DOBBS AND THE ORIGINALISTS

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ABSTRACT

Though often hailed as an originalist triumph, Dobbs v. Jackson Women's Health Organization *has also been condemned as an originalist betrayal. To some, it abandoned originalism's principles in favor of a* Glucksberg*esque history-and-tradition test, or even a "living traditionalism"; to others, its use of originalism was itself the betrayal, yoking modern law to an oppressive past.*

This essay argues that Dobbs *is indeed an originalist opinion: if not distinctively originalist, then* originalism-compliant*, the sort of opinion an originalist judge could and should have written.* Dobbs *shows the importance of looking to our original law—to all of it, including lawful doctrines of procedure and practice, and not just to wooden caricatures of original public meaning. As the case was framed, the Court's focus on history and tradition was the correct approach; on the evidence presented, it reached the correct originalist result. Understanding the Fourteenth Amendment as securing old rights, rather than as letting judges craft new ones, leaves more rather than fewer choices for today's voters. In any case, it may be the law we've made, both in the 1860s and today.*

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INTRODUCTION

Dobbs v. Jackson Women's Health Organization[1] is widely regarded as a "triumph for originalism."[2] For years, many people had assumed that opposing *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[4] was what it *meant* to be an originalist;[5] to see *Roe* and *Casey* overturned would naturally be an originalist victory.

But almost as soon as *Dobbs* was handed down, critics began to describe it as an originalist betrayal. Some saw it as a betrayal *of* originalism, arguing that the Court hadn't been originalist enough.[6] What was it doing, citing substantive due process cases like *Washington v. Glucksberg*?[7] Why wasn't it throwing *Griswold v. Connecticut*,[8] *Eisenstadt v. Baird*,[9] *Lawrence v. Texas*,[10] or *Obergefell v. Hodges*[11]

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1. 142 S. Ct. 2228 (2022).

2. Josh Blackman, *On Abortion, Justices Demonstrate Courage Under Fire,* DESERET NEWS (June 24, 2022, 4:14 PM), https://www.deseret.com/2022/6/24/23182049/perspective-on-abortion-justices-demonstrate-courage-under-fire-roe-v-wade-dobbs-samuel-alito-casey [https://perma.cc/48KX-547X]; *accord* J. Joel Alicea, *An Originalist Victory,* CITY J. (June 24, 2024), https://www.city-journal.org/article/an-originalist-victory [https://perma.cc/DM5P-JE2A]; David J. Garrow, *Justice Alito's Originalist Triumph,* WALL ST. J., May 5, 2022, at A17.

3. 410 U.S. 113 (1973).

4. 505 U.S. 833 (1992).

5. *Cf.* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2384 (2015) ("Obviously many originalists oppose *Roe;* indeed, some have claimed that people are originalists *because* they oppose *Roe*.").

6. *See, e.g.,* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition,* 118 NW. U. L. REV. 433, 457 (2023); Ilan Wurman, *Hard to Square* Dobbs *and* Bruen *with Originalism,* DENVER POST (July 12, 2022, 5:09 PM), https://www.denverpost.com/2022/07/12/roe-vs-wade-originalism-dobbs-bruen-abortion-guns [https://perma.cc/3B6V-QCSX]; *cf.* Sherif Girgis, *Living Traditionalism,* 98 N.Y.U. L. REV. 1477, 1485 (2023) (arguing that the *Dobbs* majority "seemed to assume the legitimacy of a more living-traditionalist method" than an originalist one).

7. 521 U.S. 702 (1997), *cited in* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

8. 381 U.S. 479 (1965).

9. 405 U.S. 438 (1972).

10. 539 U.S. 558 (2003).

11. 576 U.S. 644 (2015).

under the bus?[12] Was this "a form of living constitutionalism," or a "living traditionalism," or something more exotic still?[13] Others, meanwhile, portrayed *Dobbs*'s originalism *itself* as the betrayal—decrying the decision as a flawed effort both in process and in substance, one that engaged in bad history to reach bad results.[14]

Both criticisms go awry. *Dobbs* was, in fact, an originalist opinion as a matter of form; on the arguments presented, it was also correct as a matter of originalist substance. True, the *Dobbs* Court cited and applied its modern precedents on substantive due process, and it didn't cite James Madison or John Bingham every other page. In that sense it wasn't a distinctively originalist opinion, the kind that only a faithful originalist could write. But it was an originalism-*compatible* opinion, the kind a faithful originalist *could* write. Indeed, it appears to have been an originalism-*compliant* opinion, the kind a faithful originalist *should* write, reaching the right originalist result for what were essentially the right originalist reasons.

To understand why, though, we have to pay attention to some recent developments in originalist theory. In particular, we have to distinguish specific questions of original meaning from more general (and, here, more relevant) questions of original law—that is, the law of the United States as it stood at the Founding, and as it's been lawfully changed to the present day.[15] That law includes enacted law, such as the Constitution, statutes, and treaties, but it also

12. *See Dobbs,* 142 S. Ct. at 2261 (distinguishing these cases).

13. *See* Barnett & Solum, *supra* note 6, at 492 (describing *Dobbs* as an instance of "Constitutional Pluralism," which is "a form of living constitutionalism," *id.* at 451); Girgis, *supra* note 6.

14. *See generally, e.g.,* Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111; 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); Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It,* 133 YALE L.J.F. 65 (2023).

15. *See, e.g.*, Stephen E. Sachs, *Originalism as a Theory of Legal Change,* 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455, 1457 (2019); Stephen E. Sachs, *Originalism Without Text,* 127 YALE L.J. 156, 158 (2017); *see also* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism,* 105 GEO. L.J. 97, 99 & n.2 (2016) (defending an "enduring original-law-

includes unwritten law, such as unabrogated rules of the common law, equity, or admiralty.[16] In particular, it includes common law doctrines of party presentation and of stare decisis,[17] doctrines which might have obliged an originalist Court to rule pretty much as it did. If both parties in *Dobbs* accepted the authority of *Washington v. Glucksberg*,[18] it can't be too surprising that the Court might have gone ahead and *Glucksberge*d.

Once we understand the role of unwritten law, we can also see that something not too far from *Dobbs*'s history-and-tradition test may in fact be what the Constitution commands. Many originalists reject most doctrines of substantive due process, but many also see the Fourteenth Amendment's substantive rights guarantees as relating to the Privileges or Immunities Clause instead.[19] This Clause likely protects a variety of *preexisting* rights defined by general law—rights that we today might call common law rights, but not in the sense of being up to state or federal judges to invent.[20] The Clause obliges us to look to history for these rights, not because the

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ism," a term "'ugly enough to be safe from kidnappers'" (quoting C.S. Peirce, *What Pragmatism Is*, 15 MONIST 161, 166 (1905))).

16. *See infra* text accompanying notes 27–34.

17. *See infra* text accompanying notes 35–50.

18. *See* Brief for Petitioners at 12, 15, 28, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) [hereinafter Petitioners' Brief]; Brief for Respondents at 18, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) [hereinafter Respondents' Brief].

19. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."); *see, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring); *id.* at 691–92 (Thomas, J., concurring in the judgment); McDonald v. City of Chicago, 561 U.S. 742, 808–09 (2010) (Thomas, J., concurring in the judgment); RANDY E. BARNETT & EVAN BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT, at xvi–xvii (2021); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP, at ix–xi (2015); CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION 2–5 (2016); William Baude, Jud Campbell, & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1235–36 (2024).

20. Baude, Campbell & Sachs, *supra* note 19, at 1191. On general law, see generally Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019); Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921 (2013); Stephen E. Sachs, Life After *Erie* (Nov. 1, 2023), https://ssrn.com/id=4633575 [https://perma.cc/VBZ6-G9AQ].

past must always be preserved inviolate, but because certain past practices are *evidence* of certain past legal rules, and those rules are all the Amendment foists on us today. If the resulting doctrine is narrower than some might like, this just means the Amendment's yoke is easy and its burden light; the remaining decisions are up to us, and to our "elected representatives."[21]

I. THE ORIGINALIST CRITIQUE

A. Was Dobbs *Originalist?*

Start with the originalist critique. *Dobbs* is a substantive due process opinion. It reviews a Mississippi law under the Fourteenth Amendment's Due Process Clause, and it does so under *Glucksberg*'s substantive due process standard—asking whether the law infringed a right "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[22] At first glance, this doesn't look much like an originalist approach. *Dobbs* doesn't cite *Glucksberg* for evidence of original meaning, and *Glucksberg* itself looks beyond original meaning to postratification traditions.[23] If anything, the argument goes, *Dobbs* adopts a "living constitutionalist strategy"[24] (or perhaps "living-traditionalist"[25]) rather than an originalist one. So it might be natural to argue roughly as follows:[26]

(1) Substantive due process is nonoriginalist.
(2) *Dobbs* uses substantive due process.
∴ (3) *Dobbs* is nonoriginalist too.

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21. *Dobbs,* 142 S. Ct. at 2243.

22. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *accord id.* at 2246 & n.19.

23. *See* Barnett & Solum, *supra* note 6, at 456–57; *id.* at 457 (describing *Dobbs* as "a nonoriginalist decision in its reasoning").

24. *Id.* at 489.

25. Girgis, *supra* note 6, at 1485; *see id.* at 1513–14.

26. *See* Barnett & Solum, *supra* note 6, at 457.

This argument moves too fast, because originalism isn't exhausted by the original meaning of words. Rather, it properly looks to all of our original *law,* not just the part of our law expressed in enacted texts.[27] When we confront a new criminal statute—say, "[w]hoever shall willfully take the life of another shall be punished by death"—we don't read it to displace "the rules of evidence, the elevated burden of persuasion, the jury, and other elements of the legal system";[28] those things might be outside the original meaning of the statute (or, indeed, of any statute), but they're not outside the law, which is why they lawfully affect how the statute may be properly understood and applied. Or when a case falls squarely within the meaning of two different statutes, we might reconcile them through the use of common law rules, rather than pretending that one of those statutes must have meant something different all along.[29]

Originalists often discuss rules of law which the original Constitution's text leaves alone. Rules of sovereign immunity, of removal of officers, or of state borders needn't themselves have been written into the constitutional text for the Constitution to preserve them in operation.[30] If the Constitution denied Congress the power to redraw state borders, say, and if the text says nothing about where those borders are, then the borders stay wherever they *were,* subject to preexisting law about who might have power to change them.[31]

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27. *See* sources cited *supra* note 15.

28. Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited,* 112 HARV. L. REV. 1913, 1913 (1999).

29. *See* Sachs, *Originalism as a Theory of Legal Change, supra* note 15, at 878 & n.238 (discussing Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982)).

30. *See* Sachs, *Originalism Without Text, supra* note 15, at 161, 166 (discussing the removal power and sovereign immunity); Stephen E. Sachs, *Constitutional Backdrops,* 80 GEO. WASH. L. REV. 1813, 1828–34 (2012) (discussing the use of background law in cases concerning state borders); *id.* at 1859–63 (same, concerning the Executive Vesting Clause); *id*. at 1868–75 (same, concerning sovereign immunity).

31. *See* U.S. CONST. art. IV, § 3, cl. 1 (forbidding Congress from forming new states "by the Junction of two or more States, or Parts of States," without their consent); *id.* cl. 2 (providing that "nothing in this Constitution shall be so construed as to Prejudice any Claims . . . of any particular State"); Stephen E. Sachs, Pennoyer *Was Right,* 95 TEX. L. REV. 1249, 1255–69 (2017).

This preexisting law includes not only the local laws of particular states, but rules of *general* law—what Marshall called "that generally recognized and long established law, which forms the substratum of the laws of every State."[32] Whether of common law, equity, admiralty, and so on, such rules are properly applied by federal courts hearing "Cases, in Law and Equity," or "of admiralty and maritime Jurisdiction,"[33] when no applicable source of law overrides them.[34] And as relevant here, they include rules of party presentation and of stare decisis, rules highly relevant to an originalist Court's consideration of *Dobbs*.

In other words, the Court's job in *Dobbs* wasn't just to figure out which party had the better argument; it was mostly to figure out which party *made* the better argument. Our "'adversarial system of adjudication'" follows "'the principle of party presentation,'" which usually instructs a court to "decide a case" in light of what's been advanced "by the parties."[35] Even if you have a knock-down constitutional argument, you can still lose it by failing to raise it at the proper time, such as by waiving it under Rule 12(h) of the Federal Rules of Civil Procedure.[36] Criminal procedure, meanwhile, distinguishes "waiver" from "forfeiture": a "[m]ere forfeiture" by a criminal defendant can be reviewed for plain error on appeal, but

32. United States v. Burr, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (Marshall, Circuit Justice).

33. U.S. CONST. art. III, § 2, cl. 1.

34. *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance,* 97 HARV. L. REV. 1513, 1575 (1984) (describing these as laws *for,* if not *of,* the United States).

35. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 n.6 (2022) (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)); *cf.* Stephan Landsman, *A Brief Survey of the Development of the Adversary System,* 44 OHIO ST. L.J. 713, 730 (1983) (arguing that "the adversary system had become firmly established" in England and America "by the end of the 1700s"). *But cf.* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial,* 90 CORNELL L REV. 1181, 1210 (2005) (pointing out that in equity proceedings, the court sometimes had authority to engage in factfinding *sua sponte).*

36. *See, e.g.,* Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 40–41 (1st Cir. 2001) (applying FED. R. CIV. P. 12(h)).

not an argument that's been waived, whether deliberately or by operation of law.[37] (A forfeited argument is sick unto death, and only the healing hand of the court can revive it; a waived argument has been taken out back and shot.)

True, parties can't *force* judges to decide an issue by taking other issues off the table; courts aren't "bound to accept, as controlling," the parties' "stipulations as to questions of law."[38] But the fact that courts have some discretion to look past these stipulations coexists with a rule that, in general, they shouldn't: "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."[39]

Without fully exhuming the history and development of this party-presentation rule, there's good reason to think that such a rule was already recognized in Founding-era law. (As early as 1796, the Justices openly ignored legal arguments as properly belonging to parties not before them, or not within the scope of a given appeal;[40] they similarly disregarded arguments that counsel had

37. United States v. Olano, 507 U.S. 725, 733 (1993); *see also* United States v. Campbell, 26 F.4th 860, 871–75 (11th Cir. 2022) (en banc); *id.* at 899–902 (Newsom & Jordan, JJ., dissenting); *accord* Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change,* 79 NOTRE DAME L. REV. 1761, 1784 (2004).

38. Est. of Sanford v. Comm'r, 308 U.S. 39, 51 (1939) (citing Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 289 (1917)); *accord* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) (stating that a court isn't "limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"); Gary Lawson, *Stipulating the Law,* 109 MICH. L. REV. 1191, 1209 (2011).

39. NASA v. Nelson, 562 U.S. 134, 147 n.10 (2011) (quoting Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)); *accord* Lawson, *supra* note 38, at 1217 (describing consensus that courts often have "power" to reach nonjurisdictional issues *sua sponte,* but that use of this power is strongly discouraged).

40. *See* M'Donough v. Dannery, 3 U.S. (3 Dall.) 188, 198 (1796) (noting that as certain claimants to property in the court below hadn't "appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause"); *see also* Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830) (Story, J.) ("It was his duty at that time to have filed a cross appeal, if he meant to rely on his claim for damages; and not having then done so, it was a waiver of the claim, and a submission to the decree of restitution and costs only."); Morley Constr. Co. v. Md. Cas. Co., 300 U.S. 185, 191 (1937) (describing this "inveterate and certain" rule).

failed to advance, whether before them or in the court below.[41]) Or the rule may well have lawfully emerged since the Founding, whether through legislation or through the lawful development of the common law. Pursuant to statutory authority, for example, the Supreme Court has adopted rules requiring parties to raise issues and to identify relevant constitutional provisions.[42] If the respondents in *Dobbs* didn't find the Privileges or Immunities Clause relevant,[43] the Court didn't have to either.[44] So while the original meaning of the Due Process Clause might have little to do with *Glucksberg*, there's little reason to think that even an originalist judge, one who looks to the original law of the United States as it's been lawfully changed, *must* consider arguments that no party has chosen to raise.

This party-presentation rule has special force as to prior precedents, which enjoy a presumption of correctness under common law doctrines of stare decisis. At the Founding, Caleb Nelson has argued, this presumption could be overcome if the precedents were

41. *See, e.g.*, Freeland v. Heron, Lenox & Co., 11 U.S. (7 Cranch) 147, 150 (1812) ("There was another exception [to the judgment below], but as it was abandoned in the argument by the counsel, it will not be noticed."); Ins. Co. of Valley of Va. v. Mordecai, 63 U.S. (22 How.) 111, 117 (1860) (noting that if "no such question was made on the trial, or presented to the court for decision," then it "therefore cannot be entertained here"); *see also* Owen B. Smitherman, The Party Presentation Principle as General Law (Mar. 1, 2024) (unpublished manuscript) (on file with author) (manuscript at 17–29) (discussing the historical roots of the doctrine).

42. *See* 28 U.S.C. § 2071(a) (authorizing "[t]he Supreme Court and all courts established by Act of Congress . . . from time to time [to] prescribe rules for the conduct of their business"); SUP. CT. R. 24.1 (requiring that a petitioner's "brief on the merits," *id.*, contain "[t]he constitutional provisions . . . involved in the case, set out verbatim with appropriate citation," *id.* 24.1(f), and that it "exhibit[] clearly the points of fact and of law presented and cit[e] the authorities and statutes relied on," *id.* 24.1(i)); *id.* 24.2 (imposing many of the same requirements on a respondent).

43. *See* Respondents' Brief, *supra* note 18, at 1 (listing, as the only relevant constitutional provision, the Fourteenth Amendment's Due Process Clause). *Compare* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (noting that it's the Due Process Clause on which *Roe*'s "defenders . . . now chiefly rely"), *with id.* at 2245 (using the Court's discretion to discuss an equal protection argument raised only by *amici)*.

44. *Cf.* SUP. CT. R. 24.1(a) (providing that the Court, "[a]t its option," may consider a plain error "evident from the record and otherwise within its jurisdiction to decide").

demonstrably in error; a 51–49 percent chance of error wouldn't disturb settled case law, even if it might satisfy a preponderance standard.[45] There's good reason to think this feature of the rule remains in force today: note how the Court has rejected past decisions after remarking that they were "poorly reasoned"[46] or "'egregiously wrong' on the day [they were] decided."[47] In *Dobbs*, though, neither party argued that *Glucksberg* was wrong (let alone demonstrably erroneous), which gave the Court even less reason to revisit *Glucksberg sua sponte.* The petitioners explicitly endorsed *Glucksberg*'s history-and-tradition test,[48] while the respondents acknowledged *Glucksberg*'s authority and made no criticisms of its reasoning[49]—arguing, instead, that abortion rights would pass the history-and-tradition test with flying colors.[50]

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45. *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents,* 87 VA. L. REV. 1, 1–3 (2001).

46. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2479 (2018); *see also id.* at 2481 n.25 (arguing that if a past decision's rationale "'does not withstand careful analysis' [that] *is* a reason to overrule it" (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)).

47. *Dobbs,* 142 S. Ct. at 2265 (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part)).

48. *See* Petitioners' Brief, *supra* note 18, at 12, 15, 28.

49. *See* Respondents' Brief, *supra* note 18, at 18.

50. *See id.* at 20–21. On the success of that argument, see *infra* section II.A. *Glucksberg* acknowledged a right to abortion in then-governing precedent, *see* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 822 (1992)). (I am indebted for this point to Reva Siegel.) But this acknowledgment doesn't entail that *Casey* actually *passed* the *Glucksberg* test, only that *Glucksberg* had no cause to revisit the various rights "that *this Court ha[d] identified*," rightly or wrongly, as being "deeply rooted." *Id.* at 727 (emphasis added) (citing *Roe* and *Griswold*, among other cases). By way of comparison, consider how the ostensible requirements of *Grutter v. Bollinger,* 539 U.S. 306 (2003), seriously applied, might well have produced the opposite results on *Grutter*'s own facts. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2165 (2023) (citing *Grutter,* 539 U.S. at 333, 341–42); *id.* at 2168–73; *Grutter*, 539 U.S. at 379–87 (Rehnquist, J., dissenting); *cf.* Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?,* 99 NOTRE DAME L. REV. REFLECTION 113, 114 (2023) (noting "the absence of any nonarbitrary factual difference between *Grutter* and *SFFA*"); *accord id.* at 123–25. Moreover, while the Court later cast doubt on *Glucksberg*'s application to "marriage and intimacy," Obergefell v. Hodges, 576 U.S. 644, 671 (2015), *accord Dobbs,* 142 S. Ct. at 2326 n.4 (Breyer, Sotomayor & Kagan, JJ., dissenting), the *Dobbs* Court impliedly distinguished that limitation on the same grounds that it distinguished *Obergefell* itself. *See infra* note 53 and accompanying text.

An originalist Court, then, would have had good reason in *Dobbs* to ask whether *Roe* and *Casey* were demonstrably in error (or even "egregiously wrong"[51]) on the *Glucksberg* test, even if *Glucksberg* itself might turn out to be mistaken on originalist grounds. While a court can forgive a party's forfeiture, it needs good reason to, and the *Dobbs* Court had no particular need to overthrow substantive due process doctrine as a whole. That's not to say the Court *couldn't* have exercised its discretion to revisit substantive due process (as Justice Thomas would have),[52] just that it reasonably decided not to. That's also why the Court didn't have to revisit other individual-autonomy cases, such as *Obergefell:* not only were they outside the parties' arguments and the question presented, but the Court didn't think any generic right to *individual* autonomy, *Glucksberg*-approved or not, would extend to terminating what might be *another's* life, in what *Roe* had called the "inherently different" context of abortion.[53]

Having asked the egregious-wrongness question and answered it, the Court could then go on to consider reliance. In the traditional sense, under common law doctrines of precedent, this meant *detrimental* individual reliance, when the change in decisions would leave parties "worse off than [they] would have been" had the prior case never been decided,[54] and when it's "not of so much consequence" what rules apply "as that they should be settled and

51. *Dobbs,* 142 S. Ct. at 2265.

52. *See Dobbs,* 142 S. Ct. at 2301 (Thomas, J., concurring); McDonald v. City of Chicago, 561 U.S. 742, 811–13 (2010) (Thomas, J., concurring in part and concurring in the judgment)).

53. Roe v. Wade, 410 U.S. 113, 159 (1973) (describing "[t]he situation therefore [as] inherently different from marital intimacy, . . . or marriage, or procreation"); *see Dobbs,* 142 S. Ct. at 2277 (quoting *Roe*); *id.* at 2261 (distinguishing other autonomy cases not concerning an "interest in protecting fetal life"); *infra* text accompanying notes 106—110. *But see* Goodwin, *supra* note 14, at 114 (accusing the Court of "opportunis[m]" for not addressing substantive due process more generally).

54. Vikram David Amar, *Justice Kagan's Unusual and Dubious Approach to "Reliance" Interests Relating to Stare Decisis,* VERDICT (June 1, 2021), https://verdict.justia.com/2021/06/01/justice-kagans-unusual-and-dubious-approach-to-reliance-interests-relating-to-stare-decisis [https://perma.cc/NCG9-ZH6N] (emphasis omitted).

known."[55] Assuming that this exception traditionally extended beyond "rules of property,"[56] even *Casey* agreed that such detrimental reliance was generally absent here, as the *Dobbs* Court pointed out.[57] (Other, more general claims of reliance—for example, concerning decisions of "whether and how to invest in education or careers"[58]—primarily object to the *substance* of *Dobbs*'s rule rather than to the Court's having changed course over time.[59])

To critique these rules of party presentation, stare decisis, and the like, simply because they're not in the text of the Constitution, gets the whole structure of American law wrong. *Most* of American law isn't in the text of the Constitution. The Constitution is our supreme law, outranking anything else. But it isn't all of our law, or even all of our original law—and that's what a faithful originalist should keep in mind.

B. What Would Originalism Say?

But say that the petitioners had gone in guns blazing—asking the Court in *Dobbs,* as the petitioners had asked in *McDonald v. City of Chicago*,[60] to abandon substantive due process altogether. Had the

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55. Nelson, *supra* note 45, at 37 (quoting Lessee of Haines v. Witmer, 2 Yeates 400, 405 (Pa. 1798)).

56. *Id.*; *see also id.* at 20–21 & n.62.

57. *See Dobbs,* 142 S. Ct. at 2276 (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 822, 856 (1992)).

58. *See id.* at 2344 (Breyer, Sotomayor & Kagan, JJ., dissenting)

59. *See id.* at 2277 (opinion of the Court). These reliance claims also seem more ideological than individual; we have not, for example, seen significant numbers of women personally choosing not to pursue careers or education in light of the potential unavailability of abortion. *See, e.g.*, Samantha Ketterer, *Texas Colleges, Universities Report Gender Gap in Fall Enrollment, Continuing Decades-Long Trend,* HOUS. CHRON. (Oct. 4, 2023, 6:37 a.m.), https://www.houstonchronicle.com/news/houston-texas/education/article/houston-colleges-see-gains-in-female-students-18375553.php [https://perma.cc/8YQ4-MGGH] (reporting "disparately high numbers of female students in [Texas colleges'] freshman classes and overall student bodies this fall, making little progress correcting a pattern that has perplexed administrators over the past couple decades").

60. 561 U.S. 742, 753 (2015); *see also id.* at 758 (opinion of Alito, J.) (finding it unnecessary to reconsider the Court's privileges-or-immunities case law); *id.* at 806 (Thomas, J., concurring in part and concurring in the judgment) (agreeing with the petitioners).

Court accepted the invitation, the correct originalist analysis might have taken them pretty much where they ended up.

As Justice Alito has suggested, the Court has treated the Due Process Clause as "a refuge of sorts" for constitutional principles "exiled" from where they were "originally intended to reside."[61] These principles may include, as he notes, the individual rights "guaranteed by the Fourteenth Amendment's Privileges [or] Immunities Clause."[62] Indeed, there's good reason to think this Clause protected the fundamental rights of American citizenship, unwritten legal rights recognized as a matter of general law and understood as implicit limits on legislative power.[63] Many of these rights had been codified in federal or state constitutions, but they weren't fundamental because they'd been codified; they'd been codified because they were fundamental.[64] As Senator Howard described them when introducing the Fourteenth Amendment (and quoting a famous formula from *Corfield v. Coryell*[65]), they included those "privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free Governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign."[66]

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61. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2050 (2023) (Alito, J., concurring in part and concurring in the judgment).

62. *Id.*; *accord Dobbs,* 142 S. Ct. at 2248 n.22.

63. *See* Baude, Campbell & Sachs, *supra* note 19, at 1196–1202.

64. *See, e.g.*, Nunn v. State, 1 Ga. 243, 249 (1846) (recognizing a right to keep and bear arms as an unwritten privilege of citizenship); *see also id.* at 251 (describing the first eight Amendments as "beacon-lights to guide and control the action of [the state] legislatures, as well as that of Congress").

65. 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230). On the dating of *Corfield,* see Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 701 n.2 (2019).

66. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) (quoting *Corfield,* 6 F. Cas. at 551).

This isn't quite the *Glucksberg* history-and-tradition test, but as *Dobbs* pointed out, it bears a clear family resemblance.[67] Rights "implicit in the concept of ordered liberty"[68] look a lot like those which are in their nature fundamental and belong to citizens of all free governments; rights "deeply rooted in this Nation's history and tradition"[69] look a lot like those which have at all times been enjoyed by American citizens. And this resemblance isn't just happenstance: *Glucksberg*'s standard was an intellectual descendant of *procedural* due process standards that similarly looked to general law.[70] Had the Court not taken a wrong step in the *Slaughter-House Cases*,[71] eviscerating the Privileges or Immunities Clause, it wouldn't have needed due process as a refuge; it could have protected these traditional privileges and immunities under their own names.

Whether these traditions reflect a "living traditionalism" depends on how much weight one puts on the wording of *Corfield*. It's perfectly possible for a fixed constitutional provision to reference a developing common law tradition: think of the term "unusual" in the Eighth Amendment, which may mean "contrary to long usage," asking whether a new punishment departs from practices that have *become* traditional by the time of application.[72] If that's what "privileges or immunities" originally meant, then that's what it meant,

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67. *Dobbs*, 142 S. Ct. at 2248 n.22 (discussing the *Corfield* standard); *see also* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 691–98 (drawing a similar comparison).

68. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

69. *Id.* (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

70. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (asking whether a state procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856) (answering a due process question by looking "to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, . . . which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country").

71. 83 U.S. (16 Wall.) 36 (1873).

72. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1815 (2008).

and the originalist answer would be to follow its living-traditionalist command.[73]

But it's also possible, and in my view more likely, that the Fourteenth Amendment was more backward-looking.[74] The *Corfield* rights were rights to which citizens had been entitled "at all times" since the Founding;[75] they were "rights of Englishmen," as Justice Bradley put it in his *Slaughter-House* dissent, "traditionary rights and privileges" which Americans had "inherited . . . from their ancestors."[76] On this account, new rights couldn't be added to the mix; the tradition was a bounded set rather than a growing thing. If so, the Fourteenth Amendment was both a radical and a conservative measure: radical in protecting the citizenship rights of *all* Americans,[77] and conservative in protecting only those rights that American citizenship already guaranteed.

II. THE CRITIQUE OF ORIGINALISM

A. Was Dobbs *Bad Originalism?*

Turn now to the critique *of Dobbs'*s originalism. The Court's critics have been quick to accuse it of getting its history wrong,[78] suggesting that a more careful look would be more sympathetic to abortion rights, even on strict originalist grounds. But some of these critiques, whether made by eminent scholars or by learned societies (such as the American Historical Association, the Organization of American Historians, and the American Society for Legal History),[79] are quite astonishing in their form of argument.

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73. Baude, Campbell & Sachs, *supra* note 19, at 1247–49.

74. *Id.* at 1249–50.

75 Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3230).

76. *Slaughter-House Cases*, 83 U.S. at 114 (Bradley, J., dissenting).

77. *See* U.S. CONST. amend. XIV, § 1 (including as citizens "*All* persons born or naturalized in the United States, and subject to the jurisdiction thereof" (emphasis added)).

78. *See* sources cited *supra* note 14.

79. *See History, the Supreme Court, and* Dobbs v. Jackson*: Joint Statement from the AHA and the OAH,* AM. HIST. ASS'N (July 6, 2022), https://www.historians.org/news/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah

Many make some version of the following claim. Prior to 1868, some states still followed the common law rule whereby no indictment lay for an abortion prior to quickening, "that moment when the embryo gives the first physical proof of life."[80] Other states had restricted this practice by statute in the first half of the nineteenth century. Justice Alito argues that more did, his critics say that fewer did, and the debate is rather contentious.[81]

The existence of this debate is puzzling, because *Dobbs*'s critics don't really hang their hats on the quickening rule;[82] "the first physical proof of life"[83] has always come well before viability, and with modern technology it arrives quite early in pregnancy.[84] But what's more puzzling is what's entirely missing from this debate: a coherent explanation of *why any of this quickening business matters*. If chewing gum wasn't prohibited in most states prior to 1868, that doesn't show that a right to chew gum was deeply rooted in this Nation's history and tradition, much less that chewing gum was a fundamental right of citizenship at general law. It just shows that most states chose not to prohibit it at the time. Likewise, burglary was at common law restricted to intrusions at night, but daytime burgling wasn't seen to be a privilege of American citizenship.[85]

[https://perma.cc/FAB4-QUE2] [hereinafter AHA Statement]; *see also id.* (listing signatories). For full disclosure, I am no longer a member of any of the listed groups.

80. Brief for *Amici Curiae* American Historical Ass'n & Organization of American Historians in Support of Respondents at 7, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (quoting State v. Cooper, 22 N.J.L. 52, 54 (1849)); *accord* AHA Statement, *supra* note 79.

81. *Compare, e.g., Dobbs,* 142 S. Ct. at 2252–53, *with* Tang, *supra* note 14, at 78–83.

82. One potential exception may be Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban,* 75 STAN. L. REV. 1092, 1097–98 (2023).

83. State v. Cooper, 22 N.J.L. (2 Zab.) 52, 54 (1849); *accord* Evans v. People, 49 N.Y. 86, 90 (1872) (pointing to "the first clearly marked and well[-]defined evidences of life").

84. *See* Scott Frothingham, *Your 6-Week Ultrasound: What to Expect,* HEALTHLINE (Oct. 20, 2022), https://www.healthline.com/health/pregnancy/6-week-ultrasound [https://perma.cc/CPG2-GBF6] ("Your embryo has not yet developed a fully-formed heart at 6 weeks, but you may hear a cardiac pulse on the ultrasound.").

85. *See* Theodore E. Lauer, *Burglary in Wyoming,* 32 LAND & WATER L. REV. 721, 731–32 (1997); *cf.* Tang, *supra* note 82, at 1112 (rejecting putative rights "to drink through straws, jump rope, [or] write in cursive"). Even a uniform distinction between daytime

In identifying these privileges, what matters isn't just whether states *did* ban chewing gum or daytime burglaries, but whether the American legal system thought they *could*.[86] That is, we'd want to know whether the law regarded chewing gum and daytime burglary as among the inalienable rights of American citizens, "of which no law can divest them,"[87] or among the "fundamental positive rights" that legislatures hadn't been granted power to infringe, akin to "the right to trial by jury," "the rule against ex post facto laws,"[88] or "the freedom of the press."[89] Rights like these might be subject to state regulation, but they were thought to be immune from state abridgment—just as *Meyer v. Nebraska*[90] later understood the rights "to marry, establish a home and bring up children, . . . privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[91]

On this score, the evidence on abortion is so lopsided as to make the current scholarly debate seem perverse. After all, this isn't a case of applying old understandings to new questions never before debated.[92] If the early-nineteenth-century statutes had really infringed a determinate privilege of American citizenship,[93] one

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and nighttime burglaries might thus be insufficient on its own—as would a "uniform" distinction between pre- and post-quickening abortions. *Id.* at 1113.

86. *See Dobbs*, 142 S. Ct. at 2255; Robert J. Pushaw, Jr., *Defending* Dobbs*: Ending the Futile Search for a Constitutional Right to Abortion*, 60 SAN DIEGO L. REV. 265, 303 (2023) (distinguishing the absence of punishment from the presence of a constitutional right).

87. Jud Campbell, *Natural Rights and the First Amendment,* 127 YALE L.J. 246, 282 (2017) (quoting Congressional Debates (Jan. 21, 1791) (statement of Rep. John Vining), *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 340 (William Charles DiGiacomantonio et al. eds., 1995)).

88. *Id.* at 287.

89. *Id.* at 288; *accord id.* at 289–90.

90. 262 U.S. 390 (1923).

91. *Id.* at 399.

92. *E.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (applying the Fourth Amendment to infrared thermal imaging); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (asking how far zoning laws can require household consanguinity); *see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258 (2022).

93. *See generally* Jud Campbell, *Determining Rights,* 138 HARV. L. REV. (forthcoming 2025) (on file with author) (distinguishing determinate from underdeterminate rights).

might expect them to have provoked serious constitutional objections in the states, just like state infringements of the unincorporated right to keep and bear arms.[94] Yet courts applying the common law quickening rule noted that statutes could override it,[95] and courts applying these statutes raised *no* constitutional objections.[96] Had objections been raised elsewhere, such as before legislatures or the legal public, the *Dobbs* Court surely would have heard about them. Yet the majority knew of "no state constitutional provision, no statute, no judicial decision, no learned treatise"[97] objecting on these grounds, and the dissent fared no better.[98]

(One *Dobbs* critic has described this claim as "historically debatable,"[99] offering two counterexamples from 1854: a pseudonymous writer who argued that abortion was wrong but ought to be lawful nonetheless,[100] and a couple whose article in a self-published journal urged that "every woman has the inherent and inalienable right to choose" and that "any law, or constitution that denies, or violates this right, is a despotism and an outrage."[101] The latter is the sort of sentiment we'd need to see in the historical record, though prefer-

94. *See, e.g.*, Nunn v. State, 1 Ga. 243, 249 (1846).

95. *See, e.g.*, State v. Cooper, 22 N.J.L. 52, 58 (1849) ("If the good of society requires that the evil should be suppressed by penal inflictions, it is far better that it should be done by legislative enactments . . . ."); *id.* at 55–56 (noting statutory restrictions elsewhere); *cf.* Evans v. People, 49 N.Y. 86, 90 (1872) (understanding what "is punished by the [state's] statute" to track the common law rule).

96. *See, e.g.*, State v. Murphy, 27 N.J.L. 112, 114 (1858) (reading a new statute to apply "whether [the fetus] has quickened or not"); State v. Hyer, 39 N.J.L. 598, 599–600 (1877) (same, after the Fourteenth Amendment's ratification).

97. *Dobbs*, 142 S. Ct. at 2254.

98. *See Dobbs*, 142 S. Ct. at 2323, 2324 & n.3 (Breyer, Sotomayor & Kagan, JJ., dissenting) (offering no examples).

99. *See* Tang, *supra* note 14, at 88 n.128.

100. *See id.* at 88 & nn.129–131, 89 & n.132 (discussing W.C. LISPENARD [EZRA REYNOLDS], DR. W.C. LISPENARD'S PRACTICAL PRIVATE MEDICAL GUIDE (Rochester, N.Y., n. pub. 1854); *cf.* LISPENARD, *supra*, at 204 (advertising "Dr. Lispenard's Italian Hair Invigorator"). Reynolds might be read as asserting a claim about existing law, but more plausibly he asserted "a moral, rather than legal, right." Tang, *supra* note 14, at 88 n.128.

101. Tang, *supra* note 14, at 89 & n.136 (quoting and discussing T.L. Nichols & M.S.G. Nichols, *A New Philosophical Dictionary*, NICHOLS' J., Sept. 9, 1854, at 10, 11).

ably from those whom contemporaries saw as having real legal expertise.[102] So the fact that it was delivered in the course of condemning "the perjury and slavery of marriage,"[103] by a pair of water-cure enthusiasts living in a free-love anarchist utopian community on Long Island,[104] diminishes its force as evidence of a "real public dialogue advocating a woman's right to choose"[105]—let alone evidence of this right's having *already* been the law.)

Alternatively, rather than being a "legally determinate right" on its own, a right to abortion might be inferred from some "underdeterminate"—and therefore more easily regulable—principle of individual autonomy.[106] In modern times, abortion has indeed been defended as part of "the right 'to be let alone,'"[107] or of "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."[108] But such generic privileges, precisely because they weren't "legally determinate," were more subject to legislative regulation for "the health, good order, morals, peace, and safety of society"[109]—a quasi–rational basis review that Mississippi's statute easily satisfies.[110]

In some ways, Justice Alito's efforts to show a widespread prohibition of pre-quickening abortion may have done the Court's opinion a disservice. Rather than making a point necessary to win, it

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102. *Cf.* William Baude & Stephen E. Sachs, *The Official Story of the Law,* 43 OXFORD J. LEGAL STUD. 178, 196 (2023) (defining legal experts as "those whose understandings of a community's rules are regarded by its members as good evidence of *their own* commitments and practices").

103. *See* Nichols & Nichols, *supra* note 101, at 11.

104. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 115 (3d ed. 2012).

105. Tang, *supra* note 14, at 91; *see also id.* at 91 n.146 (citing *id.* at 87–90).

106. *See* Campbell, *supra* note 93 (manuscript at 49 n.317); *see also id.* (manuscript at 46–47).

107. Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))

108. *Id.* (italics omitted).

109. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 87 (1873) (Field, J., dissenting); *see* Campbell, *supra* note 93 (manuscript at 46–47, 49 n.317).

110. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283–84 (2022).

was aimed at making the rubble bounce—showing that pre-viability abortion was so very far from being a *right* as to have often been a *crime*.

But that also goes very far beyond what anyone needs to show. The majority's task in *Dobbs* wasn't to show that "*no one in America* thought of access to abortion as a right,"[111] or that there was "an ironclad consensus of state laws punishing abortion throughout pregnancy, an actual history of enforcing those laws in just that way, and the utter absence of any public complaint that such laws violated a woman's right to have an abortion";[112] this gets the burden of historical proof almost precisely backwards. What the *advocates* of an unenumerated right have to show is that state restrictions of the right were *prohibited,* not just *absent.* That is, they'd have to show the asserted right to be deeply rooted in the nation's history and tradition—or, more accurately, to be a privilege of citizenship, inalienable or protected by fundamental positive law (written or customary), and existing "at all times" since the Founding. While evidence of such customary law can be hard to weigh,[113] we should expect to find not only that state laws generally protected such a right, but also that contrary legislation faced objections from legal authorities concerned about infringing the right. Both the majority and the dissent in *Dobbs* searched for such evidence, and both came up dry.

The point here isn't just to be stingy about rights, but to avoid plain misreadings of old common law rules. If the Court in 1973 had announced a constitutional right to chew gum or to burgle in daylight, we could overturn that decision as egregiously wrong without needing an "ironclad consensus" of states' banning such things. It'd be enough to note the absence of any plausible customary-law consensus that they *couldn't.*

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111. Tang, *supra* note 14, at 88.

112. *Id.* at 91.

113. *Cf.* William Baude & Robert Leider, *The General Law Right to Bear Arms,* 99 NOTRE DAME L. REV. 1467, 1492–95 (2024) (describing confusion among courts and commentators about the customary-law nature of the inquiry in *N.Y. State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022)).

B. Does Dobbs *Show Originalism To Be Bad?*

This leaves the critique of *Dobbs*'s originalism in substance: that even if its history is largely correct, we shouldn't be bound by that history, which looks back before women could vote, before the Reconstruction Amendments, even before America was founded—perhaps "as far back," the joint dissenters remarked, "as the 13th (the 13th!) century."[114]

But whether we're bound by that history is a passing strange way to describe the outer limits of rules imposed by the past. If the Fourteenth Amendment had never existed, or if it'd said nothing at all about individual rights, then for good or ill our society would plainly be *less,* rather than more, constrained by the hidebound decisions of past generations.

So the dissent in *Dobbs* tries to hedge its bets on originalism. The dissenters correctly distinguish between an original rule and its present applications, arguing that "applications of liberty and equality can evolve" even "while remaining grounded" in old "constitutional principles."[115] As they see it, the Framers of the Fourteenth Amendment didn't "define rights by reference to the specific practices existing at the time," but rather "in general terms, to permit future evolution."[116] That's a standard originalist move: "two Senators from each State includes Hawaii, though Hawaii wasn't a state at the Founding";[117] a "'19th-century statute criminalizing the theft of goods' applies fully 'to the theft of microwave ovens'";[118] and so on. But the success of that move depends on the historical claim of linguistic generality being *true,* and on the benighted Framers fortunately having chosen the *right* principle to fix. If the Amendment's Framers didn't "perceive women as equals,

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114. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2323 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

115. *Id.* at 2326.

116. *Id.* at 2325.

117. William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto,* 136 HARV. L. REV. 861, 875–76 (2023) (footnote and internal quotation marks omitted).

118. *Id.* at 880 (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 323 (1988) (Scalia, J., concurring in part and dissenting in part)).

and did not recognize women's rights,"[119] that might be a good historical *explanation* for why they failed to make more specific provision for them—and why the privileges-of-citizenship principle they *did* enact might have failed to include abortion, even as applied to modern facts.[120]

It's a complex question how far the principles in the Fourteenth Amendment "recognize women's rights,"[121] at least in the way the *Dobbs* dissent envisions. But understanding the Amendment to secure preexisting rights, rather than to encourage judges to create new ones, wouldn't represent any commitment to preserving the past at the future's expense. The first task the Reconstruction Congress faced was to include millions of now-free Americans within existing categories of legal protection, securing rights to which these Americans *already* had a claim by virtue of their U.S. citizenship. Congress had to work hard enough to gather support for rights its members already knew about and liked, let alone for any "charter protecting the right of all persons to enjoy liberty as we learn its meaning."[122]

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119. *Dobbs,* 142 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting).

120. Thus, if "most women in 1868 also had a foreshortened view of their rights," *id.*, that might be because they accurately understood the common law to fail to confer certain rights. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 140–42 (1873) (Bradley, J., concurring). Or it might be because they and others, "due to outright bigotry and prejudice," Tang, *supra* note 82, at 1119, made "factual errors" about the scope of their rights, *id.* at 1119 n.151. But this widespread-factual-error claim is hard to square with the lighter treatment of pre-quickening abortion's having been "a conscious choice, not inadvertence," *id.* at 1113—or with the much stronger original evidence for other rights no less subject to bigotry and prejudice, such as interracial marriage. *See* David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause,* 42 HASTINGS CONST. L.Q. 213, 216 (2015) (arguing that constitutional protection for interracial marriage was a common position among "Republican officials—including virtually *every* Republican judge to face the question"). On claims that a more general right of autonomy was a privilege of citizenship, and that such autonomy entails abortion rights, see *supra* text accompanying notes 106–110.

121. *Dobbs,* 142 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting); *see* Baude, Campbell & Sachs, *supra* note 19, at 1241–43 (discussing *Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130 (1873)).

122. Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

Of course, if we want to enact new rights, we still can, as the electoral process since *Dobbs* has repeatedly showed.[123] If we don't, we don't. Other countries have changed their laws on abortion through ordinary elections and legislation;[124] if the absence of constitutional abortion rights didn't bind them to the past, why should it bind us? Only if opposition to abortion were somehow politically unreal, if pro-life movements were forever condemned to the role of antediluvian holdovers or shadowy external "forces"[125] and not ordinary present-day political actors, could we see the *absence* of constitutional constraint as the dead hand of the past.

But disagreements in the present, not any errors of the 1860s, are what prevent a nationwide settlement on abortion today. And to the extent that anything can "call[] the contending sides of a national controversy" to "accept[] a common mandate rooted in the Constitution,"[126] as *Casey* infamously suggested, it would be a mandate actually rooted in the Constitution, not one subsequently imposed.

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123. *Compare* Melissa Murray & Katherine Shaw, Dobbs *and Democracy,* 137 HARV. L. REV. 728, 774–75 (2024) (discussing a variety of pro-choice electoral successes post-*Dobbs*, but suggesting that this evinces public disagreement with the majority's "cramped vision of democracy," *id.* at 774), *with* David B. Rivkin Jr. & Jennifer L. Mascott, Opinion, *The Supreme Court Reclaims Its Legitimacy,* WALL ST. J. (June 24, 2022, 1:54 PM), https://www.wsj.com/articles/supreme-court-reclaims-legitimacy-abortion-roe-v-wade-dobbs-v-jackson-women-health-reproductive-rights-life-originalism-justice-alito-11656084197 [https://perma.cc/ZUT6-FSMV] (emphasizing that "*Dobbs* imposes no policy" but "simply states that abortion is not among those individual rights protected by the federal Constitution" and returns "this contentious issue . . . to the state legislatures).

124. *See, e.g.,* Abortion Act 1967, c. 87 (UK).

125. *Cf.* AHA Statement, *supra* note 79 (discussing "the 19th-century forces that turned early abortion into a crime").

126. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992); *see also* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time,* 78 NOTRE DAME L. REV. 995, 1038 (2003) (criticizing *Casey* for depicting "opposition to its entrenchment of *Roe,* to its grand theory, or to the Court, as opposition to the rule of law itself").