historical methods. Khiara Bridges argues that the Roberts Court uses examples of pre-civil rights-era racial injustice to define redressable harm so narrowly that contemporary manifestations of white supremacy cannot rise to a remediable level unless they closely resemble the “bad old days.” Melissa Murray chronicles how this Court enforces men’s rights to property, guns, and religious freedom at the expense of women’s rights to bodily autonomy, political participation, and physical safety. Reva Siegel details how “the Court selectively defers to the past”: the conservative Justices pick and choose when to “repudiate[] past practices” that reflect racism, nativism, and religious bias and when to uphold them.


69 Bridges, “Race in the Roberts Court,” 23. On the use of analogies to narrow the scope of redressable harm, see Serena Mayeri, Reasoning from Race: Feminism, Law, and the Civil Rights Revolution (2011), passim.

70 “[T]he selectiveness and inconsistency of originalism,” she writes, “enables [a] jurisprudence of masculinity.” Melissa Murray, “Children of Men: The Roberts Court’s Jurisprudence of Masculinity,” 60 Houston L. Rev. 799, 804 (2023). See also Goodwin, “Opportunistic Originalism” (identifying and critiquing the Court’s “selective” and “cynical” use of originalism, including its solicitude for Black men’s gun rights and “erasure” of Black women’s bodily autonomy).

71 Siegel, “How ‘History and Tradition’ Perpetuates Inequality,” 102; see also id. at 116–17 (discussing Justice Alito’s lengthy concurrence describing the nativism and anti-Catholic bias underlying Montana’s no-aid to religious entities provision struck down by the Court in Espinoza v. Department of Revenue, 140 S.Ct. 2246 (2020)).
Radical inconsistencies in the Court’s application of history-and-tradition abound. The *Dobbs* dissenters themselves excoriated the majority for applying history-and-tradition analysis differently than in *New York State Rifle and Pistol Association v. Bruen*, decided just the day before. For example, *Bruen* cast doubt on the relevance of “historical evidence that long predates [ratification]” and admonished that “post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.”72 In contrast, *Dobbs* reaches as far as the thirteenth century and forward into the mid- to late-twentieth century in evaluating the “unbroken tradition of criminalization” the majority deemed relevant to its determination that the Fourteenth Amendment does not protect abortion.73

Outside the abortion context, even in cases argued and decided in adjacent Terms, the Court has taken a very different approach to history and its relevance to statutory and constitutional interpretation. For instance, in *Health and Hospital Corporation v. Talevski* (2023), the Court rejected an invitation to overturn decades of precedent and prevent plaintiffs from bringing causes of action that rest on Congress’s spending power under Section 1983. In so doing, seven Justices joined an opinion that noted how the history on which challengers relied “is, at a minimum, contestable,” and declared that “[s]omething more than ‘ambiguous historical evidence’ is required before we will flatly overrule a number of major decisions of this Court.”74 In *Haaland v. Brackeen* (2023), the Court upheld provisions of the Indian Child Welfare Act (ICWA) against constitutional challenge, invoking congressional power to address the legacy of a long

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72 *Dobbs* dissent, 597 U.S. at 371 (quoting *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S.Ct. at 2137 (2022)) (internal quotation marks omitted).


74 *Health and Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166, 179 (2023) (internal citations omitted).
history of child removal from Native families. Again, seven Justices signed on to the holding, and a concurrence by Justice Gorsuch recounted the egregious history of colonization, oppression, and attempts to destroy Indigenous culture that impelled Native mobilization and congressional action.

C. The Future of Dobbs’s History-and-Tradition Analysis

Given the Court’s motivated and selective application of history and tradition, it is difficult to predict its future trajectory. Even if we take the Court at its word and project forward the Dobbs methodology, the results it would produce are far from clear. Overruling Roe and Casey is only the first step in a larger project to outlaw abortion nationwide and to undercut access to other forms of reproductive health care. But the utility of Dobbs’s history-and-tradition analysis in furthering this agenda is somewhat more mixed than it might appear. On the one hand, the Dobbs majority’s approach seems to cast doubt on the results of earlier decisions such as Griswold, Eisenstadt, Lawrence, and Obergefell, as Justice Thomas’s concurrence freely admits. On the other hand, in some contexts a faithful application of the Dobbs Court’s historical methodology could undermine the next generation of anti-abortion arguments.

For example, the Dobbs majority’s history-and-tradition analysis might call into question the constitutionality of a proposed nationwide abortion ban, whether through a newly enacted statute or in the form of a revivified Comstock Act. Aaron Tang argues that if the measure of a constitutional right is the states’ legal landscape at the time of a provision’s ratification, then the Fifth Amendment’s due process clause prevents the federal government from prohibiting pre-quickening abortions, since when the Bill of Rights was ratified in 1791 no state statutes yet criminalized these procedures.

The Dobbs majority’s history-and-tradition methodology, if consistently implemented, could also deal a fatal blow to constitutional fetal personhood

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76 Id. at 296–334 (Gorsuch, J., concurring) (citing work by historians and legal scholars such as Matthew Fletcher and Gregory Ablavsky). See also Bostock v. Clayton County (2020) (Gorsuch, J.) (citing early sex discrimination lawsuits by gay and transgender employees as evidence that at least some contemporaries read Title VII as protecting against sexual orientation and gender identity discrimination).
77 Dobbs, 142 S. Ct. at 2301—02 (Thomas, J., concurring).
Siegel describes how originalist arguments for constitutional fetal personhood cite primary sources selectively and misleadingly.80 Tang points out that if the Fourteenth Amendment defined embryos and fetuses as “persons,” then every state—or at least a clear majority—should have banned abortion from conception in 1868. If “as many as 21 states” did not, by Tang’s count (nine by the Dobbs majority’s lights), fetuses could not have been considered persons with constitutional rights at the time of ratification.81 Tang suggests that, per Justice Alito’s logic, “the fact that some states in 1868 chose not to permit abortion ‘does not mean that anyone thought the States lacked the authority to do so.’”82 Advocates can use historical evidence to refute the claim that the “persons” protected by the Fourteenth Amendment include the unborn and to contest the notion that fetal life and maternal life deserve equal weight, among other possible counterarguments.

If a constitutional fetal personhood argument were to succeed despite its incompatibility with Dobbs’s history-and-tradition analysis, another cascade of legal questions would follow. What it would mean to consider an embryo or fetus a legal person from the moment of conception is far from clear: John Finnis and Robert George, leading scholarly proponents of this view, imply that it would not necessarily require that fetal life be prioritized over the life of a pregnant person, but many proponents of fetal personhood support bans on abortion without such qualification.83 Supporters of “abolishing abortion” contend that the equal protection clause requires state homicide laws “to protect persons not yet born equally as persons who are,” mandating that abortion seekers and those who assist them be prosecuted and punished as murderers or accessories to murder.84 If fetal personhood arguments prevailed, questions


80 See, e.g., Siegel, “Memory Games,” 1187-91, n.236.


82 Tang, “After Dobbs,” 1152. Tang’s argument also relies on the application of “history and tradition” analysis to the equal protection clause as well as the due process clause.


84 Brief of Amici Curiae Foundation to Abolish Abortion, et al., Dobbs, No. 19-1392; Free the States: Asserting State Sovereignty to Abolish Abortion,
about historical methodology would also proliferate, including whether the Dobbs history-and-tradition analysis applies to equal protection or other constitutional provisions in the same way as it does to due process claims, or in some other way.

There is little reason to think, however, that the Court will adhere to the Dobbs history-and-tradition analysis in a future case that directly presents a claim of constitutional fetal (or embryonic) personhood. The selective, inconsistent, and results-driven approach to history and tradition on display in the Roberts Court’s recent jurisprudence on abortion and beyond—not to mention its rejection of stare decisis across a range of contexts—suggests that the majority feels few constraints on its prerogative to remake the law.85

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The Dobbs majority’s selective, inaccurate account of the past and cramped understanding of history’s relevance to constitutional interpretation understandably engenders skepticism about history’s roles in legal advocacy generally and constitutional litigation in particular.86 The problem with Dobbs, however,
is not the fact that it appeals to the past, but how, why, and for what purposes it does so. The *Dobbs* version of history and tradition is only one of many possible ways that constitutional law and politics might engage with history inside and outside of courts, as the next Part explores.

II. A CRITICAL ROLE FOR HISTORY: EQUALITY, REPRODUCTIVE JUSTICE, AND DEMOCRACY

After *Dobbs*, history is more critical than ever, in both senses of the word. It is critical, in the sense of necessary or crucial, to understand the deconstructive and reconstructive roles that accounts of the past can play in constitutional law and politics. And the importance of taking a critical approach to history—one that understands the past in all its complexity so as to shape a more just future—has never been more urgent. *Dobbs* “employed selective claims about America’s ‘history and traditions’ to celebrate inequality as freedom,” in Reva Siegel’s words. But “[c]onstitutional memory is not only an instrument for justifying repression. It can also enable critique and resistance.” The history that the *Dobbs* majority suppresses “can be mobilized to anti-subordination ends.”

History plays multivalent roles in constitutional interpretation, for conservatives and progressives, originalists and living constitutionalists. As Siegel explains, the past can be “positive precedent, identifying constitution makers who model constitutional virtues and an understanding of our constitutional commitments we wish subsequent generations to emulate” and it can be “negative precedent,” “a record of past wrongs that the nation strives to remedy and against which the nation defines itself.” Jack Balkin describes a “redemptive constitutionalism” that “sees the past and the present as fallen and hopes to repair the future.”

How the past matters to constitutional meaning in the present and future is never a value-neutral exercise. Conservative legal movement actors who...
coalesced around an originalist version of history—and-tradition did so because they sought certain outcomes; it was no coincidence that tethering constitutional rights to the 1790s or 1860s often produced the desired results.\footnote{On the politics of originalism and the conservative legal movement, see, for example, Siegel, “Memory Games”; id. at 1139 n.40 and sources cited therein; Ziegler, “The History of Neutrality.”}

Values also inform more progressive modes of constitutional interpretation, but a critical approach to the past sees history “as a resource, not a command.”\footnote{Balkin, Memory and Authority, 10. As Siegel writes, we can “find resources . . . in understandings that gave rise to the antislavery movement, and the suffrage movement, to the social mobilizations that produced Roe and the mobilizations against sterilization abuse.” Siegel, “Dobbs, the Politics of Constitutional Memory, and the Future of Reproductive Justice.”} Those who treat history as a command look to the past for definitive answers to specific constitutional puzzles: for example, if most states criminalized abortion in 1868, then no constitutional right to abortion exists today; or if the framers of the Fourteenth Amendment did not believe women and men should be political equals, then sex discrimination remains constitutionally permissible. Those who see history as a command—what happened in the past determines definitively our rights or duties in the present—have a strong incentive to eschew nuance, cherry-pick facts, and ignore inconvenient truths.

But if the past instead provides resources for thinking about constitutional principles and values (for example, what would be necessary to ensure the emancipation and equal citizenship of people whose enslavement the Reconstruction Amendments sought to eliminate)—then there is little reason to distort facts or even to gloss over moral complexity. Rather than pretend that we are searching the past for an objective, discoverable truth that will determine constitutional meaning in the present, we can acknowledge that we are engaged in a debate about constitutional principles and values informed by our understanding of the past in all of its messiness.

A critical orientation toward history changes the questions we ask of the past. Rather than asking how many states banned abortion in 1868, for example, we can ask what evils the Reconstruction Amendments’ framers sought to eradicate. Rather than focusing only on the views of white male landowners empowered to vote for ratification, we can look also to the experiences and ideas of the excluded and disenfranchised, such as formerly enslaved and freedpeople. Rather than assuming a constitutional meaning fixed in time, we can imagine a document meant to evolve in response to changing conditions, mislead their audiences about the kinds of justifications they actually employ.” Balkin, Memory and Authority, 262.
understandings, and values. Rather than deferring to and preserving historical practices, we can look to the past to find injustices to be resisted and overcome.

These, of course, are not new ideas. As we have just seen, until very recently the Court’s own understandings of history and tradition—and of equal protection—incorporated a much more dynamic and critical approach to the past. Moreover, scholars have long developed accounts of the past and its relevance to law that provide a wealth of resources for constitutional politics. Some of these interpretive methods and historical narratives have been submerged or siloed from legal advocacy for abortion rights until recently. Even before Dobbs, efforts to rekindle them in the service of reproductive justice and democracy felt increasingly urgent.

Asking different, more critical questions about the past, these interpretive methods elevate values of equality, justice, and autonomy as well as liberty and privacy. Legal arguments based in critical histories use the past as both “positive and negative precedent,” unearthing injustices to be remedied and stories of unrequited resistance to be revivified. They counter the common contention that the constitution is silent on abortion by spotlighting the liberatory promise of the Reconstruction Amendments in matters of bodily and family integrity. They look to the past to expand our understanding of whose voices matter to constitutional meaning, placing Black women’s reproductive subjugation at the center of constitutional concern.

Asking different questions of the past can also produce answers that correct distortions of the historical record. These counternarratives contradict spurious conflations of abortion and eugenics by locating abortion bans in a long history of infringements on reproductive autonomy that deny equal citizenship based on race, sex, sexuality, disability, and poverty. Accurate accounts of American political history refute the Dobbs majority’s contention that the recognition of a federal constitutional right to abortion is anti-democratic and instead draw attention to the deep intertwining of reproductive rights and justice with the past, present, and future of our democracy.

Given its current composition, the U.S. Supreme Court’s majority is unlikely to embrace critical histories, much less apply them to abortion rights and other questions of reproductive justice. But arguments grounded in these histories nevertheless are worth making even in federal courts—they are, in fact,

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93 Siegel, “Politics of Constitutional Memory,” 52.
imperative. Such legal arguments and historical accounts create a record for sympathetic judges to invoke, provide fodder for dissenting opinions that alert the public to the majority’s flawed narratives and reasoning, and lay groundwork for future rulings. These arguments and narratives also wield persuasive power in other fora: state courts, legislatures, political campaigns, public and scholarly debates, school curricula, and press coverage. If the long game requires galvanizing social movement activism, building public support, winning elections, and passing legislation, then the federal judiciary is only one of many audiences for critical histories.

A. Whose History and Tradition? Finding Constitutional Value(s) in the Past

Historians and legal scholars have long and fruitfully explored the ideas and attitudes of those excluded from the formal processes of lawmaking, as well as their influence, direct and indirect, on those past processes and on constitutional meaning in the present. More than a quarter-century ago, Peggy Cooper Davis undertook both projects in Neglected Stories: The Constitution and Family Values. There, she tells “doctrinal stories” and “motivating stories,” the latter drawn from the lived experiences and voices of enslaved people. These experiences and voices, she persuasively contends, too often fail to inform interpretation of the Reconstruction Amendments when they should be at the

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94 Balkin argues that “even people who actively oppose originalism as a comprehensive theory of interpretation should have no qualms about making originalist arguments. In fact, they should make them regularly” because “for the foreseeable future, the American judiciary is likely to be filled with many originalists”; even if not persuasive to these judges, “scholars and advocates should make arguments about adoption history [the history surrounding the framing and enactment of constitutional provisions] to critique how these judges use history”; and importantly, originalist arguments “draw on the normative power of the nation’s cultural memory.” Balkin, Memory and Authority, 173.


center of how we construct constitutional meaning. Davis recounts how abolitionists believed “exploitation of the labor, sexual and physical integrity, and reproductive autonomy” of enslaved people violated their “inalienable . . . right to [their] own body.” She writes: “If one follows the principle that freedom is slavery’s opposite, one must conclude that the antislavery movement . . . understood freedom to entail protection against totalitarian control over people’s bodies and reproductive lives.”

Davis’s intervention is one of both interpretive method and historical excavation. She is not an originalist, and she does not consider these neglected stories to be significant because they are determinative of the Reconstruction Amendments’ original intent or meaning. She asks different questions of the past, looks to different sources of constitutional meaning, and finds different answers. Davis calls us to recapture an “antislavery history and tradition” that asks not “whether the [challenged] state action was traditional or traditionally tolerated, but whether toleration of it is consistent with the history that produced, and the traditions that support, the relevant constitutional provisions.” To Davis, “[l]aws and practices consistent with a challenged state action . . . might be manifestations of a constitutional ideal, but they might also be manifestations of the mischief against which the Constitution protects us.”

After the Dobbs draft leaked, Davis reminded us that lawmakers enacted the Thirteenth and Fourteenth Amendments “in direct response to slavery’s heartless separation of families and to enslavers’ brutal practices of human breeding,” and that to the enslaved persons whose liberty and equal citizenship those amendments were meant to ensure, “Freedom meant the right to have families on one’s own terms.” Far from having nothing to say about abortion, as the Dobbs majority would have it, Davis reads the Reconstruction Amendments as speaking directly to reproductive injustices of all kinds.

In a similar spirit, Dorothy Roberts has long argued that the reproductive oppression of enslaved Black women should ground constitutional rights to

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97 Davis, Neglected Stories, 180.
98 Davis, Neglected Stories, 180.
99 Davis, Neglected Stories, 215 (emphasis in original).
100 Davis, Neglected Stories, 215 (emphasis added).
privacy, due process, and equal protection.\textsuperscript{102} More recently, Roberts has articulated an “abolition constitutionalism” that draws powerful connections between antislavery lawmakers who framed the Reconstruction Amendments and unfinished projects of liberation that seek to dismantle the carceral state in its many manifestations, including the prison-industrial complex, family policing in the name of child welfare, and the criminalization of pregnancy.\textsuperscript{103} Roberts’ abolition constitutionalism uses the Reconstruction Amendments “instrumentally,” to promote constitutional values consistent with the nineteenth-century abolitionists’ ambition of eradicating enslavement and its legacies, and to attack anti-abolitionist legal theories such as colorblindness and discriminatory purpose requirements.\textsuperscript{104}

This mode of reasoning about the past takes the constitutional framers seriously but also critically, always with an eye toward the values animating constitutional provisions and an understanding that constitutional meaning is made through a process of contestation.\textsuperscript{105} Sometimes, it looks to the words of nineteenth-century lawmakers themselves: Michele Goodwin observes that “[i]f the Court is committed to addressing contemporary concerns through the filter of the Framers of the Thirteenth and Fourteenth Amendments, then it must begin by understanding them as abolitionists committed to freeing Black women from the conditions of slavery in all its manifestations.”\textsuperscript{106} Goodwin mines antebellum and Reconstruction-era archives to show how framers referred specifically to the sexual violence, forced pregnancy, and family separation endemic to American slavery when they shaped the constitutional provisions designed to effectuate emancipation and equal citizenship for freedpeople.\textsuperscript{107} “The Constitution,” she writes, “more than acknowledges Black


\textsuperscript{104} Id. See also, e.g., Cynthia Soohoo, “Reproductive Justice and Transformative Constitutionalism,” 42 Cardozo L. Rev. 819 (2021) (exploring how applying a transformative interpretive method to the U.S. constitution could help to overcome historical and present-day reproductive injustice).

\textsuperscript{105} On constitutional change as the product of social movement conflict, see, for example, Siegel, “Constitutional Culture, Social Movement Conflict, and Constitutional Change.”

\textsuperscript{106} Goodwin, “Opportunistic Originalism,” 189. See also Davis, \textit{Neglected Stories}.

\textsuperscript{107} Goodwin writes: “[A] rich archive exists that illuminates debates, speeches, and concerns the Court overlooked related to involuntary reproductive servitude, unwanted and forced
women’s emancipation from systems of bondage—the Reconstruction Amendments directly address it.”

Crucially, these histories and their incorporation into constitutional memory also expand our conception of whose history and traditions are relevant to constitutional interpretation and worthy of honor and emulation. They amplify voices less often included in the “doctrinal stories” told by the Court and deliberately excluded until very recently from legislative debates over proposed laws and constitutional provisions—narratives of formerly enslaved persons; activists seeking to change unjust laws; women and people of color who petitioned the government for redress when they could not participate directly in the political process; and leaders and ordinary people whose participation in constitution-making historians have uncovered but courts are only just beginning to recognize. For example, Davis’s motivating stories elevate the experiences and ideas of enslaved and freedpeople; Roberts looks to thinkers such as Frederick Douglass to reconfigure abolition’s relationship to the constitution; Goodwin asks us to imagine the agony of enslaved girls, women, and mothers subjected to unthinkable violence and terror; and Siegel unearths forgotten disputes over women’s suffrage, which encompassed far more than access to the ballot and infused the right to vote with constitutional meanings that implicated women’s control over their bodies, reproductive decisions, and family lives.


109 See, e.g., Ablavsky & Allread, “We, the (Native) People”; sources cited supra.

110 See Davis, Neglected Stories.

111 See Roberts, “Abolition Constitutionalism.”


Such voices — “positive precedents” — can be found in the more recent past as well, of course.\(^{114}\) Historians have chronicled how advocates, often led by women of color, agitated in the mid- to late-twentieth century for the repeal of criminal abortion laws, an end to sterilization abuse, and statutory and constitutional guarantees of a right to subsistence.\(^{115}\) Advocacy produced results in some, though certainly not all, of these arenas.\(^{116}\) Over the half-century following Roe, feminist legal advocacy sparked a rich jurisprudence of sex equality law. Thanks to champions like Pauli Murray, Ruth Bader Ginsburg, and their legates, strong anti-stereotyping and anti-subordination principles animate caselaw from the 1970s on questions including civic participation, sex equality within marriage, and social insurance provision. More recent decisions in United States v. Virginia and Nevada v. Hibbs strengthen these principles and justify their application to laws that regulate pregnancy.\(^{117}\) As Siegel writes, “Recovering these voices and democratizing the sources of constitutional memory will help transform this nation’s account of its history and traditions,

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114 As Reva Siegel observed before Dobbs, “[W]hen the Court’s originalists debate the meaning of the Constitution’s liberty and equality guarantees, they make no pretense of employing originalist methods. Instead, they offer all manner of reasons and draw on all manner of sources, including post-ratification history, dissenting opinions, and social-movement arguments.” Siegel, “Politics of Constitutional Memory,” 50 (citing cases).


116 See Mayeri, Reasoning from Race.

117 See Siegel, “The Pregnant Citizen”; Equal Protection Brief, Dobbs; Siegel, Mayeri & Murray, “Equal Protection in Dobbs and Beyond.” Amicus briefs in recent Supreme Court cases feature the voices of women testifying to the importance of abortion access to their own ability to enjoy fulfilling lives and careers. See infra.
and so provide more resources for conversations about the family we so critically need to have.”

B. Locating Abortion Bans in a Long History of Reproductive Control

Historical narratives of progress toward racial and sex equality underpin the Roberts Court’s jurisprudence across a range of contexts. As Khiara Bridges observes, the Roberts Court selectively contrasts present-day conditions with the “bad old days” of white and male supremacy, denying any resemblance between past and present. The conservative Justices often ignore or deny persistent racial injustice and inequality, except when it suits them. If voter suppression is largely a relic of the past, then voters of color need not worry about the demise of section 5 of the Voting Rights Act or efforts to weaken section 2 enforcement. If the playing field in education and employment is now level, then affirmative action is obsolete. If racism in the criminal legal system can be overcome by rooting out biased bad apples, then structural reforms are unnecessary. If “women are not without electoral or political power,” cast more ballots than men, and have made strides in the workplace and in politics, then they no longer need to rely on reproductive freedom—if they ever did—to participate as full citizens.

To resist these narratives, Dorothy Roberts emphasizes “the importance of a historical analysis that ties together forms of white supremacy over time,” to counter the conservative majority’s refusal to acknowledge parallels between older forms of racial and gender subordination and their contemporary manifestations. Rather than posit a fundamental discontinuity between pre- and post-civil rights-era America, Roberts calls on us to understand our present as deeply rooted in past practices that endure in an altered but recognizable form today. In the context of reproductive injustice, this means noticing the “striking
connection between the exploitation of enslaved women’s reproductive labor and the denial of reproductive autonomy imposed by abortion bans,” as well as how today’s restrictive abortion laws exacerbate the effects of several decades of laws and policies that criminalize pregnancy and poverty.\textsuperscript{123}

Beginning before the \textit{Dobbs} decision, advocates looked for opportunities to highlight how abortion restrictions are part of a long history of reproductive control, broadly defined. Foregrounding this history serves many purposes: it draws connections between white and male supremacy in the past and present; it refutes anti-abortion advocates and judges who claim that abortion rights are a tool of eugenics; it “expands the frame” to expose how states that purport to support maternal health and fetal life have long perpetuated reproductive injustice instead; and it emphasizes how reproductive control historically and in the present day violates the promise of equal protection of the laws by targeting individuals, families, and communities based on race, sex, religion, poverty, and disability.

1. Critical Histories of Reproductive Control in \textit{Dobbs}\textsuperscript{124}

Reproductive justice organizations filed amicus briefs in earlier Supreme Court litigation, explaining how abortion restrictions’ disproportionate impact on Black, Brown, Native, poor, immigrant, and rural women aggravated pre-existing historical inequalities.\textsuperscript{125} Then, federal district court Judge Carlton Reeves indicated his receptivity to such arguments in his 2018 opinion granting the \textit{Dobbs} plaintiffs’ motion for a permanent injunction. Judge Reeves deemed the “Mississippi Legislature’s professed interest in ‘women’s health’ [] pure gaslighting,” and noted that despite the state’s egregiously high rates of maternal

\begin{itemize}
  \item \textsuperscript{123} Roberts, “Racism, Abolition, and Historical Resemblance, 52. See also Roberts, \textit{Killing the Black Body}; Michele Goodwin, \textit{Policing the Womb: Invisible Women and the Criminalization of Motherhood} (2020); Wendy Bach, \textit{Prosecuting Poverty, Criminalizing Care} (2022).
  \item \textsuperscript{124} This section discusses the \textit{Dobbs} case decided by the Supreme Court in 2022, as well as other litigation against Mississippi’s abortion restrictions, which also proceeded under the name \textit{Jackson Women’s Health Organization v. Dobbs}.
  \item \textsuperscript{125} For reproductive justice-oriented briefs in prior Supreme Court cases, see, for example, \textit{Brief of Twelve Organizations Dedicated to the Fight for Reproductive Justice as Amici Curiae Supporting Petitioners, Whole Women’s Health v. Hellerstedt, No. 15-274}; \textit{Brief of National Latina Institute for Reproductive Health, et al., as Amici Curiae, Whole Women’s Health v. Hellerstedt, No. 15-274}; \textit{Brief Amici Curiae for Organizations and Individuals Dedicated to the Fight for Reproductive Justice—Women with a Vision et al., June Medical v. Gee, Nos. 1323, 18-1460}; \textit{Brief of Amici Curiae Reproductive Justice Scholars Supporting Petitioners—Cross–Respondents, June Medical v. Gee}.
\end{itemize}
and infant mortality and morbidity, lawmakers had declined to expand Medi-
caid or otherwise “to lift a finger to address the tragedies lurking on the other
side of the delivery room.”

Reeves called the 15-week ban “closer to the old Mississippi—the Mississippi bent on controlling women and minorities,” the Mississippi that excluded women from juries until 1968, forcibly sterilized Black women into the 1970s, and became the last state to ratify the Nineteenth Amendment in the early 1980s.

Plaintiffs, represented by the Center for Reproductive Rights (CRR), followed each of these leads in their due process and equal protection challenge to the six-week abortion ban that Mississippi passed in 2019. Expert reports and declarations, relying on the scholarship of historians and legal scholars such as Deborah Gray White, Dorothy Roberts, and others, detailed how the “long and devastating history” of reproductive control in the United States was “deeply intertwined with white supremacy and with the subjugation of women,” beginning with the “brutal sexual violence” against and “nearly absolute reproductive control” over enslaved persons, “backed by the force of law.”

They discussed the kidnapping of Native children from their homes and communities to “forcibly eradicate Native language and culture” in state-run boarding schools. They described eugenic policies “designed to encourage reproduction among middle- and upper-class white native-born Americans and to discourage or prevent persons considered racially inferior,” “feebleminded,” sexually “promiscuous,” or otherwise “unfit” from bearing children.

The plaintiffs defined reproductive control broadly to include encouraging, coercing, or forcing pregnancy and childbearing, as well as restricting, preventing, or punishing reproduction. Filings described “selective state support for

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127 Id.
130 Plaintiffs also noted that historical actors themselves recognized various forms of reproductive control as intertwined. See Mayeri Decl., 7 (citing, e.g., Roberts, Killing the Black Body, 98-103; Khiara Bridges, “Elision and Erasure: Race, Class, and Gender in Harris v. McRae,” in Reproductive Rights and Justice Stories; Randolph, Florynce “Flo” Kennedy; Murray, “Race-ing Roe”).
certain kinds of mothers and families, and the exclusion of others.”¹³¹ For example, early public assistance programs focused on presumptively deserving white widows and deserted wives; the Social Security Act of 1935 excluded predominantly Black agricultural and domestic workers; and as Aid to Dependent Children became associated with Black single mothers, welfare grew increasingly stingy and stigmatized.¹³² Plaintiffs also detailed connections between racial repression and morals regulations that targeted poor Black Americans: exclusions from white schools, voter rolls, government benefits, workers’ compensation, marital recognition, and tort recovery, as well as laws authorizing sterilization and incarceration for nonmarital childbearing.¹³³ They stressed the disparate impact—often deliberate and intentional, always foreseeable—of reproductive control on poor women and women of color, who bore the brunt both of death from unsafe, illegal abortions before Roe and of sterilization abuse.¹³⁴

Mississippi provided no shortage of local examples, in addition to Fannie Lou Hamer’s famous estimate that six in ten women hospitalized in Sunflower County in the 1950s and 1960s were sterilized without their knowledge or consent.¹³⁵ Before and after Brown, state lawmakers called for forcible sterilization and incarceration to stem nonmarital births among Black Mississippians, using crude, dehumanizing language about their supposed racial and sexual inferiority.¹³⁶ Mississippi also pioneered pupil placement laws that segregated Black

¹³¹ Mayeri Decl., 4.


¹³⁶ Mayeri Decl., 5-6, 9-10 (citing local newspaper sources).
children based on “unfavorable moral background,’ including ‘illegitimacy.’”\textsuperscript{137} Katie Mae Andrews’ 1973 lawsuit challenging a school district ban on employment of parents of “illegitimate” children exposed how such morals regulations punished Black women who sought economic mobility and burdened their freedom to choose parenthood without penalty.\textsuperscript{138}

Lawmakers in Mississippi and elsewhere banned abortion in the name of protecting maternal health as well as fetal life. The plaintiffs took up Judge Reeves’ invitation to unmask this “protection” as “a rhetorical cover for a legal regime that kept Black and white women in their respective places and reinforced white, male dominance in the justice system and in political life.”\textsuperscript{139} For example, in 1965, prosecutors charged local civil rights leader Lillie Willis with perjury, forgery, and other offenses after she helped her nonliterate 83-year-old mother sign her name to a voter registration application. Five years earlier, the U.S. Supreme Court held that women’s place “at the center of home and family life” justified exemption from jury service; in 1966 the Mississippi Supreme Court declared that the “legislature has the right to exclude [all] women [from juries] so they may continue their service as mothers, wives and homemakers, and also to protect them . . . from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.”\textsuperscript{140} Lillie Willis’s federal constitutional challenge highlighted how purportedly “protective” laws “not only undermined all women’s status as equal citizens . . . but also intersected with rampant racial exclusion to deprive African Americans of fair trials judged by a cross-section of their peers”\textsuperscript{141} and permitted all-white, all-male juries to acquit white men who perpetrated violence against Black civil rights activists.\textsuperscript{142}

Critically, the plaintiffs connected past and present reproductive control. They noted that “despite having the highest rates of poverty in the United

\textsuperscript{137} Mayeri Decl., 5-6 (citing Walker, \textit{Ghost of Jim Crow}).

\textsuperscript{138} Mayeri Decl., 13 (citing, e.g., Mayeri, \textit{Reasoning from Race}, Ch. 5).

\textsuperscript{139} Mayeri Decl., 9; Mayeri, “After Suffrage.”

\textsuperscript{140} State v. Hall, 187 So. 2d 861, 863 (1966), quoted in Mayeri Decl., 9. Since the state routinely excluded Black men from juries, all-white, all-male panels rendered verdicts in nearly all civil and criminal jury trials. Mayeri Decl., 9.

\textsuperscript{141} Mayeri Decl., 9.

\textsuperscript{142} The Willis family experienced this white impunity when Lillie Willis’s daughter Jennie was shot in the eye while standing on her own front porch on Thanksgiving Day, 1965, apparent retaliation for the family’s activism in voting rights and school desegregation. See Mayeri, “After Suffrage.” For an argument that such white impunity is a fundamental characteristic of state regulation of violence in the U.S., see Sean A. Hill II, “The Right to Violence,” Utah L. Rev. (forthcoming 2024).
States, Mississippi consistently maintains the stingiest cash assistance program in the nation\textsuperscript{143} for an eligible population that is around 90 percent Black,\textsuperscript{143} with the Temporary Assistance to Needy Families program ("TANF") serving only 1.4 percent of applicants by 2015.\textsuperscript{144} Mississippi imposes a welfare "family cap" that withholds additional state assistance to children born while a family is receiving TANF, a policy designed to punish and deter childbearing by poor women of color.\textsuperscript{145} And despite leading the nation in maternal and infant mortality and producing the worst health outcomes for women and children, Mississippi rejected millions of free federal dollars available to expand Medicaid and fund childcare.\textsuperscript{146}

When Mississippi’s 15–week ban reached the Supreme Court in \textit{Dobbs}, amicus briefs reinforced and elaborated many of these themes. Jackson Women’s Health Organization and amici contrasted state lawmakers’ claims to being the “most pro-life state in the Nation” with its refusal to adopt policies known to save lives, improve the health of women and children, and support individuals and families who wish to avoid pregnancy by, for example, providing comprehensive sex education and access to contraception.\textsuperscript{147} Reproductive justice scholars represented by Khiara Bridges and Dorothy Roberts, for instance, framed abortion bans as “the legacy and continuation of a history in which

\textsuperscript{143} Mississippi raised its TANF benefit level in 2021, but it remains low in both absolute and relative terms. In 2021, less than ten percent of eligible families received assistance. See Mississippi Low-Income Child Care Initiative, Mississippi’s Temporary Assistance for Needy Families (TANF) Program at 25, October 2022.

\textsuperscript{144} Mayeri Decl., 15–16. In the years leading up to the passage of Mississippi’s latest abortion bans, state officials misspent millions of dollars of aid meant for needy families to line their own pockets, build a volleyball stadium, and serve other corrupt ends. For a brief summary, see “Anna Wolfe Answers Reader Questions about the Mississippi Welfare Scandal,” \textit{Mississippi Today}, Apr. 26, 2023.


\textsuperscript{146} Mayeri Decl., 15–16. See also, e.g., Mississippi Low-Income Child Care Initiative, Mississippi’s Temporary Assistance for Needy Families (TANF) Program at 25: After a Scandal and the Failure of TANF as a Safety Net Before and During the Pandemic, Major Reforms are Needed to Turn the Tide, October 2022. Mississippi is a stark example, but its neglect of needy families is typical of states that ban abortion, especially Southern states with large Black populations, high rates of poverty, and low levels of state support. See, e.g., Ife Floyd, et al., “TANF Policies Reflect Racist Legacy of Cash Assistance,” Center on Budget and Policy Priorities, Aug. 4, 2021. Cf. Reva B. Siegel, “Why Restrict Abortion? Expanding the Frame on \textit{June Medical},” 2020 Sup. Ct. Rev. 77 (describing similar conditions in Louisiana).

\textsuperscript{147} See, e.g., Equal Protection brief, \textit{Dobbs}.
Black women have been subject to all manner of subjugation and reproductive control, including forced sterilization, forced pregnancy, and forced separation from their children." And they detailed how present-day abortion restrictions, like other forms of reproductive control, have the most devastating impact on poor, rural, Black, Indigenous, and immigrant women and families. A brief authored by Lauren van Schilfgaarde and Lael Echo-Hawk on behalf of Native leaders and advocacy organizations described how Indigenous reproductive health care historically included abortion but federal funding restrictions such as the Hyde amendment and underfunding of the Indian Health Service now compromise access; detailed the impact of past and present government policies such as child removal and forced sterilization and contraception; and explained how the federal government’s failure to “fulfill its trust responsibility to provide reproductive health care” to Native peoples contributes to catastrophically high rates of maternal and infant mortality, sexual violence, and poverty.

2. Critical Histories of Reproductive Control Beyond Dobbs

In and outside of court, and beyond Dobbs, advocates and scholars have linked forced pregnancy to other reproductive injustices across time. In a recent essay, Dorothy Roberts explains how Dobbs and the restrictive abortion laws that followed aggravate and intensify phenomena that plague marginalized communities long before Dobbs: the criminalization of pregnancy, the promotion of family separation and adoption as solutions to poverty, and carceral approaches that punish rather than support Black parents and children.

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148 Brief Amici Curiae of Reproductive Justice Scholars, Dobbs, 5. See also generally amicus briefs for Yale Law School Information Society Project; National Women’s Law Center et al.; and 547 Deans, Chairs, Scholars and Public Health Professionals et al., to name just a few cited in the Dobbs dissent.


Drawing on scholarship by Roberts, Michele Goodwin, and Wendy Bach, a 2023 Pregnancy Justice report underscores the historical continuities since Roe: the War on Drugs collided with the fetal personhood movement, mandatory reporting, and family regulation in the name of child welfare to escalate the criminalization of pregnancy, especially for Black women and other women of color—and, in recent years, poor white women. Post-Dobbs, prosecutions for miscarriages and stillbirths have begun to attract greater attention, thanks to this advocacy. When Brittany Watts, a 33-year-old Black woman in Ohio, was charged with felony abuse of a corpse when she lost a pregnancy at 21 weeks after being denied miscarriage care, her case made national headlines as an exemplar of the perils of pregnancy in Dobbs’s wake; some coverage noted how the state’s persecution of Watts was part of this longer history. Chilling stories of women incarcerated in the name of fetal protection giving birth unaided in jails expose ostensibly “pro-life” policies as exercises in cruelty and control, as scholars including Dorothy Roberts, Michele Goodwin, and Priscilla Ocen have long maintained.

151 See Roberts, Killing the Black Body; Michele Goodwin, Policing the Womb: Invisible Women and the Criminalization of Motherhood (2020); Wendy A. Bach, Prosecuting Poverty, Criminalizing Care (2022).


Other striking historical similarities and continuities abound. After Texas enacted and courts upheld SB 8, which allows individuals to sue anyone who “aids and abets” a person in obtaining an abortion, commentators saw an analogy to the Fugitive Slave Act, which deputized private individuals to apprehend enslaved persons who escaped to non-slave states, criminalized those who assisted escapees, and required local officials to help enslavers recover their “property.” Post-Dobbs efforts by states and localities—to prevent travel directly through bans on transporting minors to obtain an abortion, and indirectly through private causes of action against those who assist persons traveling out of state for abortion care—inspire similar historical comparisons.

Recent efforts to revivify the Comstock Act make historical parallels vivid and undeniable. Mary Ziegler describes how the Act’s Victorian-era enforcement provides a “roadmap for the enforcement of many seemingly unenforceable anti-abortion measures today.” She provides a chilling account of how “a network of tipsters and detectives” snooped and deceived, how enforcers relied upon “personal vendettas and animosities”—and how post-Dobbs

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Shield laws, which seek to protect abortion care providers from extradition and from criminal and civil liability imposed by anti-abortion states, also hearken back to interstate conflicts over slavery. On shield laws, see David S. Cohen, Greer Donley, and Rachel Rebouché, “The New Abortion Battleground,” 123 Colum. L. Rev. 1 (2023).
anti-abortion tactics, such as surveillance by crisis pregnancy centers and lawsuits by abusive ex-partners threaten to resurrect these troubling practices.\footnote{Mary Ziegler, “Harsh Anti-Abortion Laws Are Not Empty Threats,” The Atlantic, Nov. 10, 2023. For a legal history of the Comstock Act’s enforcement and resistance thereto, see Reva B. Siegel & Mary Ziegler, “Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, And May Again Threaten It,” 134 Yale L.J. (forthcoming 2024).}

Such historical accounts and comparisons play many critical roles. They frame abortion restrictions as part of an ignominious history of subordination based on race, sex, and poverty—a matter of equality, autonomy, bodily and family integrity, and racial and economic justice, as well as liberty and privacy. They refocus attention on the Reconstruction Amendments; on Black women, families, and the legacies of slavery and Jim Crow; and on questions of reproductive justice. They “expand the frame” to interrogate state policies far beyond abortion and to draw connections between abuses past and present. They highlight the absurdly anachronistic prospect of revitalizing nineteenth-century anti-vice crusades that many saw as ridiculous even in their own time. They belie the disingenuous contention that banning abortion protects women and children.

In litigation, this history can bolster various state and federal constitutional arguments.\footnote{See Center for Reproductive Rights, “The Constitutional Right to Reproductive Autonomy: Realizing the Promise of the Fourteenth Amendment,” July 2022; Center for Reproductive Rights, “State Constitutions and Abortion Rights: Building Protections for Reproductive Autonomy,” July 2022.} In the Mississippi litigation, for example, it supported equal protection arguments by providing a rejoinder to the reasoning of Geduldig v. Aiello (1974) that pregnancy discrimination is not necessarily discrimination based on sex. The history of reproductive control demonstrates that the regulation of pregnancy and childbearing always has been a core element of sex-based subordination, at the root of why sex-based classifications are constitutionally suspect.\footnote{See Memorandum of Law in Support of Plaintiffs’ Motion for Partial Summary Judgment at 8–10, Jackson Women’s Health Organization v. Dobbs, Case No. 3:10cv171–CWR–FKB (S.D. Miss. Apr. 29, 2021). See also Siegel, “The Pregnant Citizen”; Equal Protection Brief, Dobbs; Siegel, Mayeri & Murray, “Equal Protection in Dobbs and Beyond.”}

The application of heightened scrutiny examines the link between the means the state chose—banning abortion—and the government interest it claimed to promote, the health of women and the lives of future generations. In other words, if preserving maternal health and fetal life are the aim,
why would a state criminalize abortion before attempting other measures shown to improve the health and protect the lives of women and children?\textsuperscript{160}

These histories also refute contentions by anti-abortion advocates and judges that abortion itself is a tool of eugenics.\textsuperscript{161} Melissa Murray has debunked this view in work that highlights how sterilization, not abortion, was the preferred tool of twentieth-century eugenicists; how Black feminists fought for access to contraception and abortion and against sterilization abuse in the 1960s and 1970s; and how higher rates of abortion among Black Americans are in part the result of state policies that perpetuate racial and economic inequality by failing to provide adequate health care, education, and social supports to families of color.\textsuperscript{162} And it is hard to imagine a less apt parallel than the equation of Black women’s exercise of reproductive freedom with state-sponsored eugenic policies that deprive individuals of autonomy so as to control the nation’s demographic character.\textsuperscript{163}

The current Supreme Court majority is not likely to be moved by critical historical arguments, at least in the abortion context. But these arguments may find a receptive audience among its liberal members, especially with the addition of Justice Ketanji Brown Jackson to the Court. The Dobbs dissenters provided a blistering critique of the majority’s approach to history and tradition, a robust defense of Casey, and a searingly accurate prediction and indictment of the decision’s foreseeable, devastating consequences for women’s lives, equal citizenship, and autonomy.\textsuperscript{164} They noted the striking inverse correlation between state supports for families and abortion restrictions, and they repeatedly

\textsuperscript{160} See Siegel, Mayeri, & Murray, “Equal Protection in Dobbs and Beyond.”


\textsuperscript{163} Melissa Murray, “Race–ing Roe”; Equal Protection brief, Dobbs. As Dorothy Roberts writes, Justice Thomas and other proponents of this view “invented a resemblance between the eugenicist promotion of birth control and access to abortion care to impede, not protect, black women’s reproductive autonomy.” Roberts, “Racism, Abolition, and Historical Resemblance,” 46.

\textsuperscript{164} Dobbs dissent, 597 U.S. at 359–416.
stressed the especially disastrous consequences of such laws for women without financial means.165

The Dobbs dissenters did not, however, engage the doctrinal equal protection arguments made by amici (possibly in order to avoid provoking more damaging dicta from the majority) and said little about the broader history of reproductive control. They offered relatively sparse analysis—historical or otherwise—of how other constitutional provisions might differently and affirmatively be mobilized to protect abortion and other reproductive rights.166

Though class appeared frequently in the dissent, race played a minor role;167 like

165 See, e.g., Dobbs dissent, 597 U.S. at 361 (“Above all others, women lacking financial re-

sources will suffer from today’s decision.”); id. at 398–399 (describing conditions in Mississippi

including lack of contraceptive coverage, Medicaid expansion, paid parental leave, and preg-
nancy discrimination laws as well as “abysmal” health outcomes for women and children); id.

at 399 (“States with the most restrictive abortion policies also continue to invest the least in

women’s and children’s health”); id at 407–08 (describing the differences between how women

with and without financial means will experience abortion bans, including poor women’s much

higher rates of unintended pregnancies, lack of access to reproductive health care, inability to

take time from work and caregiving obligations to travel, and likelihood of “turn[ing] in de-

speration to illegal and unsafe abortions,” for which “[t]hey may lose not just their freedom, but

their lives.”).

166 Melissa Murray asks us to imagine what Justice Jackson’s approach to the Reconstruction

Amendments might have yielded had she been on the Court for the Dobbs oral arguments and
Justice Jackson’s approach, see, for example, Mark Joseph Stern, “Ketanji Brown Jackson Has

167 The dissenters did note that abortion bans “increase[,] maternal mortality by 21 percent,

with white women facing a 13 percent increase in maternal mortality while black women face

a 33 percent increase.” Dobbs dissent, 597 U.S. at 396. See also id. n.13 (“This projected racial
disparity reflects existing differences in maternal mortality rates for black and white women.
Black women are now three to four times more likely to die during or after childbirth than
white women, often from preventable causes.”) (citing Brief for Howard University School of
Law Human and Civil Rights Clinic as Amicus Curiae).

In previous opinions, Justice Sotomayor highlighted the racial and class dimensions of denials
doctoral freedom. Dissenting from the Court’s decision to allow the FDA to require that
abortion medication be dispensed in-person at the height of the COVID-19 pandemic, she
stressed the disproportionate impact on people of color and low-income communities of abort-
ion restrictions and the virus itself. See FDA v. American College of Obstetricians and
Gynecologists, 141 S.Ct. 578, 582 (2021) (Sotomayor, J., dissenting) (“[M]ore than half of
women who have abortions are women of color, and COVID-19’s mortality rate is three times
higher for Black and Hispanic individuals than non-Hispanic white individuals. On top of that,
three-quarters of abortion patients have low incomes, [causing transportation challenges that
necessitate prolonged exposure to the virus] . . . . Finally, minority and low-income populations
are more likely to live in intergenerational housing, so patients risk infecting not just themselves
the majority’s erasure of equal protection arguments for abortion rights, its parallel between abortion and eugenics went unanswered.¹⁶⁸

In other areas, though, the liberal Justices have engaged critical approaches to history. Justice Sotomayor’s opinions in cases involving criminal law and affirmative action, for example, underscore the racial injustices that the criminal legal system and the conservative majority’s approach to equal protection permit.¹⁶⁹ In *SFFA v. Harvard College* (2023), Sotomayor’s dissent contests the majority’s historical account, detailing how the same Congress that passed the Reconstruction Amendments enacted race-conscious laws and policies such as the Freedmen’s Bureau Act and the Civil Rights Act of 1866. Justice Kagan’s dissent in *Democratic National Committee v. Brnovich* (2021) recounts how civil rights activism overcame centuries of enslavement and disenfranchisement that persisted long after the Reconstruction Amendments’ ratification to produce the Voting Rights Act of 1965.¹⁷⁰ Kagan then offers a sharp corrective to the majority’s assumption that voter suppression efforts are a relic of history: the Court’s evisceration of Section 5 of the Act in *Shelby County v. Holder* (2013) triggered “an era of voting–rights retrenchment—when too many States and localities are restricting access to voting in ways that will predictably deprive members of minority groups of equal access to the ballot box.”¹⁷¹

Dissents can affect the Court’s internal deliberations: as Justice Ginsburg once wrote, “there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation.”¹⁷² External audiences are at least as important. Dissents often influence lower court opinions, encourage legislators to act, and lay groundwork for future Court

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¹⁶⁸ Melissa Murray has systematically dismantled the abortion-as-eugenics fallacy. See Murray, “Race-ing Roe.” For more on the eugenics parallel, see supra.

¹⁶⁹ See, e.g., *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”).


¹⁷¹ Brnovich, 141 S.Ct. at 2356 (Kagan, J., dissenting).

decisions. In the words of Chief Justice Charles Evans Hughes, a dissent “is an appeal . . . to the intelligence of a future day.” Dissenting jurists can provide historical counternarratives that correct the historical record; expose the moral bankruptcy, hypocrisy, and disingenuity of claims that originalism provides a neutral and objective methodology for determining constitutional meaning; and offer alternative views on the import and relevance of history to law and to constitutional interpretation.

In Justice Ketanji Brown Jackson’s short time on the Court, she has answered the conservative Justices on their own (ostensibly) originalist terms and challenged their history-and-tradition analysis. She joins Justice Sotomayor in spotlighting how the framers of the Second Founding contemplated race-conscious remedies for legacies of enslavement and racial oppression, belying the notion that the constitution is and always has been “colorblind.” She holds litigants and the Court to account for selective invocations of the past that sanitize the origins of laws and practices relied upon to maintain “history and tradition.” At oral argument in United States v. Rahimi, pointed questioning from Justices Jackson and Kagan exposed the alarming implications of the Court’s approach to history-and-tradition in Bruen. Justice Kagan pushed Rahimi’s counsel to own the ramifications of his position: that the founding generation’s failure to ban gun possession for perpetrators of domestic violence ties the hands of present-day legislators seeking to stem the tide of gun violence. Justice Jackson wondered aloud if “there’s a flaw” in Bruen’s history-and-tradition framework “to the extent that when we’re looking at history and tradition,

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175 On the influence of judicial opinions on constitutional memory, see Balkin, Memory and Authority, 193 (“Judicial opinions both depend on and amplify conceptions of constitutional memory, and therefore they both depend on and amplify the ideological effects of what is remembered and what is forgotten.”).

we’re not considering the history and tradition of all of the people but only some of the people.”

Justice Jackson’s willingness to engage originalists on both their terms and her own offers new opportunities to exert influence on the Court’s opinions and to shape public narratives about which facts count and whose history matters. Laying claim to history and tradition as belonging to all “the people” and lifting up voices silenced in their own time powerfully reimagines whose views are worthy of recognition and constitutional fidelity. Relatedly, recognizing the historic and contemporary interconnections between reproductive injustice and the political and civic disenfranchisement of women and people of color more generally highlights the imperative to link these causes in rhetoric and action.

C. Locating Reproductive Control in a Long History of Anti-Democratic Political Traditions

Reproductive injustices and antidemocratic political traditions are intertwined in myriad ways, historically and in the present day. As reproductive justice advocates long have recognized, reproductive control operates both directly and indirectly to suppress threats to status hierarchies of all kinds. Divesting individuals, families, and communities of reproductive autonomy is itself a form of social and bodily disenfranchisement. Restrictions on reproductive freedom render people unable to make the most important decisions about their intimate and reproductive lives and the well-being of their families, depriving them of a key form of self-determination. Forced childbirth and parenthood also compound existing hardships, leaving already impoverished people with even less time and fewer resources to engage in politics and civic life.

177 Justice Jackson asked Prelogar whether the Bruen test required the Court to consider “evidence that . . . men who engaged in domestic violence historically were actually not perceived as then dangerous from the standpoint of [] disarmament.” Oral Argument Transcript at 54, U.S. v. Rahimi, No. 22-915, Nov. 7, 2023.

178 On the influence Justice Jackson may already have exerted, see, for example, “KBJ’s Rookie Year,” Strict Scrutiny (podcast), Season 4, Ep. 55 (Sept. 11, 2023).

179 Cf. Ablavsky & Allread, “We the (Native) People,” 252 (“Native interpretations of the Constitution alter our narrative of who the Constitution belongs to. Although this reconstruction cannot remedy the violence and harm of Native peoples’ forcible inclusion into the United States, it nonetheless affirms the role that Native peoples played as co-creators of American constitutional law. In this sense, too, this constitutional history is part of ‘our law,’ the shared constitutional narrative that all Americans identify with.”).
Maintaining reproductive control also requires the political disenfranchise-
ment of those who would object if empowered to do so. And authoritarian
regimes often come to power in part by igniting fears about a loss of ethnic,
religious, identitarian traditions, stoking resentment of those conceived as
other, and positing a threat to gender roles and family relationships. It is unsur-
prising, then, that reproductive control and anti-democratic political practices
often go hand in hand across historical contexts and political systems, though
the nature of those linkages depends upon time, place, and circumstance.

The political salience and popular consciousness of connections between
reproductive injustice and attacks on democratic values varies tremendously,
however. Developments since 2016 generally and Dobbs’s aftermath in partic-
ular raised public awareness and accelerated media coverage of present-day
linkages between attacks on reproductive rights and a broader assault on de-
mocracy and the rule of law.

History plays a central role in furthering public understanding—amongst
political elites and ordinary citizens alike—of how these phenomena are inter-
twined, which in turn can inform voting decisions, political judgments, and
strategies. Accurate accounts of the past also can correct the flawed historical
narratives that infect court opinions like Dobbs and distort public perception of
the relationship between reproductive freedom and democratic legitimacy.

Foregrounding the evolution and trajectory of right-wing assaults on
democratic processes and institutions can underscore the imperative to defend
democracy and the rule of law more broadly. Historical accounts can expose to
public view how the Right has used abortion as a political weapon to accom-
plish an expansive reactionary agenda. As scholars long have understood,
abortion played a central role in the late twentieth-century partisan realignment
that united traditionalist Catholics with white evangelical Protestants in a New
Right movement that transformed the Republican party and American politics.
President Richard Nixon tarred his rival George McGovern with the brush of
“acid, amnesty, and abortion” in the 1972 presidential campaign, pairing an at-
tack on countercultural social movements with a potent Southern Strategy
designed to capitalize on white voters’ resistance to desegregation and racial

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180 See Siegel, “Collective Memory and the Nineteenth Amendment,” 133–34 (“[S]tories
about a common past . . . . help forge group identity [and] supply structures of ordinary un-
derstanding, frameworks within which members of a society interpret experience and make
positive and normative judgments concerning it”); Balkin, Memory and Authority, 182
(“Memory shapes understanding because it offers narratives that a group’s members can use to
understand current events . . . . What people think happened in the past shapes their views
about the present and future.”).
justice. Anti-feminist leader Phyllis Schlafly, political strategist Paul Weyrich, and others seized upon abortion—already a contentious issue before Roe v. Wade—as a wedge issue that accomplished several objectives simultaneously.

Opposition to abortion dovetailed with anxiety about feminist and gay liberationist challenges to traditional gender roles and provided a more politically palatable language than the lexicon of overt racial resentment. Abortion could motivate blue-collar Catholic voters who traditionally supported Democrats and white evangelicals who chafed at the demands of racial justice, antiwar, and feminist movements. Abortion—and Roe itself—provided at once a singular target of attack and a synecdoche for a larger constellation of cultural discontents. Conveniently, too, loyalty secured with socially conservative positions on cultural issues cemented support for anti-statist economic policies that prioritized corporate interests. Traditional family values underwrote a much broader political project to undo the New Deal welfare state, roll back the gains of the labor, civil rights, and environmental movements, and limit the federal government’s regulatory powers.

Conservatives learned quickly to prioritize control of the federal courts and developed a powerful infrastructure to do so through the Federalist Society, which often used the anti-abortion cause as a means to achieve a broader political agenda more than as an end in itself. The anti-abortion movement played a key role in this project by teaching its constituents to care deeply enough about the composition of the Supreme Court to make judicial nominations a

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183 On the many, shifting meanings of “Roe,” see Mary Ziegler, Roe: The History of a National Obsession (2023).


185 The Federalist Society and broader conservative legal movement have had a varied and complicated relationship to the anti-abortion cause. See Mary Ziegler, Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment (2022); Fox & Ziegler, “The Lost History of ‘History and Tradition.’”
decisive factor in presidential elections. The imperative to ensure reliable conservative nominees intensified after three Republican appointees declined an opportunity to overturn Roe in *Planned Parenthood v. Casey* (1992). Mary Ziegler argues that abortion opponents also helped lead an ultimately successful attack on campaign finance laws, which appeared to coincide with corporate interests but ultimately empowered populist insurgents at the expense of the GOP establishment.

Many of the policies the Right sought to undo— and still have— broad public support. The anti-abortion movement’s ultimate goal, a constitutional fetal personhood principle that would outlaw abortion entirely, has limited appeal, necessitating end runs around public opinion. Majorities of Americans have long favored not only legal abortion, but gun safety laws, environmental and consumer protections, campaign finance regulation, the right to bargain collectively, protections against discrimination in employment and education, voting rights, and so on.

Demographic changes, too, threatened to erode traditional power structures and fortify Democrats’ putative advantage. Right-wing strategists recognized the need and opportunity to mobilize a range of

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186 See Ziegler, *Dollars for Life.*
187 See Mayeri, “Un-Dueing Roe.”
188 See Ziegler, *Dollars for Life.*
189 See Pew Research Center, “Nearly a Year After Roe’s Demise, Americans’ Views of Abortion Access Increasingly Vary by Where They Live,” Apr. 26, 2023 (“About six-in-ten Americans (62%) continue to say abortion should be legal in all or most cases, compared with 36% who say it should be illegal in all or most cases.”); Katherine Schaeffer, “Share of Americans Who Favor Stricter Gun Laws Has Increased Since 2017,” Pew Research Center, Oct. 16, 2019 (noting that 60 percent of Americans favor stricter gun laws); Pew Research Center, “The Public, the Political System, and American Democracy,” Apr. 26, 2018 (“An overwhelming majority (77%) supports limits on the amount of money individuals and organizations can spend on political campaigns and issues. And nearly two-thirds of Americans (65%) say new laws could be effective in reducing the role of money in politics.”); Ted Van Green, “Majorities of Adults See Decline in Union Membership as Bad for the U.S. and Working People,” Pew Research Center, Apr. 19, 2023; Vianney Gómez & Carroll Doherty, “Wide Partisan Divide on Whether Voting is a Fundamental Right or a Privilege with Responsibilities,” Pew Research Center, July 22, 2021 (finding that 57 percent of Americans view voting as a “fundamental right for every U.S. citizen and should not be restricted”); Alec Tyson, et al., “What the Data Says About American Views of Climate Change,” Pew Research Center, Aug. 9, 2023 (finding that majorities of Americans support various policy changes to combat climate change).
antidemocratic tools to remain electorally competitive and escalated their efforts accordingly.

Partisan gerrymandering entrenched Republican majorities in state legislatures, which also enabled the GOP to draw congressional districts that reliably favored their own. Efforts to dilute the influence of voters of color drew strength from Court decisions that limited judicial review of district line-drawing,\textsuperscript{191} upheld voter suppression laws,\textsuperscript{192} and eliminated the centerpiece of the Voting Rights Act, section 5’s preclearance provision.\textsuperscript{193} Together, these developments not only make state and federal legislatures less representative of voters’ actual preferences, but by damaging voters’ ability to hold lawmakers accountable they undermine institutional legitimacy and reduce incentives for electoral participation. They also disproportionately disenfranchise people of color, women, and other groups who tend to vote Democratic and are underrepresented in positions of political power and influence.

Reproductive rights and threats to democracy both take up much more space in the headlines today than at any time in the recent past. First the bracing jolt of Donald Trump’s 2016 victory, the revivification of white supremacism, and the relentless assaults on political norms and the rule of law during his presidency; then with a more acute focus on threats to democracy and to reproductive freedom in the wake of January 6, election denialism, the \textit{Dobbs} ruling, and the 2022 midterm elections. More press coverage connects the dots: as voters make their antipathy to abortion bans known in electoral contests and ballot referenda, anti-abortion Republicans have rushed to suppress popular will—from procedural shenanigans such as dramatically increasing the number of petition signatures or proportion of the vote necessary to place measures on the ballot and pass referenda, to firing prosecutors who use their discretion to decline enforcement of anti-abortion laws, to impeaching or otherwise disqualifying duly elected judges.\textsuperscript{194} Anti-abortion activists and organizations also have

\textsuperscript{191} Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (finding partisan gerrymandering claims non-justiciable under the political question doctrine).

\textsuperscript{192} See, \textit{e.g.}, Brnovich v. Democratic National Committee, 141 S. Ct. 2321 (2021) (upholding Arizona’s prohibitions on voting in the wrong precinct and on third-party ballot collection).

\textsuperscript{193} Shelby County v. Holder, 570 U.S. 529 (2013).

worked to overturn election results and spearhead ongoing efforts at voter suppression.195 These anti-democratic moves exacerbate structural barriers such as the Electoral College system and Senate malapportionment. Some of these obstacles are entrenched and difficult to change, others are not: the Senate filibuster, which would require only a majority vote to undo, blocks passage of voting and reproductive rights legislation, among other measures that garner popular majority support.196

As scholars and journalists expose the links between the rise of authoritarian nationalist movements and attacks on reproductive and sexual freedoms around the world, the global dimensions of these connections also have begun to penetrate public consciousness. These developments are not just occurring in parallel, though there are parallels to be drawn across time and space;197 they also are the result of increasingly visible collaborations across borders.198 International organizations such as the World Congress of Families and authoritarian leaders like Vladimir Putin and Viktor Orbán consort openly with

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196 See, e.g., Eric Holder, Jr. with Sam Koppelman, Our Unfinished March: The Violent Past and Imperiled Future of the Vote (2022).


their U.S. counterparts. Americans at the Conservative Political Action Committee (CPAC) link opposition to abortion, birth control, feminism, and LGBTQ rights with the Great Replacement theory’s demonization of immigrants and promotion of white supremacy. Recently, Donald Trump has stepped up his praise of Putin and Orbán and escalated rhetoric about immigrants “poisoning the blood” of Americans.

It is still relatively novel to see advocates and journalists draw connections between reproductive control and anti-democratic movements, though, and rarer still that thought leaders and news media situate them in historical context. The stakes of doing so are high. The mismatch between public opinion, on the one hand, and representation in legislatures, election outcomes, and Supreme Court decisions on the other is neither sudden nor accidental. Recognizing that it is instead the product of a concerted, decades-long

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antidemocratic effort helps to undermine the legitimacy of these developments and the politicians, policies, and institutional practices that enable them.

Seeing these interconnections more clearly can also bring together causes and social movements often siloed in specialized legal and political advocacy organizations. Collaboration at the intersections of reproductive justice and democracy defense feels especially urgent. As National Women’s Law Center President Fatima Goss Graves told a coalition of racial justice, feminist, reproductive justice, and voting rights organizations gathered on the steps of the Supreme Court in 2021: “It is hardly a coincidence that the same politicians trying to recreate the gender roles of the 1950s are also trying to recreate the voting restrictions of the 1950s.”

Historical context contradicts accounts that depict Roe as an antidemocratic, polarizing decision and Dobbs as the restoration of democratic equilibrium and the possibility of compromise. A legal historians’ brief in Dobbs, for example, countered the prevalent narrative promoted by some liberal as well as conservative commentators: that Roe (and later Casey) prematurely extinguished democratic debate about abortion, prompted an immediate backlash, and caused unnecessary partisan polarization.

Instead, disagreement about abortion among medical professionals, religious groups, and ordinary Americans predated Roe; partisan polarization over abortion took time and concerted effort to manifest in the years after the decision; and overturning Roe only deepened

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differences fostered by a clash of moral values and by recent developments such as the rise of partisan media.205

At the same time, public opinion surveys reveal that a majority of Americans consistently has supported abortion rights and that only a small minority supports banning most or all abortions.206 Indeed, before Dobbs conservatives could safely support extreme anti-abortion measures because of, not merely in spite of, their unpopularity, resting assured that Roe and Casey’s resilience shielded them from facing political consequences. Post-Dobbs, abortion rights have only become more popular, as revealed in polls, referenda, and election results.207

The Dobbs majority nevertheless disparaged Roe for “abruptly end[ing the] political process” that had led to liberalization of abortion laws in some states through the “exercise of raw judicial power” and for “spark[ing] a national controversy that has embittered our political culture for half a century.”208 The proper arbiters of abortion access, Alito insists, are not unelected judges—or pregnant persons themselves—but state legislators. And if women oppose abortion restrictions, he says, they can vote out the lawmakers who enact them.209

Justice Alito’s account of the relationship between the Dobbs decision and democratic values has it exactly backward along several dimensions, as Melissa Murray and Kate Shaw explain.210 The same Court that disavows federal judicial intervention on abortion and trumpets women’s electoral power has systematically undermined democratic processes and institutions that allow marginalized groups to participate meaningfully in democratic deliberation and affect outcomes.211 The Dobbs majority also ignores democratic institutions and

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205 ASLH brief, Dobbs, passim.
207 An October 2023 poll conducted by the Wall Street Journal and the University of Chicago’s NORC found that a majority of respondents (55 percent) support abortion obtained “for any reason,” and that “nearly nine in ten poll respondents support abortion access in the event of rape or incest, or when a woman’s health is seriously endangered by the pregnancy.” Julie Wernau, “Support for Abortion Access is Near Record, WSJ-NORC Poll Finds,” Wall Street Journal, Nov. 20, 2023. On ballot initiatives and referenda, see infra Part III.
208 Dobbs, 597 U.S. at 228-30.
209 Dobbs, 597 U.S. at 289.
processes beyond state legislatures, which are among the most unrepresentative governmental institutions because of Republican strategies enabled by the Court.212 Even the idea that Roe thwarted democratic deliberation emerged years after the ruling, the product of an anti-abortion strategy.213 And the Court’s historical methodology itself “belies any meaningful commitment to democracy,” relying as it does on “positive law enacted by a polity in which women and most people of color were utterly absent.”214 Reva Siegel’s recent work exposing the roots of the Dobbs majority’s reasoning about history and tradition in the defense of segregation and the systematic bias of originalism toward reactionary, results-driven reasoning, further discredits the majority’s historical methodology.215

A historical frame also contextualizes today’s right-wing political strategies, from assaults on the rights of LGBTQ+ Americans to the silencing of teachers and sanitization of school curricula to the revival of the Comstock Act to circumvent public opinion.216 Understanding how political actors have weaponized abortion, race, gender, and sexuality to inflame and motivate voters in the past can help us see more clearly how today’s far Right stokes voters’ fears in support of ostensibly populist but actually antidemocratic politicians and causes. These activists bear a striking resemblance to slavery’s apologists and segregationists who used the specter of interracial sex and invoked religious and associational liberties to resist racial integration in public schools and accommodations; to McCarthy-era reactionaries who demonized left-leaning Americans as godless communists and gay and lesbian government employees as “perverts” and security risks; and to those in the 1960s and 1970s who promised to “Save Our Children” from supposedly predatory gay teachers and other adults.217


It is no accident that history education for children and young adults has been and is a key battleground in the culture wars. From bans on “critical race theory” to prohibitions on “saying gay,” talking about gender, or teaching about the realities of slavery and Jim Crow, these battles—like those of the past—serve manifold purposes. They are designed both to scare parents into voting for fear-mongering politicians and also to deprive the next generation of Americans of the knowledge they need to effectively resist this latest assault on democratic values.218

Caution is advisable when drawing lessons from history for present-day strategy. But here one lesson seems clear: we have arrived at this historical moment because of a concerted long-term strategy to undermine multi-racial, inclusive democracy. The path forward must therefore include an affirmative agenda not only to fight off these attacks but to shore up and strengthen access to the ballot and other forms of civic participation; support district line-drawing that enhances democratic voice; remove structural barriers such as the Senate filibuster and the Electoral College; and ensure that young people learn about the nation’s troubled, contested, and hopeful history and about how Americans have worked and continue to strive to overcome and move beyond past injustices.

III. HISTORY’S ROLE IN PROTECTING REPRODUCTIVE RIGHTS IN THE STATES AFTER DOBBS

Thus far this essay has focused on a national discourse that plays out in many different venues and through various media. This Part zeroes in on states—in particular, on state constitutional law—as one important, though hardly exclusive, venue in which debates about reproductive freedom and constitutional democracy take place. Before and especially since Dobbs, the center of gravity in legal and constitutional debates about reproductive rights has shifted.219 States have long been loci of creative constitutional arguments and legislative

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218 See, e.g., Timothy Snyder, “The War on History is a War on Democracy,” N.Y. Times Magazine, June 29, 2021, at 38.

experimentation; now, more than ever, attention has turned to these “laboratories of democracy”—just as American democracy faces urgent threats.

States are and always have been free to enact constitutional and statutory protections that go beyond those provided at the federal level, so long as they do not contravene the U.S. constitution. In 1977, as Nixon’s judicial appointments began to bear fruit—and on the eve of the Reagan revolution—Justice William J. Brennan, Jr., identified and encouraged a promising trend in state courts: the interpretation of state constitutional guarantees to provide more expansive protections than federal courts had found in the U.S. constitution.220 Nearly half a century later, many states have answered Brennan’s call, including in the realm of reproductive rights and bodily autonomy. As a July 2022 Center for Reproductive Rights report put it, some “state courts have interpreted constitutional history and traditions expansively, to protect personal rights, in particular those linked to the body.”221 History supports expansive interpretations of state constitutions; discredits abortion restrictions by connecting them to a history of inequality and oppression; and highlights the politicization of religion and its connection to partisan polarization and to anti-democratic tendencies in American political life.

What follows is a compendium of illustrative recent examples of how advocates for abortion rights have made historical arguments in legal and constitutional disputes about abortion and reproductive rights. The state law developments described here are important in their own right: they provide protection against restrictive laws that is now unavailable at the federal level; pave the way for positive legislative action on reproductive justice; influence other states, which often look to one another for persuasive authority; and affect public discourse within and beyond state borders. Developments in the states can also can seed the ground for future interpretations of the U.S. constitution in federal courts and beyond.222 In the long run, robust state constitutional protections for reproductive freedoms can provide models for interpreting the federal constitution; even in the short run, some arguments that advocates make

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220 William J. Brennan, Jr., “State Constitutions and the Protection of Individual Rights,” 90 Harv. L. Rev. 489 (1977). Among the cramped federal constitutional rulings Brennan mentioned was Geduldig v. Aiello (1974). See id. at 495 (“Under the equal protection clause, for example, the Court has found permissible laws that accord lesser protection to over half of the members of our society due to their susceptibility to the medical condition of pregnancy”).

221 Center for Reproductive Rights, State Constitutions and Abortion Rights, 5 (July 2022).

222 As Paul Kahn has argued, state courts can also depart from federal courts’ interpretations, even in the absence of unique state sources of law. See Paul W. Kahn, “Interpretation and Authority in State Constitutionalism,” 106 Harv. L. Rev. 1147 (1993).
in state courts have potential to succeed in federal fora. And courts are only one of many arenas in which history provides resources for advocates: this Part also briefly discusses ballot initiatives that have enshrined expansive visions of reproductive rights in state constitutions, before suggesting some of the limits of state law and emphasizing the need for proactive vigilance against an onslaught of antidemocratic countermoves by the Right.

A. Historical Arguments for Expansive Interpretations of State Constitutions

History is relevant to the interpretation of state constitutions on several levels. It is pertinent to questions of constitutional method: states are in no way bound by Dobbs’s narrow brand of history-and-tradition analysis when they interpret their own constitutions.223 Historical evidence can help to establish that framers designed state constitutions to be interpreted dynamically, to evolve over time in response to changed circumstances and emerging values. Even when state courts are unwilling to endorse a more dynamic approach to constitutional interpretation, historical evidence can support arguments for interpreting the original meaning of state constitutional provisions more expansively than the federal constitution. And when a state has enacted constitutional provisions designed to protect new rights or to overcome past injustices, the past provides negative precedents—opportunities to invoke history as a reason to depart from rather than embrace deeply rooted traditions.

1. Interpreting Older State Constitutional Provisions

Many states already take a critical approach to history in interpreting their own constitutions—and not only progressive states. The Kansas Supreme Court’s 2019 decision in Hodes & Nauser v. Schmidt to recognize a right to abortion under that state’s constitution provides a widely cited model for refusing to bind today’s pregnant people to the ideas and practices of the past. Hodes contained several features worth noting.224 First, the Hodes court defined the right at stake at a high level of generality—asking whether the state


224 These features are familiar from the U.S. Supreme Court’s approach to federal constitutional interpretation in gay rights and sex equality cases before Dobbs. See supra Part I.
constitution’s protection of “inalienable natural rights” guarantees a “fundamental right to personal autonomy,” before finding that a right to personal autonomy includes the decision to end a pregnancy.225

Second, the Hodes court saw the Kansas constitutional framers’ refusal to recognize women’s equal citizenship stature as a reason to reject, rather than to justify, a narrow reading of the document’s rights protections. “The Kansas constitution initially denied women the right to vote in most elections, to serve on juries, and to exercise other rights that we now consider fundamental to all citizens of our state,” the court observed.226 “[T]he history of women’s rights contemporaneous to the [Kansas Constitutional] Convention reflects a paternalistic attitude and—despite what the Constitution said—a practical lack of recognition that women . . . possessed natural rights.” 227 The court used this history of discrimination to shape, but not to constrain, constitutional interpretation: it identified the exclusion of women from nineteenth-century conceptions of natural rights as inconsistent with today’s constitutional values. “True equality of opportunity in the full range of human endeavor is a Kansas constitutional value,” the court said, “and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago. Therefore, rather than rely on historical prejudices in our analysis, we look to natural rights and apply them equally to protect all individuals.”228


226 Hodes, 440 P.3d at 490. The court cited Blackstone not as an authority on history and tradition whose views should determine today’s constitutional interpretation, but rather as evidence that common law principles of coverture should not be the basis for denying women constitutional rights in the present. Id. at 490–91.

227 Id. at 491.

228 Hodes, 440 P.3d at 491. The Iowa Supreme Court reasoned similarly in a 2018 decision, only to reverse course in 2022. Planned Parenthood of the Heartland v. Reynolds, 915 N.W.2d 206 (2018), overruled by Planned Parenthood of the Heartland v. Reynolds, 975 N.W.2d 710 (2022); see also Center for Reproductive Rights, State Constitutions, 11.

Indiana trial court Judge Kelsey B. Hanlon reasoned similarly in preliminarily enjoining enforcement of the state’s abortion ban in September 2022. Abortion was unlawful in 1851 when Indiana’s constitution took effect, she acknowledged. But the state constitution also denied people of color the right to vote and deprived married women of property rights. “The significant, then-existing deficits of those who wrote our Constitution—particularly as they pertain to women and people of color—are readily apparent,” Hanlon, a Republican, wrote. “Our analysis here cannot disregard this reality, particularly when considering questions of bodily autonomy.” Order Granting Plaintiffs’ Motion for Preliminary Injunction, Planned Parenthood Northwest v. Medical Licensing Board of Indiana, Cause No. 53C06-2208-PL-001756, Circuit Court of Monroe County, Indiana, Sept. 22, 2022. The Indianapolis Star reported that Judge
Third, the *Hodes* court attributed very different significance to history than did the *Dobbs* majority. *Hodes* rejected the state-counting analysis later embraced by Justice Alito. It found the “State’s reliance on the existence of 19th century abortion statutes . . . wholly unpersuasive” for three reasons: first, “the history of enactment provides no evidence that the legislation reflected the will of the people”; second, “these statutes were never tested for constitutionality”; and third, “the historical record reflects that those at the [relevant state constitutional convention], while willing to recognize some rights for women, refused to recognize women as having all the rights that men had.” The Kansas court saw the views of “eminent common law authorities” like Blackstone not as a source of authoritative guidance for twenty-first century constitutional interpretation, but rather as evidence that common-law principles associated with coverture should *not* be the basis for denying women constitutional rights today. And the court credited the work of scholars James Mohr and Reva Siegel on the context and motivations for nineteenth-century abortion restrictions: “We cannot ignore the prevailing views justifying widespread legal differentiation of the sexes during territorial times and the reality that those views were reflected in policies impacting women’s ability to exercise their rights of personal autonomy, including their right to decide whether or not to continue a pregnancy.”

As the Center for Reproductive Rights’ 2022 report on state constitutions put it, *Hodes* “not only creates constitutional protections for the right to abortion in Kansas that are stronger than federal protections, but also shows how courts can use textual analysis, constitutional history, and a natural rights-based analysis to strongly protect abortion and related rights.” Under a *Hodes*-like analysis, once a broad set of individual liberties or personal rights are established as the constitutional baseline, then historical departures from that baseline—such

Hanlon, a “Republican judge in Owen County,” took the case “after three Monroe County judges, all Democrats, passed on it.” The case was filed in Bloomington (Monroe County) by the ACLU. Shari Rudavsky and Kaitlin Lange, “Judge Blocks Indiana’s New Abortion Law—For Now,” *Indianapolis Star*, Sept. 22, 2022. Hanlon’s injunction was later overturned on appeal by the Indiana Supreme Court. See Medical Licensing Board of Indiana v. Planned Parenthood Great Northwest, 221 N.E.2d 957 (2023).

229 *Hodes*, 440 P. 3d at 487.

230 *Id.* at 487-89.

231 *Id.* at 491 (citing Siegel, “Reasoning from the Body”); see also *id.* at 487-89 (crediting Mohr’s account of the sentiment against irregular physicians as a key motivating force behind the earliest U.S. abortion restrictions).

232 Center for Reproductive Rights, State Constitutions, 8.
as the denial of these rights to women and people of color—are constitutional violations rather than expressions of constitutional fidelity. For instance, advocates who challenged Oklahoma’s 1910 and 2022 abortion bans argued that the state’s 1906 constitutional convention embraced “natural and inalienable rights” beyond those protected in its federal counterpart, and received the imprimatur of populist leader William Jennings Bryan, who called it the “best constitution in the United States.”

Oklahoma petitioners emphasized how retrograde were lawmakers’ views about who possessed the expansive natural rights protected by the state constitution at the time of its enactment. In the early 1900s, Oklahoma women could not vote in most elections or obtain legal redress for marital rape. The Oklahoma legislature enacted a ban on interracial marriage at the same time that it adopted a new constitution.

Historical evidence often bolsters claims of state-specific conditions that support the expansive reach of state constitutional provisions. In some western states, early adoption of women’s suffrage and constitutional sex equality provisions strengthen the case for finding state constitutional limits on abortion regulations. Advocates in Wyoming, the first state to grant suffrage to women, contend that the territorial period offered residents “expansive civil rights . . . including giving women the right to vote and hold office,” and that the state constitution, ratified in 1889, enshrines these and other individual rights beyond those granted by the federal constitution.

Utah, too, gave women the right to vote before statehood and allowed women to attend its 1882 constitutional

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233 Corrected Petitioners’ Brief in Chief, Oklahoma Call for Reproductive Justice. Advocates in North Dakota pointed to the structure of the state’s 1889 constitution, which “placed the inalienable rights clause at the beginning, before any discussion of the function or structure of the state government,” which “demonstrates the importance that they place on individual liberty.” Brief of Respondents Access Independent Health Services, Inc., et al., at 24–25, Wrigley v. Romanick, No. 20220260, in the Supreme Court of North Dakota, Nov. 21, 2022, 2022 WL 17324327. See also, e.g., Planned Parenthood Great Northwest v. State, 522 P.2d 1132, 1217 (Idaho 2023) (Zahn, J., dissenting) (arguing that “the framers’ placement of the inalienable rights provision as the first, most prominent provision of our constitution demonstrates that the framers intended [this] provision to be a broad retention of personal rights enjoyed by Idahoans.”).

234 Petitioners’ Reply Brief, Oklahoma Call for Reproductive Justice, *8-*11; see also Part III. C infra (discussing Justice Yvonne Kauger’s concurring opinion in the Oklahoma case); Allegheny Reproductive Health Center v. Penn. Dep’t of Human Servs., slip op. at 159 (citing and discussing Hodes in the course of finding a right to reproductive autonomy in Pennsylvania’s state constitution).

235 Amended Complaint for Declaratory and Injunctive Relief at 3, Johnston v. Wyoming, Case No. 18553, in the District Court of the Ninth Judicial Circuit in and for Teton County, Wyoming, Mar. 21, 2023.
convention as delegates. Utah’s 1896 constitution included an equal rights provision that guaranteed equal “civil, political and religious rights and privileges” to all “male and female citizens” and provided that “the right to vote and hold office shall not be denied or abridged on account of sex.” Lawyers for Planned Parenthood point to statements from Utah constitutional convention delegates and framers expressing progressive views about women’s capabilities, roles, and rights in the 1880s and 1890s.

Historical evidence also can support methods of state constitutional interpretation that reject narrow approaches to history and tradition such as the Dobbs majority’s. In Indiana, for example, ACLU lawyers challenging the state’s abortion ban cited an 1856 state supreme court decision recognizing that the 1851 constitution’s framers understood that the document’s protections were “necessarily general,” and that they could not anticipate in advance all future exercises of state power or “attempts that might be made to invade [individuals’]

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236 Utah Constitution, art. IV, sec. 1, quoted in Motion for a Preliminary Injunction and Supporting Memorandum at 24, Planned Parenthood Association of Utah v. State, Case No. 220903886, in the Third Judicial District Court, Salt Lake County, Utah, June 29, 2022. Utah’s history also provides fodder for advocates to argue that the state constitution provides unusually broad protection for “family autonomy.” See id.

237 See Motion for a Preliminary Injunction and Supporting Memorandum at 26–27, Planned Parenthood Association of Utah. Explicit recognition in established caselaw that a state constitutional provision confers greater protection than the federal constitution may obviate the need to provide historical evidence about the framers’ progressive intentions. In Ohio, for example, advocates challenging the state’s six-week abortion ban relied on earlier decisions to argue that the state constitution’s “equal protection and benefit clause,” enacted in 1851, requires the application of strict scrutiny to abortion restrictions because they deprive pregnant women of the right to make decisions about reproductive health care. Plaintiffs’ Motion for Temporary Restraining Order Followed By Preliminary Injunction; Request for Hearing, Preterm–Cleveland v. Yost, Case No. A2203203, in the Court of Common Pleas, Hamilton, Ohio, Sept. 2, 2022. See also, e.g., Reply in Support of Plaintiffs’ Emergency Motion for Interlocutory Injunction and Temporary Restraining Order at 10, SisterSong Women of Color Reproductive Justice Collective, et al. v. Georgia, Case No. 2022CV367796, in Fulton County Superior Court, Aug. 8, 2022 (describing how Georgia Supreme Court, in sustaining a state constitutional challenge to Georgia’s sodomy law in 1998, held that the right of privacy protected by the Georgia constitution is more expansive than that protected by the federal constitution); Women’s Health Center of West Virginia, Inc. v. Paepelinto, 446 S.E.2d 658, 662 (W.Va. 1993) (superseded by state constitutional amendment) (citing precedent providing for more expansive interpretation of West Virginia’s constitution than the federal constitution to support striking down a ban on Medicaid funding for abortion).
In Utah, advocates point to precedents recognizing that “the meaning of a particular right in the Utah constitution may evolve over time if, at the time that the Constitution was enacted, the public would have understood the scope of a particular right to be ‘expanding in use and purpose.’” In other words, advocates can argue that a state has a history and tradition of living constitutionalism.

2. Interpreting Modern Constitutional Provisions

When states have adopted constitutional protections for equality, privacy, bodily integrity, and other rights in the modern era, historical evidence often supports both framers’ intent to create capacious rights and a critical approach to the past that sees overcoming historical injustice as part of the provisions’ mandate.

For example, even before voters passed a ballot initiative adding an explicit and wide-ranging reproductive freedom amendment in November 2022, Michigan’s constitution contained an equality provision that is both broader and more specific than the federal equal protection clause, as well as a separate protection for “bodily integrity.” In a post-\textit{Dobbs} challenge to Michigan’s

\textsuperscript{238} Brief of Appellees-Plaintiffs at 38–39, Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, et al., v. Medical Licensing Board of Indiana, No. 22S-PL-00338, in the Supreme Court of Indiana, Dec. 1, 2022.

\textsuperscript{239} Motion for a Preliminary Injunction and Supporting Memorandum at 18, Planned Parenthood Association of Utah v. State, Case No. 220903886, in the Third Judicial District Court, Salt Lake County, Utah, June 29, 2022. (quoting State v. Patterson, 504 P.3d 92 (Utah 2021)); see also Planned Parenthood Great Northwest v. State, Planned Parenthood Great Northwest v. State, 522 P.3d 1132, 1215–16 (Idaho 2023) (Zahn, J., dissenting) (citing evidence that framers of the Idaho constitution intended that the constitution not be “frozen in time”); Plaintiffs’ Combined Reply in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction, Planned Parenthood South Atlantic v. South Carolina, 2022 WL 4110810 (quoting statements from drafters such as “[c]ircumstances are going to change and what might be reasonable today might not be reasonable in the future” and “I think this is an area that, really, should develop and not be confined to the intent of those who sit around this table”).

\textsuperscript{240} Some states also have more recently enacted privacy provisions, for example, Louisiana, South Carolina, and Florida. Florida’s constitutional protection of privacy, amici law professors argue in a challenge to the state’s 15-week abortion ban, was enacted in 1980 against a backdrop of uncertainty about the stability of the federal constitutional right to abortion, and an understanding that the broadly worded provision would protect a right to abortion in the event that \textit{Roe} did not survive. See Brief of Amicus Curiae Law Professors in Support of Petitioners, Planned Parenthood of Southwest and Central Florida v. Florida, Case NO. SC2022-1050 (Fla. Mar. 8, 2023).
1931 abortion ban, advocates pointed to evidence from Michigan’s constitutional convention, held in the civil rights heyday of the 1960s, that suggested the document’s ambitious scope. They also cited other manifestations of Michigan lawmakers’ commitment to principles of race and sex equality then and since.\textsuperscript{241} Judge Elizabeth Gleicher agreed, enjoining enforcement of the 1931 law.

Without endorsing the \textit{Dobbs} majority’s approach to federal constitutional interpretation, Judge Gleicher emphasized the very different origins of Michigan’s constitutional protections. “Almost a century, two world wars, a constitutional amendment granting women the right to vote, the emergence of the civil rights movement, and a sea change in the laws regarding women’s status in society separate the adoption of the Fourteenth Amendment from the ratification of our 1963 constitution.” The “state’s constitutional history,” she wrote, “confirms that the drafters of our Constitution intended and expected that the document would house new rights.” Whatever the proper role of history in federal constitutional interpretation, Michigan’s modern constitution expressly authorized a dynamic, forward-looking, living constitutionalist approach. Whereas “the \textit{Dobbs} majority looked backwards, clinging to a version of history that started ‘in the earliest days of the common law’ . . . our state’s Constitution charges us to look forward, and to inform our conclusions about the liberties enjoyed by our people in the lights of an ‘ever changing conception of a living society.’”\textsuperscript{242} Whether one agrees or disagrees with the U.S. Supreme

\textsuperscript{241} See, e.g., Amici Curiae Brief of Northland Family Planning, et al., at 1, 8, Whitmer v. Linderman, Supreme P.3d 92 164256, in the Supreme Court of Michigan, Aug. 2022 (describing the “civil-rights era constitutional convention that, for the first time, included women and people of color,” and noting how “delegates described the mistreatment of minority groups as ‘the most significant single domestic problem’ in the U.S., saying “it is important that Michigan be a leader in eliminating racial discrimination’’”); Brief of Amici Curiae Professors of History and Law in Support of Governor’s Executive Brief, Whitmer v. Linderman, No. 22-193498-CZ, Supreme Court No. 164256, September 2022 [hereinafter Brief of Professors of History and Law] (a substantially similar brief was filed in the Court of Claims) (describing Michigan’s record of leadership in civil rights for women and people of color).

\textsuperscript{242} Opinion and Order Granting in Part and Denying in Part, Plaintiffs’ Motion for Summary Disposition, Granting in Part and Denying in Part Intervening Defendants’ Motion for Summary Disposition, and Permanently Enjoining the Enforcement of MCL 750.14, at 21-22, Planned Parenthood of Michigan v. Attorney General, Case No. 22-000044-MM (Mich. Ct. of Claims, 2022). “A court charged with an examination of the ideas giving rise to a 1963 Constitution is not assisted by an historical analysis of a clause drafted in a far different social and legal environment. What was ‘deeply rooted’ in history and tradition in 1868, a focal point in \textit{Dobbs}, bears little resemblance to the understanding of personal freedom, particularly for
Court’s approach to history in Dobbs, Gleicher’s opinion suggests, it is inapposite when interpreting Michigan’s constitution.

State equal rights amendments provide a strong basis for expansive interpretations of equality guarantees that break with the history of discrimination and inequality these provisions are designed to combat. Advocates who argue for abortion rights protections under state ERAs often emphasize dramatic changes over time in the recognition of women’s right to equal treatment under the law; of how sex-based stereotypes constrict women’s opportunities; and of how constraints on reproductive freedom and discrimination based on reproductive capacity historically have been central to women’s oppression.

For example, when the New Mexico Supreme Court struck down a ban on Medicaid funding for abortion care in 1998, it traced how state law evolved from providing minimal protections for women’s rights to vote, hold elective office, own and control property, and practice law to embracing sex equality across these domains. The passage of a state ERA signaled a departure from past practices: the court called New Mexico’s amendment “a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based women and people of color, motivating those who drafted and ratified our 1963 Constitution.”

Similarly, Montana’s abortion right dates from a 1972 constitutional convention whose delegates “deliberately drafted a broad and undefined right of ‘individual’ privacy” that “broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from governmental interference,” according to a 1999 state supreme court decision. Armstrong v. State, 296 Mont. 361, 367, 372-73 (1999); Center for Reproductive Rights, State Constitutions, 10. See also Plaintiffs’ Combined Reply in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction, Planned Parenthood South Atlantic v. South Carolina, 2022 WL 4110810 (providing evidence from legislative history, contemporaneous public debates, and elsewhere that the historical context in which South Carolina constitution’s privacy provisions were adopted in 1971 refutes the state’s contention that the framers would not have defined privacy to encompass reproductive autonomy).

Some courts in states lacking an equal rights amendment also have suggested that abortion restrictions may violate the constitution’s prohibition on sex discrimination. See, e.g., Order Granting Preliminary Injunction, at 18-19, Johnson v. Wyoming, Civil Action 18732, in the District Court of Teton County, Wyoming, Ninth Judicial District, Aug. 10, 2022 (“The [abortion ban] only restricts a health care procedure needed or elected by women. The statute restrictions a woman’s right to make her own health care decisions during pregnancy and discriminates against women on the basis of their sex.”).

discrimination that prevailed under the common law and civil law traditions that preceded it.”

In recent litigation challenging local ordinances that purport to enforce the Comstock Act by imposing criminal and civil liability on individuals, clinics, and other entities involved in abortion care, the New Mexico attorney general invokes the state ERA to disclaim the relevance of *Dobbs’s* use of history: “*Dobbs* rests on the interpretation of the Fourteenth Amendment’s understanding in 1868, which is both narrower than New Mexico’s constitution and premised on an understanding of women as second-class citizens that cannot be reconciled with New Mexico’s adoption of the Equal Rights Amendment.”

In *Zurawski v. Texas*, litigation seeking clarification of the state’s abortion bans and challenging their scope under the state constitution, plaintiffs invoke the state’s ERA, adopted in 1972, as “designed to provide ‘more specific protection than both the United States and Texas due process and equal protection guarantees.’” Lawyers from the Center for Reproductive Rights argue in *Zurawski* that “the State’s history of discrimination against Texas women is no justification for treating people differently based on their capacity for childbearing; it is precisely why that discrimination is suspect.” This approach treats the past as “negative precedent,” drawing on the long tradition of interpreting constitutional equality provisions as a license, or even a mandate, to depart from history and tradition.

As this essay went to press, the Pennsylvania Supreme Court vindicated advocates’ historical equality arguments in a challenge to the state’s ban on Medicaid payments for the termination of non-life-threatening pregnancies.

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245 New Mexico Right to Choose, 975 P.2d at 853. According to the Guttmacher Institute, as of July 1, 2023, “17 states have a policy that directs Medicaid to pay for all or most medically necessary abortions.” Nine of these states were prompted to do so by court orders. Guttmacher Institute, “State Funding of Abortion Under Medicaid,” July 1, 2023.


247 Plaintiffs’-Appellees’ Response Brief at *44, Texas v. Zurawski, 2023 WL 7105779 (quoting In Re McLean, 725 S.W.2d 696, 697–98 (Tex. 1987)). The Texas plaintiffs are careful to note that Justice Alito’s dismissive language about equal protection in *Dobbs* was dicta, since there was no equal protection claim before the Court. See, e.g., *id.* at *45–*46.


advocates used the historical record to undermine the 1985 decision in *Fischer v. Department of Public Welfare*, which had upheld an abortion funding restriction under the state Equal Rights Amendment (enacted in 1971). Though the Pennsylvania ERA lacks a robust legislative history, advocates cited Pennsylvania sources from the early 1970s that interpreted pregnancy discrimination as sex discrimination, including opinions from the state Human Relations Commission, the Attorney General, and the state supreme court itself. Arguments from history also buttressed petitioners’ claim that the state’s highest court should reconsider its earlier decision in *Fischer*. Both doctrinal and factual developments militate in favor of finding an abortion right in Pennsylvania’s ERA, they contended: a “widespread repudiation” of the idea that sex discrimination does not encompass pregnancy discrimination; the “emerging recognition in both federal and state case law of the importance of abortion to women’s equality”; and the development of “a vibrant body of scholarship and empirical evidence” that demonstrates “the harm that coerced pregnancy and childbearing inflict on women, particularly women of color.”

The majority and concurring opinions in *Allegheny Reproductive Health Center* draw extensively on critical historical arguments advanced by advocates and scholars. In explaining the majority’s decision to overrule *Fischer*, Justice

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251 Contemporaneous debates over the federal ERA produced conflicting accounts of the amendment’s relationship to “unique physical characteristics” such as the capacity to become pregnant. See Thomas Emerson, et al., Yale ERA article (1971); Siegel, “Constitutional Culture, Social Movement Conflict, and Constitutional Change”; Serena Mayeri, “A New ERA or a New Era?: Amendment Advocacy and the Reconstitution of Feminism,” 103 Northwestern University L. Rev. 1223 (2009).


253 Brief for Appellants at 56, *Allegheny Reproductive Health Center*; see also ERA Project Brief, *Allegheny Reproductive Health Center* at 13–17. Petitioners also argued that the funding ban violates other provisions of the state constitution, including its equal protection and privacy protections. See Brief for Appellants, *Allegheny Reproductive Health Center*; see also Brief of Amicus Curiae the ACLU of Pennsylvania and Law Professors Seth Kreimer and Robert Williams in Support of Appellants, *Allegheny Reproductive Health Center*. 
Christine Donohue’s opinion describes how the “historical origins of the unequal treatment of women under the law predate[] the creation of this Commonwealth,” cataloguing “[c]enturies of inequality,” that included the imposition of coverture and the exclusion of women from law and other professions. The court notes that “the assumptions supporting the destiny of women to hold an inferior legal status were primarily justified by biological differences between men and women.” Even after the ratification of the Nineteenth Amendment, state laws “continued to reflect the common-law view that women were incapable of functioning independently from men, thereby forcing them into their predetermined roles as wives and mothers.” The majority situates Pennsylvania’s adoption of the ERA “within this context of persistent relegation of women to subservient and dependent roles.”

The majority thus agrees with advocates that history supports the reconsideration and overruling of Fischer; a definition of sex discrimination that centrally includes laws targeting pregnancy; and the application of strict scrutiny to sex-based classifications, including those based on pregnancy. Two Justices, Donohue and David Wecht, also interpret Pennsylvania’s constitution to “secure[] the fundamental right to reproductive autonomy, which includes a right to decide whether to have an abortion or to carry a pregnancy to term.” Careful not to endorse Dobbs’s history-and-tradition methodology, they do

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254 Allegheny Reproductive Health Center, slip op. at 87-90 (Donohue, J.). This part of the court’s ruling was joined by Justices David Wecht and Kevin Dougherty.

255 Allegheny Reproductive Health Center, slip op. at 90 (Donohue, J.).

256 The majority describes the appropriate standard of review under the Pennsylvania ERA: “[A] sex-based distinction is presumptively unconstitutional. It is the government’s burden to rebut the presumption with evidence of a compelling state interest in creating the classification and that no less intrusive methods are available to support the expressed policy.” Id. at 123. It remanded the case to the Commonwealth Court (state trial court) to allow the parties to argue the merits under this standard. Id. at 219.

257 Id. at 124–125 n.84. Justice Kevin Dougherty joined the majority in overruling Fischer, but not in reaching the question of whether the state constitution also protected a right to reproductive autonomy. See Allegheny Reproductive Health Center (Dougherty, J., concurring in part and dissenting in part), slip op. at 2–3 (stating that “the majority’s incredibly insightful position” on the question of whether the state constitution contains a right to reproductive autonomy “may ultimately prevail in the end” but that the parties should first have the opportunity to present arguments on the question in the lower courts).

258 Like Judge Gleicher in Michigan, Justices Donohue and Wecht are careful not to endorse the Dobbs majority’s application of history-and-tradition methodology to the federal constitution even as they emphasize its inapplicability to the Pennsylvania constitution. Id. at 153. Justice Wecht’s concurrence attacks Dobbs’s history-and-tradition analysis more directly. See infra.
examine the historical record to identify an inherent right to “decision making on certain important issue[s] and security in one’s bodily integrity” that preceded even the state constitution’s adoption in 1776.259 Drawing on Pennsylvania’s “strong historical tradition of privacy” as well as the ERA’s intent to “enshrine equality of the sexes” and “rectify centuries of subjugation of the rights of women,” the two Justices conclude that a right to reproductive autonomy is “central to self-determination and ultimately, to equality in society,” without which constitutional guarantees would be “a hollow promise.”260 Notably, they reason synthetically about the state constitution’s privacy and equality principles, recognizing their mutually reinforcing power.

A wide-ranging concurrence from Justice Wecht draws upon feminist and historical scholarship and advocacy to model the ERA’s application to the Medicaid funding ban; to survey alternative federal and state constitutional grounds for an abortion right; and to reflect upon the proper role of history and tradition in constitutional interpretation.261

History informs Justice Wecht’s analysis of the difficult task ahead for the state: to show that it has used the least restrictive means to pursue protection of fetal life and women’s health. Wecht observes that the “provision of unequal health care and the coercion of women to give birth against their will would seem to serve archaic and stereotypical notions about women” since “[w]omen’s reproductive capacity and their ability to become mothers traditionally has long been used as justification for perpetuating distinctions between the sexes.”262 Wecht therefore credits arguments that “[w]hen the legislature uses the law to coerce but not to support women in bearing children, its purported interest in potential life rings hollow.”263 Echoing reproductive justice theorists, he enumerates the ways a state truly interested in supporting women and children could invest in contraception, comprehensive sex education and health care,

259 Id. at 154.
260 Id. at 165. The two Justices also interpret the Pennsylvania constitution’s equal protection provisions more broadly than the federal equal protection clause. See id. at 167–218.
261 Justice Wecht addresses a number of other points, including the level of generality at which courts should define constitutional rights. See Allegheny Reproductive Health Center, slip op. at 6–7 (Wecht, J., concurring) (“It is a familiar tactic of courts that are about to deny the existence of a civil right to define the right so narrowly that the right . . . will not be found in the applicable constitution”) (discussing Fischer, Bowers, and Dobbs as examples).
262 Id. at 15 (Wecht, J., concurring).
263 Id. at 16 (Wecht, J., concurring) (citing Reva B. Siegel, “Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression,” 56 Emory L.J. 815, 821 (2007)).
protections for pregnant workers, and financial subsidies for families.\textsuperscript{264} Quoting Khiara Bridges, he recognizes “the guarantee of reproductive autonomy [as] a safeguard against tyranny.”\textsuperscript{265}

History plays many other generative roles in Justice Wecht’s concurrence. The history of abortion rights advocacy inspires his call for advocates “to advance and develop new legal theories” at both the federal and state levels post-Dobbs.\textsuperscript{266} Drawing from scholarship by Reva Siegel, Linda Greenhouse, and Melissa Murray, he details creative constitutional arguments that preceded Roe—including equal protection claims and innovative interpretations of the First, Eighth, Ninth, and Thirteenth Amendments.\textsuperscript{267} He recounts how equal protection arguments for abortion rights survived even as courts reasoned about abortion on Roe’s terms, and how amici presented these arguments to the Court in Dobbs.\textsuperscript{268} He urges advocates not to give up on federal equal protection arguments or on other federal constitutional provisions, including those relied upon pre-Roe as well as the Establishment Clause and the Privileges or Immunities Clause.\textsuperscript{269} Wecht emphasizes, too, that the U.S. Supreme Court’s interpretation of the federal constitution does not bind state courts’ interpretations of their own constitutions,\textsuperscript{270} and he underscores the majority’s synthetic

\textsuperscript{264} Id. at 16–17 (citing and quoting Reva Siegel, “Prochoicelife: Asking Who Protects Life and How—and Why It Matters in Law and Politics,” 93 Indiana L.J. 207, 210–11 (2018) (discussing the implications of reproductive justice theorists’ insights for legal and political arguments)). Wecht also notes that a state “that truly was concerned with protecting women’s health would contain an exception to the [Medicaid] Coverage Exclusion for the health of the woman even when she does not face death.” Id. at 18. He warns that the “state’s interest in protecting fetal life cannot be based upon a religious view of morality or upon religious notions of when life begins or ensoulment occurs.” Id. at 20.

\textsuperscript{265} Id. at 41 (quoting Bridges, The Poverty of Privacy, 104 n.1).

\textsuperscript{266} Id. at 23 (Wecht, J., concurring). Wecht himself believes substantive due process was an inferior constitutional home for abortion rights. See id. at 22–23.


\textsuperscript{268} See id. at 31 & n.177 (citing Equal Protection Brief, Dobbs).

\textsuperscript{269} See id. at 31–40.

\textsuperscript{270} See, e.g., id. at 40 (Wecht, J., concurring) (“Now that this federal floor [Roe and Casey] has been demolished, states have a fresh opportunity to resolve with renewed vigor claims of equality and reproductive autonomy that are untethered to any possible limitations imposed by the federal constitution.”).
reading of the equality, privacy, and liberty provisions of Pennsylvania’s constitution.271

The historical context surrounding Pennsylvania’s adoption of the ERA informs Justice Wecht’s expansive interpretation of its meaning.272 Understood against the backdrop of debates that framed protections against pregnancy discrimination and safeguards for abortion as central to sex equality, the ERA “can be read as barring the government from singling out and targeting the reproductive health choices of women.”273 Proponents’ dissatisfaction with the Court’s “anemic” interpretation of the federal equal protection clause inspired the state ERA and justifies an interpretation unconstrained by discriminatory intent and state action requirements, by the inconsistent application of heightened judicial scrutiny to sex-based classifications, or by Geduldig’s denial that pregnancy discrimination is always sex discrimination.274

The historical centrality of “physiological naturalism” and assumptions about women’s maternal destiny to sex inequality also influence Justice Wecht’s “openness” to considering in future cases whether, for example, “the ERA requires courts to strike down unsupported restrictions on reproductive autonomy that perpetuate social inequality based upon childbearing capacity, forcing women to become mothers, denying women the right to make decisions to shape their own future, or enforcing stereotypes that a woman’s primary function is to beget and bear children.”275 Not only does Pennsylvania look likely to join a number of states that have interpreted their constitutions to

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271 See id. at 41–42 (“The right to reproductive autonomy anchored in Article I, Section 1 may also be supported by other provisions in our Constitution, including the ERA itself and Article I, Section 3 . . . .”).

272 This history, he contends, supports “go[ing] beyond invalidating explicit gender-based distinctions to also invalidate laws and policies that operate to perpetuate sex-based inequality.” Id. at 43.

273 Id. at 44–45.

274 Id. 44–49 (citing, inter alia, Linda J. Wharton, “State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination,” 36 Rutgers L.J. 1202 (2005)).

275 Id. at 56–57. Wecht also mentions, inter alia, his willingness “to examine generally whether the ERA independently protects reproductive autonomy as a matter of equality,” “whether specific abortion restrictions codify gender inequality based upon reproductive capacity in violation of the ERA,” “the argument that there is no equality without access to abortion,” and the applicability of Pennsylvania’s religious freedom guarantees to restrictions on reproductive autonomy. See id. at 55–58.
require public funding for abortion care, but Wecht’s concurrence—and the majority opinion itself—invite challenges to the commonwealth’s other abortion restrictions and to other laws that disparately impact women.

Finally, Justice Wecht provides an extended critique of the Dobbs majority’s history-and-tradition analysis. He credits scholars who have debunked both the opinion’s factual account and its methodology. He criticizes the Dobbs majority for “relying] upon the patriarchal notions of eminent authorities of old English common law” instead of “examining the history of the Fourteenth Amendment as a Reconstruction Amendment aimed at transforming the formerly enslaved into citizens.” He writes that “relying upon particular points in history during which women expressly were precluded from political participation effectively enshrines and perpetuates the legal subjection of women.” Rather than “a neutral survey of history,” Justice Alito’s references to Hale and Blackstone represent “the continuation of centuries of misogyny and oppression that our society has since rejected,” an interpretive method “that seems designed to perpetuate the wrongs of our past.” Wecht concludes: “Whatever one thinks about the role of history and tradition in affording rights to women” under the federal constitution, Pennsylvania’s ERA “did away with the

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277 For a summary of Pennsylvania abortion law and politics as of January 2024, see Katie Meyer, “What’s the State of Abortion Access in Pennsylvania?”, WHYY, Jan. 27, 2024, https://whyy.org/articles/abortion-legal-pennsylvania-law-viability-restriction-legislature-republican-democrat/. As the court in Allegheny Reproductive Health Center notes, it had interpreted the state ERA to require strict scrutiny for laws that have a disparate impact on women, whether or not they are motivated by discriminatory intent. See DiFlorido v. DiFlorio, 331 A.2d 174, 180 (Pa. 1975) (requiring certain property to be presumed to be held jointly by spouses because of disparate impact on women of awarding such property to the title-holding spouse).

278 Here, Wecht relies upon the works of scholars including Reva Siegel, Melissa Murray, and Aaron Tang. See id. at 60–68 (recounting the inaccuracies in Dobbs’s history of abortion in the nineteenth century and the shortcomings of its history-and-tradition analysis).

279 Id. at 60.

280 Id.

281 Id. at 62. See also, e.g., id. at 67 (“When the Supreme Court selectively examined the history and traditions of this nation, what it observed was the deeply rooted subjugation of women.”).

282 Id. at 69.
antiquated and misogynistic notion that a woman has no say over what happens to her body.”

As the Pennsylvania ruling suggests, historical arguments can support expansive interpretations of ERAs and other existing state constitutional provisions that hold great promise for protecting rights—including an affirmative right to state support for reproductive health care. Indeed, states have a history of recognizing positive as well as negative rights under their state constitutions, such as a right to education, workers’ rights, guarantees of subsistence, health care, and environmental protection—providing a model for state courts, legislatures, and framers of ballot initiatives to follow.

B. Historical Context to Discredit Old and New Abortion Restrictions

The *Dobbs* majority dismisses evidence about legislators’ constitutionally suspect motivations for enacting abortion restrictions as unpersuasive if not irrelevant and takes for granted the legitimacy of imposing white propertied men’s archaic assumptions about gender, race, class and religion on contemporary Americans. But as the previous section describes, state courts often reject approaches to the past like the one adopted by the *Dobbs* majority. To jurists who take a more critical approach, the historical context in which nineteenth-century lawmakers enacted abortion bans is a source of discredit rather than a prerequisite for constitutional protection in the present day. For laws enacted in earlier periods, historical context undermines the legitimacy of abortion restrictions passed under conditions of disenfranchisement, unfreedom, and oppression that burdened women, people of color, immigrants, disabled, poor, and other marginalized Americans. For more recent enactments, such history allows advocates to draw connections between the stereotypes and assumptions that underpin today’s abortion restrictions and those of the past.

If a problematic historical pedigree can discredit laws that restrict abortion, advocates challenging these enactments have ample ammunition. Justice Alito brushes aside the racist, nativist, anti-Catholic, and misogynist attitudes underpinning nineteenth-century anti-abortion campaigns as nothing more than “statements made by a few supporters of the new 19th-century abortion laws,”

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283 *Id.* at 71.


but even a quick glance at local sources reveals a historical record teeming with evidence. In post-Dobbs litigation challenging Michigan’s 1931 abortion law, for instance, a legal historians’ amicus brief uncovered myriad examples in local medical journals from the 1850s through the 1880s of leading Michigan physicians arguing that abortion restrictions were necessary to prevent married white Protestant women from shirking their divinely and biologically determined responsibility to conceive and bear many children. Abortion endangered women’s physical and moral health, they warned, asserting that a woman who ended her pregnancy “often pay[s] the penalty of her unnatural crime with her own life then and there.” Women who survived risked “functional and organic diseases of the reproductive system which . . . wreck the mind and entail a pitiable life worse than death.” Abortion, Michigan doctors insisted, was “a sinful habit which opens the way to unbridled licentiousness” and they cautioned that “to take away the responsibility of motherhood is to destroy the greatest bulwarks of female virtue.”

Doctors’ portrayals of women who tried to exert control over their reproductive lives reeked of misogyny and paternalism. Anti-abortion physicians “portrayed women as ‘selfish and unprincipled,’ ‘silly,’ ‘deceptive,’ and immoral stewards of their bodies and reproductive lives.” They “disparaged . . . women who sought abortions ‘only’ because they ‘do not wish to endure the inconvenience and trouble of pregnancy and childbirth,’ ‘do not want to have children,’ ‘have children enough,’ or . . . for ‘some other equally frivolous excuse.’” According to supporters of abortion restrictions, women justified ending pregnancies with “excuses” such as “poverty,” “short duration of marriage,” “poor health,” and “‘deceptively given’ assertion[s] that the woman ‘could not live through another labor.’” Other women ostensibly saw children not as “blessings but nuisances, interfering with their rounds of fashionable dissipation.” Physicians called on lawmakers to ban abortion to prevent fecund

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286 Reva Siegel’s classic article “Reasoning from the Body,” published in 1992, provides numerous examples from around the country. See Siegel, “Reasoning from the Body.” In the years since, digitized medical journals in HathiTrust and elsewhere make local instances comparatively easy to identify.

287 Brief of Professors of History and Law, Whitmer, 12.

288 Brief of Professors of History and Law, Whitmer, 12.

289 Brief of Professors of History and Law, Whitmer, 13.

290 Brief of Professors of History and Law, Whitmer, 13.


immigrants from outpacing the birthrates of white native-born Protestants. Amongst many examples of this sentiment among Michigan medical men, Dr. J.H. Kellogg cautioned in 1882 that the “monstrous vice [of abortion] threatens to exterminate the race.”

Advocates thus demonstrated the widespread and locally specific dissemination of nineteenth-century views about sex, race, class, and disability that are anathema to contemporary constitutional values. Historical research also allowed the Michigan amici to link the challenged 1931 law to contemporaneous eugenic legislation and place it in the context of continuing limitations on women’s rights. Amici showed how many of the same “lawmakers who expanded Michigan’s criminal abortion law in 1931 also oversaw a dramatic expansion of the state’s program to compulsorily sterilize women.” Revisions to state law that extended and intensified abortion’s criminalization came out of the same crime commission that produced eugenic sterilization measures, and lawmakers enacted both in the same session. Individual anti-abortion campaigners like Dr. Kellogg also promoted sterilization and other measures to establish what Kellogg called “the foundation for a new human aristocracy—possibly, in some distant future, a superior race.”

Judge Gleicher’s order enjoining the Michigan law jettisoned the Dobbs majority’s history-and-tradition analysis in favor of a more dynamic interpretation of the state constitution. She also cited historical evidence that discredits the challenged abortion regulations. Her opinion approvingly discussed the legal historians’ brief, which “present[ed] abundant evidence supporting their thesis that ‘sex-stereotyped views of women, nativist sentiments, religious bigotry, eugenic aims, and fears about maternal mortality and morbidity from pregnancy termination have animated Michigan’s laws restricting abortion.’” The court credited amici’s argument that the 1931 law specifically was fueled by “a pervasive world view in which women’s status in law, and their bodily integrity, was consistently compromised.”

293 Brief of Professors of History and Law, Whitmer, 15.
294 As the brief notes, some but not all of the anti-abortion physicians also opposed contraception. Brief of Professors of History and Law, Whitmer, 12 n.24.
296 Brief of Professors of History and Law, Whitmer, 20–22.
297 Brief of Professors of History and Law, Whitmer, 22.
299 Id. Cf. Allegheny Reproductive Health Center (Wecht, J., concurring), slip op. at 69 (emphasizing the importance of viewing Pennsylvania abortion law circa 1868 in “the social
Advocates also underscore the undemocratic processes by which early abortion bans became law. In Arizona, for instance, amici explain that the 1864 territorial law anti-abortion advocates seek to enforce originated at a time when women, Native residents, and youth under age 21 could not vote and had no voice in lawmaking. The same territorial code that contained the abortion ban “included other laws that would startle twenty-first century Arizonans and that reflected the systemic disenfranchisement of women and people of color,” including prohibitions on interracial marriage and on people of color testifying against white residents, as well as a provision that allowed girls to consent to sex at age 10.

Such arguments are not confined to cases involving nineteenth-century laws. In South Carolina, for example, then-Justice Kaye Hearn rejected the government’s argument that the notes of a committee convened in 1966 to consider adding a privacy right to the state’s constitution should determine the provision’s reach in 2023. The committee, “initially composed of nine men and not a single woman,” began deliberations at a time when the South Carolina legislature “had neither permitted women to serve on juries . . . nor ratified the Nineteenth Amendment.” Hearn wrote for the Court: “Given the historical backdrop” of South Carolina’s belated recognition of women’s rights, although “abortion was not mentioned in the amendment nor was including a woman’s right to bodily autonomy uppermost in the minds of the [amendment’s framework of its time . . . the height of the separate spheres doctrine that confined women to strict, socially constructed roles as wives and mothers, and reserved the public sphere of work and politics for men.”). See also id. at 70 (Mills v. Commonwealth, an 1850 Pennsylvania court decision affirming the unlawfulness of abortion, “aligns with the medical profession’s attempts to consolidate its medical authority . . . over women’s role in reproduction in order to preserve the social order that benefited that profession.”).

300 Amicus Curiae Brief of the Family & Juvenile Law Association, University of Arizona, James E. Rogers School of Law in Support of Respondents, Planned Parenthood of Arizona v. Mayes, No. CV-2023-0005-PR (Ariz. Oct. 4, 2023), 2023 WL 8452045, at *4 (“Members of the very populations most impacted by abortion regulations had no voice in electing either the territorial legislature that first adopted the statute or the one that voted for its recodification [in 1901].”)

301 Also, a limit on the penalty for killing a man in a duel to five years’ imprisonment. Id. at *7. See also Allegheny Reproductive Health Center (Wecht, J., concurring), at 69 (noting that in the 1860s when Pennsylvania courts affirmed the unlawfulness of abortion, “[w]omen could not vote, were restricted in available employment, and were restricted in the ways that they could own their own property.”).

framers], those facts neither guide nor end our inquiry." A divided court held that South Carolina’s six-week abortion ban violated the state constitution’s right to privacy.

Archaic justifications for abortion restrictions animate advocates’ claims that abortion bans resurrected in the wake of Dobbs are no longer good law. In West Virginia, attorneys for the ACLU and Mountain State Justice locate the state’s abortion ban, originally enacted in 1849 and last modified in 1882, in a “wave of anti-abortion legislation that swept across the United States in the nineteenth century . . . reflecting the worldview that women were appropriately destined for home and childrearing.” Older laws, they contend, have fallen into desuetude. In Arizona, too, advocates note that nativist and paternalist motives often animated abortion restrictions enacted contemporaneously with its 1864 territorial law.

Before and since Dobbs, historians and advocates have drawn connections between recently enacted laws that proponents justify as protecting women and the archaic stereotypes that undergirded nineteenth-century anti-abortion

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303 Justice Hearn continued: “We cannot relegate our role of declaring whether a legislative act is constitutional by blinding ourselves to everything that has transpired since the amendment was adopted.” Id. (citing Brown v. Board of Ed., 347 U.S. 483, 492-93). Chief Justice Donald Beatty’s concurrence similarly noted that the state was “asking this Court to rely on a time in our state’s history when women were not full participants in the public and legal affairs of this state.” The same 1895 constitution that introduced due process protections “included a provision expressly prohibiting women from voting in public elections” and “focused on disenfranchising African Americans.” Id. at 805 (Beatty, C.J., concurring).

304 The decision was overruled less than a year later. See infra.

305 Memorandum of Law in Support of Plaintiffs’ Motion for a Preliminary Injunction, Women’s Health Center of West Virginia v. Miller, in the Circuit Court of Kanawha County, West Virginia, June 29, 2022. The West Virginia plaintiffs draw on newspaper accounts and court cases revealing that the state enforced the old ban against a range of actors, including nurses, partners, and pregnant women in the late nineteenth and early twentieth centuries. See Complaint, Women’s Health Center of Virginia v. Miller; Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 5-6, Women’s Health Center of West Virginia v. Miller. In contrast, the state’s post-Roe regulatory regime targeted only licensed medical professionals, and for civil rather than criminal liability. See Memorandum of Law, Miller, 7-11.


campaigns and other paternalistic laws of the past. In litigation challenging the targeted regulation of abortion provider (TRAP) laws that multiplied after Casey, plaintiffs argue that woman-protective rhetoric reminiscent of earlier eras papers over the real impetus for these laws: anti-abortion movements’ concerted efforts to make abortion as unavailable as possible within the constraints of laws that permit abortion under certain circumstances. In a lawsuit against Virginia’s licensing and waiting period regulations, for example, historian Karissa Haugeberg provided detailed evidence about the national and local anti-abortion movements’ efforts to persuade the public that abortion should be restricted because it is dangerous to women. “Abortion laws and regulations that falsely purport to improve women’s health or decision-making reveal a deep mistrust of women’s abilities to make informed and responsible judgments, a paternalistic, antiquated belief that physicians espoused in the nineteenth century to push for criminalization of abortion,” she wrote. A historians’ brief in Whole Women’s Health v. Hellerstedt linked woman-protective rationales for abortion restrictions with coverture, jury service exemptions, and exclusions of women from employment. In Dobbs, advocates pointed to language in the Mississippi legislation that reeked of now-constitutionally suspect ideas about motherhood as women’s destiny and abortion as dangerous to women’s moral and physical health.

In state courts, too, plaintiffs connect recently enacted abortion bans with outdated, constitutionally suspect rationales. In Ohio, for example, advocates


310 Haugeberg Expert Report, 3.

311 Brief of Historians as Amici Curiae in Support of Petitioners, Whole Women’s Health v. Hellerstedt, No. 15-274. Similarly, historian Linda Kerber characterized North Dakota’s six-week ban, passed in 2013, as reliant on “some of the same stereotypes about women’s nature and abilities, and the primacy of women’s domestic obligations in the home, that sustained coverture and delayed women’s achievement of full political and economic participation in society.” Declaration of Linda K. Kerber, Ph.D., MKB Management Corp. v. Burdick, Case No. 1:13-cv-071, in the U.S. District Court for the District of North Dakota, Southwestern Division, Oct. 11, 2013.

312 Brief of Equal Protection Constitutional Law Scholars, Dobbs.
argued that the challenged law, passed in 2019, banned abortion in the name of “protect[ing] the health of the woman,” a justification “inextricably intertwined with other outdated justifications” such as “enforce[ing] wives’ marital duties” and “control[ling] the relative birthrates of ‘native’ and immigrant populations.”

Just as advocates have brought reproductive justice arguments to federal court (see Part II above), national and local histories of reproductive injustice increasingly inflect state court litigation. For example, in Michigan, an amicus brief authored by lawyers from the Center for Reproductive Rights on behalf of reproductive rights and justice organizations argued that the state’s abortion ban violated the state equal protection guarantee on grounds of race as well as sex discrimination. The brief placed Michigan’s original 1846 abortion ban and subsequent restrictions in the context of the history of reproductive control of enslaved women, the Comstock laws, and twentieth-century eugenic policies. Amici described in detail the disproportionate racial and economic impact of abortion restrictions on Black and poor Michiganders, noting how a ban would exacerbate both the legacy of historical inequality and more recent local and national developments such as the Flint water crisis, the COVID-19 pandemic, and the crisis in maternal mortality and morbidity among Black women. Similarly, in the litigation challenging Pennsylvania’s restrictions on public funding for abortion, If/When/How lawyers representing reproductive

313 Plaintiffs’ Motion, Preterm-Cleveland, 31 (citing Siegel, “Reasoning from the Body”). See also Verified Petition for Writ of Prohibition and Application for Declaratory Judgment at 15, Planned Parenthood Great Northwest v. Idaho, Case No. 49817-2022, in the Supreme Court for the State of Idaho, June 27, 2022 (“The law is designed to deprive only women of the right to choose whether or not to be a parent and to their bodily autonomy. That classification is especially invidious in light of the historical oppression of women in the particular area of the work associated with bearing and raising children.”); Verified Complaint at 8, Women’s Health Center of West Virginia v. Miller, in the Circuit Court of Kanawha County, West Virginia, June 29, 2022 (“At the same time [as they enacted abortion restrictions], legislatures in the nineteenth century—a time when states could deny women the right to vote—passed numerous other laws reflecting the view that women were appropriately destined for the home and childrearing.”).

314 The brief declared that “[a]bortion restrictions are part of our country’s sordid history of reproductive and sexual control policies,” which “historically [have] denied women and pregnant people the freedom to make fundamental decisions about their futures by preventing them from having children, coercing them into having children, or denying them the ability to raise children in conditions of their choosing.” Amici Curiae Brief of Northland Family Planning, et al., at 2, Whitmer v. Linderman.

315 Id. (passim).

316 Id. at 8–15.
justice organizations devoted to promoting the health and well-being of Black women and girls filed an amicus brief detailing how denying Medicaid funds for abortion care aggravates historic and existing disparities.  

C. A History and Tradition of Protecting Women’s Lives and Health

As the preceding section suggests, advocates need not accept Dobbs’s anomalous historical method as a given. In both state and federal courts, they can advance more capacious visions of history’s relevance even when success seems unlikely. Indeed, to avoid reifying and legitimizing Dobbs it may be important—and even necessary—to argue both for a more expansive approach to history’s relevance than the Dobbs version of history and tradition and make the best case possible for invalidating abortion restrictions within that framework. When judges decide to put the Dobbs approach (or similar approaches) into practice, they are making a choice that should be contested and for which they should be accountable in and outside of court.

Some courts may nonetheless embrace a narrower or less dynamic approach to history. In the alternative, then, advocates can argue that even under a vision of history’s relevance that investigates past practice as the leading indicator of constitutional protection today, at least some abortion restrictions are still constitutionally infirm.

Sometimes advocates find historical evidence that abortion restrictions contravene constitutional rights, statutory interpretations, or common law rules recognized at the time of enactment. For example, in the aftermath of Dobbs, the ACLU briefly obtained a temporary injunction blocking the enforcement of an abortion ban by arguing to a Kentucky trial court that at the time of the state constitution’s ratification in 1891, state courts recognized that no statute had abrogated the common law rule permitting pre-quickening abortions with

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318 Accepting the Dobbs majority’s historical methodology for the sake of argument does not require conceding its validity or legitimacy.
a woman’s consent. In that instance, advocates pointed to clear language in state court decisions to this effect.

State courts’ application of the narrow history-and-tradition reasoning of the Dobbs majority may stymie advocates seeking to invalidate bans altogether by establishing a fundamental right to abortion under state constitutions. In Idaho, for instance, a 3–2 majority of the state supreme court considered the state constitution as “an instrument whose meaning is fixed at its creation” when it examined “Idaho’s history, traditions, common law, and statutes” to determine whether the state constitution contained implicit protection for abortion rights. The court declined to issue a permanent injunction against a

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320 Plaintiffs’ Memorandum in Support of their Motion for Restraining Order and Temporary Injunction at 28, EMW Women’s Surgical Center v. Cameron, No. 22–CI–3225, in Jefferson Circuit Court Division 3, June 27, 2022 (“[T]he recognition of a constitutional right to abortion . . . is in accord with the history and traditions of this Commonwealth, including when the Kentucky Constitution was ratified in 1891. At that time, Kentucky had not codified any statutory limits on the right to abortion. Instead, as recognized by Kentucky courts, abortion was permissible at least until quickening . . . .”) (citing Mitchell v. Commonwealth, 78 Ky. 204, 210 (1879) (“[I]t never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child.”) and Wilson v. Commonwealth, 60 S.W.2d 400, 401 (Ky. Ct. App. 1901) (“[T]here is no statute in this state changing the common-law rule”). See also, e.g., Motion for a TRO, at 36–37 n.8, SisterSong v. Georgia, No. 2022CV367796 (Ga. Super. Ct. Jul. 26, 2022) (noting that while Georgia’s privacy protection does not require that a right be “deeply rooted” in history and tradition, Georgia did not prohibit abortion until 1876, 11 years after its due process clause was adopted).


322 Id. at 1173. The two dissenting Justices would not have applied the Dobbs majority’s narrow version of history-and-tradition analysis. Justice Colleen Zahn wrote that the Idaho court need not follow the U.S. Supreme Court’s analysis of fundamental rights under the federal constitution, and that “[w]hile history and tradition are important and often controlling considerations, they should not always be the sole consideration.” Id. at 1215 (Zahn, J., dissenting). Zahn interpreted the same historical evidence cited by the majority to establish an implicit fundamental right to abortion when necessary to preserve a woman’s life or health, though not in other circumstances. See id. at 1219–24. The other dissenting Justice, John Stegner, rejected outright the Idaho majority’s adoption of the Dobbs majority’s history-and-tradition test and would have recognized a more general fundamental right to abortion under the state constitution. See id. at 1227–36 (Stegner, J., dissenting) (castigating the majority opinion for, inter alia,
near-total abortion ban, relying largely on what it perceived as an uninter-
rupted history of abortion criminalization since the territorial period. After a
deeplive into primary historical sources, including legislative history, newspa-
pers and medical journals, and court decisions, the court concluded that “all of
the evidence indicates that . . . the people of Idaho, the framers of its constitu-
tion, the territorial assembly, the state legislature, and the physicians of Idaho
widely viewed abortion as a criminal offense and as grounds for medical disci-
pline except when necessary to preserve the life of the mother.” A “right to
abortion,” the court found, “has no support in Idaho’s deeply rooted traditions
or history at the time the [relevant state constitutional provisions] were framed
and adopted.”

Even rulings like Idaho’s do not foreclose more direct challenges to abortion
bans’ failure to provide exceptions for life-threatening emergencies, how-
ever. Indeed, state courts already have been receptive to the claim that their

“relegating] women to their traditional (and outdated) roles as only child-bearers and moth-
ers”; and for “removing” from the state constitution the “recognition . . . that the individual is
the master of her fate, she is the captain of her soul.”). Four months after the decision, in May
2023, Justice Stegner announced that he would retire from the court at the end of October.

The Idaho court’s application of history-and-tradition analysis included a dis-
cussion of petitioners’ evidence that newspapers routinely and openly advertised abortifacients
during the relevant period, suggesting that whatever the law on the books, abortion was a
commonly accepted practice in the nineteenth century. The court cited evidence from news-
paper accounts describing prosecutions, often of men who attempted to procure abortions for
women they had impregnated, and most of which involved attempted abortions that resulted
in the woman’s death. See id. at 1179-83. The court also examined medical journals from the
period and found that Idaho physicians “regularly condemned medical practitioners who per-
formed voluntary abortions as engaging in an unethical, immoral, and criminal practice and as
grounds to revoke a physician’s medical license.”

Unlike pre-Roe Idaho laws, which consistently included an explicit exception for abortion
necessary to save the pregnant person’s life, the recently enacted bans require providers to
mount an affirmative defense to prosecution in cases where “[t]he physician determined, in his
good faith medical judgment . . . that the abortion was necessary to prevent the death of the
pregnant woman,” or that “prior to the abortion, the woman provided a copy of her report of
rape or incest to law enforcement.” See id. at 1152-53 (quoting Idaho Code section 18-622(2)).
The Idaho supreme court confirms that framing lifesaving care as an affirmative defense rather
than an exception means that a physician who performs an abortion “could be charged, arrested,
and confined until trial even if the physician initially claims they did it to preserve the life of the
constitutions require some minimal standard of protection for the life and health of a person endangered by pregnancy. In litigation challenging laws that ban abortion regardless of danger to the pregnant person’s life and health or the unlikelihood of fetal survival, advocates argue that historical actors—usually constitutional framers or legislators—understood the laws they created to mandate the protection of women’s lives and health. State courts have responded favorably, and in doing so, some judges seize the opportunity to highlight the absurdity of tethering present-day rights to outdated law and practice.

Justice Yvonne Kauger of the Oklahoma Supreme Court did just this in her concurring opinion in Oklahoma Call for Reproductive Justice v. Drummond, a challenge to a near-total ban that allowed abortions only when necessary to preserve a pregnant woman’s life in a medical emergency. Justice Kauger maintained that the “right to preserve the life of the mother is deeply rooted in Oklahoma law,” and that even in the darkest days of women’s legal subordination Oklahoma did not prohibit the lifesaving termination of a pregnancy. In the era “when a woman had little or no say about” her body, property, political participation, employment, attire, domicile—when husbands could legally beat mother, or based on reported rape or incest. Only later, at trial, would the physician be able to raise the affirmative defenses.” Id. at 1196.

Though the state supreme court did not see these distinctions as grounds for finding a fundamental right to abortion in Idaho’s constitution, the decision does not preclude a more targeted attack on the lack of exceptions or on ambiguities that might prevent health care professionals from providing care necessary to preserve patients’ life and health. Nothing in the Idaho decision refutes the assertion that state law criminalizing abortions always explicitly exempted procedures necessary to save a pregnant person’s life. In fact, one of the medical authorities described in the Idaho opinion “discussed the important line between ‘criminal abortions’ (i.e. voluntary abortions) and ‘justifiable’ abortions necessary to preserve the life of the mother.” Id. at 1184 (citing J.H. Lyons, in Northwest Medicine Vol. V. 289-96 (1907)).

The majority does, in dicta, reject the argument from a dissenting justice that, as the majority puts it, “because Idaho statutes historically contained an exception to the criminalization of abortion to ‘save’ (later changed to ‘preserve’) the life of a mother, this statutory exception warrants the conclusion that there is an implicit fundamental right to abortion to prevent the death of the mother and to protect her health from injury, harm, or destruction.” Id. at 1193. But it also leaves the door open to future challenges not before the court in the instant case: “If the day comes that the legislature decides to prohibit abortion under all circumstances—without providing for legally justified abortions (i.e., the affirmative defenses) or exceptions—the Court may very well be called upon to take up the protections of the express right to enjoy life contained in Article I, section 1 of the Constitution or other arguments that may be advanced by a challenger.” Id. at 1195. Further, the challenges in this litigation were facial, and the court suggests that, at least with respect to void-for-vagueness arguments, the plaintiffs should bring an as-applied challenge to address “uncertainty at the margins,” i.e., how the affirmative defenses would apply to particular circumstances. Id. at 1201.
and rape their wives, women could not vote, work in most occupations, hold political office, serve on juries, obtain credit in their own names, own and control property while married, wear trousers or sleeveless tops in certain public spaces—still, Oklahoma law consistently allowed abortions when pregnancy threatened a woman’s life, certifiable medical emergency or not.\textsuperscript{326} Kauger’s invocation of history simultaneously exposes the absurdity of using archaic past practice as the measure of contemporary freedoms and highlights the extremism of abortion bans like Oklahoma’s that fail even to provide women and other pregnant persons with the minimal protections afforded by antediluvian lawmakers.

The North Dakota Supreme Court went further than Oklahoma in its March 2023 ruling upholding a preliminary injunction against a state abortion ban.\textsuperscript{327} Relying upon “contemporaneous history existing at and prior to the adoption of the constitutional provision,” the court emphasized that from the territorial period until the enactment of a trigger ban in 2007, North Dakota law consistently “provided an abortion was not a criminal act if the treatment was done to preserve the life of the woman.” The opinion quoted medical journals from the period following statehood, which “indicate it was common knowledge that an abortion could be performed to preserve the life or health of the woman.”\textsuperscript{328} The court found that “North Dakota’s history and traditions, as well as the plain language of its Constitution, establish that the right of a woman to receive an abortion to preserve her life or health was implicit in North Dakota’s concept of ordered liberty before, during, and at the time of statehood.” Accordingly, Chief Justice Jon J. Jensen wrote for the court: “It is clear the citizens of North Dakota have a right to enjoy and defend life and a right to pursue and obtain safety, which necessarily includes a pregnant woman has a fundamental right to obtain an abortion to preserve her life or her health.”\textsuperscript{329}

The Indiana Supreme Court came to a similar conclusion in its June 2023 ruling. Though the court rejected a preliminary injunction against the state’s

\textsuperscript{326} Oklahoma Call for Reproductive Justice v. Drummond, 526 P.2d 1123, 1139-43 (Okla. 2023) (Kauger, J., concurring).
\textsuperscript{327} The ban contained no exceptions; rather it enumerated affirmative defenses against felony liability in cases where “the abortion was necessary in professional judgment and was intended to prevent the death of the pregnant female” or terminated a pregnancy resulting from certain sexual assaults and incest. N.D.C.C. section 12.1-31.12.
\textsuperscript{328} Wrigley v. Romanick, 988 N.W.2d 231, 240-42 (N.D. 2023).
\textsuperscript{329} Id.
abortion ban, the Justices noted that all of Indiana’s abortion statutes since the ratification of its constitution in 1851 contained an exception for procedures required to “protect a woman’s life.” While it declined to find a broader right to abortion, the court called the “fundamental right of self-protection . . . so firmly rooted in Indiana’s history and traditions, it is a relatively uncontroversial legal proposition” that the state must allow abortions “necessary to protect a woman’s life or to protect her from a serious health risk.”

Historian amici in Texas similarly argue that “history and tradition”—including legislative history, medical literature and practice, and law enforcement—support a “deeply rooted constitutional right to abortion” when pregnancy threatens life and health. Their brief in Zurawski details both nationwide and Texas-specific evidence that even the most restrictive abortion statutes excepted abortions “necessary to preserve [the pregnant woman’s] life.” The plaintiffs argue that when Texas adopted its 1845 constitution, “[t]he common law explicitly permitted abortion before ‘quickening’ . . . and abortions were provided routinely for pregnancy complications even after ‘quickening.’” Even after Texas banned abortion in 1856, the law explicitly exempted “abortions procured ‘by medical advice’ to save the pregnant person’s ‘life.’” And subsequent pre- Roe abortion laws “did not restrict the circumstances when pregnancy might threaten a patient’s life, nor did they limit physician discretion to determine what constitutes a threat to patient life.”

331 Medical Licensing Board of Indiana v. Planned Parenthood Great Northwest, 211 N.E.3d 957, 976-77 (Ind. 2023) (emphasis added). The court held that the plaintiffs’ facial challenge to the ban was unlikely to succeed on the merits, but left the door open to a more targeted as-applied challenge to the scope of the law’s exceptions. See id. (“[Plaintiffs] framed their claim as a facial challenge to the entire statute in all conceivable circumstances rather than an as-applied challenge to the law’s application in any particular set of circumstances where a pregnancy endangers a woman’s life or health. So this appeal does not present an opportunity to establish the precise contours of a constitutionally required life or health exception and the extent to which that exception may be broader than the current statutory exceptions.”).
nonetheless authorized abortion when medically indicated for the patient’s life or health.” And “[e]ven in the handful of states lacking express authorization for medically necessary abortions, courts recognized that abortions performed ‘in good faith’ to ‘save [the pregnant person’s] life or to prevent serious impairment of her health’ were lawful.”

Historical evidence about obstetric practices and conventions under both restrictive and permissive nineteenth-century regimes also supports the use of abortion to address pregnancy complications and other medical conditions that threaten pregnant patients’ health and safety. Medical literature cited by the Zurański plaintiffs “shows that physicians recommended and performed abortions for a range of pregnancy-related health conditions and exercised wide discretion in determining when those conditions necessitated abortion.”

From the colonial period on, they demonstrate, “physicians documented abortion as the appropriate treatment for various pregnancy conditions to protect ‘the safety of the patient,’” including premature rupture of membranes (PPROM), uncontrollable hemorrhage, placenta previa, molar and ectopic pregnancies, and edema. Late-nineteenth century Texas medical journals specifically “contain[ed] numerous reports . . . describing abortion as ‘a necessity’” upon diagnosis of these and other conditions. By the early twentieth-century, these journals “published reports of abortions performed for a broad array of health conditions, including heart, kidney, and pulmonary diseases, brain tumors, and certain mental health conditions.”

335 Brief of Plaintiffs-Appellees, Texas v. Zurański, No. 23-0629, at *48-*49. The brief continues: “Courts addressing this issue since Dobbs have uniformly concluded that ‘history and tradition’ establish the right ‘to receive [and] preserve her life or health.’” Id. at *49 (citing North Dakota, Oklahoma, and Indiana decisions discussed above).


337 Id. at *51 (quoting, inter alia, William Dewees, Treatise on the Diseases of Females 343-350–51 (4th ed. 1833); John Burns, Observations on Abortion 110–11 (2d. amended ed. 1809); Joseph Brevitt, A Treatise on the Primary Diseases of Infants 101 (1801)).

338 Id. at *52 (mentioning the above conditions as well as uterine bleeding and pain, severe hyperemesis gravidarum, inevitable abortion (miscarriage), and preeclampsia and citing physicians’ publications in the Texas Medical Journal from 1885–1898); see also Historians’ Brief, Zurański, 28–31.

339 Id. at *52-*53 (citing Texas State Journal of Medicine articles from the 1900s through the 1930s). The brief continues: “While this history cannot account for advancements facilitating the diagnosis of other conditions, no authority freezes the practice of medicine in the 19th Century,” since “[t]he Texas Constitution ‘govern[s] society and institutions as they evolve through time,’ and acts ‘not widely approved in 1875 may well demand constitutional protection today.’) (citations omitted). Id. at *53-*54. See also Historians’ Brief, Zurański, 31–33.
Historical evidence also supports plaintiffs’ contention that doctors retained—and exercised—discretion to determine when pregnancy threatened serious health consequences short of a life-threatening medical emergency. The historians’ brief in Zurawski notes that the “practice of discretionary therapeutic abortions was even endorsed by those most strongly opposed to abortion during the AMA campaign for abortion bans in the mid-1800s.”340 Sources from this period and from the early-to-mid-twentieth century “emphasized physician discretion in providing care under abortion-ban exceptions.”341

Advocates also can cite evidence that concern for maternal mortality and morbidity may have motivated abortion restrictions and their selective enforcement. Early prohibitions on abortion often followed highly publicized, even sensational, cases in which women died from attempted abortions. In Arizona, for instance, amici note that the 1864 abortion restriction that some officials sought to enforce post-Dobbs was part of broader anti-poisoning provision, suggesting its purpose to “criminaliz[e] poisoning and protect[] the pregnant person’s life.”342 The perceived and real dangers associated with pregnancy terminations persisted well into the twentieth century; medical journals reveal physicians’ concerns about maternal mortality and morbidity throughout this period, before antibiotics and antiseptic techniques made pregnancy termination safe.343

Nothing in Dobbs prevents advocates from advancing similar arguments under the federal constitution to challenge state (or, eventually, nationwide) abortion restrictions that place the life and health of pregnant individuals at

340 Historians’ Brief, Zurawski, 19 (citing primary and secondary sources).

341 Id. at *52-*53 (citing Texas State Journal of Medicine articles from the 1900s through the 1930s). The brief continues: “While this history cannot account for advancements facilitating the diagnosis of other conditions, no authority freezes the practice of medicine in the 19th Century,” since “[t]he Texas Constitution ‘govern[s] society and institutions as they evolve through time,’ and acts ‘not widely approved in 1875 may well demand constitutional protection today.’” (citations omitted). Id. at *53-*54.

342 Amicus Curiae Brief of the Family & Juvenile Law Association, Planned Parenthood of Arizona v. Mayes, 2023 WL 8452045, at *7 (“the [criminal code] section begins by prescribing the punishment for poisoning ‘any person’ at a term of ten years to life in prison, before setting the penalty for administering a poison to induce a miscarriage at two to five years. Arizona. Howell Code, Ch. X, § 45.”). See also AHA/OAH brief, Dobbs.

risk. State restrictions on abortion in effect in 1868 explicitly allowed pregnancy terminations when necessary to preserve maternal life, implicitly prioritizing a pregnant woman’s survival. Indeed, even then—Justice Rehnquist’s dissent in Roe, which employed state-counting analysis, affirmed that an abortion restriction without exceptions for life-endangering situations would not survive rational basis review. Justice Kavanaugh’s concurrence in Dobbs agrees that “an exception to a State’s restriction on abortion would be constitutionally required when an abortion is necessary to save the life of the mother.”

D. History in Support of Religious Freedom Claims

Historical evidence also supports religious freedom claims under state constitutions and Religious Freedom Restoration Acts (RFRAs), while highlighting the diversity of religious beliefs about abortion and the use of abortion and religion for partisan political gain in the past and present. Religious freedom claims for abortion rights themselves have a long history, but early losses in federal court and the growing association of religiosity with opposition to abortion sidelined these arguments. Since Dobbs, these claims have reemerged,

344 See, e.g., Planned Parenthood v. Cameron, 624 F. Supp. 3d 739, 750 (W.D. Ky. 2022) (“Plaintiffs’ patients retain [after Dobbs] a liberty interest in non-elective, emergency abortion procedures for the life or health of the pregnant woman, which is protected by the Due Process Clause of the Fourteenth Amendment.”).

345 Anti-abortion scholars acknowledge the life exception, too. See, e.g., Sherif Girgis, “Dobbs’ History and the Future of Abortion and Privacy Law,” SCOTUSBlog, June 28, 2022 (“[T]he vast majority of states from 1868 down to 1960 banned abortions ... except to prevent maternal death (or serious bodily injury”). There is greater disagreement over whether dangers that are not immediately life-threatening require a constitutional exception. See, e.g., Stephen G. Gilles, “What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?,” 92 Miss. L.J. 1 (2022) (arguing that unlike the life exception, a health exception had “virtually no support in the legal tradition” prior to the 1960s).

346 Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (“I have little doubt that such a statute [prohibiting an abortion even where the mother’s life is in jeopardy] would lack a rational relation to a valid state objective”).

347 Dobbs, 597 U.S. at 339 n.2 (Kavanaugh, J., concurring) (cit ing Rehnquist’s Roe dissent).

aided by the “current Supreme Court’s radical and expansive religious liberty doctrine,” which as Elizabeth Sepper observes, “makes plausible, and even persuasive, litigation that once would have failed.”

Micah Schwartzman and Richard Schragger agree that federal Establishment Clause and Free Exercise claims should be viable weapons against abortion restrictions, but despite their merits appear unlikely to succeed in conservative federal courts. State courts, they suggest, may be more receptive. And advocates have mobilized history as they revive state disestablishment and free exercise claims post-*Dobbs*.

Advocates invoke history to buttress interpretations of state constitutional provisions that exceed the protections of the First Amendment. For example, religious organizations and clergy supporting Planned Parenthood as amici in a challenge to Utah’s abortion restrictions describe the state constitution’s expansive and specific freedom of conscience provisions as “forged in the crucible of a lengthy struggle for statehood, shaped by the experiences of members of the Church of Jesus Christ of Latter-Day Saints subjected to territorial rule by a federal government deeply hostile to their beliefs, and by the experiences of non-Mormons living under a local government dominated by the LDS church.”

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350 See Micah Schwartzman & Richard Schragger, “Religious Freedom and Abortion,” 108 Iowa L. Rev. 2299 (2023). Schwartzman and Schragger predict that while state courts may be more amenable to some religious liberty claims, the U.S. Supreme Court will reject what the authors believe to be merited arguments for religious exemptions from abortion restrictions while crediting religious liberty claims from those whose religious beliefs conform to a conservative Christian worldview, what the authors call “religious preferentialism.” See id. at 2302 (“[A]bortion bans should be vulnerable to Establishment and Free Exercise challenges under doctrinal standards developed in recent cases . . . . [but] we expect that, if faced with the issue . . . . more conservative federal courts, including the Supreme Court, will reject them, not only because of the political inclinations of those courts, but also because the doctrine is sufficiently manipulable that it can be used to reject certain kinds of religious liberty claims while accepting others.”).

351 *Id.*; see also Sepper, “Free Exercise of Abortion,” 51 (“The Supreme Court may continue to stray from principled free exercise doctrine, but state courts need not follow”).


353 Brief of Religious Organizations and Clergy as Amici Curiae in Support of Planned Parenthood and Affirmance at 3, Utah v. Planned Parenthood Ass’n of Utah, No. 20220696-
establishment clause challenge to Missouri’s abortion ban—whose text pro-
claims “the intention of the general assembly . . . [to] [r]egulate abortion . . . in
recognition that Almighty God is the author of life”—that “religious pluralism”
has been “a defining feature of . . . [the state’s] constitutional order.” They note
that in the 1830s Kansas City “was the first stop for many Latter-Day Saints
along the Santa Fe, California, and Oregon Trails,” that “the first synagogue in
Kansas City was established in 1878,” and that every version of the Missouri
constitution since 1820 has consistently prescribed that “no preference be given
to any religious denomination or faith tradition over others.” A litany of state
supreme court precedents, they contend, mandates “a strict separation of reli-
gion and government that is more robust than the federal Establishment
Clause.”

The roots of constitutional provisions ensuring the separation of church and
state in a history of discrimination, oppression, and religious strife play a prom-
inent role in some religious freedom litigation against abortion restrictions.
Jewish, Quaker, Buddhist, and Christian plaintiffs suing Florida under the state
collection’s establishment and free exercise clauses, for example, cite docu-
ments from the founding period—including Thomas Jefferson’s letter to the
Danbury Baptists, George Washington’s missive to the Jews of Newport, and
the 1797 Treaty of Tripoli signed during the John Adams administration to
support James Madison’s precept: “The purpose of separation of church and
state is to keep forever from these shores the ceaseless strife that has soaked the
soil of Europe in blood for centuries” with catastrophic results for Jews in par-
ticular. The plaintiffs characterize abortion bans as not only an attack on
Jewish beliefs about the imperative to prioritize existing life over potential life,
but also as laws that “burden[,] and criminalize[,] Plaintiffs’ religion” in a manner
reminiscent of centuries of religious persecution against Jews and other non-

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354 Petition for Injunctive and Declaratory Relief, Blackmon v. Missouri, at 57, in the Circuit
Court of St. Louis City, Missouri, Jan. 19, 2023.

355 Second Amended Complaint, Generation to Generation v. Florida, 4,
Christians.\textsuperscript{356} They note the commitment of Reform Judaism to the “broad liberalization of abortion laws” in the 1960s and describe individual plaintiffs’ abortion rights advocacy as part of family traditions of activism in support of sexual and reproductive freedom, women’s rights, and other social justice causes.\textsuperscript{357} Abortion bans, the plaintiffs contend, are “designed to take Florida back to a time when the merger of Christianity and government produced genocide, slavery, misogyny, and the denial of rights to those who did not share the gender, race or religion of those in power.”\textsuperscript{358} 

Advocates mobilize historical evidence to counter skeptics who deride religious freedom challenges as an unsubstantiated eleventh-hour effort to dodge abortion restrictions.\textsuperscript{359} In Indiana, for instance, historians of religion and reproduction filed an amicus brief describing how mainline Protestant and Jewish clergy and laypersons have, at least since the mid-twentieth-century, professed and acted upon their sincerely held belief that unrestricted access to reproductive health care to protect the health and wishes of women and pregnant persons regarding their bodies and lives is a moral and religious imperative.\textsuperscript{360}

Historical evidence also ties anti-abortion views promoted by traditionalist Catholics and white evangelical Protestants to a larger movement that seeks to mix religion and politics, and to undermine constitutional church-state separation more generally. In July 2022, a state trial court judge \textit{sua sponte} held that Kentucky’s abortion bans violated the state constitution’s prohibition on the

\textsuperscript{356} See, e.g., Second Amended Complaint, Generation to Generation, 29 (“The Jews have often borne the brunt of the horrors that occur when the powers of Christianity and the state merge. The result has been Inquisitions, Crusades, ghettos and pogroms for Jews and the eventual loss of freedom and bloodshed for everyone else. The founding fathers enshrined in our Constitution a wall of separation between Church and State to protect the rights of religious minorities, including Jews.”). \textit{See also id.} at 24 (“By conflating a fetus with a baby, recklessly describing abortion as murder, and linking abortion to Jews, some opponents of abortion stoke anti-Semitic with charges of Jewish doctors getting rich by killing babies and committing a holocaust. By inadvertence or design, the [challenged law] promotes ancient anti-Semitic tropes and blood libels against Jews as diabolical baby killers.”).

\textsuperscript{357} Second Amended Complaint, Generation to Generation, 17.

\textsuperscript{358} Second Amended Complaint, Generation to Generation, 29.

\textsuperscript{359} For a notorious example, see Josh Blackman, “Tentative Thoughts on the Jewish Claim to a ‘Religious Abortion,’” \textit{Reason}, June 20, 2022; Sepper, “Free Exercise of Abortion,” 20 & n.98 (noting that “Blackman has since recanted.”).

establishment of religion, among other provisions.\textsuperscript{361} In subsequent litigation, Jewish plaintiffs challenge Kentucky’s abortion ban as motivated by sectarian Christian beliefs about when life begins; they argue that the prohibition violates their sincerely held religious convictions—grounded in “long-standing Jewish doctrine”—that a fetus does not become a person until birth and that a pregnant person’s life takes priority over that of an embryo or fetus. To support the former claim, they note that evangelical Protestants only recently adopted anti-abortion views as part of a larger “culture war,” “a period of reactionary backlash to the dramatic sociopolitical changes” in the late twentieth-century U.S.\textsuperscript{362}

Petitioners elaborate this history in the Missouri disestablishment litigation, citing the work of historians including R. Marie Griffith, Randall Balmer, and Karissa Haugeberg to show how the Right used abortion to mobilize new alliances between Catholics and Protestants in the 1970s.\textsuperscript{363} In the years before and since that realignment, the Missouri plaintiffs further detail, clergy and religious organizations have held a range of views about abortion; indeed, before Roe, the Clergy Consultation Service famously provided some of the only licit

\textsuperscript{361} The court also rejected the government defendants’ account of Kentucky’s history and tradition of prohibiting abortion, crediting the plaintiffs’ arguments that the state had permitted pre-quickening abortions through much of its history. Opinion & Order Granting Preliminary Injunction, EMW Women’s Surgical Center v. Cameron, No. 22-CI-3225 (Jeff. Ky. Cir. Ct. Div. 3, July 22, 2022) (Perry, J).

\textsuperscript{362} See Complaint for Declaratory Relief at 8, Sobel v. Cameron, Jefferson Circuit Court, Kentucky. See also, e.g., Amended Complaint for Declaratory Judgment and Injunctive Relief at 21, Johnson v. Wyoming (describing Jewish plaintiff’s “sincerely held religious beliefs that an unborn fetus is not a person; that life begins at birth and not before; and that abortion is appropriate and at times mandatory at any time before birth where necessary to protect the woman’s physical and mental well-being” as “supported by long-standing Jewish doctrine”); Declaration of Gillian Frank, Ph.D., Johnson v. Wyoming (detailing the evolution of American Catholic, Protestant, and Jewish religious beliefs about when life and personhood begin); Verified Complaint, Pomerantz v. Florida at 4, No. 154464609, in the Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida, Aug. 1, 2022 (noting that “[m]any of the sacred texts that inform Plaintiffs’ beliefs on reproductive issues are thousands of years old”); Verified Complaint, Hafner v. Florida, in the Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida, Aug. 1, 2022 (arguing that Florida’s 15-week ban violates the state and federal constitutions and the state RFRA on religious liberty grounds); Order Granting Plaintiffs’ Motion for Preliminary Injunction, Anonymous Plaintiffs v. Medical Licensing Board of Indiana, No. 49D01-2209-PL-031056, in the Marion Superior Court, Dec. 2, 2022 (ruling that plaintiffs had a substantial likelihood of success on the merits of claims under Indiana state constitutional and statutory provisions protecting religious freedom).

\textsuperscript{363} Petition for Injunctive and Declaratory Relief, Blackmon v. Missouri, at 50-52, in the Circuit Court of St. Louis City, Missouri, Jan. 19, 2023.
abortion care in the United States, including in St. Louis.364 In Wyoming, too, a declaration from historian Gillian Frank presents evidence of religious diversity and change over time in beliefs about when life begins and how religious and civil law should treat decisions about pregnancy and abortion. Frank emphasizes that the belief that life begins at conception and abortion is equivalent to murder is a sectarian religious view, long understood as such.365

This historical context allows plaintiffs to expose the particularity of the belief that life begins at conception; to locate their challenge in a longer tradition of pluralistic religious belief about abortion that departs from the now-dominant orthodoxy of conservative Christianity; to emphasize the sincerity and longevity of religious doctrines that prioritize existing life over potential life; and to highlight the intra- and inter-denominational diversity of views about abortion.

E. Ballot Initiatives and State Constitutional Amendments

Understandings of history also inform ballot initiatives that seek to amend state constitutions to provide broader protections for reproductive decisionmaking. State constitutional amendments approved in referenda post- 

Dobbs implicitly incorporate lessons learned from the past. In several states, voters have approved amendments that embrace much more expansive visions of reproductive rights and justice than ever became part of federal constitutional jurisprudence. Many of these measures include elements that reflect an understanding of the limits of the thin version of abortion rights protected by Roe and Casey: for instance, some provide a definition of reproductive rights that goes beyond abortion to include contraception, reproductive decisionmaking generally, and protections from coercive sterilization and other abuses. Many incorporate principles of equality and autonomy, not just privacy and freedom. Some seek to ensure that any restrictions on reproductive autonomy are subject to the most rigorous judicial scrutiny. And some gesture toward recognition of a positive right to access rather than merely a negative right against government interference.

Michigan’s Reproductive Freedom for All amendment, passed in November 2022, is among the most expansive and specific of these provisions. The


365 See also Frank Decl., Johnson v. Wyoming, 11 (“The anti-abortion movement’s growth to include Evangelicals meant that it became more ecumenical rather than less religious.”).
amendment provides: “Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.” It establishes a stringent standard for judicial review of restrictions on reproductive rights: they “shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means.” And while “the state may regulate the provision of abortion care after fetal viability,” “in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical and mental health of the pregnant individual.” Importantly, the only compelling state interest that justifies post-viability regulation is one that “is for the limited purpose of protecting the health of the individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual’s autonomous decision-making.”

Vermont’s Personal Reproductive Liberty amendment, also enacted through referendum in November 2022, provides that “an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s own life course,” and, like Michigan’s, establishes strict scrutiny as the appropriate standard of review for any denial or infringement of that right. Ohio’s amendment, passed in November 2023, contains “least restrictive means” language and provides a non-exhaustive list of protected “reproductive decisions, including but not limited to decisions on: contraception; fertility treatment; continuing one’s own pregnancy; miscarriage care; and abortion.” It specifically protects both individuals and those who assist them, providing that the “State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either: An individual’s voluntary exercise of this right or; A person or entity that assists an individual exercising this right.”

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367 Vermont’s Article 22, Chapter 1 provides: “That an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.”
368 Ohio Const., art. 1, sec. 22 (adopted as Issue 1, Nov. 2023). A proposed ballot measure in Arizona includes similar language, establishing “a fundamental right to abortion that the State . . . may not deny, restrict or interfere with (1) before the point in pregnancy when a health
California’s amendment, adopted in November 2022, is brief, enshrining in the state constitution a guarantee that the “state shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives.” Given California’s already relatively expansive protection of reproductive rights under existing constitutional provisions, including public funding of abortion care, the amendment also clarifies that it is “intended to further the constitutional right to privacy . . . and the constitutional right to not be denied equal protection” and that nothing in the amendment should be construed to abrogate those existing rights.369

In November 2024, New Yorkers will vote on a ballot measure to add to the state constitution’s equal protection clause—which already protects against public and private discrimination based on race, color, creed, and religion—the categories ethnicity, national origin, age, and sex. The amendment defines sex expansively to include “sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy.” Proponents intend the amendment to “ensure the State could not pass a state abortion ban, stop state funding for abortion via Medicaid, ban private insurance coverage of abortion, prosecute or criminalize miscarriage, or add medically unnecessary burdens on patients or facilities.”370

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370 New Yorkers for Equal Rights, “Guarantee Protections for all New Yorkers,” https://nyequalrights.org/. As amended, the text of the provision would read: “No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, age, disability, creed, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state pursuant to law.” See also NYCLU Press Release, Equal Rights Amendment Advances to New York Voters in November 2024 (Jan. 24, 2023),
and specific approach incorporates reproductive freedoms into a broader state ERA sponsored not only by feminist and reproductive rights organizations but also by immigrant, labor, LGBTQ+, and civil rights/liberties groups.\textsuperscript{371}

Though each amendment responds to state-specific conditions and constraints, their common features suggest a shared set of concerns—across a range of states with varied political profiles—about the shortcomings of past protections and a more ambitious, affirmative agenda for future rights guarantees. Historical experience also suggests a negative right to be free from government interference in basic reproductive decisions is necessary but not sufficient: an agenda for reproductive justice would include measures to enhance support for caregiving to enable individuals, families, and communities not only to survive but to flourish.

\textbf{F. The Limits of State Law and the Future of Democracy}

State constitutional guarantees provide rich opportunities for more capacious understandings of rights, but they are no panacea. In the long run, some may be on a collision course with federal law: for example, with a revitalized Comstock Act, a future nationwide abortion ban, a constitutional fetal personhood decision, or a ruling that expansive interpretations of state establishment clauses violate the federal free exercise clause. Some state courts hew closely to federal constitutional precedents even when text and legislative history counsel otherwise.\textsuperscript{372} State constitutions have also proven mercurial in the short term due to greater ease and frequency of amendment, turnover in personnel, and comparative lack of insulation from political vicissitudes.\textsuperscript{373}

\textsuperscript{371} The Coalition Executive Committee of New Yorkers for Equal Rights, the amendment’s sponsor organization, includes: Planned Parenthood Empire State Acts, Planned Parenthood Action Fund, North Star, New York Immigration Coalition, New York Civil Liberties Union, New Pride Agenda, National Institute for Reproductive Health Action Fund, NAACP New York, Make the Road New York, and 1199 SEIU. See \url{https://nyequalrights.org/}.

\textsuperscript{372} See Joseph Blocher, “Reverse Incorporation of State Constitutional Law,” \textit{84 S. Cal. L. Rev.} 323, 323 (2011) (noting that “state courts have relied—at times completely and explicitly—on federal constitutional doctrine when interpreting their own charters, even when the language, history and intent of the latter are distinct.”).

Iowa is a case in point. In 2018, the state supreme court held that a 72-hour waiting period violated the state constitution’s due process and equal protection guarantees. “Our constitution recognizes the ever-evolving nature of society, and thus, our inquiry cannot be cabined within the limited vantage point of the past,” the court declared in a lengthy discussion of state and federal approaches to history and tradition.\(^{374}\) The court held that strict scrutiny, not the federal undue burden standard, was the correct level of review under Iowa’s due process clause.\(^{375}\) The waiting period also contravened Iowa’s equal protection guarantee, the court said, because it limited women’s reproductive autonomy and ability to participate equally in society.\(^{376}\) But the Iowa court’s resounding endorsement of abortion rights did not survive a change in personnel. Four years later, one week before Dobbs, a court now packed with Republican appointees reversed course, overruling its 2018 decision and finding no state constitutional right to abortion.\(^{377}\)

Of course, this instability can cut both ways, depending upon the mechanisms available to voters to effectuate constitutional change. In November 2022, voters in Michigan wiped its 1931 abortion ban off the books with a ballot initiative providing broad protections not only for abortion but a wide swath of reproductive freedoms. After Wisconsin resurrected an 1849 abortion ban post-Dobbs, backed by one of the most gerrymandered state legislatures in the nation, voters flipped the state supreme court’s narrow conservative majority to a slim liberal edge in an April 2023 special election. Voters in Ohio beat back an attempt to raise the threshold for passing a ballot initiative in August 2023, and then adopted a reproductive rights constitutional amendment in a November referendum.

Republican state lawmakers threatened to impeach the newly elected Wisconsin justice, however, and to strip Ohio courts of jurisdiction to enforce the reproductive freedom amendment.\(^{378}\) And many states do not provide avenues for direct democratic feedback in the first place, as South Carolina’s experience illustrates. There, the state supreme court struck down a six-week abortion ban under the state constitution’s privacy provision in January 2023, only to reverse


\(^{375}\) Id. at 233–34.

\(^{376}\) Id. at 244–46.

\(^{377}\) Planned Parenthood of the Heartland v. Reynolds, 975 N.W.2d 710 (2022).

course just seven months later after the retirement of the court’s only female member, Justice Kaye Hearn, and her replacement with conservative Gary Hill by state legislators. Like South Carolina, in 11 states voters have no role in selecting supreme court justices and 24 lack a voter-initiated referendum process.379

These developments inspired former Attorney General Eric Holder to call for concerted action to protect independent state courts from legislative encroachment. “History has demonstrated that when we act collectively, we can always right the course of justice and democracy.” As he put it, “The stakes could not be higher.”380

CONCLUSION

History can play a role in legislative debates at all levels of government, in the arguments advocates and ordinary people make in the streets, at dinner tables, in workplaces and civic organizations, on social media and on campuses, in school board meetings and on playgrounds. Courts are an important, though far from the only, venue in which advocates can expose and amplify critical histories. Litigation—at both the state and federal levels—has many audiences: judges themselves, but also other legal professionals, educators, students, voters and laypeople, as well as future generations. In some cases, the purpose of historically grounded arguments in court might be to persuade the decisionmaker; in others, it might be to provide support for a dissenting opinion. Such dissents can expose the ramifications of an adverse ruling; lay groundwork for a later course correction; or refute the majority’s explicit or implicit account of historical fact, method, or interpretive approach. Litigation also provides an opportunity to speak to the public through courtroom testimony, media coverage, and judicial opinions, among other channels. Court cases can spark interbranch dialogue and movement advocacy that helps galvanize legislators to change the law and voters to elect new representatives.

379 Mary Ziegler, “The Plan to Claw Back Abortion Rights State by State Just Hit a Major Roadblock,” Slate, Aug. 24, 2023. See also Eric H. Holder, Jr., “State Judges Must Guard Their Independence,” State Court Report, Brennan Center for Justice, Sept. 12, 2023 (“[I]n many states, state courts are the only entities that stand in the way of attempts by gerrymandered legislatures to impose unpopular, minority policies onto the people.”).

Scholars, educators, and journalists have especially urgent obligations to provide accurate and critical historical context for current events. This means not only getting the facts right, but also providing the background and tools to understand how today’s contests over law, policy, and constitutional meaning fit into a longer and larger national and global story.

Take the anti-abortion movement’s recent move to effectuate a nationwide abortion ban by revitalizing the 1873 Comstock Act. An obvious—and important—way to use history in covering and combating this tactic is to tell the tale of Anthony Comstock and his moralistic, misogynistic crusade, extreme even in its time and wildly anachronistic in our own. Equally crucial, though, is to explain why abortion opponents would seize upon a moribund 150-year-old law that appears to violate a panoply of constitutional rights Americans have taken for granted for the past half-century. That story would not only highlight the puritanical, retrograde attitudes toward women, sexuality, and reproduction that have long undergirded movements for “traditional family values.” It also would expose the democratic deficits, nurtured by the anti-abortion movement and a modern Republican party in thrall to the far right, that make this unlikely strategy even remotely plausible.381

A truly representative, functional Congress would at a minimum repeal the Comstock Act and guarantee a right to contraception—but gerrymandering, the evisceration of voting rights, a malapportioned Senate, and the filibuster thwart popular will. Absent the ability to forum-shop for courts willing to entertain fringe legal theories, the lawyers pushing them would not find a receptive audience in the federal judiciary. And without the successful decades-long effort to weaponize abortion, undermine democratic institutions, and pack

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the federal courts with judges and Justices handpicked to enact a sweeping agenda far to the right of popular opinion, resurrection of an archaic statute supported by only a tiny minority of Americans would be a stunt rather than a credible threat. Public opinion surveys before Dobbs suggested that a majority of Americans support, at least, codifying Roe, and some polling shows majority support for the more expansive Women’s Health Protection Act (WHPA). Since Dobbs, polls show even broader backing for abortion rights, with 55 percent of respondents in an October 2023 Wall Street Journal/NORC survey endorsing the view that abortion should be a legal option “for any reason.”

As Republican politicians realize that extreme anti-abortion measures will not boost their popularity, some are promoting a revisionist version of history to position themselves on the side of democracy. A formerly pro-choice Democrat whose promise to appoint Justices who would overturn Roe won the support and loyalty of white evangelical voters crucial to his 2016 victory, candidate Trump now claims credit for returning abortion to the states even as he trumpets his transformation of the federal judiciary. Trump may use abortion yet again to further his electoral ambitions—depicting himself as a champion of democracy even as he engineers its demise. The fate of ballot initiatives and Democrats’ success in the 2022 and 2023 elections signal that abortion holds promise, too, for those who seek to defend democracy and the rule of law.

History rarely provides simple or straightforward lessons. But it surely teaches us that we ignore creeping authoritarianism and assaults on basic freedoms—including reproductive freedoms—at our very great peril. It shows us that legal and constitutional change is the work of social movements across generations. It also reminds us that Americans have always appealed to the past to give meaning to our constitutional present and future: not just as an instrument of stagnation but as a source of inspiration and a tool of liberation. The current Court majority’s impoverished conception of history and tradition should not obscure the value of looking to the past—for injustices to be


383 Wernau, “Support for Abortion Rights at a Near Record.”


overcome as well as aspirations to be preserved, and for models of creative resistance; of contestation and bravery; and of intellectual innovation that emerged not only from the halls of power but from the struggles of the powerless. Asking the right questions of the past can help us to understand and to realize the enduring promise of our constitution as a work in progress of which we are all the authors.