
Making History

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FOREWORD

What is history but a fable agreed upon?
— Napoleon Bonaparte.

INTRODUCTION

October Term 2021 was a momentous one for the United States Supreme Court. In a series of decisions, the Court overturned two long-standing precedents guaranteeing the right to abortion,¹ expanded the scope of the Second Amendment,² and appeared to consign the Establishment Clause to the dustbin of history.³ This Collection focuses on the methods by which the Court produced that first overhaul: specifically, on the state-counting methodology employed in *Dobbs v. Jackson Women’s Health Organization*. Perhaps to soften the blow of this jurisprudential shift, the Court invoked some of its most lauded landmark decisions—decisions that are well-known for conferring rights and incorporating once-excluded constituencies into the polity. The Court’s nod to these earlier decisions was no coincidence. Indeed, it was likely an effort to cast its rights-stripping decision in *Dobbs* as a descendant of the earlier decisions’ rights-conferring moves. In blunter terms, the Court invoked history while undoing it, raising a key question: what does it mean for the Court to “do history”? That is the core premise and question at the heart of the four essays comprising this Collection.

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

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

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

To mark the end of 2022, one of the most consequential years in the Court’s history, Chief Justice John Roberts issued his annual report on the state of the federal judiciary. Yet, in that year-end report, the Chief Justice did not advert to those decisions unsettling decades of constitutional history—at least not explicitly. Instead, he invoked an entirely different history. In reflecting on 2022, the Chief Justice conjured images of “Paratroopers and Guardsmen on duty at Little Rock Central High School,” just a few months after “nine African-American children—later known as the Little Rock Nine—had bravely entered the building to go to the formerly all-white school.”⁴

It was perhaps unsurprising that the Chief Justice adverted to the Southern Manifesto, Massive Resistance, and public opposition to *Brown v. Board of Education*,⁵ the 1954 case in which the Court overturned *Plessy v. Ferguson* and its principle of “separate but equal.”⁶ In the years since it was decided, *Brown* has become so canonical and accepted that it is frequently invoked by those at different points on the ideological spectrum to underscore the righteousness and correctness of their positions.⁷ Case in point: in *Dobbs*, the 2022 case that overturned *Roe v. Wade*⁸ and *Planned Parenthood v. Casey*,⁹ the majority opinion also referenced *Brown* in what seemed to be a conscious effort to align its decision laying waste to nearly fifty years’ worth of abortion jurisprudence with the iconic decision that laid the foundation for an integrated, multiracial society.¹⁰

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4. Chief Justice Roberts, *2022 Year-End Report on the Federal Judiciary*, U.S. SUP. CT. 1 (Dec. 31, 2022), <https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf> [<https://perma.cc/56TZ-ALT9>].
 5. 347 U.S. 483 (1954).
 6. 163 U.S. 537 (1896).
 7. For example, the dueling claims to *Brown* were evident in the Court’s disposition of *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). There, in five separate opinions on different sides of the judgment, the Justices all claimed fidelity to “the heritage of *Brown*.” *Id.* at 747. See also, Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (June 29, 2007), <https://www.nytimes.com/2007/06/29/us/29assess.html> [<https://perma.cc/9G76-V87D>] (discussing the differing accounts of *Brown*’s legacy in *Parents Involved*); Pamela S. Karlan, *What Can Brown® Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1051 (2009) (discussing the efforts of conservatives and progressives alike to claim *Brown*’s legacy).
 8. 410 U.S. 113 (1973).
 9. 505 U.S. 833 (1992).
 10. *Dobbs*, 597 U.S. at 264–65 (“Some of our most important constitutional decisions have overruled prior precedents In *Brown v. Board of Education*, the Court repudiated the ‘separate but equal’ doctrine, which had allowed States to maintain racially segregated schools and other facilities. In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson*, along with six other Supreme Court precedents that had applied the separate-but-equal rule.” (citations omitted)).

Without doubt, the Chief Justice's invocation of the post-*Brown* history of Massive Resistance was an effort to bring the Supreme Court and its recent (and controversial) decisions in line with a nobler past. More particularly, it was an effort to elaborate and entrench the narratives that *Dobbs* was *Brown*'s juridical heir and the Roberts Court, like the Warren Court before it, possessed the backbone and moral clarity to stand firm in the face of public criticism of, and backlash against, its decisions. Further, the reference to this searing episode of Warren Court history likely was intended to dignify – and indemnify – the Roberts Court, while painting its critics as the descendants of the lawless rabble who, a generation ago, resisted calls for integration.

In his report, the Chief Justice referenced Wiley Branton, the Arkansas lawyer who represented the Little Rock Nine (and who later served as the Dean of Howard Law School),¹¹ and Thurgood Marshall, who successfully argued *Brown* before becoming the first African American to sit on the high court.¹² But in the Chief Justice's telling, the true hero of the story was the lesser-known Judge Ronald N. Davies, the district court judge who, in August 1957, issued the order permitting the Little Rock Nine to matriculate at Central High School.¹³

Chief Justice Roberts's deep admiration for Judge Davies is evident. As the Chief Justice explains, in the face of Governor Orval Faubus's blatant defiance of *Brown v. Board of Education* and its demand for integration, Davies "did not flinch."¹⁴ Firm in his constitutional duty, Davies would later observe that "[i]n an organized society, there can be nothing but ultimate confusion and chaos if court decrees are flaunted."¹⁵

In referencing Judge Davies and the Little Rock Nine, the Chief Justice sought to link the stalwart judge who enforced *Brown* and its integration mandate to the present-day judiciary – and more particularly, the current Justices of the Supreme Court. Despite threats to his personal safety, Davies was "uncowed" and "stuck up for the rule of law."¹⁶ Who better to serve as the template for recasting the public image of the Roberts Court? Instead of "nine lawyers in robes" prioritizing their preferences, Roberts emphasized that, like Davies, the Justices of the Roberts Court were steadfast stewards of the Constitution who adhered to the law, regardless of public reproach and pressure.

Despite these efforts to recast the Roberts Court Justices as neutral interpreters of constitutional law, Chief Justice Roberts's invocation of Judge Davies also

11. See Roberts, *supra* note 4, at 1.

12. *Id.*

13. *Id.* at 2.

14. *Id.*

15. *Id.*

16. *Id.* at 3.

underscores, perhaps unwittingly, the judicial agency and activism at the heart of landmark decisions like *Brown* and *Dobbs*. Even as he lavished praise upon Davies, the Chief Justice only recited part of the post-*Brown* history. As the historical record makes clear, for every Judge Davies, there was also a Judge Harry J. Lemley, who, in June 1958, issued a decision allowing the Little Rock School Board to suspend its plan for the gradual integration of the public schools until January 1961.¹⁷

If Judge Davies “did not flinch” in the face of popular demands to resist integration, then Judge Lemley was acutely aware of public opposition to *Brown* and its integration mandate. As he recounted in his opinion, in the wake of the Little Rock Nine’s matriculation, circumstances at Central High School had become increasingly tense.¹⁸ In addition to the continued presence of federal troops – itself a disruptive presence – there had also been “repeated incidents of more or less serious violence directed against the Negro students and their property,”¹⁹ “numerous bomb threats,”²⁰ “a number of nuisance fires started inside the school,”²¹ the “desecration of school property,”²² and “the circulation of cards, leaflets and circulars designed to intensify opposition to integration.”²³ The situation had become so fraught that W. P. Ivey, a long-time math teacher at Central High, “testified that the presence of the Negro students created a tension on the part of both students and teachers that was noticeable every day, and that this tension impaired his ability to teach and the receptivity of his students.”²⁴

To be sure, Judge Lemley explained, these incidents and the tensions they produced “did not stem from mere lawlessness” or “any malevolent desire.”²⁵ “Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years.”²⁶ Further amplifying the tension was “the conviction,” shared by many in Little Rock, “that the *Brown* decisions do not truly represent the law.”²⁷

17. *Aaron v. Cooper*, 163 F. Supp. 13, 28 (E.D. Ark.), *rev’d*, 257 F.2d 33 (8th Cir. 1958), *aff’d sub. nom.* *Cooper v. Aaron*, 358 U.S. 1 (1958).

18. *Id.* at 20.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 22.

25. *Id.* at 21.

26. *Id.*

27. *Id.*

Reading the Supreme Court's decision in *Brown II* to require that integration proceed "in an 'effective manner,'"²⁸ Judge Lemley reasoned that "a transition which impairs or disrupts educational programs and standards, and which will continue to do so, is not in the public interest, but, on the other hand, inflicts irreparable harm upon all of the students concerned, regardless of race."²⁹ With this in mind, Lemley decreed that "the personal and immediate interests of the Negro students affected, must yield temporarily to the larger interests of both races" in the effective operation of the school system.³⁰ Irrespective of the Supreme Court's edicts on the question, in Lemley's eyes, popular unrest meant that integration could – and should – be deferred to another day.

The Supreme Court, however, disagreed, roundly rejecting Judge Lemley's logic in *Cooper v. Aaron*.³¹ There, the Court made clear that its interpretations of the Constitution are "the supreme law of the land," with "binding effect on the States."³²

It is unfortunate that the Chief Justice's account of the post-*Brown* landscape did not sweep so broadly as to include Judge Lemley, *Cooper v. Aaron*, and the Court's emphatic rebuke of Southern resistance to *Brown*. Indeed, the contrast between Judge Davies and Judge Lemley is illuminating. In the face of public pressure, Davies stayed the constitutional course and insisted on fidelity to *Brown* and the rule of law. Lemley interpreted the law and his judicial duty differently, focusing on the Court's decree that integration be accomplished in an "effective manner."³³ As he saw it, fidelity to the rule of law did not require pushing forward, but rather, applying the brakes.

The contrast between Judge Davies and Judge Lemley underscores an important dynamic for judges and the project of judging with an eye on – and toward – history. These two jurists are proof that judges – and by extension, justices – are not merely umpires calling "balls and strikes."³⁴ In issuing decisions on pivotal issues (and more anodyne fare), judges exercise agency and judgment. In doing so, they may themselves serve as instruments of, or impediments to, change.

28. *Id.* at 26.

29. *Id.*

30. *Id.* at 27.

31. 358 U.S. 1 (1958).

32. *Id.* at 18.

33. *Aaron*, 163 F. Supp. at 26.

34. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56* (2005) (statement of John G. Roberts, Jr., J., D.C. Cir.).

Likewise, a judge's invocation of, and reliance on, history is not an objective endeavor but rather an exercise of agency and judgment. Chief Justice Roberts's decision to align his Court—and *Dobbs*—with Judge Davies and *Brown* was a *choice*. Judge Lemley and *Cooper v. Aaron* are proof that there were other judicial exemplars, and a more fulsome history, that could have informed the Chief Justice's account of the post-*Brown* milieu—indeed, one that more accurately parallels the Roberts Court's regressive behavior in *Dobbs*. But the specter of Lemley and *Cooper* undoubtedly would have detracted from the Chief Justice's twin efforts to counter the popular view of *Dobbs* as flouting stare decisis principles, and to recast the members of his Court as faithful stewards of the rule of law.

This is all to say that history is hardly a passive endeavor. The individual may exert agency as to *how* she is remembered. Indeed, an appeal to favorable history—and the neglect of less favorable history—is, by itself, an attempt to shape one's place in the historical record. Through the invocation of certain narratives, the individual may take a role in shaping how future generations remember and judge her and the events in which she is participating. Our understanding of our collective past and founding truths can be recast and shaped into new narratives that tell new stories about who we were, as well as who we are—and who we want to be. In this regard, the Chief Justice's appeal to *Brown* and its surrounding history is not simply a recounting of a history in which judges were courageous and righteous; it is also an attempt to imbue *Dobbs*—a decision steeped in controversy and critique—with the same patina of legitimacy and righteousness that attends *Brown*. And critically, in “doing history,” certain moments may be embellished and emphasized, while others are overlooked and ignored. In this way, “doing history” is not just the retelling of a past; it can be a *remaking* of that past—and our place in it.

This account of history as active and malleable is as evident in the *Dobbs* majority opinion as it is in the Chief Justice's 2022 year-end report. In both, the authors go to extraordinary lengths to cloak their actions in the mantle of *Brown* and the Warren Court's sober, resolute commitment to judicial integrity and the rule of law. The rub, of course, is that the Roberts Court is donning Warren Court drag to *drag* the Warren Court—that is, to dismantle the progressive gains that the Warren Court set in motion in 1954.

So, with these inversions in mind, what does it mean for nine unelected lawyers to do—or make—history in the context of interpreting constitutional text and divining constitutional rights? How should the past shape our understanding of what rights and privileges are available in our present moment? What role does history play in shaping the public's perception of a decision—and of the deciding Court? This Collection presents a rich opportunity to interrogate what it means to invoke history—to *use* history—as a basis for understanding the

nature of rights, the identity of rightsholders in a diverse and pluralistic nation, and the Court itself.

This Foreword proceeds as follows: Part I canvasses the four contributions to this Collection. As I detail, these essays consider the *Dobbs* Court's use of history, and more importantly, locate the Court's state-counting methodology in a broader jurisprudential and political landscape. In Parts II and III, I elaborate on some of the themes that surfaced in the Collection's essays. Specifically, in Part II, I discuss how members of the Roberts Court have cobbled together various histories to advance the view that the effort to expand reproductive rights in the United States is underlaid by a eugenic desire to thwart and limit reproduction among racial minorities. In Part III, I show how this invented history may underwrite a contemporary drive to enshrine the principle of fetal personhood in constitutional law. Taken together, these developments suggest how the *Dobbs* Court's selective use of history goes beyond curbing access to abortion—it may lay the foundation for a reappraisal of the courts' role in protecting minority interests, including an interest in the fetus as a distinct, rights-bearing entity.

I. HISTORY AND THE ROBERTS COURT

The four contributions to this Collection all coalesce around a central theme: that the Roberts Court, for all of its bleating about neutrality and objectivity, has deployed history—and in particular, the method of counting state-level statutes to divine the existence of historical or traditional practices—in a manner that yields certain outcomes. The genius of this outcome-driven approach is that the appeal to history is viewed as an objective enterprise, insulating the Court from criticism that it is outcome-driven. But notably, the history on which a majority of the Court has relied in some of its most consequential decisions does not tell the whole story—it is selective and instrumental.

The Court's disposition of *Dobbs v. Jackson Women's Health Organization*³⁵ epitomizes this seemingly neutral, but deeply weighted, approach to the past. In *Dobbs*, the Court overruled nearly fifty years' worth of precedent on the view that a right to abortion was neither constitutionally enumerated nor rooted in the history and traditions of the United States.³⁶ The appeal to history in *Dobbs* was purposeful. In an effort to “guard against the natural human tendency to confuse what that [Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy,” the *Dobbs* majority turned to history for an “impersonal” account of the Fourteenth Amendment and its guarantees.³⁷

35. 597 U.S. 215 (2022).

36. *Id.* at 223.

37. *Id.* at 239.

On this telling, the majority’s “history-and-tradition” methodology was critical for presenting the resulting decision as objective, restrained, and consistent with the Court’s role in preserving for the people a crucial decision-making role in our democracy.³⁸

In her essay, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*,³⁹ Professor Mary Ziegler challenges this view of history as yielding ostensibly neutral outcomes. Indeed, as Ziegler explains, the history-and-tradition approach that *Dobbs* exemplifies is, by itself, a methodological choice to prioritize certain accounts over others – not a “neutral” one as is so frequently claimed.⁴⁰ In *Dobbs*, the majority deployed a “unitary” approach that insisted “that tradition is (and should be) unchangeable and rooted in the Judeo-Christian values that were argued to animate the nation’s founding.”⁴¹ In adopting this approach, the *Dobbs* majority disregarded the “pluralist” model of history and tradition exemplified in Justice John Marshall Harlan II’s dissent in *Poe v. Ullman*.⁴² The pluralist approach, Ziegler argues, arose as part of social movement contestation over individual rights – and sexual and reproductive rights, in particular – in the 1950s and 1960s.⁴³ Rather than demanding a fixed and static approach to history, as the unitary approach did, the pluralist approach was fluid, “insist[ing] that history and tradition served as a key constraint on the courts while acknowledging that the meaning of tradition changed over time.”⁴⁴

Ziegler makes clear that historical methodologies are various – they are both contested and contestable. And as the 1980s dawned, the unitary approach, with its static account of Founding values, flourished in the hothouse of the emerging conservative legal movement and its antipathy for Warren Court-era progressivism.⁴⁵ Rebranded under the banner of “originalism,” the unitary approach to history and constitutional interpretation was billed as the method most likely to restrain “activist” judges and yield “neutral” outcomes.⁴⁶ However, as Ziegler

38. *Id.* For a discussion of the *Dobbs* Court’s preoccupation with democratic engagement, see Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024).

39. Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161 (2023).

40. *Id.* at 164.

41. *Id.*

42. 367 U.S. 497, 541-43 (1961) (Harlan, J., dissenting).

43. Ziegler, *supra* note 39, at 164.

44. *Id.*

45. *Id.* at 175.

46. *Id.* at 175-77.

observes, the unitary approach was also most likely to yield the substantive outcomes that conservatives sought.⁴⁷

Ziegler’s account of the tensions between the unitary and pluralist approaches is powerful—and points to a critical insight. There is no single “history” on which the Court—or any other decision-making body—can rely. Because a multitude of methods exist and are available to be deployed, no single historical approach can claim to get it right—that is, no single approach can actually “do” history objectively in the service of neutral principles. As Ziegler demonstrates in her assessment of the conservative embrace of the unitary approach, in a world of competing histories and historical methodologies, the decision to settle on a single history and methodology is necessarily a choice underwritten by a particular set of values.

In her Collection contribution, *The History of History and Tradition: The Roots of Dobbs’s Method (and Originalism) in the Defense of Segregation*,⁴⁸ Professor Reva B. Siegel focuses on the Court’s efforts to align itself and the *Dobbs* decision with *Brown v. Board of Education*. As Siegel explains, the majority’s many nods to *Brown* is a legitimating exercise designed to insulate the *Dobbs* Court—and its overruling of *Roe* and *Casey*—from internal and external scrutiny.

Nevertheless, the majority’s embrace of *Brown* is deeply problematic. As Siegel explains, in its zeal to invoke *Brown* to legitimate *Dobbs*, the *Dobbs* majority relied on the very methods that were once employed to oppose *Brown*.⁴⁹ In particular, Siegel points to Justice Alito’s ostensibly objective method of counting state statutes prohibiting abortion to support the majority’s conclusion that the abortion right was not deeply rooted in the history and traditions of this country.⁵⁰ This “state-counting” method, Siegel maintains, recalls both *Briggs v. Elliott*, a 1951 case in which a three-judge panel of the Eastern District of South Carolina credited the state’s authority to maintain segregated public schools,⁵¹ and the Southern Manifesto, in which Southern Senators tallied the number of Reconstruction-era statutes permitting racial segregation to undermine and resist *Brown*’s integration mandate.⁵² Although “state-counting” ultimately proved unsuccessful in halting the march toward integration, Siegel notes that then-

47. *Id.* at 180.

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

49. *Id.* at 102–03.

50. *Id.* at 110–11.

51. 98 F. Supp. 529 (E.D.S.C. 1951).

52. Siegel, *supra* note 48, at 117–19.

Justice William Rehnquist later repurposed state-counting in his dissent in *Roe*, seeding the ground for the *Dobbs* Court’s later use of this method.⁵³

As Siegel explains, the state-counting method was a means of using the past to legitimate policy preferences that were falling out of favor in the present. By counting state laws that blessed segregation or prohibited abortion, those opposed to integration and abortion rights could give their policy preferences the veneer of neutrality.⁵⁴ But state-counting—and the originalist impulse from which it springs—is hardly objective, as its adherents claim.⁵⁵ Instead, under this approach, historical sources are selectively recruited to ventriloquize particular policy choices. On this account, “an assertedly value-neutral method—like state counting in 1868—can serve, not to constrain, but to express and conceal the interpreter’s values.”⁵⁶

Aaron Tang’s Collection contribution, *Lessons from Lawrence: How “History” Gave Us Dobbs—And How History Can Help Overrule It*,⁵⁷ also considers the state-counting method used in *Dobbs*—this time in the context of *Lawrence v. Texas*, where the Court rejected the state-counting methodology as a means of determining the scope and substance of substantive due process rights.⁵⁸ Tang begins by observing, as he has previously, that the *Dobbs* Court applied state-counting poorly, misstating the precise number of states that had complete prohibitions on abortion at the time of the Fourteenth Amendment’s ratification, and ignoring the role that quickening played in the historic regulation of abortion.⁵⁹ Crucially, the *Dobbs* majority neglected the history of nonenforcement of abortion laws,⁶⁰ as well as the fact that many nineteenth-century Americans

53. *Id.* at 101.

54. *Id.* at 132.

55. *Id.* at 127.

56. *Id.* at 107.

57. Aaron Tang, *Lessons from Lawrence: How “History” Gave Us Dobbs—And How History Can Help Overrule It*, 133 *YALE L.J.F.* 65 (2023).

58. *Id.* at 78.

59. *Id.* at 79-84; see also Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 *STAN. L. REV.* 1091, 1128-46 (2023) (presenting evidence that “casts doubt” on the *Dobbs* majority’s assertion that Alabama, Florida, Louisiana, Nebraska, New Jersey, Oregon, Texas, Virginia, and West Virginia had complete abortion bans at the time of the Fourteenth Amendment’s ratification; instead, those states allowed individuals to obtain an abortion up through the moment of quickening, at roughly sixteen weeks in pregnancy). Meaningfully, professional historians have also discredited *Dobbs*’s account of the history of abortion regulation in the United States. See, e.g., Heidi Przybyla, ‘Plain Historical Falsehoods’: How Amicus Briefs Bolstered Supreme Court Conservatives, *POLITICO* (Dec. 3, 2023, 7:00 AM), <https://www.politico.com/news/2023/12/03/supreme-court-amicus-briefs-leonard-leo-00127497> [<https://perma.cc/F5D8-RGWV>].

60. Tang, *supra* note 57, at 85-87.

understood—and defended—a woman’s right to terminate a pregnancy.⁶¹ Writing with an eye on the future—and a future Court—Tang optimistically predicts that these historical errors could, in time, furnish grounds for overruling *Dobbs*.⁶²

It has happened before. As Tang explains, the Court’s 2003 decision in *Lawrence v. Texas*⁶³ makes clear exactly how this might occur. In 1986, the Court, in *Bowers v. Hardwick*,⁶⁴ upheld a Georgia sodomy statute.⁶⁵ In doing so, the *Bowers* Court, like the *Dobbs* Court, relied on a static, “unitary” approach to history and tradition, tallying the number of state-level laws, from the colonial period to the present, that criminalized homosexual sodomy.⁶⁶ But the *Bowers* Court made crucial errors—it failed to appreciate that “not a single one of the criminal sodomy laws” on which it relied targeted homosexuality *qua* homosexuality and it did not acknowledge “that the vast majority of the laws went unenforced.”⁶⁷ Seventeen years later, the Court, in *Lawrence*, would point to these historical errors as grounds for overruling *Bowers*.⁶⁸ Moreover, as Tang notes, the *Lawrence* Court went even further, jettisoning the unitary history-and-tradition test in favor of a more pluralist approach to fundamental rights that ratified core values of dignity, equality, and human flourishing.⁶⁹

In Tang’s telling, *Lawrence* offers important lessons for the future overturning of *Dobbs*. Not only is *Dobbs*’s account of history subject to the same criticisms that felled *Bowers*, *Lawrence*’s prioritization of the constitutional values of liberty and equality over history alone signals a jurisprudential approach that is both a rebuke to and a remedy for *Dobbs*. Indeed, pointing to the *Dobbs* Court’s dismissive treatment of equality arguments, Tang argues that when a future Court overrules *Dobbs*, it should correct *Dobbs*’s dismissive treatment of equal protection by rooting its decision in principles of equality, as much as liberty.⁷⁰

Equality’s possibilities also loom large in Professor Cary Franklin’s Collection essay, *History and Tradition’s Equality Problem*. As Franklin observes, the Court’s history-and-tradition approach stubbornly refuses to take account of the Equal

61. *Id.* at 87-90.

62. *Id.* at 90-91.

63. 539 U.S. 558 (2003).

64. 478 U.S. 186 (1986).

65. *Id.* at 196.

66. *Id.* at 192-93.

67. Tang, *supra* note 57, at 73.

68. *Lawrence*, 539 U.S. at 568-78 (discussing *Bowers*).

69. Tang, *supra* note 57, at 75-76.

70. *Id.* at 91-94.

Protection Clause.⁷¹ The refusal to consider equal protection, as much as the Court's interest in history and tradition, leads inexorably to certain outcomes. After all, as Franklin notes, equality is a poison pill to the Court's favored history-and-tradition methodology for the simple reason that the Equal Protection Clause was "designed to be forward-looking, to put an end to the oppressive practices of the past and to effectuate a new promise of equal citizenship."⁷²

On this account, even if a Court concluded, as it did in *Dobbs*, that America's history and traditions do not support a right to abortion, it could not resuscitate that history if doing so would offend principles of equal protection.⁷³ Even in the face of a million nineteenth-century laws prohibiting abortion, the Court would have to grapple with the Equal Protection Clause and a constitutional mandate that refused to credit policy choices that are rooted in impermissible, identity-based stereotypes.⁷⁴

As Franklin and others note,⁷⁵ the *Dobbs* majority gave equal protection short shrift, dismissing it as "squarely foreclosed by our precedents."⁷⁶ According to Franklin, the Court's perfunctory treatment of equality suggests that "significant constitutional determinations concerning equality may be made invisibly or implicitly, with little or no analysis or justification."⁷⁷ This disregard of equality, in tandem with the *Dobbs* majority's slavish adherence to history and tradition, offers the Court an avenue "to silently gut or dismantle equal protection doctrine."⁷⁸

As Franklin observes, many of the cases in which the Court has deployed the history-and-tradition approach are not equal-protection cases.⁷⁹ Nevertheless, in those cases, the Court deploys its preferred history-and-tradition

71. Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946, 951 (2024).

72. *Id.*

73. *Id.* at 950-51.

74. *Id.* at 971-79.

75. *Id.* at 986; Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 68 (2022) ("In two paragraphs at the beginning of *Dobbs v. Jackson Women's Health Organization*, the Supreme Court rejected the Equal Protection Clause as an alternative ground for the abortion right."); Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva Siegel as Amici Curiae Supporting Respondent at 1-5, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392).

76. *Dobbs*, 597 U.S. at 236.

77. Franklin, *supra* note 71, at 951.

78. *Id.*

79. *Id.*

methodology to vindicate its particular vision of equality and equal protection – and a particular understanding of the constituencies in need of judicial solicitude.⁸⁰

Taken together, these four essays strip *Dobbs* down to its bones, revealing the deliberately outcome-driven architecture that scaffolds its holding. As these four essays make clear, the *Dobbs* Court’s decision to overrule *Roe* and *Casey* was not the manifestation of objective historical directives. Rather, it was a *choice* – a choice that was careful, considered, and cloaked in distracting appeals to classic symbols of comfort, legitimacy, and the rule of law. This intentionality underscores what it means to *make* history: to make is not to identify, but to shape, create, name, and claim.

II. BEYOND *BROWN* AND *PLESSY*: THE COURT’S APPEALS TO RACIALIZED HISTORY

Several other aspects of the *Dobbs* decision reflect the Court’s calculated choices about which histories to elevate and which histories to suppress in the effort to present specific policy choices as neutral – and foreordained. As several of the essays in this Collection note, part of the *Dobbs* Court’s strategy for legitimizing the overruling of *Roe* and *Casey* involved linking *Roe* and the abortion right to *Brown* and its denunciation of *Plessy*’s misguided endorsement of separate but equal.

But critically, the *Dobbs* Court’s calculated use of history goes beyond merely reframing *Roe* as *Plessy*’s heir and *Dobbs* as *Brown*’s. In an unassuming footnote, the *Dobbs* majority credits the view – long husbanded by Justice Thomas⁸¹ – that abortion has been deployed as a vehicle of deracination and genocide.⁸² As

80. I have developed this view at greater length in other work. See, e.g., Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1533 (2024) (discussing the Court’s efforts to seed a new cadre of “minorities”); Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 274-86 (2019) (discussing the Court’s use of animus, a traditional equal-protection construct, to vindicate the interests of straight Christians).

81. See generally *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1782-92 (2019) (Thomas, J., concurring) (advancing the view that abortion can be used to thwart reproduction among African Americans).

82. See *Dobbs*, 597 U.S. at 255 n.41. For additional discussion of the “abortion as genocide” narrative, see Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021) [hereinafter Murray, *Race-ing Roe*] (discussing the ascendance of this narrative); Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599 (2022) (same); Murray & Shaw, *supra* note 38, at 802-03 (discussing footnote forty-one of *Dobbs*); Melissa Murray, *Thomas and Alito are Appropriating Racial Justice to Push a Radical Agenda*, MOTHER JONES (June 28, 2022),

Justice Alito explains, a series of amicus briefs filed in *Dobbs* argued that those favoring “liberal access to abortion . . . have been motivated by a desire to suppress the size of the African American population.”⁸³ According to Alito, empirical evidence supported the view of abortion as racial genocide: “it is beyond dispute that *Roe* has had that demographic effect.”⁸⁴ After all, “[a] highly disproportionate percentage of aborted fetuses are Black.”

In noting the concordance between race and abortion, Justice Alito cites Justice Thomas’s separate opinion in 2019’s *Box v. Planned Parenthood of Indiana & Kentucky*,⁸⁵ which featured a challenge to an Indiana law that prohibited abortion if undertaken for reasons of race or sex selection or because of the diagnosis of a fetal anomaly.⁸⁶ Critically, Thomas’s *Box* concurrence also focused on history – or at least what purported to be history. In his *Box* concurrence, Thomas asserted that “[t]he foundations for legalizing abortion in America were laid during the early 20th-century birth-control movement,” which “developed alongside the American eugenics movement.”⁸⁷ According to Thomas, reproductive-rights pioneer Margaret Sanger partnered with the eugenics movement, endorsing contraception as an effective method of population control.⁸⁸ And critically, the shared interest in optimizing the size and quality of the population was, Thomas maintains, laced with racial animus. Sanger, he noted, “campaign[ed] for birth control in black communities” – deliberately siting birth-control clinics in Black neighborhoods, like Harlem, in order to target Black reproduction.⁸⁹

The effort to link abortion to the history of the eugenics movement and the prospect of racialized genocide is deeply meaningful as an exercise in making history. If the comparison to *Plessy* served to cast *Roe* as a misguided decision that was rightly overruled, then the imbrication of abortion, eugenics, and racialized genocide further elaborates the comparison by intimating that legalized abortion has injured the Black community in similar ways as the horrors of Jim Crow. Reframed as a technology of eugenics, abortion is recast as a method of deracination⁹⁰ – akin to Nazi Germany’s decimation of the European Jewish

<https://www.motherjones.com/politics/2022/06/thomas-and-alito-are-appropriating-racial-justice-to-push-a-radical-agenda> [<https://perma.cc/Y2MX-2F6M>] (same).

83. *Dobbs*, 597 U.S. at 255 n.41.

84. *Id.*

85. *Id.* (citing *Box*, 139 S. Ct. at 1782-84 (Thomas, J., concurring)).

86. IND. CODE § 16-34-4 (2016).

87. *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

88. *Id.* at 1787; see also Murray, *Race-ing Roe*, *supra* note 82, at 2036 (noting Thomas’s discussion of Sanger’s ties to the eugenics movement).

89. *Box*, 139 S. Ct. at 1788 (Thomas, J., concurring).

90. In his *Box* concurrence, Justice Thomas explicitly attributes to the eugenics movement of the 1920s an interest in limiting the population of African Americans in the United States, noting

population.⁹¹ In this vein, the *Dobbs* Court’s decision to rescind the constitutional right to abortion that *Roe* recognized is not a regressive assault on gender equality.⁹² Instead, by resort to this invented history, it is recast as a progressive vindication of racial justice and the Court’s role in protecting “discrete and insular minorities.”⁹³

As I have elsewhere argued, the history that Justice Thomas sketched—and that Justice Alito cites in footnote forty-one of *Dobbs*—is selective and

that “[m]any eugenicists believed that the distinction between the fit and the unfit could be drawn along racial lines.” *Id.* at 1785. As Thomas explains, anxiety that “the prodigious birth-rate of the nonwhite races was bringing the world to a racial tipping point,” prompted the enactment of eugenics-infused laws aimed at limiting immigration to the United States and preventing miscegenation. *See id.* (internal quotation marks omitted).

91. *See, e.g.*, *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 538 (6th Cir. 2021) (Griffin, J., concurring) (“The philosophy and the pure evil that motivated Hitler and Nazi Germany to murder millions of innocent lives continues today. Eugenics was the root of the Holocaust and is a motivation for many of the selective abortions that occur today.”); *Box*, 139 S. Ct. at 1786 (Thomas, J., concurring) (“Support for eugenics waned considerably by the 1940s as Americans became familiar with the eugenics of the Nazis But even today, the Court continues to attribute legal significance to the same types of racial-disparity evidence that were used to justify race-based eugenics.”). Prominent political leaders, including President Ronald Reagan and current Speaker of the House of Representatives Mike Johnson, have also explicitly compared abortion to the Holocaust. In 1984, then-President Reagan published a volume on abortion that invoked the Holocaust in its discussion of abortion. RONALD REAGAN, *ABORTION AND THE CONSCIENCE OF THE NATION* (1984). The book included an essay by Reagan’s Surgeon General, C. Everett Koop, titled, *The Slide to Auschwitz*, and another by pro-life advocate Malcolm Muggeridge titled, *Humane Holocaust*. Reagan’s own essay favorably cited two other books that explicitly compared abortion to the Holocaust. *See* REAGAN, *supra*, at 36 (“We should not rest until our entire society echoes the tone of John Powell in the dedication of his book, *Abortion: The Silent Holocaust*”); REAGAN, *supra*, at 29 (“Another William Brennan—not the Justice—has reminded us of the terrible consequences that can follow when a nation rejects the sanctity of life ethic: ‘[t]he cultural environment for a human holocaust is present whenever any society can be misled into defining individuals as less than human and therefore devoid of value and respect.’” (quoting WILLIAM BRENNAN, *THE ABORTION HOLOCAUST: TODAY’S FINAL SOLUTION* (1983))). In a 2005 opinion essay, Speaker of the House Mike Johnson compared abortion to the Holocaust. *See* Scott MacFarlane & Michael Kaplan, *House Speaker Mike Johnson Once Referred to Abortion as “A Holocaust,”* CBS NEWS (Oct. 26, 2023, 8:19 PM EDT), <https://www.cbsnews.com/news/house-speaker-mike-johnson-abortion-holocaust> [<https://perma.cc/R5BV-8Q55>] (describing Johnson’s essay in the *Shreveport Times* in which Johnson argued that the judicial philosophy underlying decisions like *Roe v. Wade* and *Planned Parenthood v. Casey* “is no different than Hitler’s It is a holocaust that has been repeated every day for 32 years, since 1973’s *Roe v. Wade*.”).
92. Murray, *Race-ing Roe*, *supra* note 82, at 2089 (“Just as the reproductive justice movement extended the boundaries of the abortion debate beyond gender and feminism, thus transforming the central understanding of what reproductive rights are, Justice Thomas seeks to change the social—and constitutional—meaning of abortion, transforming it from an issue of privacy and sex equality to one of racial equality.”).
93. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

incomplete.⁹⁴ As an initial matter, Thomas blithely conflated the history of the birth-control movement and contraception with the history of abortion, although the two are quite different.⁹⁵ Meaningfully, neither the eugenics movement nor Margaret Sanger advocated abortion.⁹⁶ An early advocate of “voluntary motherhood,”⁹⁷ Sanger decried abortion as “the abnormal, often dangerous, surgical operation,”⁹⁸ insisting that ready access to contraception would better facilitate women’s ability to choose motherhood on their own terms.⁹⁹

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94. See Murray, *Race-ing Roe*, *supra* note 82, at 2028; see also Mary Ziegler, *Bad Effects: The Misuses of History in Box v. Planned Parenthood*, 105 CORNELL L. REV. ONLINE 165, 196-202 (2020) (critiquing the historical arguments in Justice Thomas’s *Box* concurrence); Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL’Y REV. 273, 276 (2020) (“When Justice Thomas and others seek to weaponize disability rights against abortion, they distort or disregard the full history of eugenics.”); Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATL. (May 29, 2019), <https://theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455> [<https://perma.cc/8835-64ZU>] (explaining that “Thomas used the history of eugenics misleadingly, and in ways that could dangerously distort the debate over abortion”); Alexandra Minna Stern, Opinion, *Clarence Thomas’ Linking Abortion to Eugenics Is as Inaccurate as It Is Dangerous*, NEWSWEEK (May 31, 2019, 12:02 PM), <https://www.newsweek.com/clarence-thomas-abortion-eugenics-dangerous-opinion-1440717> [<https://perma.cc/P3GT-YYBE>] (asserting that Thomas’s abortion-as-eugenics reasoning is “historically inaccurate”).
95. See Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, *supra* note 82, at 1632 (noting that “abortion and contraception have distinct histories”). See generally Murray, *Race-ing Roe*, *supra* note 82 (discussing these different histories). Meaningfully, Thomas concedes these distinctions, though he insists that they are distinctions without difference. See, e.g., *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring),
- It is true that Sanger was not referring to abortion when she made these statements, at least not directly But Sanger’s arguments about the eugenic value of birth control in securing ‘the elimination of the unfit[]’ . . . apply with even greater force to abortion, making it significantly more effective as a tool of eugenics.
- Box*, 139 S. Ct. at 1784 (internal citations omitted); *Box*, 139 S. Ct. at 1788-89 (“To be sure, Sanger distinguished between birth control and abortion Although Sanger was undoubtedly correct in recognizing a moral difference between birth control and abortion, the eugenic arguments that she made in support of birth control apply with even greater force to abortion.”).
96. See Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, *supra* note 82, at 1606 (“[N]either the eugenics movement nor Margaret Sanger was preoccupied with endorsing abortion as a means of reproductive control.”).
97. See Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 AM. SOCIO. REV. 498, 510 (2004); Murray, *Race-ing Roe*, *supra* note 82, at 2038-39 (discussing Sanger’s interest in voluntary motherhood). See generally ELLEN CHESLER, *WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA* (2007) (discussing Sanger’s work in the birth-control movement and her early interest in voluntary motherhood).
98. Margaret Sanger, *Birth Control or Abortion?*, 2 BIRTH CONTROL REV. 1, 3 (1918).
99. *Id.*

For its part, the eugenics movement's efforts were focused on optimizing the white race through coercive sterilization, miscegenation bans, and restrictive immigration policies.¹⁰⁰ Its interests in racial engineering did not extend to abortion, and its activities were largely focused on rooting out "defective" whites and preventing the "mongrelization" of the white race, not on coercing unwitting Black communities to exercise reproductive freedom.¹⁰¹

Justice Thomas's narrative overlooks these unhelpful facts (which are readily accessible) while also ignoring the Black community's agency in seeking broader access to contraception. As Professor Dorothy Roberts notes, "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, then as now, faced startlingly high rates of maternal and infant mortality.¹⁰² Eager to secure the Black community's economic stability, W.E.B. Du Bois publicly endorsed birth control as a means of vesting Black women with the ability to choose "motherhood at [their] own discretion."¹⁰³

And these are not the only histories that Justice Thomas elides in the effort to forge a new history in which abortion is a tool of eugenics and *Roe* is a vehicle of racial injustice. In conflating the history of the birth-control movement with the history of abortion, Thomas neglects the degree to which the nineteenth-century campaign to criminalize abortion was underwritten by its own elements of racial injustice. As scholars have noted, nativism and white supremacy animated the push to criminalize abortion in the nineteenth century.¹⁰⁴ Falling

100. See Murray, *Race-ing Roe*, *supra* note 82, at 2037-38.

101. *Id.* at 2037; see also Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 465-66 (2019) ("At bottom, eugenics was about improving the white race. Because nonwhite races were thought to be inveterately inferior, eugenicists conceptualized any effort to improve these races through the elimination of undesirable genes as laughably futile or wholly impossible. Thus, it is not an overstatement to say that, on the whole, eugenicists working in the early twentieth century were uninterested in people of color.") (emphasis omitted); Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOC. INQUIRY 541, 546-51 (1998) (discussing the eugenics movement's efforts to optimize the white race through antimiscegenation bans, coercive sterilization policies, and immigration restrictions).

102. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 82-84 (1997).

103. W.E. BURGHARDT DU BOIS, *DARKWATER* (1920), reprinted in *THE OXFORD W.E.B. DU BOIS READER* 483, 565 (Eric J. Sundquist ed., 1996).

104. See SARA DUBOW, *OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA* 20-23 (2010); Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 335 (2022) ("Nativists such as Dr. Horatio Robinson Storer, who spearheaded the campaign to criminalize abortion, were concerned that the country would soon be overrun with Catholic immigrants who had more children than white Protestants and that Protestant women were shirking their duties to become mothers."); Reva Siegel, *Reasoning from the Body: A Historical*

birthrates among native-born white women, coupled with rising birthrates among immigrant and nonwhite populations “fuel[ed] concerns that the nation was on the precipice of a massive demographic reordering.”¹⁰⁵ The criminalization of abortion proceeded amidst fears that “these demographic changes would radically alter the nation’s character (and reduce the political power of native-born whites),” and in the hope that such measures would “deter[] native-born white women from terminating pregnancies.”¹⁰⁶ Drawing comparisons to contemporary “Replacement Theory” (and confounding Thomas’s selective history), Reva Siegel and Duncan Hosie have shown that the effort to criminalize abortion was part of a broader effort to ensure that America remained a white nation.¹⁰⁷ Yet this inconvenient history, which makes clear the nativist and white supremacist impulses that undergirded nineteenth-century abortion restrictions, is utterly absent in Thomas’s cobbled-together narrative.¹⁰⁸

Nevertheless, despite its obvious omissions and flaws, Justice Thomas’s association of abortion with eugenics is powerful. For years, women’s rights advocates have made the case that reproductive freedom was essential for women’s equality.¹⁰⁹ More recently, reproductive justice advocates have expanded this

Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 318 (1992) (“Concerns of gender, ethnicity, and class were not peripheral to this ethic, but an integral part of it. The interest in protecting unborn life was an interest in preventing (certain) women from practicing birth control.”).

105. Murray, *Race-ing Roe*, *supra* note 82, at 2036; *see also* Siegel, *supra* note 104, at 281–82 (discussing the physician’s campaign to restrict abortion among native-born white women).

106. Murray, *Race-ing Roe*, *supra* note 82, at 2036; Siegel, *supra* note 104, at 281–82.

107. Reva Siegel & Duncan Hosie, *Trump’s Anti-Abortion and Anti-Immigration Policies May Share a Goal*, TIME (Dec. 13, 2019, 4:35 PM), <https://time.com/5748503/trump-abortion-immigration-replacement-theory> [<https://perma.cc/MBS6-M25T>].

108. *See* Reva B. Siegel & Mary Ziegler, *Abortion-Eugenics Discourse in Dobbs: A Social Movement History*, 2 J. AM. CONST. HIST. (forthcoming 2024) (reconstructing the role of the antiabortion movement in seeding the association between abortion and eugenics in and beyond communities of color, and “[e]xamin[ing] the underappreciated role these arguments played in *Dobbs*”).

109. *See, e.g.*, *Hall v. Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969) (reviewing claims that abortion access vindicated, among other things, gender equality); *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972) (same), *vacated on other grounds*, 410 U.S. 951 (1973); *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969) (reviewing claims that lack of abortion access violates, among other things, poor women’s rights to equal protection under the Fourteenth Amendment), *rev’d*, 402 U.S. 62 (1971); *Babbitt v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970) (same); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970) (same); *Klein v. Nassau Cnty. Med. Ctr.*, 347 F. Supp. 496 (E.D.N.Y. 1972) (reviewing the claim that a directive prohibiting the use of Medicaid funding for abortion would deny indigent women the equal protection of the laws to which they are constitutionally entitled), *vacated on other grounds*, 412 U.S. 925 (1973); *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971) (reviewing Fourteenth Amendment claims of two women plaintiffs who are in different socioeconomic classes and sought abortions), *vacated on*

frame to show how limits on abortion and contraception not only implicate gender equality, but race and class equality as well.¹¹⁰ Taken together, these efforts forged a new social meaning for reproductive rights – one in which more liberal access to abortion (and contraception) were part of an intersectional appeal to gender, race, and class equality.

But Justice Thomas’s thin history, which the *Dobbs* majority seemingly incorporates by reference, turns this logic on its head. If the reproductive-justice movement, in tandem with the reproductive-rights movement, argues that restrictions on abortion are not just about gender injustice but also about race and class injustice, then the association of abortion with eugenics counters these intersectional justice claims by insisting that the *real* injustice is abortion’s decimation of communities of color.¹¹¹ In this regard, Thomas’s *Box* concurrence and the *Dobbs* majority opinion remade history in an effort to transform the social meaning of abortion once again.

And critically, this use of history is also an attempt to reshape our understanding of jurisprudence and the Court’s obligation to follow precedent. Justice Thomas’s abortion and genocide narrative is powerful in many respects, but it is perhaps most effective in bolstering the view that *Roe* and *Casey* were illegitimate decisions that were not entitled to stare decisis deference. That is, by associating abortion with racial genocide, Thomas constructs an argument that paints *Roe* and *Casey* with the brush of racial animus.¹¹² On this account, in addition to concerns about its poor reasoning and misguided identification of a fundamental right, *Roe* is suspect – and ripe for overruling – because it is rooted in racism.¹¹³ And critically, this racially remedial logic has underwritten departures from precedent in the past.¹¹⁴ In October Term 2019, in *Ramos v. Louisiana*,¹¹⁵ the Court overruled a 1972 precedent in part because an earlier Court failed to appreciate

other grounds, 410 U.S. 950 (1973); see also Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875, 1889–90 n.66 (2010) (discussing pre-*Roe* litigation efforts that emphasized the racial and economic disparities of abortion restrictions); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2042 (2011) (“[I]n the late 1960s, many feminists began to view challenging policies concerning childbearing as essential to women’s equality and to advocate for the decriminalization of abortion.”).

110. See Murray, *Race-ing Roe*, *supra* note 82, at 2055–57.

111. *Id.* at 2059–71 (discussing the effort to use the “abortion as eugenical” narrative to shift the social meaning of abortion from an issue of gender justice to a question of racial injustice).

112. *Id.* at 2077.

113. *Id.*

114. *Id.* at 2077–80.

115. 140 S. Ct. 1390 (2020).

the challenged policy's white supremacist underpinnings.¹¹⁶ In this regard, the broader interest in racial justice – and remedying the racial injustices wrought by earlier generations – bolstered the case for overturning *Roe* and withdrawing the abortion right.

In the end, of course, the decision to scuttle *Roe* and *Casey* did not explicitly rest on claims of irredeemable racial animus, but rather on another contestable historical account: the flawed state-counting method that the essays in this Collection discuss at length.

But even though it is not the crux of the *Dobbs* Court's reasoning, Justices Alito and Thomas's efforts to paint abortion and its history with the brush of racism are deeply meaningful. Through its marshaling of a contested – and contestable – history linking abortion and eugenics, footnote forty-one of *Dobbs* cultivates the view that abortion has genocidal potential, conjuring images of Nazi concentration camps and other efforts to eradicate minority groups.¹¹⁷

Viewed through this incendiary lens, not only is the social meaning of abortion transformed, but also the social meaning of abortion *restrictions*. In a world in which abortion is a tool of deracination, abortion restrictions assume new import. Rather than being viewed as limits on women's intersectional liberty and equality, abortion restrictions are recast as antidiscrimination measures designed to prevent the most egregious form of racial injustice: genocide.¹¹⁸

The effort to remake the meaning of abortion restrictions – and indirectly, the overruling of *Roe* and *Casey*, which would have subjected such restrictions to

116. *Id.* at 1405.

117. To be sure, the antiabortion movement has long cultivated the association between abortion, Nazism, and the Holocaust. As sociologists Nicola Beisel and Sarah Lipton-Lubet have documented, “[p]ro-life activists have likened abortion to the Nazi Holocaust from the earliest days of the movement.” Nicola Beisel & Sarah Lipton-Lubet, *Appropriating Aushwitz: The Holocaust as Analogy and Provocation in the Pro-Life Movement* (unpublished manuscript) (on file with author). Contemporary antiabortion rhetoric and argument frequently associate abortion with the Nazis’ targeted deracination of Jews. See, e.g., Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1042 (2003) (“To the extent that the Court has invalidated essentially all legal restriction of abortion, it has authorized private violence on a scale, and of a kind, that unavoidably evokes the memories of American slavery and of the Nazi Holocaust.”); *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 538, 540 (6th Cir. 2021) (Griffin, J., concurring) (“Many think that eugenics ended with the horrors of the Holocaust. Unfortunately, it did not . . . Specifically, the selective abortion of unborn babies who are deemed ‘unfit’ or ‘undesirable’ is becoming increasingly common.”); *Mike Huckabee Compares Abortion to Slavery*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/mike-huckabee-abortion-slavery_n_824020 [<https://perma.cc/NKC4-AW22>].

118. See Murray, *Race-ing Roe*, *supra* note 82, at 2064 (“[T]he association of abortion with eugenics may serve as a thumb on the scale, imbuing the state’s efforts to limit abortion access with the patina of antiracism and antidiscrimination.”).

more searching judicial review—aligns with the *Dobbs* Court’s cooptation of *Brown*’s history. In much the same way the majority sought to reframe the overruling of *Roe* and *Casey* as akin to the *Brown* Court’s disavowal of *Plessy*, footnote forty-one aligns the abortion restrictions that will surely follow in *Dobbs*’s wake as necessary tools of racial justice.

III. HISTORY AND THE VINDICATION OF THE RIGHTS OF (NEW) DISCRETE AND INSULAR MINORITIES

The majority’s invocation of the thin history linking abortion to eugenics serves to provide an additional justification for the *Dobbs* decision, recasting it—and the abortion restrictions that will inevitably flow from it—as acts of racial justice. But racial justice for whom? As this Part argues, the effort to associate abortion with the eugenics movement goes beyond simply reshaping the social meaning of abortion. It may also undergird an effort to enshrine the fetus as a rights-bearing minority for purposes of constitutional and statutory law.

Although footnote forty-one notes the disproportionate rates of abortion among Black women, it is likely that Black women and the Black community are not the only—or even the intended—beneficiaries of abortion restrictions’ anti-discrimination potential. Under footnote forty-one’s logic, abortion restrictions, in the long-term, prevent the deracination of vulnerable minority communities. But in the short-term, they protect another vulnerable entity: the fetus.¹¹⁹ In other words, the account of abortion as genocide is not only an effort to recast abortion restrictions as an element of racial justice; it is also an effort to identify the fetus as an entity *in need* of judicial protection. Viewed in this light, the *Dobbs* Court’s deployment of this selective and incomplete history serves a particular purpose. To cast abortion restrictions as antidiscrimination measures suggests, however implicitly, that the *fetus* is an entity subject to discriminatory actions and in need of state protection.¹²⁰ In this way, footnote forty-one and the argument it undergirds gesture toward fetal personhood—the view that the fetus is a person imbued with rights that the Constitution protects.¹²¹

Since *Dobbs* was decided, fetal personhood rhetoric has proliferated. In a much-discussed ruling in a challenge to the Food and Drug Administration’s 2000 approval of mifepristone, the first drug in the two-drug medication abortion protocol, a federal trial judge deployed the vernacular of fetal personhood

119. See Murray & Shaw, *supra* note 38, at 802; see also Murray, *Race-ing Roe*, *supra* note 82, at 2063-65 (discussing the effort to cast abortion restrictions as antidiscrimination measures).

120. Murray & Shaw, *supra* note 38, at 802.

121. *Id.* at 802-03.

repeatedly, referring to fetuses as “unborn humans,” “babies,” and “children.”¹²² In a recent oral argument before the Florida Supreme Court concerning a proposed ballot initiative that would enshrine protections for reproductive freedom in the state constitution, the court’s Chief Justice repeatedly questioned the advocates as to whether the Florida Constitution recognized the fetus as a person.¹²³ The logic of his questions was evident: If the fetus was a person for purposes of state law, then the proposed ballot initiative, and its protections for reproductive rights, was an impermissible modification of the fetus’s rights under Florida law.¹²⁴ Finally, in a widely discussed decision, the Alabama Supreme Court embraced the logic of fetal personhood in determining that the state’s wrongful death statute could be deployed in circumstances involving the destruction of cryogenically preserved embryos, which the court referred to as “extrauterine children.”¹²⁵

Critically, these gestures toward fetal personhood may signal another, perhaps more concerning development. In nodding toward fetal personhood, the *Dobbs* majority frames fetuses as a *minority group* in need of judicial protection.¹²⁶

122. See *All. for Hippocratic Med. v. FDA*, No. 22-CV-223, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023), *aff’d in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom. FDA v. All. for Hippocratic Med.*, 144 S. Ct. 537, 217 L. Ed. 2d 285 (2023).

123. See Kate Riga, *Florida Chief Justice Pushes Fetal Personhood at Argument for Abortion Amendment*, TALKING POINTS MEMO (Feb. 7, 2024, 11:40 AM), <https://talkingpointsmemo.com/news/florida-chief-justice-fetal-personhood-abortion-amendment> [<https://perma.cc/C4SM-NRNC>].

124. See *Strict Scrutiny, The Good, the Bad, and the Ugly from State Courts*, CROOKED MEDIA, at 56:12 (Feb. 19, 2024), <https://crooked.com/podcast/29662> [<https://perma.cc/L6BU-N3JV>] (discussing the import of the Chief Justice’s fetal personhood rhetoric).

125. See *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022-0515, 2024 WL 656591, at *1 (Ala. Feb. 16, 2024) (“The central question presented in these consolidated appeals, which involve the death of embryos kept in a cryogenic nursery, is whether the Act contains an unwritten exception to that rule for extrauterine children[:]unborn children who are located outside of a biological uterus at the time they are killed.”).

126. *Dobbs*, 142 S. Ct. at 2268 (“[N]one of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed ‘potential life.’”); *id.* at 2258 (“What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn human being.’” (citing *Roe v. Wade*, 410 U.S. 113, 159 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992))); *id.* at 2243 (“*Roe*’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called ‘fetal life’ and what the law now before us describes as an ‘unborn human being.’”); *id.* at 2261 (“The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States’ interest in protecting fetal life.”); *id.* at 2256 (“[O]ur decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests.”).

In so doing, the *Dobbs* majority does not simply credit the view that the fetus is a rights-bearing individual—it underwrites the fetus’s *equality* relative to other rights-bearing individuals.

There is no principle more central to the logic of equal protection than the rights of minorities. In another consequential footnote—footnote four of *United States v. Carolene Products Co.*—the Court sketched a hierarchy of claims that would trigger heightened judicial scrutiny and protection.¹²⁷ As footnote four explained, more searching judicial scrutiny was warranted in circumstances where government actions implicated fundamental rights, impaired the political process, or intruded upon the rights of “discrete and insular minorities.”¹²⁸ Years later, in his seminal work, *Democracy and Distrust: A Theory of Judicial Review*, constitutional theorist John Hart Ely would elaborate the question of the Court’s obligations to preserve the pathways of political participation and to protect politically vulnerable minorities.¹²⁹ In his defense of the Warren Court and its decisions dismantling segregation and enfranchising racial minorities, Ely gestured to *United States v. Carolene Products* footnote four to argue that judicial review was not countermajoritarian, as some claimed, but rather, *democracy-enhancing* when it operated to perfect the political process and facilitate the participation of “discrete and insular minorities” who required the Court’s interventions to protect their interests from the vicissitudes of majoritarian politics.¹³⁰

The logic of *Democracy and Distrust* shadows the Court’s disposition of *Dobbs*. As the *Dobbs* majority explains, *Roe*—and later *Casey*—conjured a fundamental right out of whole cloth, depriving the people of the opportunity to deliberate and decide the abortion question for themselves. On this telling, *Dobbs* does no more than return a fraught and divisive issue “to the people and their elected representatives.”¹³¹

Curiously, for a decision that is utterly preoccupied with promoting democracy and democratic engagement, the *Dobbs* majority opinion spends little time pondering *Democracy and Distrust* and Ely’s views of judicial review as a democracy-enhancing enterprise.¹³² Instead, the *Dobbs* majority focuses its attention on one of Ely’s earlier works, the 1974 *Yale Law Journal* article, *The Wages of*

127. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

128. *Id.*

129. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

130. *Id.* at 76-77.

131. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 292 (2022).

132. Indeed, the *Dobbs* majority cites *Democracy and Distrust* just once—for the proposition that “[s]ome scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights.” *See id.* at 240 n.22.

Crying Wolf: A Comment on Roe v. Wade.¹³³ Indeed, in its first pages, the *Dobbs* majority specifically notes that in his “memorable and brutal” essay, Ely decried *Roe* as “‘not constitutional law’ at all and g[iving] ‘almost no sense of an obligation to try to be.’”¹³⁴

But the majority’s interest in *Wages* likely goes beyond Ely’s account of *Roe* as “a very bad decision,”¹³⁵ and instead may speak to a latent interest in refashioning the fetus as a minority in need of judicial protection and solicitude. In *Wages*, Ely critiqued *Roe*’s prioritization of the pregnant woman’s rights and interests above those of the fetus.¹³⁶ In a telling passage, Ely conceded that women frequently lacked political power: “Compared with men, very few women sit in our legislatures”¹³⁷ But, Ely noted, women’s political powerlessness paled in comparison to another entity’s vulnerability. According to Ely, “no fetuses sit in our legislatures.”¹³⁸

Viewed through this lens, the unstated connections between the *Dobbs* majority’s invocation of Ely’s *The Wages of Crying Wolf* and the “abortion as genocide narrative” become more legible. In canvassing the history of scholarly critiques of *Roe*, and highlighting Ely’s critique, the *Dobbs* majority lays the foundation for rebranding the fetus as a minority—and remaking our understanding of *Roe* and its place in constitutional law. If judicial review is intended to, among other things, protect “discrete and insular minorities” who are powerless to press their interests in majoritarian processes, then *Roe*’s vindication of the pregnant woman’s rights left the fetus utterly bereft of judicial protection.¹³⁹ In this regard, *Roe* was doubly problematic. It not only deprived the people of

133. See *id.* at 278 (“John Hart Ely famously wrote that *Roe* was ‘not constitutional law and g[ave] almost no sense of an obligation to try to be.’” (quoting John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 947 (1973))). Ely’s article has been enormously influential. It is among the most cited law review articles of all time. See Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 *MICH. L. REV.* 1483, 1489 (2012) (ranking it the twentieth most-cited law review article of all time). It is frequently cited to discredit and disparage *Roe*—perhaps because it is a sharp critique of *Roe* from an influential law professor whose liberal bone fides were well-known. See Diarmuid F. O’Scannlain, *The Future of the Federal Judiciary*, 20 *FEDERALIST SOC’Y REV.* 138, 140 (2019) (quoting *Wages* and noting Ely’s stature in the legal academy).

134. See *Dobbs*, 597 U.S. at 228.

135. Ely, *supra* note 133, at 947.

136. *Id.* at 933–35.

137. *Id.* at 933.

138. *Id.*

139. See Murray & Shaw, *supra* note 38, at 801.

the opportunity to decide a contentious issue for themselves,¹⁴⁰ but it also ran roughshod over the interests of the fetus, a politically powerless minority.¹⁴¹

In this regard, the selective history of the abortion as genocide, like the *Dobbs* majority's invocation of *Brown*, recalls the Chief Justice's invocation of Massive Resistance. Just as the appeal to *Brown* and Massive Resistance served to cloak the Court in the mantle of Warren Court progressivism, the cobbled-together history of abortion and eugenics seeks to rebrand opposition to abortion as a species of racial justice and fidelity to underserved minorities more broadly. But critically, this "made" history may serve other purposes—beyond simply reframing how the public sees the Court and how the Court sees itself. Instead, in making this new history of abortion as eugenics, the Court and its members also are remaking our understanding of constitutional equality, racial justice, and the identities of those "discrete and insular minorities" whom the Court is obliged to protect.

CONCLUSION

So, what does it mean for the Supreme Court to "do" history? As the four essays in this Collection suggest, for the Court, "doing" history is a dynamic enterprise—one in which the Justices may emphasize certain facts and accounts, while completely occluding others. In this regard, "doing" history is often tantamount to "making" history. The Court frequently invokes the past as a means of recasting the present in terms that will be more palatable to the public—and future publics.

But the invocation of history goes beyond insulating the Court's decisions from public critique, whether in the present or the future. It is also about the Court creating an image of itself and advancing a normative project under the banner of that remade image.

It is often said that history is written by the victors, suggesting that while history is rooted in a collection of objective facts, those facts are subject to interpretation by those who have the power and position to craft the narrative. In his 1996 dissent in *Romer v. Evans*, Justice Scalia echoed this point, famously observing that "[w]hen the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars"¹⁴² On this telling, the Court's account of its own work tends to frame that work as heroic, righting wrongs and vindicating important collective values.

140. *Id.* at 730–31.

141. *Id.* at 801.

142. 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting).

MAKING HISTORY

Nowhere is this impulse more evident than in the Court's presentation of its work in *Dobbs*. From the majority's reliance on history to present its decision as neutral, objective, and in the service of racial justice and democratic engagement, to the Chief Justice's efforts to align his Court with Judge Davies and the noble pursuit of the rule of law, history is a lens through which the Court may refract and reshape its own image – for itself, the public, and its future jurisprudence.

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