COMMENTARY

HOW "HISTORY AND TRADITION" PERPETUATES INEQUALITY: *DOBBS* ON ABORTION'S NINETEENTH-CENTURY CRIMINALIZATION

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ABSTRACT

In this Commentary, I show how the tradition-entrenching methods the Court employed to decide *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* and *Dobbs v. Jackson Women's Health Organization* intensify the gender biases of a constitutional order that for the majority of its existence denied women a voice in lawmaking and restricted women's roles. The tradition-entrenching methods the Court employed to decide *Bruen* and *Dobbs* elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law. The methods the Court employs are gendered in the simple sense that they tie the Constitution's meaning to lawmaking from which women were excluded and in the deeper sense that the turn to the past provides the Court resources for expressing identity and value drawn from a culture whose laws and mores were more hierarchical than our own.

Sampling their recent opinions, Part II of this Commentary shows that the conservative Justices have repudiated past practices when those practices expressed racism or nativism to

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which the Justices objected. Yet, Part III of this Commentary shows that in *Dobbs* the conservative Justices embraced past practices as the nation's history and tradition, counting abortion bans enacted with the support of the nineteenth-century anti-abortion campaign without scrutinizing evidence that the campaign mixed arguments for protecting unborn life with arguments that banning abortion would prevent ethnic replacement and would enforce wives' marital and maternal roles. In Part IV, I suggest that Justice Alito might have refused to defer to prejudice of the past as he did in *Espinoza v. Montana Department of Revenue* if he saw religious liberty, rather than abortion rights, at stake.

There are several reasons for revisiting the claims about abortion, history, and tradition on which the *Dobbs* decision rests. Even if the Supreme Court itself never acknowledges *Dobbs*'s selective and inaccurate account of the historical record, as it acknowledged historical errors of *Bowers v. Hardwick* in *Lawrence v. Texas*, there is value in recognizing that the Court's claims about the past have a politics. In demonstrating that the Court selectively defers to the past, this Commentary shows how the Court's history-and-traditions method provides new justifications for enforcing old forms of status inequality. This Commentary builds the historical record critical to debates over the criminalization of abortion in state courts and legislatures. And it contributes to Professor Melissa Murray's remarkable and wide-ranging account of how the jurisprudence of *Bruen* and *Dobbs* is gendered: *Children of Men: The Roberts Court's Jurisprudence of Masculinity*.

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> The law is wholly masculine: it is created and executed by our type or class of the man nature. The framers of all legal compacts are thus restricted to the masculine stand-point of observation—to the thoughts, feelings, and biases of men. The law, then, could give us no representation as women, and therefore, no impartial justice, even if the present law-makers were honestly intent upon this; for we can be represented only by our peers.
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> Antoinette Brown [Blackwell], 1852[1]

1. THE PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT SYRACUSE, SEPT. 8TH, 9TH & 10TH, 1852 20–21 (J.E. Masters 1852). Antoinette Brown attended the first national women's rights convention in 1850; advocated for women's rights to speak from the pulpit (she was the first woman to be ordained as a Protestant minister in the United States); worked for abolition, temperance, and social reform; and lived to cast a vote in the first election after ratification of the Nineteenth Amendment. *See* FRIENDS AND SISTERS: LETTERS BETWEEN LUCY STONE AND ANTOINETTE BROWN BLACKWELL, 1846–93

I. INTRODUCTION

Under the Second Amendment, as interpreted by the Supreme Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,[2] can the government enforce a law prohibiting a person who is subject to a restraining order for intimate partner violence from possessing a weapon?[3] The stakes are high: the presence of a gun in a domestic violence situation increases the risk of homicide by 1,000%.[4] Applying *Bruen*'s history-and-tradition method in *United States v. Perez-Gallan*,[5] Judge David Counts ruled that the 1994 law authorizing the government to prohibit persons under court order for partner violence from possessing a gun was unconstitutional. Judge Counts reasoned that the general societal problem of intimate partner violence has existed from before the founding, and until the 1970s, the American legal system barely took formal legal action in response.[6] For Judge Counts, that meant under the history-and-tradition method espoused by *Bruen*, the "domestic violence prohibitor" was unconstitutional because it broke with that historical tradition of inaction.[7] Professor Peter

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xviii–xix, 13, 88, 234 (Carol Lasser & Marlene Deahl Merrill eds., 1987). She also supported ratification of the Fifteenth Amendment when woman suffragists were divided over its drafting. *See id.* at 164–66.

2. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

3. Under the Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 922(g)(8), the government may prohibit firearm possession for "any person . . . who is subject to a court order that" (1) "restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury"; and (2) "includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child" or prohibits the use or threat of use of physical force.

4. Chelsea M. Spencer & Sandra M. Stith, *Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis*, 21 TRAUMA, VIOLENCE, ABUSE 527, 535–36 (2020) ("The perpetrator's direct access to guns increased the likelihood of IPH [intimate partner homicide] compared to IPV [intimate partner violence] by 11 times.").

5. United States v. Perez-Gallan, No. PE:22-CR-00427, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022).

6. *Id.* at *4–5, *12.

7. *Id.* at *10 ("*Bruen* is clear: if a challenged regulation addresses a 'general societal problem that has persisted since the 18th century,' and 'earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.'" (quoting *Bruen*, 142 S. Ct. at 2131)). Since *Perez-Gallan*, the Fifth Circuit has ruled the domestic violence prohibitor unconstitutional on the grounds that there was no sufficiently analogous historical tradition to uphold the

Shane dryly observed, "There is nothing subtle about how *Perez-Gallan* constitutionalized traditional misogyny. It is all spelled out."[8] *Bruen* does not require this result,[9] but its history-and-tradition method provides judges opportunities to "ventriloquiz[e] historical sources with their own values,"[10] to employ law of earlier eras to infuse traditional understandings of gender into contemporary constitutional decisions.[11]

As the epigraph opening this Commentary reminds us, the gender of the law was clear during the centuries that men denied women the vote while claiming to represent women in politics.[12] Woman suffragists demanded self-government and attacked men's claims that women were virtually represented in American government as no representation at all.[13] But women's enfranchisement did not bring this era to an end, as recent history-and-tradition decisions like *Perez-Gallan* demonstrate. In 2022, the Supreme Court expanded the gender-based structures of representation that suffragists protested when the Court adopted

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statute under *Bruen*. *See* United States v. Rahimi, No. 21-11001, 2023 WL 2317796 (5th Cir. Mar. 2, 2023). *Bruen* by no means compels this result.

8. Peter M. Shane, *The Trickle-Down Supreme Court*, WASH. MONTHLY (Dec. 14, 2022), https://washingtonmonthly.com/2022/12/14/the-trickle-down-supreme-court [https://perma.cc/GEM6-N7YQ].

9. For an account of *Bruen*'s historical-analogical method, see Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4355024 [https://perma.cc/5MVL-FF8G]. For discussion of *Bruen*'s standard in *Perez-Gallan* and other cases, see *id.* (manuscript at 24–27).

10. *Id.* (manuscript at 26). For an in-depth account of how originalism and history-and-tradition methods enable judges to read their values into historical sources, see Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1134 ("Originalist judges ventriloquize historical sources.").

11. *See* Blocher & Siegel, *supra* note 9 (manuscript at 26–28).

12. For examples of these claims of virtual representation asserted during the debates over Reconstruction, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981–87 (2002).

13. *See id.* at 987–93; Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 458–60 (2020). On the colonists' gendered understanding of virtual representation, see Joan R. Gundersen, *Independence, Citizenship, and the American Revolution*, 13 SIGNS 59, 63 (1987) ("[C]olonial political thought rejected the argument that the colonies were virtually represented in parliament, that they shared a community of interests with England. . . . However, these leaders continued to apply theories of virtual representation to colonial legislatures and to families.").

"history-and-tradition" methods in *Bruen*,[14] expanding Second Amendment rights, and in *Dobbs v. Jackson Women's Health Organization*,[15] overturning abortion rights.

In this Commentary, I show how the tradition-entrenching methods the Court employed to decide *Bruen* and *Dobbs* intensify the gender biases of a constitutional order that for the majority of its existence denied women a voice in lawmaking and restricted women's roles. The tradition-entrenching methods the Court employed to decide *Bruen* and *Dobbs* tie the Constitution's meaning to lawmaking of the past and so elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law. The 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 our own.[16] This Commentary demonstrates that the turn to history conceals rather than disciplines the expression of judicial values.

Sampling recent opinions, this Commentary shows that the conservative Justices have repudiated past practices when those practices expressed racism or nativism to which the Justices objected. But in *Dobbs*, the conservative Justices embraced past practices as the nation's history and tradition, counting abortion bans enacted with the support of the nineteenth-century anti-abortion campaign without scrutinizing evidence that the campaign mixed arguments for protecting unborn life with arguments that banning abortion would prevent ethnic replacement and would enforce wives' marital and maternal roles.

There are several reasons for revisiting the claims about abortion, history, and tradition on which the *Dobbs* decision rests. Even if the Supreme Court itself never acknowledges *Dobbs*'s selective and inaccurate account of the historical record, as it acknowledged historical errors of *Bowers v. Hardwick* in *Lawrence*

14. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

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

16. *See* Siegel, *supra* note 10, at 1134 (observing that originalism "locates democratic authority in imagined communities of the past . . . about which originalism reasons in lawmaking stories that entrench norms, traditions, and modes of life associated with old status hierarchies" (emphasis omitted)).

v. Texas,[17] there is value in recognizing that the Court's claims about the past have a politics.[18] In demonstrating that the Court selectively defers to the past, this Commentary shows how the Court's history-and-traditions method provides new justifications for enforcing old forms of status inequality. This Commentary builds the historical record critical to debates over the criminalization of abortion in state courts and legislatures. And it contributes to Professor Melissa Murray's remarkable and wide-ranging account of how the jurisprudence of *Bruen* and *Dobbs* is gendered.

Writing 170 years after Antoinette Brown's declaration that "[t]he law is wholly masculine," Professor Melissa Murray has described *Bruen* and *Dobbs*, along with *Kennedy v. Bremerton School District*,[19] as part of "the Court's ascendant 'jurisprudence of masculinity.' From cases expanding the scope of gun rights, free exercise of religion, and property rights, the Court in recent years has cobbled together a jurisprudence that prioritizes, both explicitly and implicitly, men's rights, even as it diminishes and constrains women's rights."[20] "Rights to free exercise of religion, speech, and guns are preferred and prioritized," Professor Murray argues in her Frankel Lecture Address, "while other fundamental rights, including the right of privacy and the right to abortion, are discredited or discarded entirely."[21] The Court "privileges rights that are 'coded' male" and the "exercise of constitutional rights *by men*."[22]

It is not simply that rights coded male get the protection of the Court while other rights do not. Professor Murray observes that rights coded male get *super* protections from the Court, protections so powerful that they reorganize the public–private

17. Lawrence v. Texas, 539 U.S. 558, 564–67 (2003); *see also* George Chauncey, *"What Gay Studies Taught the Court": The Historians' Amicus Brief in* Lawrence v. Texas, 10 GLQ 509 (2004), https://doi.org/10.1215/10642684-10-3-509 [https://perma.cc/HF9K-KL6P] (recounting historians' efforts to correct the Court's historical errors and historical selectivity in *Bowers v. Hardwick* and reproducing the amicus brief they filed).

18. *See* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 23 (2022) ("Because constitutional memory is employed to legitimate the exercise of authority, constitutional memory has a politics.").

19. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

20. Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 803 (2023) (citations omitted).

21. *Id.* at 804.

22. *Id.*

divide: "While *Kennedy* and *Bruen* make clear that the public sphere may be transformed into a private refuge for praying or gun-toting men, the possibilities of such sanctuary are more elusive for women after *Dobbs*."[23] The Court accords men rights so powerful that they can transform public spaces into a private sphere of male prerogative: "Coach Kennedy's prayers are private conduct and speech, constitutionally insulated from state regulation, even though they are the actions of a public employee that occur on public property."[24] "Under *Bruen*'s logic, it is not simply that a man's home is his castle but that even *public* spaces, like the New York City subway, can be viewed as an extension of the home and castle when the safety of the individual male rights bearer is [under] threat[]."[25] By contrast, in *Dobbs*, Professor Murray observes: "[T]he transmutation of space works in the opposite direction from *Kennedy* and *Bruen*, transforming the private sphere into public space suitable for state regulation."[26]

Professor Murray sees the originalism of the cases as participating in this same jurisprudence of masculinity, precisely because the Court is selective in its adherence to method. "To be clear, originalism, on its face, knows no gender," Professor Murray reasons. "As an interpretive method, it relies entirely on the neutral recounting of historical facts." [27] But as applied by the Roberts Court, she argues, "facts and sources [are] cherry-picked and prioritized" in ways that serve gendered ends.[28]

In this Commentary, I differ with Professor Murray's assessment of originalism in one key respect. Originalism *is* gendered in at least the following simple sense. Most who are committed to originalist and history-and-tradition methods would interpret our Constitution in light of lawmaking at the Founding and at Reconstruction, times when men excluded women from lawmaking and saw women as the kind of persons who were to be governed and not fit to engage in self-governance. In this respect, originalism is deeply gendered and, for that matter, raced and

23. *Id.* at 831.
24. *Id.* at 832.
25. *Id.*
26. *Id.* at 830–31.
27. *Id.* at 857.
28. *Id.*

classed.[29] It elevates in significance and in weight the decisions, deliberations, and cultural mores of a class of lawmakers who were only a minority of the adult population and who saw fit to exclude others from participating in self-governance.[30]

Most originalists are unconcerned about this methodological bias—uncritical of the democratic deficits of the Founders' Constitution and of the ways in which their own interpretive method in turn exacerbates those deficits.[31]

We know that today's constitutional order still depends on assumptions of virtual representation. Only recently have women taken seats on the Supreme Court and begun to play a role in the articulation of our fundamental law.[32] Yet women are asked to accept a Constitution that was written and interpreted for centuries by men *only* as a Constitution that speaks for men and women *both*. What does it mean when the Supreme Court endorses originalist and history-and-traditions methods that amplify this bias, by centering the Constitution's meaning around lawmaking from which women were excluded—a question the dissenting

29. These methods identify the sources of the Constitution's meaning in the era of its ratification or at other times in the deep past, though they may differ in the extent to which they consider post-ratification sources as legitimately consulted. For recent examples, see Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366019 [https://perma.cc/TUZ6-MBSU]; Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition* (Jan. 26, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338811 [https://perma.cc/Y6MM-B946].

30. For further discussion of the antidemocratic logics of originalism, see Siegel, *supra* note 10, at 1188–99.

31. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 395 (2007) (claiming that "women were virtually represented . . . by their male relatives" and that they sometimes "believed that they should not have the right to participate"). *But see* Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 401–02 (2018) (suggesting an originalist model that would "incorporat[e] more diverse populations into the corpus of evidence of founding-era meaning"); James W. Fox, Jr., *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 U. PA. J. CONST. L. 267, 270, 349 (2021) (advocating for an inclusive approach that looks to multiple counterpublics rather than only to a unitary entity).

32. After Justice Ketanji Brown Jackson's appointment, only six of the 116 Supreme Court Justices have been women. *See* Jessica Campisi & Brandon Griggs, *Of the 115 Supreme Court Justices in US History, All but 7 Have Been White Men*, CNN (Mar. 24, 2022, 8:23 AM), https://www.cnn.com/2022/03/24/politics/supreme-court-justices-minorities-cec/index.html [https://perma.cc/FJ9W-DTF5]; *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/TDG9-F3W7] (last visited Jan. 9, 2023).

Justices asked in *Dobbs*.[33] As the dissenters in *Dobbs* pithily summed it up: "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."[34]

This Commentary proceeds in three parts. Part II shows that the Justices who decided *Bruen* and *Dobbs* do not systematically defer to the past. Because their commitment to originalism and to history and tradition is selective, as Professor Murray[35] and so many others have observed,[36] we can see how the conservative

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33. There is a dispute between the majority and the dissent in *Dobbs* on just this point. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2260 (2022).

> [F]or more than a century after 1868—including "another half-century" after women gained the constitutional right to vote in 1920—it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule *Roe* and *Casey*. The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.

Id. (internal citations omitted). *But see id.* at 2324–25 (Breyer, Sotomayor & Kagan, JJ., dissenting).

> "[P]eople" 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. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) . . . Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. *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.*

Id. (emphasis added).

34. *Id.* at 2325.

35. Murray, *supra* note 20, at 856–57.

36. *See, e.g.*, ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 139 (2022) ("[O]riginalists often abandon the method when it fails to give them the results they want. Conservative justices use originalism when it justifies conservative decisions, but they become non-originalist when doing so serves their ideological agenda."); ERIC J. SEGALL, ORIGINALISM AS FAITH 125–30 (2018) (explaining that Justices Thomas and Scalia fail to "provide[] significant historical analysis of" campaign finance reform, which "stands in stark contrast to their harsh critiques of other justices, who they claimed ignored text and original meaning in other cases" and that "[n]either justice has ever shown, or tried to show, that the original meaning of [the Fourteenth] Amendment justifies" rejecting "any racial criteria or preferences"); Richard H. Fallon,

Justices' claims on the past express value and identity. Part III brings this insight to *Dobbs*'s account of the historical record. *Dobbs* defines America as an abortion-banning nation not simply by counting statutes but by declaring the bans enacted for legitimate reasons, over objections that the campaign was partly based on constitutionally illegitimate reasons—that the anti-abortion campaign mixed arguments for protecting the unborn with pleas for protecting the ethno-religious character of the nation and for enforcing women's marital and maternal roles. To justify overturning *Roe*, the Justices defined constitutional liberties through laws enacted for reasons and through processes that today we would call unconstitutional. In Part IV, I contrast the conservative Justices' approach to past practice across fundamental rights cases and suggest that Justice Alito might approach the record in *Dobbs* differently—and refuse to defer to prejudice of the past—if he saw religious liberty, rather than abortion rights, at stake.

II. CONSERVATIVE JUSTICES EMBRACE THE CONSTITUTION OF TRADITION AND THE CONSTITUTION OF ASPIRATION

Sometimes judges decide cases recognizing us as the kind of people we are; and sometimes judges decide cases recognizing us as the kind of people we aspire to be. Both forms of interpretation, backward- and forward-looking, can express the identity of the American people. A judge invoking tradition looks backward to express identity through appeals to custom and memory, rather than into the future in which we might define ourselves by living in accordance with our principles and ideals.

Professor Hanna Pitkin has described these as complementary modes of constitutional reasoning. On the bicentennial, she invited Americans to consider "two uses of the word 'constitution.'"[37] Constitution means "a characteristic way of

Selective Originalism and Judicial Role Morality (Feb. 3, 2023) (manuscript at 10–12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347334 [https://perma.cc/R8VJ-6WAA]; Eric Segall, *Originalism as Dangerous Nonsense*, DORF ON L. (Nov. 3, 2022, 10:48 AM), http://www.dorfonlaw.org/2022/11/originalism-as-dangerous-nonsense.html [https://perma.cc/8BSF-7N6G] (charging the Court's originalists with selectivity). For some of my own work, see, e.g., Siegel, *supra* note 10, at 1166–67, 1178–80; Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 563–64 (2006).

37. Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167 (1987).

life, the national character of a people, their ethos or fundamental nature as a people."[38] "In this sense, our constitution is less something we *have* than something we *are*."[39] She contrasted a second use of "'constitution' . . . pointing to the action or activity of constituting—that is, of founding, framing, shaping something anew," observing that this activity "is an aspect of the human capacity . . . to innovate, to break the causal chain of process and launch something unprecedented."[40] Our practice of constitutionalism spans both usages: "the constitution we have depends upon the constitution we make and do and are."[41]

The Justices who decided *Bruen* and *Dobbs* know perfectly well how to modulate between these two different phases of constitutionalism. In *Bruen* and *Dobbs*, they embraced interpretive practices that define American law through the nation's traditions but, in other contexts, these same Justices endorse different modes of interpretation that accommodate change or that self-consciously break with the mores of the past and interpret our founding charter aspirationally, to forge a constitutional community that more nearly embodies our constitutional ideals. Justices who claim fidelity to originalism regularly depart from its methods.[42] Justices who identify with our forebears will—on other occasions—denounce our forebears as too biased and entrenched in status-based reasoning to decide our law for us.

In *Bruen*, the Court looked to history and tradition, the Court explained, to ascertain the original public meaning of the Second Amendment's text.[43] *Bruen* replaced a two-step means-ends test for determining the constitutionality of firearms regulation with a requirement that government show that gun control "regulation is consistent with this Nation's historical tradition of firearm regulation."[44] Following that method, a court just enjoined a recently enacted New York law regulating guns in the aftermath of *Bruen*, invalidating many of its parts because the judge could

38. *Id.*
39. *Id.*
40. *Id.* at 168.
41. *Id.* at 169.
42. *See* sources cited *supra* note 36.
43. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126–28 (2022).
44. *Id.* at 2125–26.

not find sufficiently similar historical analogues.[45] In *Dobbs,* the Court applied the substantive due process doctrine to determine the meaning of the Fourteenth Amendment's liberty guarantee, tying the liberty guarantee to practices that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[46] The Court declared that the Fourteenth Amendment's liberty guarantee did not protect abortion rights because a number of states had begun to ban abortion at the time that the Amendment was ratified.[47]

These decisions tie the Constitution's present meaning to past practices and understandings, uncritically, as if there were no reason to be concerned about incorporating these past practices and understandings into our present constitutional order. But the authors of these decisions do not demand uncritical deference to the past. The deference to past orderings they require in decisions like *Bruen* and *Dobbs* reflects their belief that *in these doctrinal contexts the past is a past with which Americans can identify*—exactly the opposite of what Justice Scalia claimed about the historical method. In *Originalism: The Lesser Evil*, Justice Scalia wrote that looking to history "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[48] He argued that originalism provides judges objective, value-neutral methods by which they can decide cases without regard to their own personal commitments.[49] Instead, I identify some contexts in which we can see that these Justices' allegiance to past practice breaks down at exactly those points where past practice is rooted in commitments that the Justices abhor. At these junctures, the Justices shift register and express identity, not through tradition but in the register of contemporary values and the Constitution of Aspiration.

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45. Antonyuk v. Hochul, No. 22-CV-0986, 2022 WL 16744700, at *2, *41, *46, *51, *53–54, *60, *62, *67–68, *71, *73, *75, *77, *80, *86 (N.D.N.Y. Nov. 7, 2022).

46. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *see also* Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

47. *Dobbs*, 142 S. Ct. at 2235–36.

48. Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. CIN. L. REV. 849, 864 (1989).

49. *Id.* at 863.

We can see this when Justice Thomas encounters past practices enforcing race inequality. In *Bruen*, the Court mandated deference to arms regulation of the past. But in *McDonald v. City of Chicago*, an earlier case holding that the Second Amendment is incorporated under the Fourteenth Amendment's Due Process Clause, the Court offered a more complex account of the nation's history in regulating arms, emphasizing race-based state action directed at free Blacks who possessed or sought to possess weapons.[50] In *McDonald*, concurring in part and in the judgment, Justice Thomas argued against relying on substantive due process to incorporate the Second Amendment, as the majority had decided to, and called upon the Court instead to incorporate the Second Amendment through the Privileges or Immunities Clause.[51] In this opinion, Justice Thomas urged the Court to overrule major parts of the *Slaughter-House Cases*[52] and *United States v. Cruikshank*[53] and held out the right to bear arms as a symbolic repudiation of the history of racist mob violence that spanned the Reconstruction era to the 1960s, in the process recounting lynchings from 1882 to 1968.[54] Justice Thomas offered an originalist case for reinterpreting the clauses of the Fourteenth Amendment that was based on lawmaking of the past, but he continued for pages in his *McDonald* opinion, employing constitutional memory of a very different kind, asking for the Court and the nation to repudiate and to remedy myriad acts of

50. McDonald v. City of Chicago, 561 U.S. 742, 770–77, 791 (2010).

51. *Id.* at 805, 812, 823, 858 (Thomas, J., concurring in part and in the judgment).

52. *Id.* at 851–52, 855 (rejecting the Court's decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), to exclude constitutionally enumerated rights from protection under the Fourteenth Amendment's Privileges or Immunities Clause).

53. *Id.* at 808, 850 (citing United States v. Cruikshank, 92 U.S. 542, 548–49, 551–53 (1876)); *id.* at 858 ("There is nothing about *Cruikshank*'s . . . holding that warrants its retention.").

54. *Id.* at 855–57 ("*Cruikshank*'s holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery. Without federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were tragically successful in waging a campaign of terror against the very people the Fourteenth Amendment had just made citizens.").

violent racial domination licensed by Constitution, common law, and positive law during the nineteenth *and* twentieth centuries.[55]

In breaking with the Court to advance an originalist argument that called for overturning a century and a half of precedent and reorganizing the Court's approach to interpreting the Second and the Fourteenth Amendment, Justice Thomas could be understood as demanding that the nation define itself through its past, by submission to the Constitution of Tradition. But there is passion driving Justice Thomas's appeal to the past, his demand that the Court repudiate its decisions in the *Slaughter-House Cases* and *Cruikshank*—and it is in service to the Constitution of Aspiration. In citing documents from Reconstruction, Justice Thomas is seeking to reconstruct American ways. His *McDonald* concurrence chronicles the many forms of violent racial domination that American law has licensed and calls for their repudiation and repair through expansive recognition of Second Amendment rights that will secure the equal citizenship of Blacks—paradigmatically, Black men.[56]

Justice Thomas took this same constitutionally reconstructive attitude toward the past in his concurring opinion in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*,[57] a case involving a law prohibiting abortions when the pregnant person allegedly seeks the abortion solely because of the fetus's race, sex, or disability status.[58] Justice Thomas, famously, penned a

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55. *Id.* at 855–58 ("*Cruikshank* is not a precedent entitled to any respect. The flaws in its interpretation of the Privileges or Immunities Clause are made evident by the preceding evidence of its original meaning, and I would reject the holding on that basis alone. But, the consequences of *Cruikshank* warrant mention as well.").

56. *Id.* at 827, 855–58; *cf. id.* at 772, 775–76 (majority opinion) ("Every man . . . should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete." (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866) (remarks of Sen. Samuel Pomeroy))).

57. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782–83, 1792 (2019) (Thomas, J., concurring).

58. *Id.* at 1783. Advocates had supported passage of such laws invoking fears of eugenics and citing higher abortion rates among women of color as evidence of targeting by clinics. *See* April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 548–49 (2016) (noting that supporters of Arizona's race-selective abortion ban asserted that the higher

concurrence that credited reason bans like the Kentucky law with "promot[ing] a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[59] To connect abortion to eugenics, Justice Thomas recounted a history focused on Margaret Sanger's work providing birth control, invoking her views about race as reason to characterize practices of birth control and abortion in the Black community as eugenics, even though Justice Thomas acknowledged that Sanger opposed abortion and that many women and men of color advocated for controlling fertility as in the interest of individual, family, and community.[60] Justice Thomas's opinion conflated (1) the decisions of women of color to control fertility; and (2) state projects of eugenics in an opinion that seemed to join the debate over fertility control *within* the Black community, as Professor Melissa Murray has suggested.[61] As Professor Khiara Bridges has observed, Justice Thomas's opinion in *Box* is not an expression of originalism.[62] In *Box*, Justice Thomas did not look to the past as a

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rate of abortion among black women "was the result of a desire to reduce the population of black people," and that abortion providers "were accused of 'targeting' black women for abortions").

59. Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1604 (2022) (quoting *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring)).

60. *See Box*, 139 S. Ct. at 1783–88, 1790–91 (Thomas, J., concurring); *see also* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2040 (2021).

> [S]cholars have noted that increased access to birth control was not simply thrust upon the Black community in an unwelcome attempt to reduce the Black birthrate, as Justice Thomas's history suggests. As [Dorothy] Roberts explains, "Black women were interested in spacing their children and Black leaders understood the importance of family-planning services to the health of the Black community," which was plagued by high rates of maternal and infant mortality.

Id. (citations omitted).

61. Melissa Murray details an intergenerational debate within the Black community over birth control and abortion in which women of color spoke out about the importance of controlling fertility. Murray, *supra* note 60, at 2040–48.

62. Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 61 (2022).

> [F]or Justice Thomas, originalism is not an inexorable command, but rather a strategy that he deploys when it leads to the preferred result. Justice Thomas's decidedly nonoriginalist concurrence in *Box* provides invidious explanations for disparities that, as this Foreword shows, can be understood quite differently. When those disparities are framed in a way that suggests the impropriety of abortion, Justice Thomas proposes that they are relevant to the constitutional inquiry, and originalism gets tossed to the wayside. When those disparities are

source of authority and revered tradition. Instead, he *repudiated* past practice as subordinating and status-enforcing and called for the nation to change course.[63] Like his opinion in *McDonald*, his opinion in *Box* appealed to the Constitution of Aspiration.

What of Justice Alito? He too is perfectly willing to attack traditional practices of the past. Consider *Espinoza v. Montana Department of Revenue*.[64] There, the Supreme Court struck down a longstanding "no-aid" provision of the Montana Constitution that prohibited any aid to a school controlled by a "church, sect, or denomination" as violating the First Amendment's Free Exercise Clause.[65] In a lengthy concurring opinion, Justice Alito invoked *Ramos v. Louisiana*,[66] a decision from which he dissented,[67] for the proposition that a law is unconstitutional if it was "originally adopted . . . for racially discriminatory reasons," even if subsequently reenacted for nondiscriminatory reasons.[68] Justice Alito cited twenty briefs arguing that Montana's no-aid provision was modeled on the failed Blaine Amendment to the Constitution of the United States and fueled by anti-Catholic animus and, in a lengthy opinion, recounted animus directed against Catholics sweeping mid-nineteenth-century America as reason to invalidate Montana's no-aid provision even if it was subsequently reenacted in the 1970s with Catholic participation.[69] He filled his lengthy

> framed in a way that suggests the necessity of abortion, Justice Thomas undoubtedly would argue that they are irrelevant to the constitutional inquiry. Why? Because originalism requires an interrogation into the meaning of the Constitution at the time of its adoption. The hypocrisy is staggering.

Id.

63. Professor Murray has offered detailed accounts correcting the historical allegations that appear in Justice Thomas's *Box* opinion. *See* Murray, *supra* note 59, at 1604–07; Murray, *supra* note 60, at 2040.

64. Espinoza v. Mont. Dep't of Revenue,140 S. Ct. 2246 (2020).

65. *Id.* at 2255–56 (quoting MONT. CONST. art. X, § 6(1)) ("The Free Exercise Clause protects against even 'indirect coercion,' and a State 'punishe[s] the free exercise of religion' by disqualifying the religious from government aid as Montana did here." (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017))).

66. *Id.* at 2267 (Alito, J., concurring) (citing Ramos v. Louisiana, 140 S. Ct. 1390 (2020)).

67. *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting).

68. *Espinoza*, 140 S. Ct. at 2267–68 (Alito, J., concurring).

69. *Id.* at 2268–74.

opinion with stories of nineteenth-century nativism.[70] He reproduced a nativist cartoon.[71]

The majority in *Espinoza* was not prepared to sign onto Justice Alito's nineteenth-century history as an explanation for the unconstitutionality of Montana's no-aid provision.[72] More than one scholar has questioned whether Justice Alito collapsed the complex historical record of no-aid provisions (which began before Catholic immigration) to fit the memory of anti-Catholic nativism that unquestionably did shape nineteenth-century politics.[73] Without going into this dispute, it is enough to say that Justice Alito found the story of anti-Catholic animus so powerful that he viewed it as a freestanding reason to strike down the no-aid provision of the Montana Constitution. And after filling the pages of the U.S. Reports with the constitutional memory of nativist bias, Justice Alito demanded its contemporary repudiation, *even if* Montana's no-aid provision was enacted by groups including

70. *Id.* at 2269 ("An entire political party, the Know Nothings, formed in the 1850s 'to decrease the political influence of immigrants and Catholics,' gaining hundreds of seats in Federal and State Government. Catholics were considered by such groups not as citizens of the United States, but as 'soldiers of the Church of Rome,' who 'would attempt to subvert representative government.'" (first quoting T. ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S, at 110, 127–28, 135 (1992); and then quoting P. HAMBURGER, SEPARATION OF CHURCH AND STATE 206 (2002))).

71. *Espinoza*, 140 S. Ct. at 2269–70 (reprinting a "famous cartoon, published in Harper's Weekly in 1871, which depicts Catholic priests as crocodiles slithering hungrily toward American children as a public school crumbles in the background").

72. Although the majority recounted the history of the Blaine Amendment and its "state counterparts"—as well as the state's argument that "Montana . . . re-adopted its own [no-aid provision] in the 1970s, for reasons unrelated to anti-Catholic bigotry"—it demurred on the question of whether or not this history matters. *Id.* at 2259 (majority opinion).

73. *See* Steven K. Green, *The Supreme Court's Ahistorical Religion Clause Historicism*, 73 BAYLOR L. REV. 505, 534–38 (2021); *see also* G. Alan Tarr, Espinoza *and the Misuses of State Constitutions*, 73 RUTGERS U. L. REV. 1109, 1119–20 (2021).

> There is some scholarly support for [Alito's] claim that the Blaine Amendment provided the model for states' no-aid provisions. But ultimately the claim rests on the facile assumption that the "real" constitutional law is federal constitutional law and that state constitutional developments are best understood as a response to federal constitutional developments. This assumption is simply wrong. . . . Not surprisingly, then, the relation between the Blaine Amendment and the states' no-aid prohibitions is more complex—and more interesting—than their detractors suggest.

Id. (citations omitted).

Catholics and for reasons having nothing to do with the history of anti-Catholic animus that Justice Alito was reciting.[74] *Why?*

Why did Justice Alito come to this remarkable conclusion in *Espinoza*, especially given that he had originally dissented in *Ramos*? His explanation is extraordinary: "[T]he no-aid provision's terms keep it '[t]ethered' to its original 'bias,' and it is not clear at all that the State 'actually confront[ed]' the provision's 'tawdry past in reenacting it.'"[75] Like Justice Thomas in *McDonald*, Justice Alito's eleven-page concurring opinion in *Espinoza* documenting the history of nativist animus toward Catholic immigrants sought a national recognition and repudiation of past wrongdoing.

In these sole-authored opinions in *McDonald*, *Box*, and *Espinoza*, constitutional memory is playing a powerful role in expressing identity, but not as it ordinarily does in an originalist

74. *Espinoza*, 140 S. Ct. at 2268–74 (Alito, J., concurring). In 1972, the "Aye" vote list for the no-aid provision was populated by Catholic leaders and believers. *See* MONT. CONST. CONVENTION, vol. 7, 2671–72 (Mont. Legis. & Legis. Council 1972), https://courts.mt.gov/external/library/mt_cons_convention/vol7.pdf [https://perma.cc/2ZWE-8VAH]. For instance, "Aye" voter Delegate Arbanas was ordained as a Catholic priest in 1948, served as principal and superintendent of Catholic schools, directed education for the Roman Catholic Diocese of Great Falls, and served as President of the Clergy Senate and the Priest Committee National Chairman of the National Federation of Priests' Councils. *See* MONT. CENTENNIAL COMM'N, 100 DELEGATES—MONTANA CONSTITUTIONAL CONVENTION OF 1972, at 35 (1989). Delegates Driscoll and Schiltz both identified as Catholic and voted in favor of the no-aid provision, even though they expressed skepticism of the 1889 provision's historical record. *See* MONT. CONST. CONVENTION, vol. 6, 2012 (Mont. Legis. & Legis. Council 1972), https://courts.mt.gov/external/library/mt_cons_convention/vol6.pdf [https://perma.cc/D5W2-5LC7]; MONT. CONST. CONVENTION, vol. 7, 2672 (Mont. Legis. & Legis. Council 1972). Indeed, the support on the floor for the no-aid clause was animated by *protection* of religion, rather than disdain for it. In a majority report, the committee of delegates that initially recommended the no-aid provision argued that "public aid to sectarian schools which might result from a relaxation of the prohibition also poses a potential threat to religion," since "[t]he control which comes with aid could excessively involve the state in religious matters and could inadvertently favor one religious group over another." MONT. CONST. CONVENTION, vol. 2, 729 (Mont. Legis. & Legis. Council 1972), https://courts.mt.gov/external/library/mt_cons_convention/vol2.pdf [https://perma.cc/XLS9-PXC8]. Delegates McNeil and Barnard argued that, as believers, they were opposed to the tax money supporting church purposes. MONT. CONST. CONVENTION, vol. 6, 2016–17 (Mont. Legis. & Legis. Council 1972), https://courts.mt.gov/external/library/mt_cons_convention/vol6.pdf [https://perma.cc/D5W2-5LC7]. Delegate Conover pointed out that "three different church denominations" had supported the no-aid provision for the same reason. *Id.* at 2016. Delegate Harper—a clergyman—voiced concerns that government support of religious institutions would hamper religion: "[W]hen state and a dominant church, or any church, get mixed up, it always has seemed to work to the detriment of both the church—the religious institution, finally, and to the state itself." *Id.* at 2012–13. Delegates Conover and Harper proceed to vote in favor of the no-aid provision. MONT. CONST. CONVENTION, vol. 7, 2672 (Mont. Legis. & Legis. Council 1972).

75. *Espinoza*, 140 S. Ct. at 2274 (Alito, J., concurring) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring in part)).

modality, by affirmation of custom and past practice. In the sole-authored concurrences we have examined, Justice Thomas and Justice Alito appeal to constitutional memory as a source of narratives that help the nation define itself aspirationally *against its past practice*. Their appeals to constitutional memory document collective wrongdoing and demonstrate reasons for the ideals through which the United States defines itself as a community of free and equal citizens.

In these passages in *McDonald*, *Box*, and *Espinoza*, we see that the Justices who joined the majority opinion in *Bruen* and *Dobbs* are capable of breaking with the Constitution of Tradition—even in the midst of a tradition-entrenching jurisprudence—when Americans in the past engaged in practices that the Justices do not view as respect-worthy in light of contemporary constitutional understandings.

III. STATUS-BASED REASONING IN THE NINETEENTH-CENTURY CAMPAIGN TO CRIMINALIZE ABORTION

This examination of the opinions of Justice Thomas and Justice Alito casts into sharper relief the gender of their judgment in *Dobbs*. The *Dobbs* majority adopted a history-and-traditions framework that defines liberty in terms of laws enacted by men in the nineteenth century who (1) excluded women from voting; and (2) viewed women as the sort of people fit to be governed rather than to be self-governing. But against the backdrop of opinions analyzed in Part II, we can say even more about the gender of the history-and-traditions analysis in *Dobbs*.

Justice Thomas and Justice Alito do not consistently defer to tradition. In cases where they have found past practice constitutionally objectionable, they have appealed to the Constitution of Aspiration. When we compare the opinions of Justice Thomas and Justice Alito in *McDonald*, *Box*, and *Espinoza* to their reasoning in *Dobbs*, we can see that the Justices are not deferring to the past in *Dobbs* because they believe that the past is always owed deference or because the past is, as Justice Alito claimed in *Dobbs*, a source of disciplining impersonal criteria.[76]

76. Justice Alito claimed that tying the meaning of the Fourteenth Amendment's liberty guarantee to America's "history and traditions" prevented the Justices from imposing their own views on the case at hand. Dobbs v. Jackson Women's Health Org., 142

The conservative Justices defer to the past in *Dobbs* as they do not in other cases as a source of values with which they identify and can ask Americans to identify.

While Justice Scalia and Justice Alito claimed that the history-and-traditions method would constrain judicial discretion, this Commentary shows how the history-and-traditions framework can disguise and help legitimate the expression of judicial values. The conservative majority invokes the *Washington v. Glucksberg*[77] standard, which was advocated by the dissenters in the same-sex marriage case,[78] to justify overturning *Roe* and narrowing constitutional protection for decisions about sexual and family relations.[79] For the Court's conservative Justices, embracing the *Glucksberg* standard does the exact opposite of what Justice Alito claims: by demanding that the nation defer to the Constitution of Tradition, the Court can give full throated expression to the Constitution of Aspiration. The conservative majority of the Roberts Court is interpreting the Constitution to promote family-values traditionalism.

This identification with the past is visible when we compare the opinions of Justice Thomas and Justice Alito in *McDonald*, *Box*, and *Espinoza* with their reasoning in *Dobbs*; but it is also expressed directly in *Dobbs* itself. The tradition to which the Court tethers the due process liberty guarantee in *Dobbs* is not determined simply by counting statutes, as an initial reading of

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S. Ct. 2228, 2247 (2022). "In interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,'" he writes, "we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy." *Id.* The Court continued: "As the Court cautioned in *Glucksberg*, '[we] must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.'" *Id.* at 2247–48 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

77. *Glucksberg*, 521 U.S. at 720–21, 728–32.

78. Obergefell v. Hodges, 576 U.S. 644, 697–99 (2015) (Roberts, C.J., dissenting) ("Our precedents have required that implied fundamental rights be 'objectively, deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" (quoting *Glucksberg*, 521 U.S. at 720–21)); *id.* at 737 (Alito, J., dissenting) ("[T]he Court has held that 'liberty' under the Due Process Clause should be understood to protect only those rights that are 'deeply rooted in this Nation's history and tradition.' And it is beyond dispute that the right to same-sex marriage is not among those rights." (quoting *Glucksberg*, 521 U.S. at 720–21)).

79. For a full-length argument that draws on very different sources to make this point, see Siegel, *supra* note 10, at 1191–93, 1203.

Dobbs might suggest. In a long passage of the *Dobbs* opinion that runs for five paragraphs across two pages, Justice Alito argued that the campaign to criminalize abortion, which led to the enactment of the abortion bans collected in the decision's appendix, was animated by respect-worthy motives; he asserted his belief that rather than expressing status-based judgments about women or Catholics, legislators "instead" were concerned about protecting unborn life.[80]

To justify reversing *Roe* and clear the path for the criminalization of abortion, the *Dobbs* majority constructed a respect-worthy tradition around which to define the Constitution's liberty guarantee. Justice Alito forged this tradition, not simply by counting statutes but by refusing to discuss evidence of the status-enforcing and constitutionally objectionable roles that gender, race, and religion played in the criminalization of abortion.

I briefly consider some of the status-enforcing arguments in the nineteenth-century campaign to criminalize abortion that *Dobbs* discounted. This evidence, which *Dobbs* simply refuses to consider, shows yet another dimension in which the majority's history-and-traditions jurisprudence is gendered, a "jurisprudence of masculinity."

The *Dobbs* Court discounted evidence of nativism and eugenics in the record that should have disturbed at least two of its members given their opinions in *Espinoza* and *Box*—as well as rivers of sexism that apparently was of little consequence to the *Dobbs* majority given its interest in justifying a decision that would empower other actors in the American constitutional order to ban abortion.

My brief comments here are intended to suggest why historians ought to revisit *Dobbs*'s claims about the historical record. Perhaps, in the fullness of time, *Dobbs* will meet the fate that *Bowers*'s[81] claims about history met in *Lawrence v. Texas*.[82] But even if the Court never reexamines the record, it matters for others to do so because these same questions about the historical roots of laws criminalizing abortion bans are now in play *outside* the Supreme Court, in state courts and in state legislatures facing

80. *Dobbs*, 142 S. Ct. at 2254–56. For this reading, see Siegel, *supra* note 10, at 1185–87.

81. Bowers v. Hardwick, 478 U.S. 186, 189–92 (1986).

82. Lawrence v. Texas, 539 U.S. 558, 564–67 (2003); *see also* Chauncey, *supra* note 17.

decisions whether to enact or to strike down laws criminalizing abortion.

As I show, the *Dobbs* Court only would listen to the leaders of the campaign to criminalize abortion when the Justices heard talk of "child-murder"; they tuned out arguments for banning abortion that advocated putting suffrage-seeking women in their place or requiring them to submit to sex and to have babies, as well as arguments that urged Americans to ban abortion to prevent ethnic replacement. In Section III.A, I briefly revisit the campaign and show how the nineteenth-century doctors of the newly organizing American Medical Association (AMA) could simultaneously argue that abortion was wrongful life-taking because life begins at conception and that married women who violated their obligation to bear children would threaten the ethnic character of the nation. In Section III.B, I sample evidence of gender-status-based reasoning from the campaign to criminalize, whose significance the Supreme Court disparaged in *Dobbs*.

A. How Concerns About Ethnic Replacement Mingled with Concerns About Protecting the Unborn in the Nineteenth-Century Campaign to Criminalize Abortion

At the founding and during the early republic, the common law criminalized abortion only *after* quickening—as late as weeks sixteen to twenty-five in pregnancy.[83] In the decades before and after the ratification of the Fourteenth Amendment,[84] there was a campaign to ban abortion.[85] (*Dobbs*'s appendix lists many of these state statutes).[86] Justice Alito's case for a history and tradition

83. *See* JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, at 6 (1978) ("Prosecutors took the precedent so much for granted that indictments for abortion prior to quickening were virtually never brought into American courts. Every time the issue arose prior to 1850, the same conclusion was sustained: the interruption of a suspected pregnancy prior to quickening was not a crime in itself."); Cornelia H. Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 WM. & MARY Q. 19, 20 n.3 (1991) ("Abortion before quickening . . . was not viewed by the English or colonial courts as criminal. No statute law on abortion existed in either Britain or the colonies. . . . [N]o New England court before 1745 had attempted to prosecute a physician or other conspirators for carrying out an abortion."). *Compare* Brief for *Amici Curiae* American Historical Ass'n & Organization of American Historians in Support of Respondents at 2, *Dobbs*, 142 S. Ct. 2228 (No. 19–1392) [hereinafter Brief for *Amici Curiae*], *with Dobbs*, 142 S. Ct. at 2249–51.

84. *Dobbs*, 142 S. Ct. at 2248–49, 2251–53.

85. *Id.* at 2252–53.

86. *Id.* at 2285–300.

focused on the laws enacted—not only their number but also their character: Are they the kind of laws on which we should base the meaning of our Constitution's liberty guarantee?

In *Dobbs*, Justice Alito asserted that the nineteenth-century abortion bans are respect-worthy expressions of respect for unborn life and waived away any questions about the motivations of the legislators who enacted them.[87] After reminding his readers about the Court's reticence to look into legislative motive, hence to consider the social concerns driving the campaign to ban abortion (evidently no obstacle in *Espinoza*, where Justice Alito impugned a 1972 statute with a social history of nativism ranging throughout nineteenth-century America[88]), Justice Alito shifted back to the facts of the matter: "Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?"[89] He then answered: "There is ample evidence that the passage of these laws was *instead* spurred by a sincere belief that abortion kills a human being."[90]

What if those campaigning were sincere *and* they premised their campaign on views about race and sex that today we would view as unconstitutional? Surely this is not implausible, and in fact is the most likely possibility in the mid-nineteenth century—a time when race-based reasoning was pervasive and when role divisions between the sexes were so systematically enforced by law that the Supreme Court itself authorized states to bar women from voting[91] and to deny women the right to practice law.[92] That is the problem with a method that ties constitutional meaning to the deep past.

Moreover, the public's beliefs about the permissibility of abortion did not just change overnight. Old common law and customary understandings of quickening persisted through the

87. *Id.* at 2255–56.

88. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2267–69, 2273–74 (2020) (Alito, J., concurring).

89. *Dobbs*, 142 S. Ct. at 2256.

90. *Id.* (emphasis added).

91. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 173–76 (1874).

92. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138–39 (1872).

nineteenth and even into the twentieth century.[93] Advocates who sought to criminalize abortion from conception had to persuade a resistant public.[94] The doctors' tracts are full of complaints about the public's continuing belief in quickening.[95] Those advocating more stringent criminal sanctions appealed to a range of *different kinds of reasons* in an effort to move legislators.[96] They enfolded arguments about protecting unborn life with arguments that criminal bans were needed to enforce women's maternal and marital duties and to protect the ethno-religious character of the nation.[97] Many tracts began with concerns about ethnic replacement.

L.C. Butler, a member of the Vermont Medical Society recommending passage of an 1867 state law banning abortion, began his case by observing that "the natural increase of the foreign population" was "considerably greater than that of the native or American population"—asking "what will be the condition of society twenty-five, fifty, or a hundred years hence, if this preponderance of the births in favor of foreigners shall continue?"[98] and tied these objectionable demographic trends to

93. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 6, 8–10 (2022) ("Private discussions among family and friends, conversations between women and doctors, and the behavior of women (and the people who aided them) suggest that traditional ideas that accepted early abortions endured into the twentieth century."); Brief for *Amici Curiae*, *supra* note 83, at 27–28 (observing that at the time of the Fourteenth Amendment's ratification "the common-law view persisted in American law and popular opinion"); Horatio R. Storer et al., *Report on Criminal Abortion*, *in* 12 TRANSACTIONS AMA 75, 75, 77 (1859) (leader of the campaign to criminalize abortion noting "a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the fœtus is not alive till after the period of quickening"). Professor Aaron Tang argues that the *Dobbs* majority underestimated the persistence of quickening and thus misread and miscounted the statutes that banned abortion at the time of the Fourteenth Amendment's ratification. Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205139 [https://perma.cc/FHC6-FZT3].

94. Brief for *Amici Curiae*, *supra* note 83, at 16–17.

95. *See* Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 287 (1992).

96. *Id.* at 287, 293, 297.

97. *See id.* at 261, 281, 287, 290–91, 297, 301, 317; Brief for *Amici Curiae*, *supra* note 83, at 20–22, 24–25.

98. L.C. Butler, *The Decadence of the American Race, as Exhibited in the Registration Reports of Massachusetts, Vermont [And Rhode Island]; The Cause and the Remedy,* 77 BOS. MED. SURG. J. 89, 89–90 (1867), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJM186709050770501 [https://perma.cc/BVP2-YFUQ]; VT. MED. SOC'Y, TRANSACTIONS OF THE VERMONT MEDICAL SOCIETY FOR THE YEARS 1867 AND 1868, at 6 (1869).

equally objectionable traits in the conduct of American women. The author blamed the relative birthrates on the conduct of women who seek out "instructions [on] how persons may have or avoid having a family, how they may enjoy all the sensual gratifications of married life without increase unless they specially desire it,"[99] motivated by a new sense of role:

> Instead of the retirement of domestic life, woman must now mingle in public affairs. She must occupy the pulpit, the forum, the rostrum, the stump. She must answer the demands of sociability, by visiting, travel, social parties, the dancing hall, the street, the places of public amusement, the whirl of fashion. These are inconsistent with the condition of pregnancy. One or the other must give place. And since the spirit of the age indicates that woman may occupy a different sphere from that in which she has formerly moved; and since all the public pursuits and offices hitherto held exclusively by man, may yet be the objects of her ambition, she should not be compelled to exclude herself from the excitements and amenities of social or public life.[100]

It is only *after* this lengthy discussion of demographic and sex-role considerations, and a comparison of "Romish" (Catholic) and Protestant doctrine on abortion, that the report recommended that physicians adopt the view that abortion was wrongful life-taking.[101]

Butler was a member of the Vermont Medical Society recommending that the state increase restrictions on abortion when the state enacted its 1867 statute.[102] The nineteenth-century anti-abortion campaign unfolded during an era of nativist, anti-immigrant, and anti-Catholic feeling.[103] Horatio Storer, the campaign's leader, and others blamed abortion for the differences in birth rate between "native" (i.e., Protestant) women and "foreign" women.[104]

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99. Butler, *supra* note 98, at 90.

100. *Id.* at 92.

101. *Id.* at 89–90, 94, 96–97.

102. 1867 Vt. Acts & Resolves 57, §§ 1, 3; *see also* MOHR, *supra* note 83, at 210–11 (describing the influence of the medical society on the Vermont legislature).

103. *See* ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES 42–44 (2019).

104. *See* HORATIO ROBINSON STORER, WHY NOT? A BOOK FOR EVERY WOMAN 62–63 (1866); *id.* at 64 (observing that "abortions are infinitely more frequent among Protestant

In the campaign's popular tract, *Why Not?*, published in 1866, Storer tied Protestant families' declining size to Protestant women exercising reproductive autonomy; he sought abortion bans to increase the number of Protestants. He questioned whether "the great territories of the far West, just opening to civilization, and the fertile savannas of the South" would be filled by "our own children or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation."[105] (He also argued systematically from women's bodies and women's roles. "Intentionally to prevent the occurrence of pregnancy, otherwise than by total abstinence from coition, intentionally to bring it, when begun, to a premature close, are alike disastrous to a woman's mental, moral, and physical well-being.")[106] Storer argued that banning abortion would protect the unborn, enforce women's roles, *and* prevent ethnic replacement. Storer's appeal to anxieties about ethnic replacement and enforcing gender roles moved his audience.

Justice Alito disparaged the influence of Storer, the campaign's leader, dismissing him as just "one prominent proponent" of the anti-abortion statutes that arose in the mid-nineteenth century:

> Another *amicus* brief . . . tries to dismiss the significance of the state criminal statutes that were in effect when the Fourteenth Amendment was adopted by suggesting that they were enacted for illegitimate reasons. . . . [T]his account . . . is based almost entirely on statements made by *one prominent proponent* of the statutes . . . . Resort to this argument is a testament to the lack of any real historical support for the right that *Roe* and *Casey* recognized.[107]

Quite remarkably, Justice Alito expressed no concern about arguments advanced in support of abortion bans, arguments that appealed to nativism (the history he pointed to in his *Espinoza* opinion) and rank sexism. He discounted the significance of

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women than among Catholic [women]"); *see also, e.g.*, William McCollom, *Criminal Abortion*, *in* TRANSACTIONS OF THE VT. MED. SOC'Y 40, 42 (1865) ("Our own population seem to have a greater aversion to the rearing of families than . . . the French, the Irish and the Germans."); Butler, *supra* note 98, at 93–94 (comparing Protestant and Catholic doctrine on abortion with attention to the relevant reproductive rates of Protestants and Catholics).

105. STORER, *supra* note 104, at 85.

106. *Id.* at 76.

107. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2255 (2022) (emphasis added).

arguments made by the leader of the campaign to criminalize abortion and others, questioning whether Horatio Storer and others could have influenced legislation enacted.[108] (Again, his approach to reviewing the record diverges completely from his approach in *Espinoza*.)

For this reason, it is worth considering some evidence of Storer's influence. We can see Storer's reasoning shaping a report accompanying Ohio's 1867 bill on abortion—a report that anti-abortion advocates often cite because the report was issued just before ratification of the Fourteenth Amendment and condemns abortion as "child-murder."[109] The report in fact opens with demographic considerations and denounces "alarming and increasing frequency" of abortion, as it reduced "the number of children born alive of native American parentage" in the nation generally and in Ohio in particular.[110] The Ohio report then blames abortion on women's breach of sexual and marital duties and blames women for the demographic consequences:

> The demands of society and fashionable life; the desire of freedom from care and home duties and responsibilities; and the absence of a proper understanding of the dangers and criminality of the act, lead our otherwise amiable sisters to the commission of this crime. *Do they realize that in avoiding the duties and responsibilities of married life, they are, in effect, living in a state of legalized prostitution? Shall we permit our broad and fertile prairies to be settled only by the children of aliens?* If not, we must, by proper legislation, and by the diffusion of a correct public sentiment, endeavor to suppress a crime which has become so prevalent.[111]

108. *Id.* at 2256 ("Here, the argument about legislative motive is not even based on statements by legislators, but on statements made by a few supporters of the new 19th-century abortion laws, and it is quite a leap to attribute these motives to all the legislators whose votes were responsible for the enactment of those laws.").

109. 1867 OHIO SENATE J. APP. 233, *available at* https://acrobat.adobe.com/link/track?uri=urn:aaid:scds:US:1fe5fbff-fa80-3ca6-9331-d97c2f8a8d3f [https://perma.cc/3FUU-RDRZ]. For discussion of advocates who have appealed to the report, see Siegel, *supra* note 10, at 1189 n.236.

110. 1867 OHIO SENATE J. APP. 233, 233, 235 (twice noting that abortion was most prevalent among the privileged classes); Siegel, *supra* note 95, at 316 & n.225.

111. S. JOURNAL, 57th Gen. Assemb., 235 (Ohio 1867) (emphasis added). For accounts of this law, see Siegel, *supra* note 95, at 314–18; MOHR, *supra* note 83, at 206–09.

Throughout, the Ohio report repeatedly cited the work of Horatio Storer.[112]

B. How Concerns About Enforcing Women's Roles Mingled with Concerns About Protecting the Unborn in the Nineteenth-Century Campaign to Criminalize Abortion

In condemning marriage as "legalized prostitution," a term Storer used to condemn marriage without a legal duty to procreate,[113] the Ohio legislators echoed the doctors' attack on the woman suffragist campaign, appropriating and flipping the suffragists' claims for voluntary motherhood.

In the years before and after the Civil War, women seeking the vote and, through the vote, the ability to reform the common law doctrine of marriage that gave a husband rights in his wife's person, labor, and property claimed "voluntary motherhood": the right to say no to sex in marriage and thus to control the timing of childbearing.[114] Without it marriage was little better than "legalized prostitution"—an exchange of sex for support.

As the Ohio report illustrates, anti-abortion advocates appropriated the feminist "legalized prostitution" argument and turned it upside-down. In advocating laws banning abortion, they argued that without imposing on wives a duty to procreate (that is, without laws imposing obligations of sex and motherhood), marriage was little better than "legalized prostitution."[115] Not

112. *See* S. JOURNAL, 57th Gen. Assemb., 233–35 (Ohio 1867). The report's discussion of fertile prairies is a condensed reference to Storer's arguments in *Why Not?*. *See supra* note 105 and accompanying text. For Storer's condemnation of marriage without continuous procreation as "legalized prostitution," see *infra* notes 113, 116, 119 and accompanying text.

113. *See* STORER, *supra* note 104, at 14 ("[A]s has forcibly been asserted of marriage where conception or the birth of children is intentionally prevented, such is, in reality, but legalized prostitution, a sensual rather than a spiritual union."); *see also infra* text accompanying note 119 (quoting Storer using "legalized prostitution" in justifying increased criminal penalties for married women who seek an abortion).

114. *See* Siegel, *supra* note 95, at 304–14. At common law, a wife was presumed to consent to sex with her husband when she consented to marriage. For a history of that presumption and nineteenth-century challenges to it, see generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

115. S. JOURNAL, 57th Gen. Assemb., 235 (Ohio 1867). For other antiabortion usage of the "legalized prostitution" argument, see Siegel, *supra* note 95, at 308–10, 317, 318 n.236.

surprisingly, Storer made this claim,[116] as did others in the antiabortion campaign.[117]

It is perhaps not surprising that having advocated for extending criminalization of abortion from quickening throughout pregnancy, Storer had views about abortion's proper punishment. In 1860, Storer advocated employing the criminal law to punish women who have abortions and advocated increasing the punishment for married women. He proposed a model statute. It punished a woman for soliciting an abortion, "and if said offender be a married woman, the punishment may be increased at the discretion of the court."[118]

The marital penalty distinction made plain enough that the wrong centered on a sex-role violation. But in case there was any doubt, Storer explained the need for criminal sanctions to enforce the reproductive ends of marital sex:

> Enough has already been said to show that there is need of increased vigilance on the part of medical men . . . . If . . . the community were made to understand and to feel that marriage, where the parties shrink from its highest responsibilities, is nothing less than *legalized prostitution*, many would shrink from their present public confession of cowardly, selfish and sinful lust.[119]

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116. *See* HORATIO R. STORER, ON CRIMINAL ABORTION IN AMERICA 101 (Philadelphia, J.B. Lippincott & Co. 1860) ("[M]arriage, where the parties shrink from its highest responsibilities, is nothing less than legalized prostitution."); *see also* Horatio Storer et al., *Report of the Committee on Criminal Abortion*, SUFFOLK DIST. MED. SOC'Y 10 (1857).

117. *See* Siegel, *supra* note 95, at 297–99 (describing Storer, James Whitmire, Augustus Gardner, and H.S. Pomeroy's remarks that were designed to "channel[] wide-ranging social concern into the act of reproduction itself").

118. STORER, *supra* note 116, at 99.

119. STORER, *supra* note 116, at 101 (emphasis added). Storer was clear about connecting criminal responsibility to agency:

> The part played by the mother, herself so often a victim, is almost always that of a principal, yet, as laws now stand, she can scarcely ever be reached. The cases where she is under duress, by threat of other personal violence from her husband or seducer, and thus compelled to submit to abortion, or where the act is performed by his direction but without her knowledge, are so rare, that in a general statement they may be assumed not to exist. If the mother does not herself induce the abortion, she seeks it, or aids it, or consents to it, and is, therefore, whether ever seeming justified or not, fully accountable as a principal.

STORER, *supra* note 116, at 54–55; *see also* HORATIO R. STORER & FRANKLIN FISKE HEARD, CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW 97 (Boston, Little, Brown & Co. 1868).

A statute focused on punishing the married woman only was nearly adopted in Ohio but failed by a vote.[120]

The anti-abortion campaign attacked woman's rights claims on a regular basis.[121] The AMA's 1871 *Report on Criminal Abortion* announced: "She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures but shrinks from the pains and responsibilities of maternity . . . ."[122] As Storer put it: "I would not transplant [women] from their proper and God-given sphere, to the pulpit, the forum, or the cares of state . . . ."[123] Dr. Montrose Pallen similarly tied woman's rights and birth control:

> "Woman's rights" now are understood to be, that she should be a man, and that her physical organism, which is constituted by Nature to bear and rear offspring, should be left in abeyance, and that her ministrations in the formation of character as mother should be abandoned for the sterner rights of voting and law making. The whole country is in an

120. MOHR, *supra* note 83, at 208–09. At common law, women who procured abortions were generally immune from prosecution. According to James Mohr, all abortion laws enacted between 1821 and 1841 exempted women from prosecution. *Id.* at 43–44. This did begin to shift mid-century around the time Storer was writing. *See id.* at 201, 210–11, 218, 222–25, 227–29. But, however the statutes were drafted, courts seemed to continue following the tradition of common law immunities. In considering the issue of whether a woman who voluntarily procures an abortion could be held criminally liable, state courts in the 1800s were quick to answer, no, often simply referring to her status as "the victim," despite there being no written exception. Courts appear to have assumed it was settled law. *See, e.g.*, Peoples v. Commonwealth, 9 S.W. 509, 510 (Ky. Ct. App. 1888) (admitting the pregnant woman was "at least a consenting party to the deed" but nevertheless one safe from criminal liability: "The law does not, however, regard her as an accomplice. She could not have been indicted for it. She is looked upon rather as the victim than as a co-offender"); Dunn v. People, 29 N.Y. 523, 527 (1864) ("She did not stand legally in the situation of an accomplice; for although she no doubt participated in the moral offence imputed to the defendant, she could not have been indicted for that offence. The law regards her rather as the victim than the perpetrator of the crime."); Watson v. State, 9 Tex. Ct. App. 237, 244 (1880) ("The rule that she does not stand legally in the situation of an accomplice, but should rather be regarded as the victim than the perpetrator of the crime, is one which commends itself to our sense of justice and right, and there is certainly nothing in our law of accomplices which should be held to contravene it.").

121. *See, e.g.*, *supra* text accompanying note 100 (Vermont doctor complaining that "[i]nstead of the retirement of domestic life, woman must now mingle in public affairs. She must occupy the pulpit, the forum, the rostrum, the stump.").

122. D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 TRANSACTIONS AMA 239, 241 (1871).

123. Siegel, *supra* note 95, at 303 (alteration in original) (quoting HORATIO R. STORER, IS IT I?, A BOOK FOR EVERY MAN 89 (Lee & Shepard 1868)).

> abnormal state, and the tendency to force women into men's places, creates new ideas of women's duties, and therefore . . . the marriage state is frequently childless.[124]

In *Dobbs*, Justice Alito acknowledged that historians had brought to the Court's attention that nineteenth-century abortion statutes were enacted for both constitutional and unconstitutional reasons. He responded in ways that seemed to acknowledge that the legislation would have to rest on constitutional grounds if it were to constitute a tradition legitimating *Roe*'s reversal. To achieve that end he embraced and endorsed the nineteenth-century abortion bans, *despite* their nativism and sexism. "[W]e see no reason to discount the significance of the state laws in question based on these *amici*'s suggestions about legislative motive."[125]

As we have seen in Part II, the conservative Justices in the *Dobbs* majority are perfectly capable of repudiating the past status-enforcing practices of the American public when those traditions offend them. It is in that context that we should consider the *Dobbs* majority's indifference to the evidence presented that a variety of ethnic, religion, and gender status-enforcing arguments might have encouraged a white male electorate to enact anti-abortion statutes, in addition to concerns about protecting the unborn. The Court's readiness to raise and dismiss evidence in the briefs that the anti-abortion campaign encouraged voters to enact abortion bans on the basis of nativism and sexism is yet another dimension of *Dobbs*'s gendered reasoning, over and above the Court's decision to legitimate overturning *Roe* with reference to a body of laws enacted by men who barred women from voting.

IV. *DOBBS* AND *ESPINOZA*: ABORTION AND THE POLITICS OF CONSTITUTIONAL MEMORY

What if Justice Alito were as concerned about gender justice as he is about discrimination against Catholics?

Recall that in *Ramos*, Justice Alito expressed skepticism about intervening to repair racial injustice that occurred in the deep past;[126] but in *Espinoza,* a case presenting questions of bias

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124. Siegel, *supra* note 95, at 303–04 (quoting Montrose A. Pallen, *Foeticide, or Criminal Abortion*, 3 MED. ARCHIVES 193, 205–06 (1869) (paper read before the Missouri State Medical Association, Apr. 1868)).

125. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2239, 2256 (2022).

126. Ramos v. Louisiana, 140 S. Ct. 1390, 1425–27 (2020) (Alito, J., dissenting).

against Catholics, Justice Alito suddenly became interested in the politics of memory. In *Espinoza*, he voted to strike down Montana's 1972 "no-aid" provision even though discrimination, if any, had long ago ceased. Why? Because: "[T]he no-aid provision's terms keep it '[t]ethered' to its original 'bias,' and it is not clear at all that the State 'actually confront[ed]' the provision's 'tawdry past in reenacting it.'"[127]

Reckoning with past injustices was an important first step to breaking their legacies in the present, Justice Alito seemed to be saying, much as Justice Thomas argued in *McDonald*. Revisiting status injuries of the past, in their grotesque outlines, makes clearer the stakes of present injustice, precisely because the outlines in the present are rarely so stark as in the past.

What might Justice Alito have said about the nineteenth-century campaign to criminalize abortion if he cared about the case of gender justice with the kind of concern he devotes to combatting discrimination against Catholics? *Espinoza* tells us that he would never have decided *Dobbs* as he did. *Espinoza* tells us that if he cared about the case of gender justice and still sought to overrule *Roe*, he would have found another path, and another voice.

Espinoza tells us that a man who cared about the case of gender justice might conclude that the nation needed to confront and reckon with the history of abortion's nineteenth-century criminalization before deciding whether and how it would continue the practice, consistent with its current commitments to gender justice.

Can dormant bans simply be revived in *Dobbs*'s wake? Consider the case of Wisconsin, where the first abortion ban was enacted in 1849[128] and amended shortly thereafter in 1858 (to criminalize accomplices to abortion and to prohibit abortions both before and after quickening).[129] "Historians attribute the 1858

127. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2267–69, 2273–74 (2020) (Alito, J., concurring) (quoting *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring in part)).

128. WIS. STAT. §§ 133.10–11 (1849); *see also* MADELINE KASPER ET AL., A BRIEF HISTORY OF ABORTION LAWS IN WISCONSIN, LEGIS. REFERENCE BUREAU 1 (Aug. 25, 2022), https://docs.legis.wisconsin.gov/misc/lrb/lrb_reports/history_of_abortion_laws_6_4.pdf [https://perma.cc/9WRU-5RPF].

129. *See also* KASPER ET AL., *supra* note 128, at 2–4. *Compare* WIS. STAT. §§ 133.10–11 (1849) (limiting the agent of criminal abortion to those who "administer" drugs or "use" or

abortion law changes to the influence of Dr. William Henry Brisbane, a Wisconsin doctor committed to discouraging women from seeking abortions and penalizing doctors who performed them."[130]

Brisbane knew and was in regular communications with Dr. Horatio Storer, the leader of the anti-abortion movement, about these 1858 amendments.[131] Brisbane exhibited a class-oriented understanding of abortion, noting in one letter to Storer the "undoubted fact that, especially in high life, and in the middle ranks of society, many wives (and often with the connivance of their husbands) take measures of this kind."[132] In addition to these communications, Brisbane, a founding member of the Wisconsin Medical Society (WMS), served on the 1857 AMA committee chaired by Storer, along with "fellow [WMS] co-founder Samuel H. Bassinger, a state representative and member of the conference committee that recommended adoption of the amendment striking the word 'quick' from statutes relating to abortion."[133] The AMA committee issued a report in 1859 recommending the criminalization of abortion.[134] Back in Wisconsin, Brisbane succeeded in lobbying for the passage of the new abortion restrictions in 1858, having made "various trips to Madison to meet with lawmakers."[135] In 1859, after the law was passed,

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"employ" an instrument to do so and limiting criminal abortion to the circumstance of an "unborn *quick* child" or a "woman pregnant with a *quick* child" (emphasis added)), *with* WIS. STAT. § 169.58 (1858) (adding criminal liability for those who "advise" or "procure" means for a woman to seek abortion), *and* WIS. STAT. §§ 164.10–11 (1858) (omitting "quick" from the 1849 statutory phrase).

130. KASPER ET AL., *supra* note 128, at 4.

131. *See, e.g.*, *id.* at 4 (quoting Letter from William Henry Brisbane to Horatio R. Storer (Apr. 6, 1857) (on file with the Harvard Countway Library, B MS b47), titled "Correspondence to Horatio Robinson Storer from various physicians relating to criminal abortion," in which Brisbane expressed an intent to "get a law passed by our Legislature to meet the case, much too common, of administering drugs and injections either to prevent conception or destroy the embryo").

132. *See* MOHR, *supra* note 83, at 140, 293 n.57.

133. KASPER ET AL., *supra* note 128, at 4–5; *see also Minutes of the Tenth Annual Meeting*, 10 TRANSACTIONS AMA 9, 30 (1857).

134. Storer et al., *supra* note 93, at 75, 78 (rejecting the idea "that the fœtus is not alive till after the period of quickening" and requesting "the zealous co-operation of the various State Medical Societies in pressing this subject upon the legislatures of their respective States . . .").

135. KASPER ET AL., *supra* note 128, at 4–5 (first citing diary entries dated Jan. 12, 1858, to May 16, 1858; and then citing WILLIAM HENRY BRISBANE PAPERS, 1829–1975, *available at* https://search.library.wisc.edu/catalog/999464456002121 [https://perma.cc/255D-L9DF]).

"Brisbane reported to Storer that he had 'succeeded in having enacted by our Legislature'" the new abortion laws.[136]

Wisconsin's 1849 ban, as amended in 1858, was revived by *Dobbs*. This threat became even more pressing after the Sheboygan County District Attorney announced that he would prosecute abortion cases under the 1849 ban;[137] pending litigation will determine whether this nineteenth-century ban will remain in effect.[138]

Should a law enacted under the conditions of debate the Supreme Court blessed in *Dobbs* simply go into effect in 2022? That question is not governed by the Court's decision in *Dobbs*. What would Justice Alito say, given the logic of his opinion in *Espinoza*?

More generally, well beyond the case of the dormant ban, a larger question lurks. Before we invoke the criminalization of abortion to express respect for life, shouldn't we, as Justice Alito himself advocated in *Espinoza*, confront the past before reenacting it[139] and explore whether, a century and a half later, there are more equality-respecting ways to express respect for life?[140]

V. CONCLUSION

Examining the history-and-tradition method illuminates from a different vantage point what Professor Murray has termed

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136. *Id.* at 5 (quoting Letter from William Henry Brisbane to Horatio R. Storer (May 19, 1859) (on file with Harvard Countway Library, B MS b47), titled "Correspondence to Horatio Robinson Storer from various physicians relating to criminal abortion").

137. *Sheboygan County D.A. Advises Law Enforcement He'll Prosecute Abortion Cases*, WBAY (July 1, 2022, 11:33 AM), https://www.wbay.com/2022/07/01/sheboygan-county-da-advises-law-enforcement-hell-prosecute-abortion-cases [https://perma.cc/9KUX-72UC].

138. *See* Madeline Fox, *Attorney General Josh Kaul Sues to Block Wisconsin's Abortion Ban*, WIS. PUB. RADIO (June 28, 2022, 4:00 PM), https://www.wpr.org/attorney-general-josh-kaul-sues-block-wisconsins-abortion-ban [https://perma.cc/Y23D-Q83U]; Corrinne Hess, *Wisconsin DOJ Replaces Republicans with Local District Attorneys in Abortion Lawsuit*, MILWAUKEE J. SENTINEL (Sept. 16, 2022, 4:00 PM), https://www.jsonline.com/story/news/2022/09/16/wisconsin-republican-lawmakers-replaced-abortion-lawsuit/10398927002 [https://perma.cc/B2B5-L5FH]. The complaint is available here: https://www.wpr.org/sites/default/files/everskaul_criminal_abortion_ban_complaint.pdf [https://perma.cc/K3CV-MKQR].

139. *Cf.* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2267, 2274 (2020) (Alito, J., concurring).

140. For analysis, see Cary Franklin & Reva B. Siegel, *Equality Emerges as a Ground for Abortion Rights in and After* Dobbs, *in ROE V. DOBBS*: THE PAST, PRESENT, FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee Bollinger & Geoffrey R. Stone eds., forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4315876 [https://perma.cc/PGV5-P8RA].

the Roberts Court's "jurisprudence of masculinity."[141] The "history-and-tradition" method employed in *Dobbs* and *Bruen* expresses gender through its implicit identifications. The method is gendered in the simple sense that it ties the Constitution's meaning to laws made by men who excluded women from lawmaking and public life. The method is gendered in a deeper sense that it provides resources for expressing identity and value drawn from a culture whose laws and mores were more openly hierarchical than our own.

141. *See* Murray, *supra* note 20, at 804.

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