

REPRODUCTIVE INJUSTICE, FEMINIST RESISTANCE, AND THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION

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Jack Balkin's *Memory and Authority* makes a persuasive case for history's relevance to constitutional interpretation far beyond originalism. "[H]istory," he writes, "is a resource, not a command."¹ The past inevitably plays a role in all schools of constitutional interpretation as well as in the collective memory that informs political decisions, including our choice of interpretive method. Drawing from Reva Siegel's theory of "constitutional memory," Balkin emphasizes the power of memory and erasure in shaping our constitutional present and what we can imagine to be our constitutional future.²

In the wake of *Dobbs v. Jackson Women's Health Organization*³ and *New York State Rifle & Pistol Ass'n v. Bruen*,⁴ it was tempting to despair of history as a resource for constitutional interpretation. The U.S. Supreme Court saw a very particular version of the past as a harsh and unyielding command: The right-wing supermajority's refashioning of "history-and-tradition" handed the constitutional reins to elite white, propertied men of yore. Conservatives claimed for their brand of history-and-tradition a neutral pedigree: looking to 1791 or 1868 (or thirteenth-century England) supposedly drains the inquiry of political or personal bias and ensures judicial objectivity. In fact, the constitutional authorities honored in *Dobbs* and *Bruen* condoned everything from human enslavement to marital rape and excluded a majority of Americans—including men of color and all women—from meaningful participation in the polity. No wonder history seemed like a dead end.

But to abandon history would be both foolish and futile, as Balkin underscores.⁵ The past matters to non-originalists, too—it just matters differently. Elsewhere, I

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¹ JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* 10 (2024).

² See Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 21–22 (2022) [hereinafter Siegel, *Politics of Constitutional Memory*]; BALKIN, *supra* note 1, at 179–91.

³ 597 U.S. 215 (2022).

⁴ 597 U.S. 1 (2022).

⁵ See generally BALKIN, *supra* note 1; 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, 1134 (2023) [hereinafter Siegel, *Memory Games*] ("[Originalism] is a deeply antidemocratic mode of constitutional interpretation, *not because it appeals to the past*, but because it denies its own values as it is doing so." (emphasis added)).

have argued that history should, and already does, play a critical role in constitutional interpretation and in legal and political advocacy for reproductive rights and justice after *Dobbs*.⁶ A critical orientation toward history asks different questions of the past, looks to different historical actors for the answers, and uses those answers for different purposes. The past, as Siegel explains, can be “*positive precedent*, identifying constitution-makers who model constitutional virtues” and it can also be “*negative precedent*,” “a record of past wrongs that the nation strives to remedy and against which the nation defines itself.”⁷ If we look to those excluded from the franchise or suppressed within the constitutional conversation, we see dramatically different possibilities than if we focus only on the framers and adopters of constitutional provisions. Constitutional memory “is not only an instrument for justifying oppression,” as Siegel writes. “It can also enable critique and resistance.”⁸

It is unsurprising that an argument for history’s critical role in post-*Dobbs* debates about reproductive justice and democracy relied upon the rich literature on the history of reproductive injustice and its relevance to constitutional law, including the work of Reva Siegel, Peggy Cooper Davis, and Dorothy Roberts, among others.⁹ But it does seem notable that in making a general case for history as a resource in constitutional interpretation and the reconstruction of constitutional memory, Balkin turned to this same body of scholarship. *Memory and Authority*, too, builds on these scholars’ ideas, which feature centrally in Part IV. After explaining how collective memory and erasure are used by “memory entrepreneurs” to make political and legal arguments that affect status relations among groups, in Chapter 12 Balkin explores Siegel’s concept of constitutional memory as it shapes constitutional interpretation.¹⁰ In Chapter 13, he makes the case for expanding constitutional memory, beginning with the paradigm case of Siegel’s work on the erasure of women from American constitutional memory.¹¹ Davis’s study of the centrality of reproductive injustice and family rights to Reconstruction-era understandings of enslavement and freedom provides another key example of how expanding constitutional memory would enrich today’s constitutional conversations.¹²

The brilliance and prescience of this work would be more than sufficient reason for our shared reliance upon it. And to be sure, it is eminently generalizable across legal fields, constitutional provisions, and chronological periods. In her classic 1997

⁶ Serena Mayeri, *The Critical Role of History After Dobbs*, 2 J. AM. CONST. HIST. 171, 178–95 (2024) [hereinafter Mayeri, *Critical Role*].

⁷ Siegel, *Politics of Constitutional Memory*, *supra* note 2, at 54.

⁸ Reva B. Siegel, *Dobbs, the Politics of Constitutional Memory, and the Future of Reproductive Justice*, BALKINIZATION (Jan. 22, 2023, 9:30 AM) [hereinafter Siegel, *Future of Reproductive Justice*], <https://balkin.blogspot.com/2023/01/dobbs-politics-of-constitutional-memory.html> [<https://perma.cc/RK79-5AY4>].

⁹ See generally Mayeri, *Critical Role*, *supra* note 6.

¹⁰ BALKIN, *supra* note 1, at 192–209.

¹¹ *Id.* at 210–27.

¹² See generally PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997) [hereinafter DAVIS, *NEGLECTED STORIES*].

book *Neglected Stories*, Davis called for a history-and-tradition analysis 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.*”¹³ 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.*”¹⁴ Davis extracts from Supreme Court opinions the “doctrinal stories” the Justices tell to explain and justify their interpretation of the Reconstruction Amendments. She then excavates “motivating stories,” drawn from the ideas and experiences of the persons those amendments were designed to liberate and protect. She argues persuasively that such voices frequently fail to inform constitutional interpretation when they should be central to it. Davis applies her approach to interpret the Reconstruction Amendments with the lives of enslaved and freed people top of mind, but it is equally relevant to other marginalized actors, constitutional enactments, and time frames.

Siegel’s conception of constitutional memory, too, is generally applicable. “The Constitution’s interpreters are continuously producing constitutional memory as they make claims on the past to guide decisions about the future,” she writes.¹⁵ Constitutional memory is “a field of meaning in which we continually negotiate who we are and what we are to do together.”¹⁶ Constitutional memory serves a powerful justificatory function: “it can help rationalize all manner of governmental and social relationships, whether hierarchical or egalitarian, centralizing or decentralizing, tradition-preserving or tradition-perfecting, whether structured on identification or repudiation, agonism or antagonism.”¹⁷ When constitutional memory diverges from constitutional history and selectively silences historical actors, it “can legitimate authority by generating the appearance of consent to contested status relations and by destroying the vernacular of resistance.”¹⁸ The antidote to this elision includes what Siegel calls “democratizing voice”—expanding the universe of whose ideas, experiences, and activism matters.¹⁹ All of her analysis applies broadly across time, space, and context.

Balkin’s discussion of constitutional memory and of the critical importance of looking beyond framers and adopters when interpreting the constitution thus could have built upon these general theoretical insights and stopped there. But Chapter 13 also centers examples drawn from the histories of reproductive injustice and feminist movements to illustrate and concretize these theories.²⁰ One probable reason for

¹³ *Id.* at 215.

¹⁴ *Id.* (emphasis added).

¹⁵ Siegel, *Politics of Constitutional Memory*, *supra* note 2, at 21.

¹⁶ *Id.* at 22.

¹⁷ *Id.* at 23.

¹⁸ *Id.* at 24, *quoted in* BALKIN, *supra* note 1, at 196.

¹⁹ Siegel, *Memory Games*, *supra* note 5, at 1193–204.

²⁰ BALKIN, *supra* note 1, at 210–27.

this focus is that these are primary examples elaborated by Siegel and Davis, providing both the historical foundation on which their theories build as well as deeply researched accounts to draw upon. This Essay suggests that these examples also offer especially compelling payoffs for non-originalist methods of constitutional interpretation that use history as a resource.

Part I examines the erasure of constitutional memory about reproductive injustice and feminist mobilizations and the benefits of recovering these histories. Part II explores how cases involving women's subordination provide particularly effective illustrations of the anti-democratic, even absurd, results the current supermajority's approach to history-and-tradition is designed to produce. Part III concludes with a brief discussion of some sites for the expansion of constitutional memory about reproductive control and freedom.

I. RECTIFYING ERASURE AND EXPANDING CONSTITUTIONAL MEMORY

Why are these examples so fruitful? First, the Court's erasure of these histories has been particularly dramatic. Davis wrote more than a quarter-century ago of how "[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."²¹ That erasure has persisted, even intensified, in Court opinions, culminating in the triumph of the narrow and selective version of history-and-tradition endorsed by today's supermajority. Nowhere in *Dobbs*, for example, does Justice Alito so much as mention the historical context or purpose of the Reconstruction Amendments, much less the persons and values they sought to protect.²² Alito's opinion does not even canvas the framers' and adopters' views on slavery and freedom; instead, he cites authorities such as English jurists Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone, and counts how many states restricted abortion as of 1868.²³

Merely to acknowledge the framers' own awareness and discussion of family rights and of sexual and reproductive injustice would advance the ball beyond anything courts have done. Davis, and more recently Michele Goodwin, provide rich accounts of how lawmakers themselves saw reproductive control, family separation, forced childbirth, and sexual exploitation as central to enslavement—and their eradication as a prerequisite to emancipation.²⁴ As Goodwin writes, "[if] the Court is

²¹ DAVIS, NEGLECTED STORIES, *supra* note 12, at 5.

²² *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

²³ *Id.* at 242, 248. Siegel has traced this methodology to the segregationist defense of *Plessy v. Ferguson*. See Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99, 101 (2023). For more on the shortcomings of *Dobbs*, see Mayeri, *Critical Role*, *supra* note 6, at 178–95.

²⁴ See DAVIS, NEGLECTED STORIES, *supra* note 12, at 174–81; Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women's Health Organization*, 2022 SUP. CT. REV. 111, 161 (2023) [hereinafter Goodwin, *Opportunistic Originalism*] ("[A] rich archive exists that illumines debates, speeches, and concerns the Court overlooked related to involuntary

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.”²⁵ Dorothy Roberts long has grounded constitutional rights to privacy, due process, and equal protection as a response to and remedy for the reproductive oppression of Black women.²⁶ Her “abolition constitutionalism” connects antislavery legislators’ conceptions of the Reconstruction Amendments to present-day efforts to dismantle the carceral state, family policing in the name of child welfare, and the criminalization of pregnancy.²⁷ But courts rarely if ever pluck even these low-hanging fruit.²⁸

The erasure in law of women’s activism for constitutional change is even more complete. As Siegel writes, “Constitutional memory depicts a world in which men speak for women; women lack political voice and have yet to exercise authority to lead.”²⁹ True, even free white women had little power, political or otherwise, at the founding. Far from “accident” or mere “prejudice,” women’s disfranchisement was “a structural feature of the plan”—part of the founders’ “institutional design.”³⁰ Women did not have the vote because the framers believed that husbands, brothers, and fathers virtually represented their female relatives. Women voting would disrupt men’s authority over women and “destroy the harmony and good order of the household.”³¹

The nature of this exclusion was fundamental and women’s resistance to it—increasingly concerted and organized by the mid-nineteenth century—revolutionary. Yet the “intergenerational struggle” by women for suffrage, and for an end to hierarchical marital, household, economic and political structures, nowhere informs the Justices’ interpretation of the Constitution—not of the Reconstruction Amendments or even, astonishingly, of the Nineteenth Amendment.³² Balkin quotes Siegel’s inventory of the U.S. Reports, where “[t]here is no mention . . . of Elizabeth Cady

reproductive servitude, unwanted and forced pregnancies, coerced childbirth and motherhood.”); *id.* at 163 (“[T]he Constitution more than acknowledges Black women’s emancipation from systems of bondage—the Reconstruction Amendments directly address it.”); Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191, 212–14 (2022).

²⁵ Goodwin, *Opportunistic Originalism*, *supra* note 24, at 189.

²⁶ For an early example, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

²⁷ See, e.g., Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 17–18, 69–71 (2019).

²⁸ See BALKIN, *supra* note 1, at 221 (“[D]espite the valuable work of scholars detailing this history, the constitutional memory of the Reconstruction Amendments does not emphasize these features of slavery.”).

²⁹ Siegel, *Politics of Constitutional Memory*, *supra* note 2, at 27.

³⁰ *Id.* at 33.

³¹ *Id.* at 33–34.

³² *Id.* at 27.

Stanton, Sarah Grimké, Sarah Parker Remond, Lucretia Mott, Lucy Stone, Sojourner Truth, Frances Ellen Watkins Harper, Mary Church Terrell, Alice Paul, Crystal Eastman, Florence Kelley, Ida B. Wells, or Mary McLeod Bethune.”³³ Save Justice Stevens’ incidental reference to Susan B. Anthony in an opinion about flag-burning, “no Supreme Court opinion has named—much less quoted—the leaders of women’s quest for political voice in our constitutional order.”³⁴ It’s not only majority or controlling opinions that omit these narratives: even dissenting jurists have neglected them.³⁵ In Siegel’s words, “the Nineteenth Amendment plays scarcely any role in constitutional interpretation, *even in the law of sex discrimination*”—“impressive evidence of women’s near-perfect exclusion as acknowledged makers of our constitutional law.”³⁶

Such silences are particularly striking given the proliferation of scholarship that could buttress a more expansive constitutional memory of reproductive injustice and of movements for women’s full citizenship. Thanks to work by scholars such as Dorothy Roberts, we now understand the history of racialized reproductive control—how various forms of legal and extra-legal coercion have restricted sexual and reproductive autonomy, sometimes to limit fertility, other times to encourage it.³⁷ We have rich accounts of how Black Americans resisted reproductive oppression and fought for legal and constitutional rights of all kinds. For example, legal historian Martha Jones details how Black women formed a vanguard in the struggle for equal citizenship that encompassed not only universal suffrage regardless of race or sex but also the freedom to live, work, travel, and raise flourishing families; to participate in effective political activism and office-holding; and to be free from racial and sexual violence.³⁸ Julie Suk’s history of Equal Rights Amendment advocacy highlights how suffragists and feminists contested constitutional meanings and interpretations as well as social practices that constrained their freedoms and ability to participate in public life.³⁹ Movements for what we now call reproductive justice fought not only for sexual and reproductive autonomy, but for the right to state

³³ *Id.* at 26 (footnotes omitted), *quoted in* BALKIN, *supra* note 1, at 211.

³⁴ *Id.* at 27.

³⁵ *See id.* (“The erasure is so fundamental it passes without notice.”), *quoted in* BALKIN, *supra* note 1, at 211.

³⁶ *Id.* at 30. As Balkin notes, constitutional memory makes women and people of color appear to be the passive beneficiaries of white male beneficence. BALKIN, *supra* note 1, at 224–27; *see also* JILL ELAINE HASDAY, *WE THE MEN: HOW FORGETTING WOMEN’S STRUGGLES FOR EQUALITY PERPETUATES INEQUALITY* (Oxford Univ. Press forthcoming 2025) (on file with author).

³⁷ *See, e.g.*, DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

³⁸ *See generally* MARTHA S. JONES, *VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL* (2020).

³⁹ *See generally* JULIE C. SUK, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT* (2020).

support for caregiving generally and motherhood specifically.⁴⁰ They protested and resisted state surveillance of families and communities of color on constitutional as well as moral grounds.⁴¹ In Siegel's terms, all of these efforts are part of our constitutional history, but they barely register in our constitutional memory.

The result of these erasures is to make a historical reality of oppression and contestation appear legitimate and consensual. By constricting constitutional memory, originalists who invoke a selective history-and-tradition not only adopt the logic of a deeply unequal and unjust social structure, they also obscure and naturalize the anti-democratic nature of their methodology. Originalism, Siegel writes, from the start has "attacked a variety of rights that opened democratic life to more broad-based participation."⁴² Even when not motivated solely by such aims, originalist methodology "amplif[ies] the Constitution's democratic deficits."⁴³ The impoverishment of constitutional memory is a key technique used to obscure conflict, dissent, and the possibility of collective action—to "destroy[] the vernacular of resistance."⁴⁴

The potential impact of expanding constitutional memory to fill these silences is commensurate with the magnitude of the erasure. Siegel asks us to imagine what our constitutional law would look like if jurists—and all of us—remembered and honored these struggles.⁴⁵ If we did, her work reveals, the Nineteenth Amendment would appear not only as a rule about voting eligibility, but as a revolution in family—and national—governance: Suffragists' call for the "democratization of the family" included rights to sexual and reproductive autonomy, economic independence, "self-ownership" of one's own body and labor, and state support for caregiving.⁴⁶ As Davis demonstrates, an understanding of the Reconstruction Amendments

⁴⁰ See, e.g., PREMILLA NADASEN, *WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES* 229 (2005); FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* 160 (2007); ANNEISE ORLECK, *STORMING CAESARS PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY* 231–33 (2005).

⁴¹ See generally, e.g., MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973* (1993); KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017). For more, see generally Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L.J. F. 512 (2020).

⁴² Siegel, *Memory Games*, *supra* note 5, at 1134.

⁴³ *Id.*

⁴⁴ Siegel, *Politics of Constitutional Memory*, *supra* note 2, at 24, *quoted in* BALKIN, *supra* note 1, at 196.

⁴⁵ *Id.* at 51–52 ("Imagine a world in which the Justices consulted the arguments of the excluded, subordinated, and disfranchised about the meaning of our constitutional values—a world we can glimpse in the work of Martha Jones, Peggy Cooper Davis, [and] Dorothy Roberts" (footnotes omitted)).

⁴⁶ See *id.* See generally Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, YALE L.J. F. 450 (2020) [hereinafter Siegel, *Democratization of the Family*]; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) [hereinafter Siegel, *She the People*].

that centers enslaved and freed people's lives also would recognize sexual and reproductive autonomy, family integrity, and much else as fundamental to those provisions' meaning.⁴⁷

If we expand constitutional memory in these ways, abortion bans become part of a long history of reproductive control that subordinates women and people of color.⁴⁸ As Roberts writes, by engaging in "historical analysis that ties together forms of white supremacy over time," we can resist the Court's refusal to see parallels between older forms of subordination and their contemporary incarnations.⁴⁹ Such histories spotlight the "striking connection between the exploitation of enslaved women's reproductive labor and the denial of reproductive autonomy imposed by abortion bans."⁵⁰ They also illuminate the roots of nineteenth-century abortion criminalization in nativist, anti-Catholic, and misogynist views long since repudiated in our constitutional jurisprudence.⁵¹ And they give the lie to narratives that frame abortion bans as antidotes rather than close cousins to eugenic policies and practices.⁵²

Recent work by Reva Siegel and Mary Ziegler on the Comstock Act illustrates the limits of Alito's approach to history and tradition and the payoff of expanding constitutional memory about reproductive injustice and resistance.⁵³ Siegel and Ziegler persuasively refute interpretations of the Comstock Act that would support its enforcement as a nationwide abortion ban. They document how the statute always excepted health from the definition of prohibited obscenity and demonstrate a "continuous tradition of access to urgently needed reproductive healthcare in the United States."⁵⁴

⁴⁷ See DAVIS, *NEGLECTED STORIES*, *supra* note 12, at 10–12; Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 379 (1993), *discussed in* BALKIN, *supra* note 1, at 221–23.

⁴⁸ For more, see Mayeri, *Critical Role*, *supra* note 6, at 195–227.

⁴⁹ Dorothy E. Roberts, *Racism, Abolition, and Historical Resemblance*, 136 HARV. L. REV. 37, 49 (2022).

⁵⁰ *Id.* at 52.

⁵¹ Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 280–323 (1992) [hereinafter Siegel, *Reasoning from the Body*]; Brief for Am. Hist. Ass'n & Org. of Am. Historians as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) and sources cited therein.

⁵² See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2027–29 (2021) [hereinafter Murray, *Race-ing Roe*].

⁵³ 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 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751 [<https://perma.cc/JUZ9-VRPE>].

⁵⁴ *Id.* (manuscript at 9–10).

Moreover, Siegel and Ziegler show how recovering the history of resistance to Comstockery and the repression thereof can inform constitutional interpretation and political argument. Siegel and Ziegler's account reveals how antithetical to modern constitutional values were the statute's motivations, substance, and enforcement. The anti-vice movement that produced the Comstock Act, they show, opposed abortion and contraception "because they facilitated illicit sex, threatened sexual purity, and lured upper-class white women from their rightful place in the home."⁵⁵ Women, anti-vice crusaders argued, would descend into licentious debauchery without the possibility of unwanted pregnancy hanging over them. Immigrants and men of color posed special threats to the sexual purity of white native-born Protestant women. Like the physicians who promoted abortion restrictions in the mid- to late-nineteenth century, Comstock's minions often expressed nativist motivations and played on fears about women abandoning their divinely ordained roles as wives and mothers.⁵⁶

Further, selective prosecutions of Comstockery's critics chilled all manner of political speech in ways that clearly contravene the First Amendment and flout basic democratic principles. Comstock censors "prosecuted Americans who sought birth control, abortion, or information about either one, targeting in particular those who called for free speech, voluntary motherhood, and the statute's reform or repeal."⁵⁷ They repelled attempts to change the law, despite its chronic unpopularity. Opposition to Comstock and activism for women's rights from feminists, birth control activists, free speech advocates, and others without political power affected the law's enforcement. Significantly, these largely forgotten efforts laid the foundation for modern conceptions of free expression and of sexual and reproductive freedom.⁵⁸

Constitutional case law and legal commentary is silent about nearly all of this history. Siegel and Ziegler's historical excavation exposes the infirmities of *Dobbs*'s history-and-tradition analysis and of present-day attempts to revive Comstock and apply it as a nationwide abortion ban. Not only is this interpretation of the Comstock Act at odds with traditional health exceptions and physician discretion, it also spotlights the profoundly anti-democratic nature of the statute's origins, enforcement, and resurrection. The Right's revival of Comstock provides opportunity as well as danger: it showcases in stark terms the consequences of looking to nineteenth-century lawmakers in thrall to sexual purity crusaders as a source of legitimate constitutional authority.

More recent history also can inform constitutional interpretation—and has done so in other contexts.⁵⁹ For instance, advocates fought in the mid- to late-twentieth

⁵⁵ *Id.* (manuscript at 30).

⁵⁶ *Id.* (manuscript at 27–29, 32).

⁵⁷ *Id.* (manuscript at 4).

⁵⁸ *See id.*

⁵⁹ When interpreting the constitution, even originalists "offer all manner of reasons and draw on all manner of sources, including post-ratification history, dissenting opinions, and

century to decriminalize abortion, end forced sterilization, and establish a constitutional right to subsistence. As Melissa Murray highlights, women of color often led these efforts, the story of which provides a sharp counterpoint to anti-abortion activists and jurists who suggest that abortion is a eugenicist plot against Black Americans.⁶⁰ In fact, Black women and feminists fought to make meaningful choices about their bodies and lives without restrictions imposed by law or by coercive practices that denied reproductive freedom to women living in poverty.⁶¹

Indeed, these activists understood access to contraception and abortion care as essential to *preserve* women's lives and future fertility. Poor women of color disproportionately died from unsafe illegal abortions before *Roe*.⁶² After *Roe*, when the federal Hyde Amendment and state bans on Medicaid funding restricted abortion care for low-income women, no exceptions protected pregnant patients' health.⁶³ And as Khiara Bridges underscores, if sterilization was the only available method to avoid childbearing then many would be forced, pressured, or deceived into giving up their ability to have children altogether.⁶⁴ Incorporating this history into our constitutional memory would provide a powerful rejoinder to arguments that abortion rights—rather than denial of access—serves eugenic purposes.⁶⁵

The history of reproductive injustice and feminist resistance has critical payoffs for the future of constitutional sex equality law. Dicta in *Dobbs* tries to resurrect the 1974 decision in *Geduldig v. Aiello* and to erase the constitutional history and jurisprudence of sex equality over the past half-century. Feminist legal advocacy in the 1960s and 1970s, with roots in earlier mobilizations for suffrage and family democratization,⁶⁶ produced anti-stereotyping and anti-subordination principles that

social-movement arguments.” Siegel, *Politics of Constitutional Memory*, *supra* note 2, at 50 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521, 527 (1989) (Scalia, J., concurring)); BALKIN, *supra* note 1 *passim*.

⁶⁰ See Murray, *Race-ing Roe*, *supra* note 52, at 2043–45; Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1632–36 (2022) [hereinafter Murray, *Universe of Reproductive Rights*].

⁶¹ See Murray, *Race-ing Roe*, *supra* note 52, at 2043–45; FELICIA KORNBLUH, A WOMAN'S LIFE IS A HUMAN LIFE: MY MOTHER, HER NEIGHBOR, AND THE JOURNEY FROM REPRODUCTIVE RIGHTS TO REPRODUCTIVE JUSTICE 288–95 (2023) [hereinafter KORNBLUH, A WOMAN'S LIFE].

⁶² See LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1873, at 137–39 (1997).

⁶³ The Supreme Court upheld the constitutionality of these restrictions in *Maier v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980).

⁶⁴ See Khiara M. Bridges, *Elision and Erasure: Race, Class, and Gender in Harris v. McRae*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 117, 120–21, 126–27 (Melissa Murray et al. eds., 2019); see also KORNBLUH, A WOMAN'S LIFE, *supra* note 61, at 234–35.

⁶⁵ See ROBERTS, KILLING THE BLACK BODY, *supra* note 35, at 64–79; Murray, *Race-ing Roe*, *supra* note 52, at 2102; Murray, *Universe of Reproductive Rights*, *supra* note 60, at 1636.

⁶⁶ Siegel, *Democratization of the Family*, *supra* note 46, at 490–93.

informed cases such as *United States v. Virginia*⁶⁷ and *Nevada Department of Human Resources v. Hibbs*.⁶⁸ As Reva Siegel has long argued, these decisions—both joined by a supermajority of the Court—are properly read to supersede *Geduldig*’s suggestion that not all discrimination based on pregnancy is sex discrimination subject to heightened scrutiny under the equal protection clause.⁶⁹

Virginia takes a critical approach to history: Justice Ginsburg’s opinion uses the “past as negative precedent,” citing discrimination against women and people of color in education as a reason to apply heightened scrutiny to the state’s exclusion of women from VML.⁷⁰ *Virginia* also makes clear that classifications based on pregnancy are sex-based classifications under the Equal Protection Clause: Ginsburg uses the maternity leave benefit upheld in *Cal Fed v. Guerra* (1978) “as a paradigmatic example of a law classifying on the basis of sex that is constitutional because it advances women’s equality.”⁷¹ *Hibbs*, which upheld the Family and Medical Leave Act (FMLA) as a valid exercise of congressional power under Section 5 of the Fourteenth Amendment, reflects a “growing awareness of the central role that regulation of pregnancy has played in women’s marginalization,” including among previously skeptical conservatives.⁷² This awareness was nurtured by experience under the Pregnancy Discrimination Act (PDA)⁷³—the product of concerted legal advocacy by a coalition of feminists, labor unions, and some opponents of abortion.⁷⁴

To resurrect *Geduldig* would erase this history, and as Cary Franklin argues, surreptitiously overrule a half-century of jurisprudence.⁷⁵ Remembering this history

⁶⁷ 518 U.S. 515 (1996).

⁶⁸ 538 U.S. 721 (2003).

⁶⁹ See, e.g., Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 76–79 (2023) [hereinafter Siegel et al., *Equal Protection in Dobbs and Beyond*]; Reva B. Siegel, *The Pregnant Citizen from Suffrage to the Present*, 108 GEO. L.J. 167, 204–11 (2020); Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1891–94 (2006); Brief for Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, & Reva Siegel as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392).

⁷⁰ See Siegel, *Politics of Constitutional Memory*, *supra* note 2, at 54–55; see also Deborah Widiss, Note, *Re-viewing History: The Use of the Past as Negative Precedent in United States v. Virginia*, 108 YALE L.J. 237, 252 (1998).

⁷¹ Cary Franklin & Reva Siegel, *Equality Emerges as a Ground for Abortion Rights In and After Dobbs*, in *ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION* 22, 28 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024) [hereinafter Franklin & Siegel, *Equality Emerges*].

⁷² *Id.* at 29.

⁷³ Siegel et al., *Equal Protection in Dobbs and Beyond*, *supra* note 69, at 73–79; Franklin & Siegel, *Equality Emerges*, *supra* note 71, at 28–30.

⁷⁴ See, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 476 (2011).

⁷⁵ See Cary Franklin, *History and Tradition’s Equality Problem*, 133 YALE L.J. F. 946, 982–84 (2024).

is critical to an interpretation of the equal protection clause and other equality mandates as centrally concerning, rather than inexplicably excluding, the regulation of pregnancy. As *Virginia* and *Hibbs* underscore, sex-based stereotypes about women's primary role as bearers and rearers of children have been at the heart of women's subordinate status, historically and in the present day.⁷⁶ They therefore are the paradigmatic instance of classifications subject to "skeptical" scrutiny and require an "exceedingly persuasive justification" to be upheld.⁷⁷

Heightened scrutiny "requires that before a state targets women with coercive, discriminatory regulation, it must first explore non-coercive, non-discriminatory alternative means to achieve its ends."⁷⁸ States that ban abortion notoriously provide minimal state support for parents, children, and families: for example, they reject available federal funds to increase access to contraception, sex education, and child care; they refuse to expand Medicaid; they divert or withhold from poor families money that could be spent on direct cash assistance; and many impose limits on benefits to additional children born into families receiving aid.⁷⁹ Out of this history and case law emerges what Siegel and Franklin call an "anti-carceral presumption": before banning abortion, at the very least states must attempt noncoercive measures to promote life and health.⁸⁰

The Court's repudiation of sex-based stereotypes also is crucial to LGBTQ+ rights. Opponents of equality and dignity for transgender Americans, for instance, use *Geduldig* to argue that denying transgender persons access to restrooms, athletic opportunities, birth certificates, and medical care consistent with their gender does not violate equal protection, because laws based on "biological" sex differences do not discriminate on the basis of sex.⁸¹ On the contrary, if we understand that discrimination based on "inherent sex differences" is at the heart of sex-based subordination, then gender identity discrimination is a paradigm case of sex discrimination.⁸² When the state expects or requires a person's gender identity to conform to their sex assigned at birth, that is the very definition of a sex-based stereotype.⁸³

⁷⁶ Siegel et al., *Equal Protection in Dobbs and Beyond*, *supra* note 69, at 77–79.

⁷⁷ *Id.* at 71, 79 (quoting *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996)).

⁷⁸ *Id.* at 84.

⁷⁹ *See id.* at 81–90.

⁸⁰ Franklin & Siegel, *Equality Emerges*, *supra* note 71, at 25.

⁸¹ Most courts rejected this analysis until recently. *See* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1456–57 (2023). *But see* Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1127–28, 1128 n.62 (2024); *L.W. v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023), *cert. granted sub nom.*, *United States v. Skrmetti*, 144 S. Ct. 2679 (2024).

⁸² *See* Siegel et al., *Equal Protection in Dobbs and Beyond*, *supra* note 69, at 77–78 ("This reading can also aid litigation challenging trans-exclusionary laws, where *Virginia* is sometimes invoked as if the case sanctioned claims of physical difference as a limit on equal protection claims, when it does exactly the reverse.").

⁸³ *Id.* at 78 (arguing that *Virginia* "call[s] for the application of anti-stereotyping and anti-subordination principles to laws justified by claims about physical difference, rather than

Because the supermajority's approach to history-and-tradition is so narrow and selective, it provides the most dramatic illustration of critical histories' value-added. But even decisions that take a more expansive approach to history and reach comparatively progressive results could frame the nature and scope of constitutional rights differently if they credited a wider range of voices. For example, in *Obergefell v. Hodges*, Justice Kennedy's majority opinion draws on a historians' brief to recount how marriage evolved over time to incorporate race and sex equality norms.⁸⁴ But he nowhere mentions the social movements that powered those changes, or the less successful contemporaneous efforts to decouple public and private legal benefits from marriage.⁸⁵

Had the voices of feminists and gay liberationists informed his analysis, *Obergefell* might have had broader implications for equality based on sex, sexual orientation, and marital status. *Obergefell* might have rested more explicitly on sex equality grounds: it could have embraced arguments that restricting marriage to male-female unions instantiated impermissible sex-based stereotypes. Rather than implicitly denigrating nonmarriage, Kennedy's opinion might have recognized a broader right to choose to marry—or *not to marry*—without legal penalty.⁸⁶

II. SHOWCASING ABSURD AND ANTI-DEMOCRATIC RESULTS:

DOBBS, BRUEN, AND RAHIMI

Cases involving reproductive and racial injustice and the rights of women provide especially dramatic illustrations of the *Dobbs/Bruen* history-and-tradition approach's absurd results and anti-democratic pedigree.⁸⁷ *Dobbs* exposes how a selective history-and-tradition methodology operates not only to entrench inequality but to make hierarchy appear legitimate—even necessary to liberty. In *Dobbs*, Siegel

simply deferring to claims about 'biology' or 'nature'"); *id.* (arguing that under *Virginia*, impermissible "sex-role stereotypes include the belief that motherhood is a woman's 'paramount destiny,' that women who are poor or of color should have fewer children, or that a man or a nonbinary person cannot be pregnant"). To be clear, this interpretation of *Geduldig* is not necessary to a finding that gender identity discrimination is sex discrimination.

⁸⁴ 576 U.S. 644, 662–63 (2015).

⁸⁵ See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 160–61 (2011); Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 130–32 (2015).

⁸⁶ On movements to challenge the legal privileging of marriage, see SERENA MAYERI, MARITAL PRIVILEGE: MARRIAGE, INEQUALITY, AND THE TRANSFORMATION OF AMERICAN LAW (Yale Univ. Press forthcoming 2025); Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMM. 377 (2017); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

⁸⁷ *Dobbs* is an especially powerful catalyst for resistance to originalism as a method not only because of its high stakes but also because the opinion "provides such a graphic illustration of originalist constitutional memory games at work," as Siegel puts it. Siegel, *Memory Games*, *supra* note 5, at 1135.

writes, the majority “presented domination as freedom and encouraged Americans today to view it that way.”⁸⁸ Alito’s opinion accomplishes this by providing a highly selective history. He rejects inconvenient facts about the legality of pre-quickening abortion at the founding.⁸⁹ He denies that nineteenth-century abortion bans, much less their modern iterations, were animated by illegitimate motives including assumptions about women’s divinely ordained roles as mothers.⁹⁰ He ignores the exclusion of women and people of color from the lawmaking class who enacted abortion bans, as well as the contemporaneous and subsequent feminist mobilizations to rectify women’s disfranchisement and denials of reproductive, sexual, and other forms of autonomy.⁹¹ In short, *Dobbs* provides an especially stark example of how “[s]ystematic divergence between constitutional memory and constitutional history can legitimate authority.”⁹²

But *Dobbs* also presents an opportunity to undermine that same legitimacy. It’s one thing to assert the shortcomings of a narrow history-and-tradition approach when it merely produces anachronistic results; quite another when it subjects historically disfranchised and subordinated groups to archaic norms that extinguish established rights. The point resonated in popular culture immediately after the *Dobbs* opinion leaked when a Saturday Night Live skit parodied the majority’s references to medieval legal authorities. “In the draft of his majority opinion overturning *Roe v. Wade*,” the cold open begins, “Justice Samuel Alito explains that no woman has a right to an abortion, and that in fact abortion is a crime. To prove it, he cites a treatise from 13th century England.”⁹³

SNL then transports the viewer “to that profound moment of moral clarity, *almost a thousand years ago*, which laid such a clear foundation for what our laws should be in 2022.”⁹⁴ Three men dressed in period costume debate the wisdom of an abortion ban, comparing it to other “fair and reasonable” laws such as that prescribing castration for the crime of hunting deer on royal property.⁹⁵ “We should make a law that will stand the test of time,” one suggests, “so that hundreds and hundreds of years from now, they’ll look back and say, ‘No need to update this one at all. They nailed it back in 1235!’”⁹⁶ Another proposes deciding the question on a “fiefdom by fiefdom basis,” so that men could send their “concubine[s]” off to “Old York City” for an abortion if necessary.⁹⁷

⁸⁸ Siegel, *Future of Reproductive Justice*, *supra* note 8.

⁸⁹ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 217 (2022).

⁹⁰ *Id.* at 218.

⁹¹ *See id.*; Siegel, *Memory Games*, *supra* note 5, at 1186–87.

⁹² Siegel, *Future of Reproductive Justice*, *supra* note 8.

⁹³ Saturday Night Live, *Roe v. Wade Cold Open*, YOUTUBE (May 8, 2022), <https://www.youtube.com/watch?v=mLMp-1NdZR8> [<https://perma.cc/8FRK-RMJE>].

⁹⁴ *Id.* at 00:22.

⁹⁵ *Id.* at 00:59.

⁹⁶ *Id.* at 01:14.

⁹⁷ *Id.* at 01:28.

The men speculate about possible punishments for the woman who ends a pregnancy, including “put[ting] her in a boat and let[ting] her sail off the cliff at the edge of the world” to be eaten by the turtles who hold up the earth.⁹⁸ One man asks about exceptions for rape and incest, and is told, “But those are the only kinds of sex!”⁹⁹ A young person who is “about to reach the childbearing age of twelve” inquires politely whether perhaps she should have the right to make decisions about pregnancy, given the fifty-fifty odds of dying in childbirth.¹⁰⁰ Why, she asks, are the men so focused on prohibiting abortion when other pressing problems, such as mass illiteracy and rampant plague, loom.¹⁰¹ At which point one of the men proclaims that he should not have to wear a mask to protect others from his “active” case of the plague: “My body, my choice!”¹⁰²

After the *Dobbs* draft became the majority’s opinion, virtually unchanged, Justices Sotomayor, Kagan, and Breyer stressed in dissent:

[O]f course, “people” did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women’s liberty, or for their capacity to participate as equal members of our Nation. . . . 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 second-class citizenship.¹⁰³

Commentators too rehearsed the stark implications of tying lawmakers’ hands based on archaic assumptions and values. They protested that men who condoned human enslavement, coverture, theft of Indigenous land, white and male supremacy, and so on should not be the authors of a modern democracy’s present and future.¹⁰⁴

⁹⁸ *Id.* at 01:39.

⁹⁹ *Id.* at 03:20.

¹⁰⁰ *Id.* at 03:03.

¹⁰¹ *Id.* at 03:29.

¹⁰² *Id.* at 03:39.

¹⁰³ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 372–73 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting). And the dissenters warn that the majority’s rationale means that “all rights that have no history stretching back to the mid-19th century are insecure.” *Id.* at 363. The framers “did not perceive women as equals, and did not recognize women’s rights.” *Id.* at 373. They did not believe that the Fourteenth Amendment protected interracial marriage. But, the dissent argues, the framers of 1788 and 1868 “understood that the world changes,” so they “defined rights in general terms, to permit future evolution in their scope and meaning.” *Id.* at 374.

¹⁰⁴ In addition to sources cited elsewhere in this Essay, see, for example, Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 733–34 (2024); Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 37 (2022); Reva B.

Even if it were possible to provide an “objective” account of “original public meaning,” these methodologies suffer from a fatal deficit of democratic legitimacy. Arguably all laws and constitutional provisions enacted prior to the 1965 Voting Rights Act exhibit this flaw. But it is especially glaring where the rights of people who were excluded from the polity when the relevant constitutional provisions were written and ratified are squarely at stake.¹⁰⁵

Perhaps it is no accident, then, that the case in which the Court tried to walk a rigid history-and-tradition test back from the brink, *United States v. Rahimi*, involved a gun regulation designed to prevent intimate partner violence against women. *Bruen* itself sparked plenty of criticism. In *Bruen*, Justice Clarence Thomas’s majority opinion announced that if a gun regulation is to survive Second Amendment scrutiny, the government must point to “relevantly similar” laws from the founding period that imposed “a comparable burden on the right of armed self-defense” and were “comparably justified.”¹⁰⁶ *Bruen* declared that “when it comes to interpreting the Constitution, not all history is created equal. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”¹⁰⁷ Whereas *Dobbs* tethers individuals’ twenty-first century reproductive rights to nineteenth-century laws, *Bruen* ties the government’s ability to regulate guns today to an era still further removed from modern technology, state capacity, and egalitarian values.

Many high-profile critiques of *Bruen* focused on how its interpretive methodology used history instrumentally to constrain modern lawmaking. Justice Breyer’s dissent in *Bruen*, joined by Justices Sotomayor and Kagan, elaborated the catastrophic scourge of modern gun violence and the dramatically more destructive weaponry developed in the 230+ years since the Second Amendment’s ratification.¹⁰⁸ Breyer criticized at length the majority’s “history only” approach on the grounds that judges are ill-equipped to answer questions that require painstaking historical research,¹⁰⁹ that *Bruen*’s approach to history invites selective, inconsistent, and motivated reasoning about the past; and that to require a close analogue from the eighteenth century to uphold a twenty-first century gun regulation leaves lawmakers unable to adapt legislation to a drastically different modern world.¹¹⁰

A few months later, federal district court Judge Carlton Reeves offered a similar critique. Judges, he wrote, “are not trained historians. . . . [W]e are not experts in

Siegel, *How “History and Tradition” Perpetuates Inequality: Dobbs on Abortion’s Nineteenth-Century Decriminalization*, 60 HOUS. L. REV. 901, 909 (2023); Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 352 (2023).

¹⁰⁵ *Dobbs*, 597 U.S. at 372–73 (Breyer, Sotomayor & Kagan, JJ., dissenting).

¹⁰⁶ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 29 (2022).

¹⁰⁷ *Id.* at 34 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008)).

¹⁰⁸ *Id.* at 83–91 (Breyer, J., dissenting).

¹⁰⁹ *Id.* at 107–08.

¹¹⁰ *Id.* at 113–14; see also BALKIN, *supra* note 1, at 206–09 (explaining the flaws in Justice Thomas’s selective reliance on advocates’ versions of history in *Bruen*).

what white, wealthy, and male property owners thought about firearm regulation in 1791.”¹¹¹ Reeves quoted leading historians who “called the Court’s historical analysis [in *Bruen*] ‘an ideological fantasy’” replete with “inconsistency and caprice.” Loathe to “cherry pick history,” Reeves ordered the parties to brief the question of whether he “should appoint a historian to serve as a consulting expert” on the constitutionality of a federal statute that prohibits felons from possessing firearms.¹¹²

In his opinion in *Dobbs*, Judge Reeves memorably had accused Mississippi of “gaslighting” when the state purported to ban abortion to protect maternal health.¹¹³ In fact, Reeves wrote, abortion bans were reminiscent of the “old Mississippi—the Mississippi bent on controlling women and minorities.”¹¹⁴ But a general ban on felons’ gun possession did not present Reeves with a similar opportunity to highlight how *Bruen*’s approach to history cemented outdated ideas about women and people of color that justified oppressive treatment.

In *Rahimi*, though, the ramifications of using history to enshrine archaic views about guns and about women in the Constitution collided to great effect. Unlike prior cases that reached the Court, where gun rights advocates often handpicked sympathetic plaintiffs, defendant Zackey Rahimi was no peaceful law-abiding citizen who wanted to keep and carry firearms for self-defense. Rahimi had terrorized and threatened his girlfriend, shot indiscriminately at bystanders in fits of rage, and otherwise comported himself in ways that made him an inconvenient Second Amendment poster child. As Dana Bazelon describes the conduct that led to the protective order that disarmed him, “Rahimi dragged [his girlfriend] across a parking lot, slammed her into a car, then fired his gun in her direction when she ran. Rahimi later threatened to shoot her if she reported the incident.”¹¹⁵ In the following months, Rahimi “was involved in five other shootings, threatened a *different* woman with a gun, and continued to harass [the protected partner].”¹¹⁶ Eventually convicted of several crimes, by the time his case reached the Supreme Court Rahimi himself said he did not wish to have a gun.¹¹⁷

¹¹¹ Order at 3, *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB (S.D. Miss. June 28, 2023), ECF No. 65.

¹¹² *Id.* at 6.

¹¹³ *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 n.22 (S.D. Miss. 2018), *aff’d sub nom.*, *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *rev’d*, 597 U.S. 215 (2022).

¹¹⁴ Brief for Petitioners at 9, *Dobbs*, 597 U.S. 215 (No. 19-1392).

¹¹⁵ Dana Bazelon, *The Supreme Court Hasn’t Actually Fixed the Mess Clarence Thomas Created on Guns*, SLATE (June 26, 2024, 4:47 PM), <https://www.slate.com/news-and-politics/2024/06/supreme-court-scotus-thomas-barrett-gun-control-rahimi.html> [<https://perma.cc/9XTB-RGFH>].

¹¹⁶ *Id.*

¹¹⁷ Abbie VanSickle, *Texas Man at Center of Supreme Court Case Says He No Longer Wants Guns*, N.Y. TIMES (Nov. 6, 2023), <https://www.nytimes.com/2023/11/06/us/politics/supreme-court-rahimi.html> [<https://perma.cc/4QAH-LNVM>] (quoting Rahimi’s “handwritten

Nevertheless, the Fifth Circuit applied *Bruen* to invalidate a federal law that bars individuals subject to domestic violence restraining orders from firearm possession. The court rejected the government's arguments that various laws from the early republic—including those that barred gun possession by “dangerous” persons—provide historical analogues sufficient to uphold the statute.¹¹⁸ The Fifth Circuit's opinion in *Rahimi* epitomized the untenable implications of *Bruen*'s approach and exemplified what Melissa Murray calls the “jurisprudence of masculinity”: the supermajority's interpretation of “the Constitution, its text, and history in ways that prioritize and protect men in their exercise of constitutional rights while willfully ignoring the history that might support women's claims for constitutional protection and rights.”¹¹⁹

Commentators seized the opportunity to note that the government's failure to identify specific founding-era laws designed to protect women from intimate partner violence was a feature, not a bug, of *Bruen*'s history-and-tradition inquiry.¹²⁰ Some of the same legal authorities cited by the *Dobbs* majority, after all, sanctioned husbands' physical chastisement of wives and declined to recognize the possibility of marital rape.¹²¹ State and federal laws that specifically addressed domestic violence and spousal sexual abuse did not emerge until the late twentieth century, and only after protracted struggle by feminist advocates.¹²²

Pointed questioning by Justices Ketanji Brown Jackson and Elena Kagan at oral argument in *Rahimi* spotlighted the deficiencies of *Bruen*'s approach as practiced

letter from jail” declaring that he wished “to stay away from all firearms and weapons, and to never be away from my family again”).

¹¹⁸ See *United States v. Rahimi*, 61 F.4th 443, 457 (5th Cir. 2023), *rev'd*, 602 U.S. 680 (2024).

¹¹⁹ Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 800 (2023).

¹²⁰ See, e.g., Madiba Dennie, *Originalism Is Going to Get Women Killed*, THE ATLANTIC (Feb. 9, 2023), <https://www.theatlantic.com/ideas/archive/2023/02/originalism-united-states-v-rahimi-women-domestic-abuse/672993/> [<https://perma.cc/7PH3-ARYW>] (noting that originalism is a threat to women and minorities disenfranchised at the time of the founding).

¹²¹ See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 81 (2022) (citing Blackstone and other influential commentators on the right to keep and carry weapons); WILLIAM BLACKSTONE, 1 COMMENTARIES *444; SIR MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 629 (1736) (“[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent an[d] contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”); see also Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123 (1996) [hereinafter Siegel, *Rule of Love*]; Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1389 & n.43, 1391 n.47 (2000) [hereinafter Hasday, *Contest and Consent*].

¹²² See Hasday, *Contest and Consent*, *supra* note 121, at 1376; ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 20, 42 (2000); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 74–80 (2012).

by the Fifth Circuit. 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—or any other specific group—ties the hands of present-day legislators seeking to stem the tide of gun violence. Justice Jackson asked Solicitor General Elizabeth Prelogar whether the *Bruen* test requires 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.”¹²³ She wondered aloud whether “there’s a flaw” in *Bruen*’s history-and-tradition framework “to the extent that when we’re looking at history and tradition, we’re not considering the history and tradition of all of the people but only some of the people.”¹²⁴

Ultimately, the Court upheld the restriction challenged in *Rahimi* over a lone dissent from Justice Clarence Thomas, *Bruen*’s author. The Second Amendment, Chief Justice John Roberts wrote, is “not . . . a law trapped in amber.”¹²⁵ Justice Sotomayor’s concurrence noted a flaw that Breyer’s *Bruen* dissent overlooked: “Given the fact that the law at the founding was more likely to protect husbands who abused their spouses than offer some measure of accountability, it is no surprise that that generation did not have an equivalent to” the challenged law.¹²⁶ She continued: A “rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstring[s] our democracy.”¹²⁷

Even for the Court’s supermajority, then, *Rahimi* was a bridge too far—though arguably the Fifth Circuit’s ruling was a logical endpoint of *Bruen*’s analysis, as Justice Jackson suggested in a separate concurrence. Jackson countered the majority opinion’s implication that lower courts had misunderstood *Bruen*, writing that “the blame may lie with us, not with them.”¹²⁸ *Bruen* led to “confusion” and “discord,” and Jackson posed a litany of “unresolved questions” that she predicted would continue to plague lower courts. “I could go on—as others have. But I won’t.”¹²⁹ Not in this case, perhaps, but more opportunities are likely to follow.

Rahimi highlights the potential positive impact of a different approach to history’s relevance. Even if we just thought of the Fourteenth and Nineteenth Amendments as equality mandates that modify the original Bill of Rights by inducting men of color and women into full citizenship, the Fifth Circuit’s analysis in *Rahimi* could

¹²³ Transcript of Oral Argument at 15–16, *Rahimi*, 602 U.S. 680 (No. 22-915).

¹²⁴ *Id.* at 54.

¹²⁵ *Rahimi*, 602 U.S. at 691.

¹²⁶ *Id.* at 705 (Sotomayor, J., concurring) (citing Siegel, *Rule of Love*, *supra* note 121, at 2154–70).

¹²⁷ *Id.* at 706.

¹²⁸ *See id.* at 741 (Jackson, J., concurring).

¹²⁹ *Id.* at 746 (citation omitted).

not stand. As Joseph Blocher and Reva Siegel argue, despite how “the *Bruen* Court’s ode to history and traditions encourages uncritical deference to status-based reasoning of the past,” the government “can regulate guns with our twenty-first century understanding of We the People.”¹³⁰

Better yet, if history and tradition played a different role in judicial review of gun legislation, past laws and practices that shielded violent husbands from liability would have an entirely different significance. Indeed, the *Bruen* history-and-tradition analysis as interpreted by the Fifth Circuit—like that of *Dobbs*—breaks with decades of jurisprudence in which a majority of the Court embraced a dynamic approach to the past that incorporated evolving social mores and understandings into constitutional interpretation.¹³¹ If the past provides negative precedents, in Siegel’s terms, or “manifestations of the mischief against which the Constitution protects us,” in Davis’s words, then the history of women’s oppression, intimate partner violence, and state and private violence against people of color could be reasons to *approve* regulations designed to prevent gun violence, which disproportionately harms these groups.¹³²

Constitutional interpretation could further transform if we incorporated the history of feminist anti-violence activism into our constitutional memory. The analysis in cases such as *United States v. Morrison*¹³³ and *Town of Castle Rock v. Gonzales*,¹³⁴ for example, might look very different. In *Morrison*, the Court struck down a provision of the 1994 Violence Against Women Act, which allowed survivors of gender-motivated violence to bring civil rights lawsuits against perpetrators.¹³⁵ In *Town of Castle Rock*, the Court held that a municipality and its police department could not be sued under Section 1983 for refusing to enforce a restraining order obtained by Jessica Gonzales against her estranged husband, who then murdered her three children.¹³⁶

In both cases, the majority disregarded histories of the government’s failure, based on constitutionally suspect assumptions and stereotypes about women’s subordinate roles, to enforce civil and criminal law against perpetrators of intimate partner violence. It erased feminist mobilizations against that government-sanctioned violence, including those surrounding the passage and ratification of the Nineteenth Amendment.¹³⁷ A reading of the Fourteenth and Nineteenth Amendments that

¹³⁰ Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under Bruen*, 98 N.Y.U. L. REV. 1795, 1829 (2023).

¹³¹ See Mayeri, *Critical Role*, *supra* note 6, at 186–89.

¹³² DAVIS, NEGLECTED STORIES, *supra* note 12, at 215 (emphasis added).

¹³³ 529 U.S. 598 (2000).

¹³⁴ 545 U.S. 748 (2005).

¹³⁵ 529 U.S. at 617–18.

¹³⁶ 545 U.S. at 768–69.

¹³⁷ See Siegel, *She the People*, *supra* note 46, at 1022–29. On the temperance movement’s crusade against male violence and its overlaps with suffrage advocacy, see JULIE C. SUK,

incorporates this history could supply congressional authority to enact remedies such as the one struck down in *Morrison*.¹³⁸ It could create an affirmative obligation to protect victims of violence under circumstances like those Jessica Gonzales and her children faced.¹³⁹

III. OPPORTUNITIES TO EXPAND CONSTITUTIONAL MEMORY OF REPRODUCTIVE INJUSTICE AND FEMINIST RESISTANCE

In the near-term, of course, the Court's supermajority is unlikely to expand constitutional memory to place women, people of color, and other marginalized Americans at the center of analysis. The majority's version of history-and-tradition excludes these voices and concerns by design. For from producing a neutral or objective guide to constitutional meaning, the majority's approach to history and tradition yields predictable results, especially because it is used selectively and strategically. Indeed, we should expect the continued creation of constitutional memory that frames the victims of injustice very differently: "unborn children," embattled conservative Christians, gun owners, and white male victims of "racial preferences" instead earn the majority's solicitude.

But other opportunities to reconstruct constitutional memory beckon. Dissenting (and concurring) opinions can and do serve this purpose. Some of this work simply corrects the factual record; some of it interprets the significance of facts differently; and some critiques the way the majority uses history to understand the constitution's meaning. And, of course, federal courts are only one of many fora in which constitutional memory is created and deployed.

A. Dissenting (and Concurring) Opinions

Separate opinions, be they dissents or concurrences, can both correct distorted histories offered by majorities and expand constitutional memory by providing different narratives and interpretations thereof. In the 2023 affirmative action cases, for example, Justices Sotomayor and Jackson countered the majority's and concurring

AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 125–51 (2023).

¹³⁸ See Siegel, *Politics of Constitutional Memory*, *supra* note 2, at 57 & nn.183–85; Siegel, *She the People*, *supra* note 46, at 1030–31, 1036.

¹³⁹ The work of Beth Richie and others illuminates how some strands of the feminist anti-violence movement took a carceral turn in the 1980s and 1990s, calling into question approaches that use the criminal law to address interpersonal violence. See, e.g., RICHIE, *supra* note 122, at 72–86. Notably, both *Morrison* and *Town of Castle Rock* concern attempts to address this violence through civil protective orders or civil remedies initiated by survivors themselves. See *Morrison*, 529 U.S. at 603; *Town of Castle Rock*, 545 U.S. at 751.

Justices' selective recollections of the Reconstruction, Jim Crow, and civil rights eras as well as their implications for equal protection's meaning as "color-blind."¹⁴⁰

The majority and concurring opinions in *Students for Fair Admissions v. Harvard College* cast affirmative action policies designed to further integration and inclusion for historically subordinated groups as interchangeable, for constitutional purposes, with invidiously discriminatory laws and practices that upheld exclusion and segregation. Justice Sotomayor's dissent, by contrast, shows how, in the 1860s, lawmakers enacted race-conscious policies to provide educational opportunities directed at freed people but available to all Black persons, "whatever may have been their previous condition."¹⁴¹ The Civil Rights Act of 1866, too, "classified by race," in "using white citizens as a benchmark" to provide non-white citizens with "the privileges enjoyed only by white people."¹⁴² Indeed, as Justice Jackson's dissent in the University of North Carolina case points out, President Andrew Johnson vetoed the bill "because it 'discriminat[ed] . . . in favor of the negro.'"¹⁴³ And "Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities."¹⁴⁴

A century of violent repression, exploitation, and segregation followed. Both dissents detail its indignities and depredations, and describe how during the same period many white Americans benefited from racially exclusive government largesse, from the Homestead Act of 1862 to the G.I. Bill, to federal home loans. As Jackson puts it, "in so excluding Black people, government policies affirmatively operated—one could say, affirmatively acted—to dole out preferences to those who, if nothing else, were not Black."¹⁴⁵

At long last, the federal government began to enforce Reconstruction's promise of racial equality by implementing *Brown v. Board of Education*. On the importance of the *Brown* decision, the Justices agree. But civil rights litigators and plaintiffs did not—as the majority claims—understand *Brown* as mandating color blindness, Sotomayor writes.¹⁴⁶ "The Court's recharacterization of *Brown* is nothing but revisionist history, and an affront" to Thurgood Marshall and his compatriots, who supported race-conscious affirmative action to achieve equality in education.¹⁴⁷

¹⁴⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 319–25 (2023) (Sotomayor, J., dissenting); *id.* at 385, 407 (Jackson, J., dissenting). Justice Jackson recused herself from the Harvard case because of her previous appointment to Harvard's Board of Overseers, and therefore issued her dissent only with respect to the UNC case. *See id.* at 319–25 (Sotomayor, J., dissenting); *id.* at 385, 407 (Jackson, J., dissenting).

¹⁴¹ *Id.* at 323–24 (Sotomayor, J., dissenting) ("[T]he same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education.").

¹⁴² *Id.* at 325.

¹⁴³ *Id.* at 387 (Jackson, J., dissenting).

¹⁴⁴ *Id.* at 325 (Sotomayor, J., dissenting).

¹⁴⁵ *Id.* at 392 (Jackson, J., dissenting).

¹⁴⁶ *Id.* at 329–30 (Sotomayor, J., dissenting).

¹⁴⁷ *Id.* at 330–31.

Sotomayor recounts the history of discrimination and exclusion at UNC and Harvard, which endured “well into the 20th century” and contributed to lasting educational and societal inequalities.¹⁴⁸ Jackson describes the enduring legacy of this history: wealth and income gaps, housing and educational disparities, environmental injustices and their health impacts, employment barriers, and other manifestations of “intergenerational inequality.”¹⁴⁹

The *Dobbs* dissent provides a trenchant critique of the majority’s history-and-tradition analysis and disregard for stare decisis, as well as a clear-eyed prediction of the decision’s devastating consequences. But it does not, by and large, use history as the resource it could be. The dissent does not, for instance, challenge the majority’s historical account of the genesis and scope of nineteenth-century abortion restrictions. It does not directly question Justice Alito’s dismissal of abundant historical evidence that abortion bans were and are motivated by a combination of concern for fetal life and constitutionally suspect assumptions about women’s roles as mothers. It does not address the majority’s assertion that abortion—rather than restrictions on reproductive freedom—has eugenic effects. It does not question the proposition that the framers of the Reconstruction Amendments had nothing to say about abortion or reproductive rights or that—especially for formerly enslaved women—liberation would have entailed freedom to make decisions about one’s own body, labor, and family life.

In the early days of Justice Jackson’s tenure on the Court, Melissa Murray asked us to imagine how her presence might have changed the debate over *Dobbs*, given Jackson’s attention to the history of the Reconstruction Amendments in subsequent cases.¹⁵⁰ Jackson has made clear that she cares about history—but in a different way than the supermajority: she considers Reconstruction a Second Founding, and she does not hesitate to criticize the majority’s narrow history-and-tradition methodology.¹⁵¹ She already has joined Sotomayor and Kagan as a strong and assertive voice on many contested subjects. When another constitutional reproductive rights case reaches the Court, history can provide valuable resources to these Justices, even in dissent.

Though dissents do not have direct legal effect, they can contribute to constitutional memory in crucial ways. Dissents can educate the public about constitutional history the majority ignores. They can criticize the role history plays in the majority’s interpretive methodology. And by bridging the gap between history and memory, they can undermine the justificatory and legitimating functions served by the majority’s erasure.

¹⁴⁸ *Id.* at 340.

¹⁴⁹ *Id.* at 386–96 (Jackson, J., dissenting).

¹⁵⁰ See Strict Scrutiny, *Limiting the Inevitable Damage*, CROOKED MEDIA (Oct. 10, 2022), <https://www.crooked.com/podcast/limiting-the-inevitable-damage/> [https://perma.cc/2JN3-AXTJ]; Serena Mayeri, *Equality and Liberty After Dobbs*, BALKINIZATION (Oct. 23, 2022, 9:30 AM), <https://balkin.blogspot.com/2022/10/equality-and-liberty-after-dobbs.html> [https://perma.cc/7JEF-GMAS].

¹⁵¹ For more, see Mayeri, *Critical Role*, *supra* note 6, at 213–14.

B. State (and Federal) Courts and Constitutions

Before and after *Dobbs*, history has been a valuable resource for state constitutional interpretation in abortion cases. Now that they have discretion to go their own way, states have become an even more important locus of political activism, law-making, and constitutional interpretation. As I have explored in detail elsewhere, advocates and jurists already engage with the past to construct a more expansive constitutional memory than that of the *Dobbs* majority.¹⁵² Here I will make just a few general observations about how arguments from history function in abortion cases.

Litigants and jurists often invoke history to argue that state constitutional rights are more capacious than their federal counterparts.¹⁵³ Sometimes these arguments take the form of state exceptionalism. For instance, advocates argue in western states that embraced woman suffrage earlier than most, such as Wyoming and Utah, that the states' unusually strong and precocious commitment to sex equality should spur a generous interpretation of their constitutions.¹⁵⁴ Sometimes advocates mobilize historical evidence to show that a state constitution's framers intended these documents to be interpreted dynamically, to evolve over time in response to changed conditions and emergent norms and understandings.¹⁵⁵ Other times litigants and judges marshal specific evidence about the framers' intent to enshrine broader or more specific rights in the state than the federal constitution.

Some state courts interpret the rights protected by an older constitution at a high level of generality, and cite subsequent egalitarian amendments and developments to support a more progressive interpretation of clauses that framers of old may not have endorsed.¹⁵⁶ The Kansas Supreme Court's 2019 decision to recognize a right to abortion under the state constitution is a case in point.¹⁵⁷ The court asked not whether the constitution explicitly protects reproductive rights; it does not. Rather, the court found that the document's "natural rights guarantee" includes a "right to personal autonomy."¹⁵⁸ The Justices did not shy away from acknowledging that the framers denied women equal citizenship. Instead, they took a general right to personal autonomy and used contemporary egalitarian values to extend that right to women.

Kansas cited a similar set of historical sources to those embraced by the *Dobbs* majority, but the state supreme court drew from them the opposite conclusion. The court refused to rely upon common-law authorities like Blackstone *because* they

¹⁵² See *id.* at 195–267.

¹⁵³ *Id.* at 232.

¹⁵⁴ *Id.* at 232–33.

¹⁵⁵ *Id.* at 233–34.

¹⁵⁶ Balkin observes: "State courts are especially likely to engage in forms of 'living constitutionalism,' interpreting their constitutions according to evolving contemporary mores." BALKIN, *supra* note 1, at 74.

¹⁵⁷ *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 486 (Kan. 2019).

¹⁵⁸ *Id.* at 483.

embraced coverture.¹⁵⁹ Because nineteenth-century abortion restrictions did not reflect “the will of the people” and the constitution’s framers failed to recognize women as rights-holders, the court disputed their relevance to contemporary constitutional interpretation. And in sharp contrast to Justice Alito’s dismissive treatment of professional historians’ conclusions in *Dobbs*, the Kansas court credited the work of scholars such as James Mohr and Reva Siegel, who documented the nativist, paternalist, and misogynist rationales for nineteenth-century abortion criminalization.¹⁶⁰

Such arguments are even easier to make when a state constitution contains an Equal Rights Amendment or other provision that specifically guarantees sex equality. In cases involving state ERAs or other equality provisions, advocates “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.”¹⁶¹

The Pennsylvania Supreme Court’s 2024 decision in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* showcases the potential utility of critical historical arguments in constitutional interpretation. The majority opinion, and especially Justice David Wecht’s concurrence, model how feminist and historical scholarship and advocacy can be used to great effect in applying an equality mandate and other state constitutional provisions to a restrictive abortion law—in this case, a ban on Medicaid funding for abortion care.¹⁶²

When courts take a critical approach to the past, they often use the historical context in which lawmakers enacted abortion bans to discredit, rather than validate them. For older enactments, “historical context undermines the legitimacy of abortion restrictions passed under conditions of disenfranchisement, unfreedom, and oppression.”¹⁶³ For more recently enacted laws, “such history allows advocates to draw connections between the stereotypes and assumptions that underpin today’s abortion restrictions and those of the past.”¹⁶⁴ Archival repositories such as HathiTrust now allow advocates to search for state-specific documents that starkly illustrate the constitutionally problematic motives that animated abortion restrictions, such as nineteenth and early-twentieth-century medical society publications. Advocates also spotlight the “undemocratic processes by which early abortion bans

¹⁵⁹ For more on *Hodes*, see Mayeri, *Critical Role*, *supra* note 6, at 229–31.

¹⁶⁰ See *Hodes*, 440 P.3d at 491 (citing Siegel, *Reasoning from the Body*, *supra* note 51); 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).

¹⁶¹ Mayeri, *Critical Role*, *supra* note 6, at 236.

¹⁶² See *Allegheny Reproductive Health Ctr. v. Penn. Dep’t Hum. Servs.*, 309 A.3d 808, 870–71 (Pa. 2024); see also *id.* at 961 (Wecht, J., concurring). For a detailed discussion of these opinions, see Mayeri, *Critical Role*, *supra* note 6, at 237–44.

¹⁶³ Mayeri, *Critical Role*, *supra* note 6, at 244.

¹⁶⁴ *Id.*; for examples, see *id.* at 244–51.

became law.”¹⁶⁵ Even provisions enacted in the mid- to late-twentieth century are susceptible to this critique because of the dearth of women in state legislatures and constitutional conventions.¹⁶⁶ And recently passed laws frequently echo archaic justifications for abortion bans, such as “protecting” maternal health.¹⁶⁷

Even in courts that adhere to a narrow history-and-tradition methodology similar to *Dobbs*’s, advocates can and do argue for a “history and tradition of protecting women’s lives and health.”¹⁶⁸ Advocates challenging abortion bans that provide few or no exceptions have successfully argued that even the nineteenth-century proponents of these bans understood them to exclude health-preserving and life-saving medical care and to allow physicians wide discretion to exercise their medical judgment to end hazardous pregnancies.¹⁶⁹ Arguments like these can serve a dual purpose: they both answer *Dobbs*’s history-and-tradition approach on its own terms and highlight the extremism of abortion bans that make no life and health exceptions. For example, a concurrence from Oklahoma Supreme Court Justice Yvonne Kauger in a case challenging the state’s extreme ban emphasized that even at a time “when a woman had little or no say” in her political or personal life—no right to vote, be a juror, work in many jobs, maintain an independent financial identity, be free from spousal violence, dress as she wished—Oklahoma law consistently allowed life-saving abortions.¹⁷⁰

This Essay has focused on courts, but other venues are at least as important sites of constitutional memory- and meaning-making: from legislatures and administrative agencies, to workplaces and schools, college campuses and street protests, ballot initiatives and social media, living rooms and civic spaces. Here too, reproductive injustice and feminist mobilizations have much to recommend them as untapped

¹⁶⁵ *Id.* at 247.

¹⁶⁶ *See id.*

¹⁶⁷ *Id.* at 249.

¹⁶⁸ *Id.* at 251.

¹⁶⁹ *Id.* at 253–54. Siegel and Ziegler’s research on the Comstock Act confirms a similar history and tradition at the federal level: they “demonstrate that the statute’s original language . . . referred to a crime requiring proof of a termination performed for unlawful purposes, and was traditionally understood to exclude a physician’s attempts to save a pregnant woman’s life.” Reva Siegel & Mary Ziegler, *Access to Life- and Health-Preserving Care—A History and Tradition*, BALKINIZATION (May 16, 2024, 10:00 PM), <https://balkin.blogspot.com/2024/05/access-to-life-and-health-preserving.html> [https://perma.cc/9DWT-3SL8]. Further, “[j]udicial interpretation of the Comstock Act in the years immediately following enactment . . . consistently shielded the doctor-patient relationship.” *Id.*; see also Reva Siegel & Mary Ziegler, *Abortion’s New Criminalization—A History-and-Tradition Right to Healthcare Access After Dobbs and the 2023 Term*, VA. L. REV. (forthcoming 2025).

¹⁷⁰ Okla. Call for Reproductive Just. v. Drummond, 526 P.3d 1123, 1139–43 (Okla. 2023) (Kauger, J., concurring). For more, see Mayeri, *Critical Role*, *supra* note 6, at 254–55.

resources. The reproductive justice movement's emphasis on narrative-shifting and storytelling can inform the creation of constitutional as well as other forms of collective memory.¹⁷¹ As Balkin reminds us, "the quest for political redemption requires us to remember the past every bit as much as the quest for restoration does."¹⁷²

Perhaps the most urgent forum for collective and constitutional memory creation today is electoral politics. The Right's stunning success in using abortion to mobilize voters and transform the federal judiciary in service of a much broader reactionary agenda has reverberated throughout our polity in ways that resonate with voters like never before. It is no exaggeration to say that the future of multiracial democracy may depend upon the same questions of reproductive injustice and feminist mobilization that so powerfully illustrate the stakes of constitutional memory and erasure.

¹⁷¹ See generally LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* (2017).

¹⁷² BALKIN, *supra* note 1, at 176.