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The Supreme Court's Draft Abortion Decision Overturning Roe v. Wade: *How Originalism's Rejection of Family Formation Rights Undermines the Court's Legitimacy and Destabilizes a Functioning Federal Government*

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The Supreme Court's Draft Abortion Decision Overturning Roe v. Wade*: How Originalism's Rejection of Family Formation Rights Undermines the Court's Legitimacy and Destabilizes a Functioning Federal Government*

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On May 3, 2022, someone leaked a draft[1] of the Supreme Court's decision in *Dobbs v. State of Mississippi*,[2] which overturns *Roe v. Wade*.[3] A key passage on page five unequivocally states that "*Roe* and *Casey* must be overruled," the Court's reasoning is that "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment."[4] Assuming that this draft opinion forecasts the resulting outcome, this article will examine three issues.

First, the Supreme Court's legitimacy has been undermined because it has turned into a political branch of one party. The reality is that we now have a Supreme Court where we know the votes before we even have the case. For fifty years, conservative activists have made it their mission to appoint justices to the Supreme Court (and federal judges to lower courts) whose mandate is to overturn *Roe v. Wade.* As explained in Section I, this was a well-planned campaign that started as a backlash to the Warren Court's case law that struck down state laws that policed an individual's decision to make intimate decisions about whether to have children or not and whether to marry or not. The result has been the Republican Party appointing too many justices and judges who are willing to pursue one party's political objectives instead of preserving the legitimacy of the Court.

Second, the draft *Dobbs* opinion purports to both overrule *Roe v. Wade* and also expressly repudiate the decades-old case law that engendered the Fourteenth Amendment as the bulwark that protects against state laws seeking to police the intimate decisions of childbirth, child-rearing, and marriage. This result is damaging because the

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[1] Josh Gerstein and Alexander Ward, *Supreme Court Has Voted to Overturn Roe Wade, Draft Opinion Shows*, POLITICO (May 3, 2022), https://perma.cc/SGL9-TWD3.

[2] Dobbs v. Jackson Women's Health Organization, Opinion, First Draft (Feb. 10, 2022), https://perma.cc/U6TM-XWSK [hereinafter Draft Opinion].

[3] 410 U.S. 113 (1973) (*Roe*).

[4] *See* Draft Opinion, *supra* note 2, at 5.

Fourteenth Amendment was developed as an extraordinary protection of a person's freedom to form—or not form—the family of their choice. A person's decision to have a child or marry their favorite person is at once a private and personal act, but simultaneously takes on a public dimension by communicating value choices by accepting, rejecting, or modifying traditional models of marriage and child-rearing. This political expression of values becomes a person's unique contribution to the Democratic order. That is likely why so much energy had been invested by states in policing the most intimate of decisions regarding whether a person uses birth control, marries someone of the same race or same gender, and when married, takes their spouse's name and domicile or not. The state and federal governments' prior attempts to regulate families were part of an effort to homogenize a person's expression of love and intimacy. This political project took on its ugliest form when outright denying disfavored individuals an ability to even have any family, as seen in our country's history of creating policies that denied marriages and children to slaves, removed children from Native American homes, denied Chinese immigrants a right to have their wives join them, and later denaturalized white women who married Japanese and Chinese men. Most recently, it is chilling that among the ways that the Trump administration tried to stop asylum was to separate children from their parents who were asking for asylum.

These examples show how powerful it is for a person to have the freedom to choose a spouse and a child because the family we choose is the most effective way to shape and contribute values to democracy. That right arose from the Fourteenth Amendment's fundamental correction to the Constitution's first iteration that failed to protect family as a democratic right. The Warren Court recognized how fundamental and transformative this freedom is and built the scaffolding of a constitutional framework that declared that the state laws that policed a person's freedom to form a family—or not—was an impermissible interference in a person's fundamental right to live the life of their own making.

The draft *Dobbs* opinion expressly rejects this meaning of the Fourteenth Amendment. As a result, in Section II, the new *Dobbs* decision will permit states to return to an era when they could impose a moral homogeneity on people by criminalizing sex outside of marriage and by regulating non-procreative sex inside of marriage. By favoring the morality of 1789 instead of the contemporary values of today, the Supreme Court removes the logical and legal impediments that will permit states to again criminalize access to contraception, criminalize abortions, ban same-sex marriage, ban interracial marriage, and deny parents a right to educate their children.

Third, the most dangerous implication of the draft *Dobbs* decision is that the Supreme Court claims it is putting to end a contentious issue by permitting states to now decide the issue of abortion. But the result will be balkanization with Democratic legislatures continuing the modern world in which we live and Republican legislatures not just criminalizing

abortion but criminalizing those inside and outside of the state who assist others in obtaining a legal end to pregnancy. The rise in state power with a decline in a functioning federal government is a reckless and perilous combination. Twice in our history when this situation arose, the result was not a good one. In 1781, the failure of the Articles of Confederation required a new Constitution to launch a new and functioning government. In 1861, the rise in state power resulted in the dissolution of the union, repaired only with a civil war.

Our country succeeds only when there is a functioning federal government. Up until 2009, when the Supreme Court issued decisions, Congress could and would respond with laws modifying or changing the outcome. Democracy is defined not by one person, one vote, but by a system of checks and balances whereby three co-equal branches work in concert to shape and enact policies. Massachusetts is an example whereby the three branches work together. When the Supreme Judicial Court held that a man could not be prosecuted under the crime that the prosecutor charged, the governor and legislature responded by writing and enacting a new law that fit the crime, which the court had suggested in the event that the other branches wished to pursue the matter. That response occurred in two days. The lesson is that whereas one branch may have a superior standing at one moment in time, democracy is an endless game of rock, paper, and scissors, where one branch never becomes the superior one with the final and ultimate say.

At the federal level, Senator Mitch McConnell ended that essential operation of democracy when in 2009, he elected (with the full consensus of the Republican senators) to prevent a Democratic Congress from enacting any further legislation by invoking the filibuster rule, requiring a sixty-vote supermajority to act. The last piece of meaningful legislation that a Democratic Congress has passed was in March 2010 when, by a vote of 60 to 39, the supermajority in the Senate enacted the Affordable Care Act.[5] The dearth of legislation since then on any policy promoted by a Democratic Congress is an immediate victory for the Republican minority, but comes at the most costly of prices: the threat of a working democratic system. Renowned civil rights theorist Lani Guinier observed that the sports analogy of "I win, and you lose," cannot apply to American politics because unlike sports, democracy survives only if there is more than one winner.[6] Likewise, when one side always wins, the result is political instability because there is no reason for the electoral losers to continue to consent to be governed.[7] One immediate and necessary response to the Supreme Court decision is for Congress to be awakened from his dysfunctional inertia and return to being a functioning co-equal branch of government. As Guinier explained, "the ideal of democracy promises a

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[5] Gary Price and Tim Norbeck, *A Look Back at How The President Was Able to Sign Obamacare Into Law Four Years Ago*, FORBES (Mar. 26, 2014), https://perma.cc/NY5K-RM3T.

[6] LANI GUINIER, THE TYRANNY OF THE MAJORITY 4–5 (Free Press 1994).

[7] *Id*. at 9 ("Political stability depends on the perception that the system is fair to induce losers to continue to work within the system rather than to try to overthrow it.").

fair discussion among self-defined equals about how to achieve our common aspirations."[8]

As an additional needed reform, the Supreme Court's reliance on Originalism and Textualism, the current interpretative philosophies used by the Roberts Court, must end. Originalism and Textualism serve the purpose of advancing a subjective political viewpoint, masked as a non-political agenda. But the end result is that the Supreme Court has returned to its early days when justices purported to be oracles, discovering truths without purported bias that no one else had been able to discover. The danger of Originalism and Textualism is that they undermine the legitimacy of the Court by pretending a political agenda does not exist, because the Court only gains legitimacy from admitting the political nature of its decisions and defending the result through persuasion. Justice Roger Traynor, the justice of California's Supreme Court from the 1940s to 1960s embodied this ideal judging philosophy by fulling admitting he was using the power of the court to engage in a modern world with a functioning government, but his legitimacy came from his decisions filled with transparency and intellectual persuasion. Of most import, the California legislature could overturn his decisions, and the voters could vote him out of his position. That check on power is lacking from the current Supreme Court, which again, is why the rise in congressional power is the only means to restore the Court's legitimacy and a functioning democracy.

I. THE SUCCESSFUL FIFTY-YEAR CAMPAIGN TO FORM A COURT WHOSE MISSION WAS TO OVERTURN *ROE V. WADE*

Starting with the first question, how on earth could a Supreme Court in 2022 overturn *Roe v. Wade*, a case that is described as a "super precedent"?[9] Like *Brown v. Board of Education*,[10] *Roe v. Wade* has become so fundamental to the ordering of our modern society that few can fathom what life will be without it. Despite its status in that category, *Roe v. Wade's* demise looks imminent. The Supreme Court's composition has fundamentally changed from 1992, which was when the Court last revisited the question of whether *Roe v. Wade* could be overturned in the

[8] *Id.* at 6.

[9] Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV 1204, 1205–06 (2006) ("Super precedents are those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time. Super precedents are deeply embedded into our law and lives through the subsequent activities of the other branches. Super precedents seep into the public consciousness and become a fixture of the legal framework. Super precedents are the clearest instances in which the institutional values promoted by fidelity to precedent—consistency, stability, predictability, and social reliance—have become irredeemably compelling. Thus, super precedents take on a special status in constitutional law as landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.").

[10] 347 U.S. 483, 493 (1954) (striking down racial segregation in public schools because that practice violates the equal protection clause set forth in the Fourteenth Amendment and overruling Plessy v. Ferguson, 163 U.S. 537 (1896), which had provided that the state could provide for equal treatment when separating people based on race).

Planned Parenthood v. Casey[11] decision. From 1992 to 2022, the Republican Party dramatically changed its selection criteria in determining which type of lawyer would be nominated to the federal courts. To understand who and why they picked, it is critical to understand what life in America was like before *Roe v. Wade* existed and to recognize the transformative role that the Supreme Court played in shaping the modern world we have been living in.[12]

A. Life Before Roe v. Wade

Up until the 1960s, states had the right to ban and criminalize all sex that was outside of marriage and ban and criminalize all sex that did not lead to procreation.[13] If a person was married and had an affair, that was the crime of adultery.[14] If someone just had sex without being married, that was the crime of fornication.[15] If a person lived with someone from a different race, that was assumed to involve sex; therefore, that was the crime of cohabitation.[16] If a person married someone from a different race,

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[11] 505 U.S. 833, 866 (1992) (*Casey*).

[12] *Roe*, 410 U.S. at 113.

[13] All states have the power to regulate morals through the general police power. In our modern world, the states have recognized a difference between regulating public morals (which is permitted) and regulating private morals (which has limits). *See* State v. Shapiro, 122 N.J. Super. 409, 421 (Law. Div. 1973) ("Under the police power government does have the right to regulate public morality."). The distinction between a state's regulation between public and private regulation has been based on the fact that "the First and Fourteenth Amendments have created a certain 'zone of privacy' protected from government control." *Id*. (citing Griswold v. Connecticut, 381 U.S. 479 (1965)); Stanley v. Georgia, 394 U.S. 557, (1969); *Roe*, 410 U.S. at 113. *See also* Gryczan v. State, 942 P.2d 112, 125 (1997) (Nelson, J.) ("We do not deny the legislature's public policy-making power, nor do we dispute that public policy and the laws implementing it may often reflect majority will and prevailing notions of morality. Nevertheless, it is axiomatic that under our system of laws, the parameters of the legislature's policy-making power are defined by the Constitution and that its ability to regulate morals and to enact laws reflecting moral choices is not without limits."). *Id*. at 455–56 (in striking down a Montana law that criminalizes consensual adult intimacy between people of the same gender, the Court noted "Quite simply, while legislative enactments may reflect the will of the majority, and, arguably, may even respond to perceived societal notions of what is acceptable conduct in a moral sense, there are certain rights so fundamental that they will not be denied to a minority no matter how despised by society.") (Nelson, J.). When *Roe v. Wade* is overturned, the Supreme Court will be overturning the exact line that judges and lawmakers have used under the federal Constitution to distinguish between a state's permissible regulation of public morals and a state's impermissible regulation of private ones.

[14] Hopgood v. State, 76 Ga. App. 240, 241, 45 S.E.2d 715, 716 (1947) (reversing a conviction for adultery because there was insufficient evidence that both parties were married). Not all states have decriminalized, repealed, or struck down adultery, fornication, and consensual same-sex sodomy crimes. *See* Christina Oehler, *16 States Where You Can Get That Cheating Jerk Thrown in Jail*, WOMAN'S DAY (June 23, 2015), https://perma.cc/LC7T-8CCQ.

[15] *See* State v. Saunders, 381 A.2d 333, 346 (N.J. 1977) (Schreiber, J., concurring) (discussing the origins of fornication law, including its inclusion in the law called "An Act for the Punishment of Crimes (Revision of 1898)" and commenting that "there is no evidence that this statute was intended as anything but an attempt to regulate private morality").

[16] The crime of cohabitation applied to people of all races to police heterosexual couples who lived together outside of marriage. *See* Matthew J. Smith, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1058 (1992) ("One of the most significant changes has occurred in the criminal law. Historically, most states criminalized cohabitation. Today, most states have repealed these criminal statutes. In addition, many states have decriminalized fornication."). Enforcement of the crime was often motivated by racism, which is why in some states it was more or exclusively enforced against couples of different races. *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 70-91 (Pantheon

that was the crime of miscegenation—a felony.[17] States could prosecute this crime until 1967, when the Supreme Court decided *Loving v. Virginia*.[18]

If a person had sex with someone of the same gender, that was the crime of sodomy—a felony.[19] States could prosecute this crime until 2003, when the Supreme Court decided *Lawrence v. Texas*.[20]

Convinced that this criminal scheme was still inadequate to deter a woman from having sex outside of marriage, some states did even more. For a child whose mother was unmarried, some states utilized the power of public humiliation by stamping the word "bastard" on the birth certificate where the name of the father was supposed to be.[21] In many states, a "bastard" could not inherit property or money.[22] A "bastard" could not bequeath money or property to their own child.[23] And a "bastard" was barred from running for public office and testifying in court.[24] States could even deny burials to "bastards."[25] If murdered, their killers faced lighter sentences than if they had killed someone born in wedlock.[26] States could impose significant disadvantages on people based on their parents' marital status until 1968 when the Supreme Court decided *Levy v. Louisiana*.[27]

Married women also had their sex lives policed. If a married couple asked for information about contraception, the doctor who answered their questions would be committing a felony.[28] States could enact this law until 1965, when the Supreme Court decided *Griswold v. Connecticut*.[29]

Books 2003) (discussing various laws and cases criminalizing interracial relationships from 1876 to the 1950s).

[17] Loving v. Virginia, 388 U.S. 1, 4 (1967) (*Loving*).

[18] *Id*. at 2 (striking down crime of interracial marriage).

[19] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (*Lawrence*).

[20] *Id*. at 578–79 (striking down state sodomy laws that only targeted conduct involving intimacy shared by same-sex couples).

[21] Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 267 n.21 (2009) ("For centuries such children had been filius nullius, the child of no one, meaning they had no legally recognized relationship with, including no right to support from, their mother or father . . . . Women who kept their children, including the black women who were excluded from most of the unwed-mother homes, faced harsh state policies, including denial of public assistance and eviction from public housing. Doctors sometimes sterilized them without their knowledge or consent. Their children's birth certificates were sometimes stamped 'bastard.'").

[22] *Inheritance by, from, or through illegitimate*, 24 A.L.R. 570 (Originally published in 1923) ("Except in Connecticut, a bastard cannot, in the absence of legislative provision, inherit from his ancestors or collateral relatives. As a bastard's descendants, who seek to inherit from his ancestors or collateral relatives, claim by representation, they stand on the same footing as the bastard himself. The result is that if at the time of his death the bastard is incapable of inheriting a particular estate, his descendants, who claim through him, cannot inherit that estate.").

[23] *Id*.

[24] Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

[25] *Id*. at 506 n.97.

[26] *Id*.

[27] 391 U.S. 68, 70 (1968) (striking down a state law that prohibited child born out of wedlock from prevailing in a wrongful death action against their mother. "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.").

[28] Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

[29] *Id*. (this decision first recognized a penumbra of federal privacy rights, which stitched together a shield against the general police powers of the states to criminalize intimacy).

A doctor who gave contraception to an unmarried person was guilty of a felony.[30] States could prosecute this crime until 1972, when the Supreme Court decided the *Baird v. Eisenstadt* case.[31]

Then in 1973, the Supreme Court decided *Roe v. Wade*, which struck down a Texas state law that had punished a doctor who performed an abortion with a two-to-five-year prison term.[32] The state laws that policed abortion were part and parcel of the scheme that used bans and crimes to police sex outside of marriage and police sex inside of marriage that did not lead to procreation.

B. The Constitutional Foundation for Our Modern World

Based on scaffolding built from a constitutional framework premised on the meaning of the Fourteenth Amendment, the Supreme Court vanquished each state law that policed the realm of intimacy, relationships, and love. The majority of these decisions were issued by what is known as the "Warren Court," a time from 1961 to 1969 when Chief Justice Earl Warren was at the helm of the highest court. The Warren Court issued decisions establishing civil rights, the separation of church and state, criminal procedural protections, and due process rights. The decisions from this period "are now so ingrained in the system that one might assume that they have much deeper roots than the past 50-plus years."[33]

The Warren Court is often attributed with "revolutionizing" the law and modern life.[34] But I would argue that the outsized impact that the Warren Court's decisions have had on modern life was due to the fact that the Supreme Court was mirroring, not dictating, the reality of Americans' deep-seated objections to state laws' attempts to homogenize the way by which people choose a spouse, a child, and a family.

When the Supreme Court was striking down the litany of state restrictions on a person's intimate decisions, the Court's ability to capture the majoritarian values of the day (and of the future) arose from the justices' deliberate choices to eschew today's highly popular interpretation methods, that are known as Originalism (the belief that the Founders' intent is discoverable and determines the meaning of legal disputes)[35] and

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[30] *See* Baird v. Eisenstadt, 405 U.S. 438 (1972).

[31] *Id*. at 443 (striking down criminalization of providing contraception to unmarried persons).

[32] Roe v. Wade, 410 U.S. 113 (1973).

[33] Michael Vitiello, *Introducing the Warren Court's Criminal Procedure Revolution: A 50-Year Retrospective*, 51 U. PAC. L. REV 621, 622 (2020).

[34] *Id*.; *see also id.* at 625–26 (noting the public backlash against the Warren Court by blaming it for the rise of crime, inserting the composition of the Court into the presidential election, and resulting in the newly-elected President Richard Nixon appointing "four Supreme Court appointments in a two year period. His appointments started to narrow, if not overrule, the Warren Court precedent, beginning with the inception of the Burger Court."). Despite the immediate attempts to erode "so many Warren Court decisions, the Warren Court's revolution has changed the law. Examine any Criminal Procedure casebook. Most chapters begin with Warren Court precedent and then develop post-Warren Court case law." *Id.* at 631.

[35] Jamal Greene et. al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 357–58 (2011) ("The question of the degree to which judges and legal academics should commit themselves to the

Textualism (determining the meaning of the Founders' intent through a close scrutiny of words, rather than looking to history or the ideals that the words invoke).[36] To the contrary, the justices found meaning from two sources—an interpretation method that responded to the complexities of modern life and the Fourteenth Amendment.

In this era, the Supreme Court used a judicial philosophy that expressly rejected looking to the past as an authoritative source for breathing meaning into contemporary and complex issues. For instance, in 1967, when deciding whether Virginia and the laws of fifteen other states "could prevent marriages between persons solely on the basis of racial classifications,"[37] *Loving* started by recognizing a deep-seated history and tradition that could resolve that question in favor of the states. Fifty years prior, Virginia had enacted the Racial Integrity Act of 1924 and laws criminalizing miscegenation "have been common in Virginia since the colonial period."[38] Moreover, when adopting the Fourteenth Amendment, the congressional debates that occurred included statements by those who "did not intend the Amendment to make unconstitutional state miscegenation laws."[39] Despite the history, tradition, and precedents supporting miscegenation, *Loving* did not let history resolve the constitutional question because the Supreme Court made an extraordinary observation that the historical scheme and practice violated equal protection because they were "measures designed to maintain White Supremacy," a project that has "patently no legitimate overriding purpose."[40]

Loving also went further too and explained that the miscegenation laws violated due process because "the freedom to marry has long been recognized as one of the vital personal rights essential to the *orderly pursuit of happiness* by free men."[41] The Supreme Court invoked not the text of the Constitution but the ideals and aspirations of the Declaration of Independence when striking down a state law that denied a person the choice to marry. The Court continued, and grounded its analysis—again not by the Founders' blind spots in 1789—by recognizing a powerful inalienable right held by individuals. "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not

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Constitution's original meaning acquired new life after the Supreme Court's recent decision in District of Columbia v. Heller, in which both the majority and the principal dissent used originalist methods in analyzing whether the Second Amendment protects an individual right to handgun possession in the home.").

[36] "The full meaning of the Constitution's text often eludes textualists. By viewing the document's clauses in splendid isolation from each other—by reducing a single text to a jumble of disconnected clauses—readers may miss the significance of larger patterns of meaning at work." Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

[37] Loving v. Virginia, 388 U.S. 1, 2 (1967).

[38] Id. at 6.

[39] *Id*. at 9.

[40] *Id*. at 11.

[41] *Id*. at 12 (emphasis added).

marry, a person of another race resides with the individual and cannot be infringed by the State."[42]

Stated another way, the Supreme Court knew that the legitimacy of policies that shaped the present and future must be determined not by the past but by a living Constitution, a document that was capacious enough to interpret the ideals of the Founders while permitting nuanced applications of those ideals to modern inventions and practices that were beyond the Founders' imagination. As Justice Oliver Wendell Holmes observed, "The life of the law has not been logic: it has been experience."[43] It is extraordinary that, in 1967, the Supreme Court named white supremacy as the reason for the state miscegenation laws, which erased the legitimacy that time usually affords to tradition. It is equally extraordinary that the *Loving* decision recognized that what was at stake in these laws was not simply the tradition of marriage, but a "freedom to marry or not marry," which named the role of the Fourteenth Amendment in shaping modern life.

When articulating how and why the Fourteenth Amendment must strike down state laws that interfered with the individual's intimate decisions, the series of cases enumerated above announced that our very personhood was no longer limited by history and tradition. [44] It was not limited by the words uttered by the Founders. It was not limited by the Founders' own blind spots. Rather, the Fourteenth Amendment created equality and personal liberty. As much as this concept often is called a right to privacy, the Fourteenth Amendment—as the Supreme Court in this era interpreted it—provided us with so much more.

"Family values" is a term often associated with conservative movements, a desire to keep traditional gender roles intact. Professor Peggy Cooper Davis powerfully argues for progressives to take back that term because "family values" refers to the essential autonomy we all have in choosing whether to form a family or not.[45] Our country has an ugly history of racism, and one of the most vicious ways racist laws operated was to deny a person—whom the majority deemed inferior—a right to form their own families. We see this in the denial of marriage and parental rights to slaves,[46] the mass and systematic removal of children from Indian

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[42] *Id*.

[43] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Transaction Publishers 2005) (1881).

[44] The most shameful decision issued by the Supreme Court was Dred Scott in which the Court deferred to history to declare Black people as not having the status of a citizen or person. "A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States." Dred Scott v. Sandford, 60 U.S. 393 (1857), *superseded* (1868). It is telling that when establishing that "separate but equal" violated the Constitution, *Brown* rejected the authority of history. In 1954, when deciding whether state laws could impose racial segregation in schools, the Supreme Court explained: "In approaching this problem, *we cannot turn the clock back* to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written." Brown v. Board of Education, 347 U.S. 483, 492–93 (1954) (emphasis added).

[45] Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1353 (1994).

[46] "During the period of American Slavery, blacks were denied even the most basic of human rights, including the right to join together as a legally sanctioned family unit. As to personalty, slaves lacked the capacity to enter into any form of marital union recognized necessarily

families,[47] the exclusion of Chinese and Japanese women from entering the United States to join their husbands (who often were building our railroads),[48] denaturalizing any white woman who married a Japanese or Chinese man,[49] the removal of 200,000 children from Catholic immigrants who were sent out on Orphan Trains until all children were "claimed" (and no doubt exploited) by the farmers picked up at train stations,[50] and most recently, in the Trump administration's unconscionable separation of children from their parents who were seeking asylum.[51] It is telling that the family separation policy was stopped a federal court judge who invoked case law, based on the Fourteenth Amendment, that "uphold the[] rights to family integrity and association."[52] These examples reveal that one of the most ruthless and shameful exercises of state power against a disliked minority is to prevent them from having a partner and from having children. Indeed, in the recent debate over whether marriage rights would extend to same-sex couples, the opponents articulated that permitting

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or legally by the plantation masters, the government, or the judiciary. . . . No civil rights, obligations, or protections attached to contubernal relationships, and these relationships under slavery could be terminated at the will of the parties or, more significantly, at the will of a plantation master. Many jurisdictions prohibited clergyman from solemnizing contubernal relationships, and prohibited clerks from issuing marriage licenses and recording these putative unions." Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307–08 (2006).

[47] "The threat this time was the wholesale removal of American Indian children from their tribal culture. Studies conducted in 1969 and 1974 showed that twenty-five to thirty percent of American Indian children were separated from their families and tribes by placement in foster homes, adoptive homes, or institutions.[7] Once removed from their families, most of the children were placed in non-Indian environments.[8] In comparison to Caucasian children, the disparity in removal statistics is staggering. In one state the risk that a[n] Indian child would be removed from her family was 1600 percent greater than that of a Caucasian child." Wendy Therese Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 382 (1997).

[48] "Chinese exclusion, the first race-based immigration exclusion from the United States, is usually understood to begin in 1882 with the ten-year suspension of immigration of Chinese laborers. But the 1882 law was preceded by another piece of federal legislation, the 1875 Page Law, which through its targeting of prostitutes from 'China, Japan, or any Oriental country,' almost completely shut down Chinese female immigration." Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 410–11 (2005).

[49] The 1922 Cable Act "explicitly mandated that women who married men who were ineligible for citizenship (mainly Asian men) would lose their citizenship for the duration of their marriage." Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1393 (2011).

[50] "Beginning in the 19th century, as many as 200,000 children across New York City's overcrowded boroughs, often from immigrant homes, were removed from their families and relocated to settlements in the American West." Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 Beginning in the 19th century, as many as 200,000 children across New York City's overcrowded boroughs, often from immigrant homes, were removed from their families and relocated to settlements in the American West." Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 MOD. AM. 3, 3 (2009).

[51] "Eleven weeks ago, Plaintiffs leveled the serious accusation that our Government was engaged in a widespread practice of separating migrant families, and placing minor children who were separated from their parents in government facilities for "unaccompanied minors." According to Plaintiffs, the practice was applied indiscriminately, and separated even those families with small children and infants—many of whom were seeking asylum. Plaintiffs noted reports that the practice would become national policy. Recent events confirm these allegations. Extraordinary relief is requested, and is warranted under the circumstances." Ms. L. v. U.S Immigr. & Customs Enf't ("ICE"), 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019), and *enforcement granted in part, denied in part sub nom.* Ms. L. v. U.S. Immigr. & Customs Enf't, 415 F. Supp. 3d 980 (S.D. Cal. 2020).

[52] *Id.* at 1148 (citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978), Rosenbaum v. Washoe Cty., 663 F.3d 1071, 1079 (9th Cir. 2011)).

marriage was a social harm because LGBTQ+ people would have a state-sanctioned means to pass on their values to their children, and in turn produce more, instead of ending the existence, of LGBTQ+ persons.[53]

The ugly history of denying family formation rights to certain people reveals that the Fourteenth Amendment has an extraordinary role in protecting people's right to create—and as *Loving* recognized, a freedom not to create—their own families. The value of family formation is a private, intimate decision that simultaneously gains public significance as it is the singular forum in which we publicly announce our own values.[54] The choice to marry or not, the choice to take one spouse's last name or not, the choice to merge finances or not, is a private decision that also communicates the acceptance, rejection, or modification of the institution of marriage.[55] For those who have children, families further transmit to the

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[53] It is obvious that a parent cannot determine the sexual orientation of their child, as proven by the fact that LGBTQ+ were raised by heterosexual parents. The supporters of state laws and regulations that banned same-sex couples from adopting and fostering "claim[ed]—often sincerely—that the preferred family formation is in the best interest of children, these latter-day statutes and regulations are a revival of family policies that seek to regulate undesirable individuals. . . . As poignantly illustrated by the 1999 Lofton v. Kearny case, the purpose of these new adoption bans is not to place children in good homes, but rather, to remove children from the care of families who are deemed morally inferior. The exercise of parens patriae again is infused with an intolerance intent on destroying differing conceptions of morality, gender identity, and personhood. These contemporary adoption bans, once stripped from their feel-good rhetoric, are nothing more than revived attempts at improper social engineering, and as such, they should not continue." Kari E. Hong, *Parens Patri(Archy): Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 9–10 (2003).

[54] "Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 322 (2003) (first state court decision that recognized that state laws must extend marriage rights to same-sex couples).

[55] Many people have practical, personal, and political reasons not to marry someone with whom they are committed to and intend to build a life with. See *15 Women on Why They Said 'No' to Marriage*, CNN (June 25, 2010), https://perma.cc/SAY7-Q9LW. It is significant that the states policed traditional marriage, such as having laws that prohibited women who did not take their husband's names and not permitting a wife to sell or own property without their husband's consent. *See* Alexandra Sifferlin, *How American Women Fought to Keep Their Maiden Names After Marriage*, TIME (Dec. 17, 2015), https://perma.cc/L2D3-4P5H (quoting Frances Perkins who in 1913 kept her maiden name and was the first woman appointed to a U.S. cabinet position. Secretary Perkins said, "My whole generation was, I suppose, the first generation that openly and actively asserted—at least some of us did—the separateness of women and their personal independence in the family relationship."). In 1975, the Tennessee Supreme Court struck down a state law that mandated a woman take the name of her husband, the court acknowledged the state's defense of the law because "permitting a married woman to retain her maiden name would result in chaos and confusion" but rejected that reason because "in this jurisdiction a woman, upon marriage, has a freedom of choice. She may elect to retain her own surname or she may adopt the surname of her husband. The choice is hers." Dunn v. Palermo, 522 S.W.2d 679, 688 (Tenn. 1975); *see also* Latta v. Otter, 771 F.3d 456, 487–88 (9th Cir. 2014) (Berzon, J., concurrence) ("Marriage laws further dictated economically disparate roles for husband and wife," including barred married women to hold property; "[t]here was also a significant disparity between the rights of husbands and wives with regard to physical intimacy"; and "the profoundly unequal status of men and women in marriage was frequently cited as justification for denying women equal rights in other arenas, including the workplace."). The flipside of this issue is that the states withheld the name of marriage to the legal recognition of same-sex relationships. "[W]e emphasize the extraordinary significance of the official designation of 'marriage.' That designation is important because 'marriage' is the name that society gives to the relationship that matters most between two adults. A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not." *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012) (striking down California's law prohibiting same-sex couples from entering marriages as violating equal protection), *vacated and remanded sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013).

next generation the political, religious, and moral beliefs that shape our world.[56] In this sense, the family we choose becomes one of the most lasting and meaningful ways that we contribute to democracy and participate in it.

The Supreme Court of the 1960s and 1970s articulated the protections of the Fourteenth Amendment as protecting family formation. Under the Fourteen Amendment, we all have a right and freedom to choose our family in our own image and reflecting our own values. Contrary to how Justice Alito frames this in the draft opinion, this right is much more than a narrow right to have an abortion. This right is:

The right to have children—or not.

This is the right to marry—or not.

This is the right to a person's life.

This is the right of a person to shape their own destiny.

The Warren Court actively recognized these family formation rights when striking down state laws that restricted who could be a spouse or parent.[57] The critics accused the Court of engaging in judicial activism.[58] However, the Warren Court interpreted the Constitution to reflect our values, not limit them as shown by the majority of Americans preferring this modern world.[59]

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[56] "To think of family liberty as a guarantee offered in response to slavery's denials of natal connection is to understand it, not as an end in itself, but as a means to full personhood. People are not meant to be socialized to uniform, externally imposed values. People are to be able to form families and other intimate communities within which children might be differently socialized and from which adults would bring different values to the democratic process. This reconstructed Constitution gives coherence and legitimacy to the themes of autonomy and social function sounded in Meyer, Pierce, Skinner, Barnette, and Prince. The idea of civil freedom that grows out of the history of slavery, antislavery, and Reconstruction entails more than the right to continue one's genetic kind in private. It also entails a right of family that derives from a human right of intellectual and moral autonomy. It entails the right of every individual to affect the culture and embrace, act upon, and advocate privately chosen values. For parents and other guardians, civil freedom brings a right to choose and propagate values. For children, civil freedom brings nothing less than the right to grow to moral autonomy, because the child-citizen, like the child-slave, flowers to moral independence only under authority that is flexible in ways that states and masters cannot manage, and temporary in ways that states and masters cannot tolerate." Davis, *supra* note 45, at 1371–72.

[57] Among some of its decisions, the Warren Court decided Brown v. Board of Education, 347 U.S. 483 (1954) (racial segregation in schools is unconstitutional); Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing a right to counsel in criminal trial); New York Times v. Sullivan, 376 U.S. 254 (1964) (protecting freedom of the press from libel suits); Griswold v. Connecticut, 381 U.S. 479 (1965) (this decision first recognized a penumbra of federal privacy rights, which stitched together a shield against the general police powers of the states to criminalize intimacy); Miranda v. Arizona, 384 U.S. 436 (1966) (excluding statements made to police in interrogations without the advising the defendant of their constitutional rights); Loving v. Virginia, 388 U.S. 1, 2 (1967) (striking down crime of interracial marriage). The Warren Court "was the most progressive United States Supreme Court in our Nation's history. For those of us who see ourselves as civil libertarians, it was a bright and exciting moment in our Nation's history in terms of protecting free speech, press freedom, separation of Church and State, civil rights, and criminal justice reform." Joshua Dressler, *Reflections on the Warren Court's Criminal Justice Legacy, Fifty Years Later: What the Wings of A Butterfly and A Yiddish Proverb Teach Me*, 51 U. PAC. L. REV. 727, 727–28 (2020).

[58] Joshua Dressler, *Reflections on the Warren Court's Criminal Justice Legacy, Fifty Years Later: What the Wings of A Butterfly and A Yiddish Proverb Teach Me*, 51 U. PAC. L. REV. 727, 739 (2020).

[59] Gino Spocchia, *Almost 70 percent of Americans Back Abortion Rights, Polling Finds, Amid Fears Supreme Court Will Vote Down Roe vs. Wade*, INDEPENDENT (May 3, 2022), https://perma.cc/HUZ6-97LU.

It is critical to realize that the Warren Court engendered the rights of family formation in a manner intended to move the country on a specific and deliberate path that had not been blazed by the Founders. As will be discussed in Section II, the draft *Dobbs* opinion is written in a way not just to overturn *Roe v. Wade,* but to repudiate the modern application and interpretation of the Fourteenth Amendment. In so doing, the Court's radical action will tear down every other family formation right discussed above and threaten the Court's legitimacy.

C. The Successful Fifty-Year Campaign to Change the Supreme Court

A minority of Americans did not like what the Warren Court did in striking down state regulations that homogenized family formation. And to their credit, they undertook a dedicated fifty-year campaign to change the institution that started it all—the Supreme Court [60] In the past eighty years, most of the justices appointed to the Supreme Court were appointed by Republican Presidents. Yet the men—and they were all men—who were picked were thoughtful men whose views changed over time.

Justice William Brennan—"the lion of liberalism"—started as a Republican, appointed by President Eisenhower.[61] Justice Harry Blackmun, who ended up championing LGBT rights and calling for the end of the death penalty, was appointed by President Nixon.[62] Justice David Souter, who eloquently defended the separation of church and state and wrote the 1992 *Casey* decision that affirmed *Roe v. Wade*, was appointed by George H.W. Bush.[63]

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[60] Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV 191, 241 (2008) ("The New Right embraced originalism as the jurisprudential vehicle for these claims [of a traditional social order embracing race, family, and faith]. Now that conservatives were beginning to exercise authority in the Republican Party, and from Congress, the Justice Department, and the bench, the original understanding provided authority that could legitimate their new exercises of public authority as the Constitution—supplying reason, not only to limit judicial review, but to expand it in new ways. The New Right's understanding of the original understanding was populist and popular, but clearly partisan—by no means consensual, or even majoritarian.").

[61] Laurence H. Tribe, *Lion of Liberalism*, TIME (Aug. 4, 1997), https://perma.cc/ET8L-MKPE ("If John Marshall was the chief architect of a powerful national government, then Brennan was the principal architect of the nation's system for protecting individual rights. Intellect alone could never have achieved so much, though Brennan's intellectual brilliance was indispensable. What animated him was passion and compassion, insight and empathy, and a vision of a Constitution of, by and for the people.").

[62] Joan Biskupic, *Justice Blackmun Dies, Leaves Legacy of Rights*, WASH. POST (Mar. 5, 1999), https://perma.cc/VU96-U5TE ("Blackmun was appointed both to an appeals court and to the Supreme Court by Republican presidents. But by the time he retired, he was the most liberal member of the bench. His ideological odyssey intrigued political Washington but was also a measure of the court's transformation from the progressive post-Earl Warren era of the '70s to the conservatism of the '90s.").

[63] Huma Khan, *David Souter: A Classic Yankee Republican*, ABC NEWS (May 2, 2009), https://perma.cc/5CH6-ND5F ("Though a Republican, Souter deviated from other conservatives on many issues. His opinions on controversial topics like abortion and school prayer irritated some Republicans, many of whom think his nomination was one of the biggest presidential blunders in modern history. But some who knew him say he did not come in with an agenda and did not care to push decisions in a particular direction. Instead, he came in with an open mind and looked to past cases and the existing law to come to his decision.").

Some Republican politicians were infuriated about this.[64] They wanted a judge to be faithful to the small politics of a president instead of being a thinker, someone who evolved as the law and facts demanded. Accordingly, these politicians made changes.

Which type of lawyer would be the best judge to follow party politics above fidelity to the institution? It could not be a lawyer who had worked with real people as clients, who knew the heartbreak of loss and understood how critical the Court's legitimacy was forged in creating a fair fight. The ideal lawyer to serve a political agenda was one whose job was to do just that. Therefore, we got Clarence Thomas, whose prior legal work was for the Reagan administration and Republican senators.[65] We got Samuel Alito, who worked for the Reagan administration.[66] We got Neil Gorsuch, who worked for the Bush administration.[67] We got Brent Kavanaugh, who worked for the Bush administration.[68] We got Amy Coney Barrett. Although she did not work for the government, her scholarship and advocacy openly and publicly called for overturning *Roe v. Wade*[69] and her legal writings as a law professor argued religious views (actually, her religious views) should triumph over legal ones.[70]

See a pattern?

John Roberts also had worked for the Reagan, Bush I, and Bush II administrations.[71] Yet, as Chief Justice, he evolved. In 2016, the Supreme Court struck down a Texas law placing administrative burdens on Texas abortion providers as pretextual ones that do not "confer[] medical benefits sufficient to justify the burdens upon access [to abortion services] that each imposes."[72] Chief Justice Roberts joined Justice Alito's dissent, which argued to uphold those laws as permissible regulations.[73] But in 2020, the Supreme Court struck down an identical law from Louisiana, and, in honoring precedent, Chief Justice Roberts wrote a concurring opinion explaining that as much as he believes that the 2016 decision "was wrongly decided," he was going to "adhere to it" because it is precedent.[74]

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[64] *See supra* notes 61 & 62.

[65] *Clarence Thomas*, OYEZ, https://perma.cc/YNB7-D8M6.

[66] *Samuel A. Alito, Jr.*, OYEZ, https://perma.cc/E2B9-N77N.

[67] *Neil Gorsuch*, OYEZ, https://perma.cc/D2QE-7SFA.

[68] *Brent Kavanaugh*, OYEZ, https://perma.cc/9692-4RTV.

[69] Rebecca R. Ruiz, *Amy Coney Barrett Signed An Ad in 2006 Urging Overturning The 'Barbaric Legacy' of Roe v. Wade*, N.Y. TIMES (Oct. 1, 2020), https://perma.cc/FN4E-6K9R ("But with news on Thursday that Judge Barrett had signed the open letter, which was also signed by her husband, Jesse Barrett, a fellow lawyer and former federal prosecutor, the nominee's view on the ruling became clear. Though the judge's participation in other groups had indicated her personal opposition to abortion, her stance on the court decision specifically had not been widely known.").

[70] "This puts Catholic judges in a bind. They are obliged by oath, professional commitment, and the demands of citizenship to enforce the death penalty. They are also obliged to adhere to their church's teaching on moral matters." John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 303 (1998).

[71] *John G. Roberts, Jr.*, OYEZ, https://perma.cc/3EAN-G6GH.

[72] Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 136 S. Ct. 2292, 2299 (2016), *as revised* (June 27, 2016).

[73] *Id.* at 2335 (Alito, J., dissenting, joined by Chief Justice Roberts) (presenting technical arguments to uphold the Texas law that required doctors performing abortions to have admitting privileges at a hospital within thirty miles of the abortion clinic).

[74] June Med. Servs. L. L. C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring).

Chief Justice Roberts understands that the Court's legitimacy is a precarious one. The Court's legitimacy will be lost if it is just an extension of the Republican Party. That is why, at critical times, Chief Justice Roberts breaks from his personal views to embrace a nobler value.[75]

However, the other former government attorneys did not leave their politics when they put on black robes. Now, on abortion rights and too many other issues, we know the votes before we even have a case.

All of this machination has been in the open with the end-game in sight. In September 2021, Mike Pence went to Hungary. He gave a speech praising Donald Trump for picking three justices who would overturn *Roe v. Wade*.[76]

D. The Unusual Path in the Court Hand-Picking a Case to Create a Challenge to Roe v. Wade

The states controlled by Republican legislators knew the deck was stacked too. Starting with the addition of Justice Kavanaugh, Republican state legislatures passed laws—in clear violation of *Roe v. Wade*—to regulate abortion before the twenty-four-week period that *Roe* said could not be policed.

In March 2018, Mississippi passed a law prohibiting all abortions after fifteen weeks. In May 2019, the federal district court struck it down, citing to *Roe v. Wade*, and starting the decision with "Here we go again. Mississippi has passed another law banning abortions prior to viability."[77]

In December 2019, on appeal, the Fifth Circuit also struck down this law, explaining "In an unbroken line dating back to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability."[78]

In March 2020, as it has the right to do, Mississippi appealed this case to the Supreme Court, which is known as *Dobbs v. Jackson Women's Health Organization*.[79] In its June 2020 petition for writ of certiorari,

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[75] *See also* Nat'l Fed. of Independent Businesses v. Sebelius, 567 U.S. 519 (2012). In a 5-4 decision, Chief Justice Roberts authored the decision that upheld the law known as Obamacare.

[76] Zoe Strozewski, *Mike Pence Praises Hungarian Leader's Conservative Policies, Hopes SCOTUS Bans Abortion*, NEWSWEEK (Sep. 23, 2021) ("Recognizing Hungary's own success in decreasing abortions, Pence expressed hope that the U.S. could do the same, especially in light of the conservative majority instated in the U.S. Supreme Court by the administration he served in with former President Donald Trump. He also spoke of the 300 conservative judges appointed to federal courts during the administration, including three Supreme Court justices, the AP reported. 'We may well have a fresh start in the cause of life in America.' Pence said. 'It is our hope and our prayer that in the coming days, a new conservative majority on the Supreme Court of the United States will take action to restore the sanctity of life at the center of American law.'").

[77] Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549, 551 (S.D. Miss. 2019), *aff'd*, 951 F.3d 246 (5th Cir. 2020).

[78] "In an unbroken line dating to *Roe v. Wade*, States may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions. The law at issue is a ban. Thus, we affirm the district court's invalidation of the law, as well as its discovery rulings and its award of permanent injunctive relief." Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 269 (5th Cir. 2019).

[79] 19A1027, Docket #1 (Mar. 16, 2020), https://perma.cc/K4GJ-LYKM.

Mississippi argued, "To be clear, the questions presented in this petition do not require the Court to overturn *Roe* and *Casey*."[80]

Then, on September 18, 2020, Ruth Bader Ginsburg died.[81] On October 26, 2020, Donald Trump appointed Amy Coney Barrett to the Supreme Court.[82] On May 17, 2021, the Supreme Court accepted the case for consideration.[83] It did not have to do this. The Court only selects 75 to 85 of the 10,000 cases presented to it each year.[84] There was no conflict and no unsettled law in the case.

On July 22, 2021, recognizing the opening it had been given, Mississippi filed a new brief, saying that the only issue for the Court to address is whether "it will overrule" *Roe* and *Casey*.[85] It is highly unusual for parties to substantially change positions in briefing while the case is winding its way through the courts.

Nothing about this case is usual. We have a situation where the Republican Party hand-picked five justices to overturn *Roe v. Wade*. These five justices then hand-picked a case to overturn *Roe v. Wade*. And the state of Mississippi even changed its legal argument from the time when Justice Ginsburg was alive to when Justice Coney Barrett replaced her.

As Justice Sonia Sotomayor asked in oral argument, "will the Supreme Court survive the stench" if the reason to overturn *Roe v. Wade* is not a change in society, but a change in who is on the Court.[86]

This is how we got here. It was a well-planned campaign that started in the 1980s and was in plain sight. In 2007, Professor Bruce Ackerman predicted this exact moment:

> [M]ovement-activists in the Republican Party are trying to change our Constitution by following the higher lawmaking script elaborated during the New Deal. They are looking for brilliant jurists who could emulate Justices Black, Frankfurter, and Jackson in writing landmark opinions that sweep away the law of the preceding era and create a brave new world for the constitutional future. If they have their way, Republican Presidents will add right-thinking judges to the Roberts Court until it transforms Roe v. Wade into the Lochner v. New York of the twenty-first

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[80] Petitioner's Writ of Petition for Certiorari at 5, 19A1027 (Jun. 15, 2020), https://perma.cc/VE9Q-5DJV.

[81] Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sep. 18, 2020), https://perma.cc/PN2F-XN4Q.

[82] Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020), https://perma.cc/4NSU-5ZKA.

[83] Petition Granted, 19A1027 (May 17, 2021), https://perma.cc/XR6M-ZEJB.

[84] *The U.S. Supreme Court*, JUDICIAL LEARNING CENTER, https://perma.cc/G45R-RS2J.

[85] Brief for Petitioners at 1, 19A1027 (July 22, 2022), https://perma.cc/PZV7-9KCD ("*Roe* and *Casey* are thus at odds with the straight-forward, constitutionally grounded answer to the question presented. So the question becomes whether this Court should overrule those decisions. It should.").

[86] Oral Argument, Dobbs v. Jackson Women's Health Organization at 14–15, 19-1392 (Dec. 1, 2021), https://perma.cc/E6E3-R6FK ("Now sponsors of this bill, the House bill, in Mississippi, said we're doing it because we have new justices. The newest ban that Mississippi has put in place, the six-week ban, the State sponsors said we're doing it because we have new justices on the Supreme Court. Will this Court survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?").

> century—the great anti-precedent stigmatizing an entire era of constitutional law.[87]

The draft *Dobbs* opinion very much establishes that the demise of *Roe v. Wade* is imminent. The next question is what else will be impacted by this earth-shattering decision.

II. WHEN THE SUPREME COURT OVERTURNS *ROE V. WADE*, IT WILL ALSO SHATTER THE MODERN CONSTITUTIONAL FRAMEWORK PROTECTING ACCESS TO CONTRACEPTION, SAME-SEX MARRIAGE, INTERRACIAL MARRIAGE, AND A PARENT'S RIGHT TO EDUCATE THEIR CHILD

The most dangerous aspect of the Supreme Court's draft *Dobbs* opinion is its repudiation and rejection of the constitutional framework and evolution that arose from the Warren Court. A key passage on page five unequivocally states that "*Roe* and *Casey* must be overruled"; the Court's reasoning is that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment."[88]

Instead of starting with the meaning of the Fourteenth Amendment and the rights inherent in creating and denying family formation, the draft *Dobbs* opinion restarts the clock and looks only at what life meant to a select number of white men in 1789. There are numerous problems with the methodology. The most shocking one is that this analysis ignores the significance that the Fourteenth Amendment has had on our world. The Fourteenth Amendment was drafted to expressly *break* from a history that had literally denied personhood to too many.[89] If the draft opinion is the final one, today's Supreme Court would return to the intent of the Founders in a manner that erases the essential correction that the Fourteenth Amendment provided to the Constitution and to our society.

If the draft *Dobbs* opinion is the final opinion, the Supreme Court will unshackle the Constitution's limits on state laws to police how we love, whom we love, whether we have children or not, and which ethical and religious codes inform our daily lives.

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[87] Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741–42 (2007).

[88] *See* Draft Opinion, *supra* note 2, at 5.

[89] Davis, *supra* note 45 ("The history and tradition most pertinent to an understanding of the Fourteenth Amendment's due process protection of liberty is the story of why and how the Amendment came to be—a story of conflict, war, and reconstruction. Although the conflict and war had multiple causes, the words spoken in support of the Reconstruction Amendments make clear that the Amendments were inspired by rejection and repudiation of slavery. The rejection and repudiation of slavery were, in turn, the product of a successful political movement led by slaves, former slaves, and other abolitionists. The movement was grounded in human rights traditions that had been enshrined in the nation's founding documents and stood in increasingly explicit challenge to the commodification of human beings. The Fourteenth Amendment is, then, illuminated by the history of slavery, antislavery, war, and Reconstruction; by repudiation of the traditions of slavery; and by the human rights traditions that drove antislavery and Reconstruction.").

If this is the final opinion, our Supreme Court will no longer invoke the Fourteenth Amendment as a means for the Supreme Court to reflect the diversity of modern life.

Instead, if this is the final opinion, we will have a Supreme Court that will invoke "history" and "tradition" that will limit people's ability to form their own families and will impose a homogenous and anachronistic set of values on all of us. Although these values are embraced and lived by a minority, the majority of Americans no longer recognize nor accept them.

Stated more succinctly, by having a Supreme Court that looks to 1789 as the key date determining which values are valid, we will see a repeat in state laws using their police power to police private morality.

A. What's Going to Happen When This Decision Comes Out?

The draft *Dobbs* opinion states that it will overturn *Roe v. Wade* and "we thus return the power to weigh those arguments to the people and their elected representatives."[90] The opinion contends that *Roe v. Wade* was the cause of unending controversy and the Supreme Court "wrongfully removed an issue from the people and the democratic process."[91] But by unleashing this issue back to the states, our country will not be unified but will live in a balkanized world rife with interstate battles.

On abortion, twenty-six states will ban abortion immediately.[92] Montana cannot—but only because the state constitution is a living constitution that protects a right to privacy under Article II, Section 10.[93]

However, Republican leaders in Montana are calling for a constitutional convention to excise this part of the state constitution.[94] The Republican Party is two votes shy in the Montana legislature of making that happen.[95]

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[90] *See* Draft Opinion, *supra* note 2, at 34–45.

[91] *Id*. at 40–41.

[92] Jessica Glenza, *'It Will Be Chaos': 26 States in US Will Ban Abortion if Supreme Court Ruling Stands*, THE GUARDIAN (May 3, 2022), https://perma.cc/B9MB-D8GY.

[93] "In truth, that the Convention delegates deliberately drafted a broad and undefined right of 'individual' privacy was more a testament to and culmination of Montanans' continuous and zealous protection of a core sphere of personal autonomy and dignity than it was an attempt to create a greater right than that which already existed by historical precedent." Armstrong v. State, 989 P.2d 364, 374–75 (1999) (Nelson, J.) (citing William C. Rava, *Toward a Historical Understanding of Montana's Privacy Provisions*, 61 ALB. L. REV. 1681, 1716–17 (1998) (striking down law that prohibited physician assistants from performing abortion as a violation of Article II, Section 10 of the Montana Constitution). "As noted, Article II, Section 10 of the Montana Constitution was intended by the delegates to protect citizens from illegal private action and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private." *Id*. at 374.

[94] Eric Dietrich, *Prominent Republican Says Montana Should 'Throw Out' State Constitution*, MONTANA FREE PRESS (Nov. 18, 2021), https://perma.cc/8BE4-Q4MB.

[95] Arren Kimbel-Sannit, *Election Lookahead: A Possible GOP Supermajority, A Midterm Environment, Looking U.S. House Races*, DAILY MONTANAN (Feb. 20, 2022), https://perma.cc/L67K-8ABG ("A bicameral supermajority is a powerful tool in state politics, and the possibility of Republicans winning two-thirds majorities in the next session looms large over the 2022 election. The party already holds such a majority in the state House and is just two seats shy in the state Senate.").

Other states will return to criminalizing abortion. And this time, they are not just going after doctors. They are going after the women. Louisiana already has drafted bills that criminalize abortions, including in the case of ectopic pregnancies, and punishes them as the crime of murder.[96] This is more extreme than the pre-*Roe v. Wade* days. When a woman miscarries, there will be a police investigation to determine if she committed murder. Women will have to prove in court that their miscarriage was accidental and not intentional conduct.

This prediction is not an irrational one. On April 9, 2022, the police in Texas arrested a 26-year-old woman who sought medical care after a miscarriage and charged her with murder.[97] The district attorney dismissed the charges in a couple of days. If the Supreme Court returns to an era where states have unfettered authority to police morality again, states will have the legal authority to enact this type of law. The police will arrest women, prosecutors will press charges, and judges will sentence them to prison.

On the federal level, Senator Joni Ernst, a Republican from Iowa, is among a group of senators ready to introduce a bill that would ban all abortions that occur after six weeks.[98]

Already, Senator Mitch McConnell has said that in 2025, if the Republicans win the house, win the Senate, and win the presidency, they will pass a federal law to outlaw all abortions by statute.[99] Senator McConnell's call for the Democrats not to end the filibuster when they are in the majority will magically be made into a new "Merrick Garland rule"—a capricious new rule that applies only to the situation before it—when it serves McConnell's desired political ends.[100]

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[96] Nadine El-Bawab, *Proposed Louisiana Bill Seeks to Criminalized Abortion, Charge Women With Murder*, ABC NEWS (May 12, 2022), https://perma.cc/X92H-9VSJ.

[97] Ed Pilkington, *Murder Charges Dropped Against Texas Woman for 'Self-Induced Abortion,'* THE GUARDIAN (Apr. 10, 2022), https://perma.cc/6R56-U8C4.

[98] Caroline Kitchener, *The Next Frontier for The Antiabortion Movement: A Nationwide Ban*, WASH. POST (May 2, 2022), https://perma.cc/NQR5-ND7G ("A group of Republican senators has discussed at multiple meetings the possibility of banning abortion at around six weeks, said Sen. James Lankford (Okla.), who was in attendance and said he would support the legislation. Sen. Joni Ernst (R-Iowa) will introduce the legislation in the Senate, according to an antiabortion advocate with knowledge of the discussions who spoke on the condition of anonymity to discuss internal strategy.").

[99] Lexi Lonas, *McConnell Says National Abortion Ban Possible*, THE HILL (May 7, 2022), https://perma.cc/DYU8-GW4G.

[100] The "Merrick Garland rule" refers to Mitch McConnell's decision, supported by all Republican Senators, to not permit President Obama to appoint a justice to the Supreme Court in his last year of office. This "rule" had never been used until McConnell made it up. It is telling that this rule also was immediately abandoned when the same Republicans that had blocked Merrick Garland from appointment rushed through President Trump's pick for the Supreme Court in October 2020, even after millions of Americans had cast their ballot in the presidential election. In support of the claim that Democratic Senators believe that Senator McConnell would abandon his current claim that to do so violates tradition, "Many Democratic critics of the filibuster say McConnell is lying [about not abolishing the rule]. 'When the opportunity presents itself, there's no doubt in my mind that they'll change the rules to pass a bill criminalizing abortion federally,' says Senator Chris Murphy." Jonathan Chait, *Will Social Conservatives Make Mitch McConnell Kill the Filibuster*, NEW YORK (May 11, 2022), https://perma.cc/8JNY-KGCG. McConnell's gamesmanship that blocked President Obama's appointment to the Supreme Court and rushed through President Trump's appointment has turned the Supreme Court into a political branch, in process and in its result. The Republican senators who went along with these games attempt to defend their games, but it reeks of "Tegwar." Coined in the book *Bang The Drum Slowly*, Tegwar is "The Exciting Game Without Any Rules," a ruse used by baseball

B. But What Else Is Gone? Contraception, Same-Sex Marriage, Interracial Marriage, and Right to Educate Children Are Next

If *Roe v. Wade* is overturned, there will be no federal right to protect all decisions about when and how to form a family. Re-read that sentence. It is important. When *Roe v. Wade* is overturned, there will no longer be a federal constitutional right to protect when, how, and if to form a family.

Some states will ban and even criminalize contraception. In May 2022, Republican leaders in Idaho[101] and Louisiana[102] promised to criminalize intrauterine devices and other forms of contraception. There is no doubt that the current Supreme Court will permit these state laws to stand. In the 2014 *Hobby Lobby* case, the employer opposed providing health care to their employees who wanted contraception.[103] The employers argued contraception aborts a fetus—and the Supreme Court agreed.[104] Although *Hobby Lobby* was a religious freedom case, it signals that the Supreme Court will permit states to criminalize contraception.

The 2015 *Obergefell v. Hodges* case is based on the right to form one's own family.[105] The 2003 *Lawrence v. Texas* case ended states' ability to arrest and prosecute LGBT people for being who they are.[106] The Texas Right to Life and a former Attorney General in Texas have called for both *Obergefell* and *Lawrence* to be overturned. In September 2021, their words explained, "These 'rights,' like the right to abortion from *Roe*, are judicial concoctions . . . and there is no other source of law that can be invoked to salvage their existence."[107]

In 2017, Arkansas passed a law saying it would not list both lesbian parents as the parent of their child. The Supreme Court struck it down, citing *Obergefell*.[108] Justices Thomas, Alito, and Gorsuch dissented,

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players against the rookie who, after being lured into the game, would be subjected to ever-changing rules. "The poor cluck would always lose but would be reassured of the game's legitimacy by the veneer of rationality that appeared to overlie the seemingly sophisticated game." Mark Harris, BANG THE DRUM SLOWLY 8 (Alfred A. Knopf, Inc. 1956).

[101] Ian Max Stevenson, *After Roe Decision, Idaho Lawmakers May Consider Restricting Some Contraception*, IDAHO STATESMAN (May 10, 2022), https://perma.cc/9TM9-A69P.

[102] Editorial Board, *Louisiana Reveals The War on Rights That Is Coming If Roe Is Overturned*, WASH. POST (May 10, 2022), https://perma.cc/WZ6R-FE3J (discussing a proposed bill that "appears to declare the use of in-vitro fertilization, intrauterine devices and emergency contraception to be homicide, too.").

[103] 573 U.S. 682, 701 (2014).

[104] *Id*. at 701 (upholding religious exemption for a business owner who seeks to be "excluded from the group-health-insurance plan they offer to their employees [which covers] certain contraceptive methods that *they consider to be abortifacients*") (emphasis added)).

[105] Obergefell v. Hodges, 576 U.S. 644 (2015) (*Obergefell*).

[106] Lawrence v. Texas, 539 U.S. 558 at 578–79 (2003) (*Lawrence*).

[107] Nico Lang, *The Architect of Texas' Abortion Ban Wants to Make Gay Sex Illegal Again*, THEM (Sept 20, 2021), https://perma.cc/7FRY-9JZK.

[108] Pavan v. Smith, 137 S.Ct. 2075, 2077 (2017) ("Because that differential treatment infringes *Obergefell* 's commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage,' *id.*, 135 S. Ct., at 2601" the Court struck down a court order that had prevented both lesbian mothers to be on their child's birth certificate).

arguing that the state has the right to define families by biology and that *Obergefell* went too far.[109]

This leaves Justice Kavanaugh and Justice Barrett to protect same-sex couples. It is safe to predict how that is going to end. When we no longer have a federal right to marry someone of the same sex, we no longer have a federal right to marry someone of a different race. When *Roe v. Wade* is overturned, there will be no logical or legal way to save *Loving v. Virginia*. States will be free to return to criminalizing and banning interracial marriages.

The constitutional framework that built *Roe v. Wade* also protects the right for a parent, as opposed to the state, to control their child's education. The foundational protections for family formation in modern life started in the 1920s. As part of anti-immigrant sentiment, in 1923, Nebraska passed a law prohibiting schools from teaching the German language to children because "the Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear their children in the language of their native land."[110] In *Meyer v. Nebraska*, the Supreme Court declared that the state could not ban the teaching of a foreign language because the Constitution forbids it from exercising the power to "foster a homogenous people."[111]

In 1925, Oregon passed a law closing private schools that promoted the Catholic religion, the religion of immigrants, to instead promote public education for all.[112] In *Pierce v. The Society of Sisters of the Holy Names of Jesus and Mary*,[113] the Supreme Court disagreed, arguing that there is a fundamental right for parents to educate their children.[114] "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[115] This means that along with all of the family formation rights, the right for the parents to educate their children will also be without a federal constitutional protection.

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[109] Pavan v. Smith, 137 S.Ct. at 2079 (Gorsuch, J., dissenting) ("Neither does anything in today's opinion purport to identify any constitutional problem with a biology based birth registration regime.").

[110] Meyer v. Nebraska, 262 U.S. 390, 401 (1923) ("It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and 'that the English language should be and become the mother tongue of all children reared in this state.").

[111] *Id*. at 402.

[112] *See* Pierce v. The Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (*Pierce*).

[113] *Id*.

[114] *Id*. at 534–35.

[115] "We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 534–35.

If the draft *Dobbs* opinion is the final decision, the impact will be sweeping. The rights to contraception, abortion, marriage, and how a person raises their child will no longer be guaranteed. Some states will recognize the modern world we grew up knowing, and some states with Republican-controlled legislatures will not. These states will criminalize the choices that most Americans hold dear.

Contrary to what the draft *Dobbs* opinion claims, there will be no end to divisiveness by returning the abortion issue to the states. Not when we have Texas creating a bounty scheme to authorize and encourage private individuals to sue anyone who helps a woman seeking an abortion.[116] Not when Oklahoma's legislature passed a law that "prohibits nearly all abortions starting at fertilization" without regard to rape and incest, empowering private citizens to sue anyone who "aids and abets" an abortion.[117]

We will now see states not just imposing morality on their own residents, but we already see draft bills from states that will criminalize the conduct of people who live outside of their state who share different moral values than those state politicians.[118] The issue of abortion will not be benignly settled when the "states decide," because those states are seeking to criminalize and authorize private individuals to police a woman and her network of support, including her family, friends, religious community, and anyone she turns to in her time of need.[119] The world without *Roe v. Wade* will be a revival of the fugitive slave issue, when slave states prosecuted people—including those living in free states—who assisted Black people when escaping from slavery.[120]

III. HOW CONGRESS MUST AWAKEN FROM ITS DYSFUNCTIONAL INACTION AND RETURN TO LEGISLATING RESPONSES TO COURT DECISIONS

If we live in a world where Originalism demands that we return to 1789, let us start with a moment of awe for what the Founders did. They

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[116] Alan Feuer, *The Texas Abortion Law Creates a Kind of Bounty Hunter. Here's How It Works*, N.Y. TIMES (Sep 10, 2021), https://perma.cc/3VYX-SJ5X.

[117] Kate Zernike, Mitch Smith, Luke Vander Ploeg, (*Oklahoma Legislature Passes Bill Banning All Abortions*, N.Y. TIMES (May 19, 2022), https://perma.cc/3LXD-6EYP.

[118] Sarah Fentem, *Missouri Lawmaker Wants to Make It A Crime To Help People Get Abortions Out of State*, ST. LOUIS PUBLIC RADIO (Mar. 11, 2022), https://perma.cc/5EAG-L4ZY. As professor David Cohen observed, "We're going to see state-against-state battles that are really going to divide this country even deeper on this issue." The new laws include the possibility of banning residents from leaving their own state to criminalizing people in different states who assist in obtaining abortions. Melody Schreiber, *US States Could Ban People From Traveling for Abortions, Experts Warn*, THE GUARDIAN (May 3, 2020), https://perma.cc/3CJA-94VQ.

[119] It is telling too that the same forces that are seeking to police pregnancy are engaging in shocking tactics to harm transgender kids and their families. *See* Chuck Lindell, *Texas Can Resume Child Abuse Investigations for Transgender Care, Supreme Court Says*, AUSTIN AMERICAN-STATESMAN (May 13, 2022), https://perma.cc/EU4V-MNH2/.

[120] "The Fugitive Slave Acts of 1793 and 1850 provided for federal involvement in slave-catching in Northern states and (in 1850) established federal officers to assist in slave-catching and penalties for obstruction of such activity." Anthony J. Sebok, *Judging the Fugitive Slave Acts*, 100 Yale L.J. 1835 (1991).

had the gall to declare a right to govern themselves. Instead of allowing the King to decide, they said "We the People," should be the ones to set our own course, our own destiny. In the Constitution, the words "We the People" are not just in there. They are the first words in the Constitution.[121]

Thomas Jefferson made clear that there was nothing special about the Founders. But what made this group of men extraordinary—and again, it was all men—was that they were dedicated to shaping the world they wanted.[122] Jefferson explained that democracy would only survive if each generation wrote the Constitution to recreate the world as it meant to them.[123] To this end, he suggested a constitutional convention every twenty years "for periodical correction."[124]

When the Supreme Court overturns *Roe v. Wade*, the Court will immediately undermine its own legitimacy. However, it is critical to remember that the Founders envisioned a functioning democracy as one involving all three branches—the executive, legislative, and judiciary—working together and, when warranted, checking an excess of power exercised by one branch. The necessary and essential response to the Supreme Court overturning *Roe v. Wade* is for Congress to end its fifteen-year period of inaction and start legislating laws, codifying the modern and essential Fourteenth Amendment protections that the *Dobbs* decision will undermine, and if necessary, engage in court reform.

There are obstacles for this to happen, most notably the need to reform or abolish the filibuster rule, but all can be surmountable if the current electorate votes. The voter turnout in the United States lags behind other democracies. As much as people, particularly young people, claim that voting is without impact, futile, or inconsequential, the Supreme Court will overturn *Roe v. Wade* because a dedicated minority showed up at every election and voted for every candidate that would appoint judges and justices that would result in this very decision. Voting is highly effective in shaping democracy. If it were not, there would not be an astonishing contemporary effort to make it harder or irrelevant. For every person who objects to the Supreme Court overturning *Roe v. Wade*, they must vote in every election, every year, and be committed to encouraging others to do the same.

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[121] U.S. CONST., pmbl., https://perma.cc/S4HP-AC8Z.

[122] Robert J. Martin, *The Case for Convening A Constitutional Convention*, N.J. LAW, 6/97, at 39, 42 n.6 (1997) (nothing that Thomas Jefferson called for "a constitutional constitution be convened every 20 years 'for periodical repairs,' thereby affording each generation the 'right to choose for itself the form of government it believes most promotive of its own person.'") (citing Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (cited in Merrill Peterson, *Mr. Jefferson's Sovereignty of the Living Generation*, 52 VA. Q. REV. 437, 443–47 (1976)).

[123] *Id*.

[124] *Id*.

A. The Originalist and Textualist Methodology Is Undermining the Court's Legitimacy Because Justices Act like Oracles and Pretend to Be Above Politics

There is no doubt that the Supreme Court, when overturning *Roe v. Wade*, will do so at the cost of its own institutional legitimacy. Already the *leak* of the draft *Dobbs* opinion resulted in a record-low approval rating of 44% in May 2022 and a record-high disapproval rating of 55%, which is a shift of ten points from March 2022 when the numbers were reversed at a 54% approval rating and a 44% disapproval rating.[125] In 2001, the public approval of the Supreme Court was 62% and disapproval was 29%.[126] The Supreme Court's nosediving approval rate comes from the public disapproval of the justices acting as political actors. In February 2022, an "overwhelming majority of adults (84%) . . . say Supreme Court justices should not bring in their own political views into the cases they decide . . . "[127]

The drop in the public opinion polls reveals a truth, which is that the judicial branch's legitimacy rests on a fragile ability to earn the trust of the public. As Alexander Hamilton wrote, unlike the power of the purse or the power of the sword, the judicial branch's power only comes through persuasion.[128]

The sin of Originalism and Textualism is that it is returning to the early days of the Supreme Court when justices claimed that they were oracles, uniquely situated to discover and find true meaning in texts that eluded the rest of us.[129] The oracle theory of judging left the early days of the Supreme Court without public confidence, with even some of the early justices not bothering to resign from their other jobs to attend to the ill-defined and non-pressing business of the Court.[130]

The 2020 *Bostock v. Clayton County, Georgia* case is an example of how subjective the methodology of Textualism in statutory interpretation truly is.[131] In determining whether the term "sex" in Title VII prohibits discrimination based on a person's sexual orientation or gender identity, Justice Gorsuch's majority opinion concluded it does. Its methodology, however, was based on an arrogant claim that it could determine the

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[125] Juliana Tornabene, *Poll: U.S. Supreme Court Approval Rating Drops After Leaked Abortion Draft Opinion*, NBC15.COM (Mar. 25, 2022), https://perma.cc/2VK9-Z2LZ.

[126] *Supreme Court*, GALLOP, https://perma.cc/3X86-47D6.

[127] *Public's View of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RESEARCH CENTER (Feb. 2, 2022), https://perma.cc/T6D4-Z2AH.

[128] U.S. CONST. art. III; *see* Alexander Hamilton, *Federalist Paper No. 78*, https://perma.cc/UJ6N-UQXP ("The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment. . . .").

[129] G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 8 (Oxford University Press 1988).

[130] *Id*.

[131] 140 S. Ct. 1731 (2020).

"clear" meaning of the Title VII's words as they were understood in 1964 by consulting dictionaries.[132] A concurrence by Justice Alito disagrees with the majority, but does so by claiming that he is able to know the meaning of the relevant terms as they were defined in 1964, which he intuits simply by arguing that "discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'" [133] Justice Alito further criticizes Justice Gorsuch's statutory analysis with "[i]t is curious to see this argument in an opinion that purports to apply the purest and highest form of textualism because the argument effectively amends the statutory text."[134] Not to be undone, Justice Kavanaugh filed a separate decision in which he too claimed that he alone had the ability to read text unlike any other. "And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase."[135] (He is partially right, in that he saw meaning that no one else on the Court did.)

Statutory interpretation, textualism, and Originalism all lay claim to being able to objectively divine meaning, independent of politics or bias. As shown in *Bostock*, if three conservative justices are unable to divine the same meaning of only three words, statutory interpretation obviously is neither objective nor apolitical. The most damning criticism of Textualism and Originalism is that the interpretation method is in essence the work of a snake oil salesman, a subjective and conservative worldview that is sold under a veneer of legitimacy that the justices are simply discovering the true meaning of the law and Constitution. As Jill Lepore wrote, "[Originalism] is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution."[136]

The *Dobbs* decision, which surveys historical practices before, at, and after the country's founding, revives the discredited methodology of having five justices go back to 1789 and conveniently find a new history and new truth that had eluded all others in the past 200 years and one that will overturn *Roe v. Wade* on the basis that this new history was newly divined and must trump all. It is not surprising for the public opinion of the Court to dramatically drop when this draft opinion was made public.

It is disingenuous to pretend that politics are not part of the judicial project and that a judge (and justice) is acting as an oracle, and simply being a neutral diviner of a universal truth. But how can a court have legitimacy if all judges are simply being political actors? Justice Roger Traynor, who was on California's Supreme Court in the 1940s, 1950s, and

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[132] *Id*. at 1738–39.

[133] *Id*. at 1755–56 (Alito, J., dissenting).

[134] *Id*. at 1761 (Alito, J., dissenting).

[135] *Id*. at 1825 (Kavanaugh, J., dissenting).

[136] Jill Lepore, *Tea and Sympathy: Who Owns the American Revolution?*, NEW YORKER at 26, 31 (May 3, 2020), https://perma.cc/2PHZ-2CER; *see generally* Siegel, *supra* note 60, 122 HARV. L. REV. at 241 ("The New Right embraced originalism as the jurisprudential vehicle for these claims [of a traditional social order embracing race, family, and faith]. Now that conservatives were beginning to exercise authority in the Republican Party, and from Congress, the Justice Department, and the bench, the original understanding provided authority that could legitimate their new exercises of public authority as the Constitution—supplying reason, not only to limit judicial review, but to expand it in new ways. The New Right's understanding of the original understanding was populist and popular, but clearly partisan—by no means consensual, or even majoritarian.").

1960s, grappled with this dilemma by seeing the courts as partners with the executive and legislative branches that permit the values of modern society to flourish. Justice Traynor's philosophy required judicial decisions that "needed to be modernized, so that they could be responsive to the social conditions of contemporary [American] life; [and needed] to be generalized, so that they could function as guidelines for conduct in an increasingly complicated world . . . ."[137]

As much as that partnership is also political, in that it weighs in on certain questions and reflects a worldview that a functioning government is an ideal one, Justice Traynor and his Court were viewed as legitimate actors. Indeed, in 1944, Justice Traynor developed the tort of strict liability, a concept that all fifty states enacted as their own law.[138] In 1948—six years before *Brown v. Board of Education* and nineteen years before *Loving*—Justice Traynor wrote the majority decision in *Perez v. Lippold*,[139] which struck down California's anti-miscegenation law by invoking the Fourteenth Amendment as ensuring that "the right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring."[140] In so doing, Justice Traynor noted that the state had no legitimate purpose in writing a law that was, in part, designed to prevent the existence of mixed-race children who would be born from these marriages. In addition, Justice Traynor struck down the laws as unconstitutionally vague because the state cannot be in the odious business of defining who is and is not in a racial category.[141]

Justice Traynor's creation of a new tort and striking down anti-miscegenation law is no less political than the draft *Dobbs* decision that intends to overrule *Roe v. Wade* and to overrule eighty years of Fourteenth Amendment precedent. But the latter is viewed as a grossly inappropriate act, in part, because its methodology in Originalism and Textualism gaslights the audience by pretending to be above politics. Justice Traynor, by contrast, sought and received legitimacy for his judicial actions because he made sure that his reasoning was transparent and he made a case for the judiciary to be part of a project to participate in modern society. "[F]or Traynor the promotion of substantive policies in a judicial opinion was easily distinguishable, if the opinion was properly crafted, from the individual bias of the writer."[142] To achieve this, Justice Traynor offered

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[137] White, *supra* note 129, at 295.

[138] Escola v. Coca Cola Bottling Col, 150 P.2d 436, 442 (1944) (en banc) (Traynor, J., concurring); Derrick Williams, *Secondhand Jurisprudence in Need of Legislative Repair: The Application of Strict Liability to Commercial Sellers of Used Goods*, 9 TEX. WESLEYAN L. REV. 255, 265 (2003) ("[i]n his concurrence, Justice Traynor addressed both the negligence doctrine and warranty theory, and explained that strict liability in tort was the next logical step for cases involving product-related injuries.").

[139] 198 P.2d 17, 19 (1948) (Traynor, J.).

[140] *Id*. at 19.

[141] "Enforcement of the statute would place upon the officials charged with its administration and upon the courts charged with reviewing the legality of such administration the task of determining the meaning of the statute. That task could be carried out with respect to persons of mixed ancestry only on the basis of conceptions of race classification not supplied by the Legislature." Perez, 198 P.2d at 29.

[142] White, *supra* note 129, at 314.

an intellectual defense of his reasons. "A social policy was promoted not because of its emotional appeal to the judge but because, after careful examination, it emerged as a rational and intellectually defensible resolution of a current conflict."[143]

Justice Traynor gained legitimacy by admitting the political agenda infiltrating his decisions and then defending them with reasoning. That stands in stark contrast to the draft *Dobbs* opinion (and the contemporary Supreme Court's reliance on Originalism and Textualism in general) that denies that the resulting decision is political even though it very much is. Returning to a world where states can use their criminal code to impose a specific moral ordering on sex, children, and families is a political project shared by other religious and political groups across the world that we typically do not align our values with. European countries and modern democracies permit abortion and let people live inside or outside of marriage. Twenty-seven countries, located in Central America, Africa, and the Middle East, ban and criminalize abortion.[144] El Salvador, a country led by a dictator, bans all abortions, including those arising from rape or incest, and women who "suffer miscarriages and stillbirths can be prosecuted for murder" with penalties of two- to fifty-year prison terms.[145]

Another factor that Justice Traynor had in providing that his judicial decisions were legitimate is that there was a check on his power. After his initial appointment to the bench, the California voters determined if he remained on the court or not (which they did).[146] As discussed below, the current Supreme Court is without a check on its power as long as Congress remains an inactive branch, unable to nimbly respond as it once did.

The outsized power that the Supreme Court will have on American life will cost the institution its legitimacy to function. A critical corollary is that the restoration of Congress into a functioning branch will make the Supreme Court more legitimate by having an immediate check on its own power when the public views that it oversteps. This was the lesson of *Marbury v. Madison*,[147] the case described as genius because the Court at once announced the doctrine of judicial review and the remarkable power to declare laws unconstitutional. However, in so doing, the Court simultaneously cabined its own power to strike down laws by explaining that its authority to do so arose from a specific law Congress could pass, which means that Congress could immediately undo the outcome if it so chose. By declaring that Congress can limit the Supreme Court's own reach, Justice Marshall deftly avoided a political crisis by chiding the Jefferson administration in breaking a law, but as a constitutional matter,

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[143] *Id*. at 315.

[144] *El Salvador's Abortion Ban Jails Women for Miscarriages And Still Births—Now One Woman's Family Seeks International Justice*, THE CONVERSATION (Mar. 15, 2021), https://perma.cc/Q9TP-WB76.

[145] *Id*.

[146] *Johnson's Vote Makes Record in California*, HEALDSBURG TRIBUNE (Dec. 9, 1940) https://perma.cc/L5R2-RDCS.

[147] Marbury v. Madison, 1 Cranch 137, 156–74 (1803).

it made sure that the Supreme Court would be only one of three branches and not always be the final arbiter. [148]

What is often not remembered about this case is that in establishing the right to strike down the laws of Congress, the Supreme Court refrained from doing just that for the next sixty years, exercising that right only once between 1803 and 1864.[149] The Supreme Court's legitimacy came from its restraint and its ability to carve out space as a co-equal—not the superior–branch. Originalism and Textualism run counter to this project by claiming that justices are oracles, unique individuals capable of discovering and declaring the law rather than defending the outcome as a rational result. The proposal below, which is to restore Congress' ability to respond to decisions it disagrees with will check the Court's power and, in so doing, increase the Court's legitimacy.

B. Congress Must Awaken from Its Dysfunctional Inaction

The Founders waited to form the federal courts in Article III—the last of the three branches—because it was supposed to be the weakest one.[150] What most people forget is that our Constitution is actually the

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[148] *Id*. *Marbury v. Madison* involved a heated dispute between the outgoing Adams administration and the incoming Jefferson administration. After Adams and the Federalists lost the 1800 election, the lame-duck Federalist Congress passed the Judiciary Act of 1801, which created new courts and gave the president power to appoint new judges. The lame-duck president John Adams acted quickly, appointing 16 new circuit judges and 42 justices of the peace before he left office. All of those judges were members of the Federalist party and were picked in part to frustrate the legislative goals of the new Jefferson administration and his Democrat-Republican party. The Senate approved all of the new judges, and the final step in appointing these new judges was for the Secretary of State to deliver their commissions to them. The Adams administration delivered, some but not all, commissions before Thomas Jefferson became president. William Marbury had been appointed to be a new justice of the peace, but Jefferson's Secretary of State James Madison refused to deliver his commission. Mr. Marbury filed a writ with the Supreme Court, asking for the remedy of a court ordering the Secretary of State to deliver his commission to him.

[149] "Between 1803 and 1864, the Supreme Court struck down only one congressional statute--portions of the 1820 Missouri Compromise in Dred Scott. . . ." Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of A "Great Case"*, 38 WAKE FOREST L. REV. 375, 381 (2003).

[150] U.S. Const, Art. III; *see* Alexander Hamilton, *Federalist Paper No. 78*, https://perma.cc/UJ6N-UQXP ("[t]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as,

Founders' second attempt at figuring out what system of government will work best. After the colonies chose self-governance over following a King, our Founders' original attempt at democracy was the Articles of Confederation, a framework that gave all the power to states.[151] This experiment ended after seven years because, when kept apart, the states pursued their small interests instead of the larger, nobler cause of a nation.[152]

What made our Constitution work is that the federal government had a significant role in governing the nation. In this new framework, the most powerful institution was Congress, a place for representatives across the land to talk face-to-face, compromise, learn from each other, and ultimately move forward toward the Union that President Lincoln knew he had to save.[153] This is why the Founders formed Congress first, in Article I.[154]

The draft *Dobbs* opinion states that it will overturn *Roe v. Wade* and "we thus return the power to weigh those arguments to their people and their elected representatives."[155] The dangerous move in this action is that the rise in state power comes at the cost of a strong federal government, an experiment that ended in 1789 with the abolition of the Articles of Confederation and again in 1861 with the end of the Union. Although those who "dissented in any respect from *Roe*" as the draft *Dobbs* opinion calls them[156] will have an opportunity to set their own morals in states where they have the majority vote, the result of passing aggressive laws that announce their own moral agenda, and prosecuting those outside of the state who disagree with them, returns us to an era where states will battle against one another. We see this already with the Florida governor mocking New York's policies that differ from its own,[157] and the California governor running for re-election on the threat that his opponent will turn the state into Florida.[158] The states are no longer the site for

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from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.").

[151] Gregory E. Maggs, *A Concise Guide to the Articles of Confederation As A Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 403 (2017).

[152] *Id*. at 416–17.

[153] Annual Message to Congress, Dec. 1, 1862. One month before signing the Emancipation Proclamation, President Lincoln articulated what is an often-quoted excerpt defending the need to end slavery and save the Union. His speech included, "Fellow-citizens, we cannot escape history. We of this Congress and this administration, will be remembered in spite of ourselves. No personal significance, or insignificance, can spare one or another of us. The fiery trial through which we pass, will light us down, in honor or dishonor, to the latest generation . . . . We shall nobly save, or meanly lose, the last best hope of earth."

[154] U.S. Const, Art. I.

[155] *See* Draft Opinion, *supra* note 2, at 34–45.

[156] *Id*. at 40.

[157] Douglas Ernst, *Ron DeSantis: Vaccinated New Yorkers in "Six Masks" Mocking Open Florida Are The "Crazy Ones"* WASH. TIMES, May 26, 2021 https://perma.cc/SAS4-3TV6.

[158] Mackenzie Mays, *California Can't Stop Talking About Florida*, POLITICO (Aug. 26, 2021), https://perma.cc/Y6WU-L8F4.

experimentation, as the Founders promised, but a site for recrimination and tribalism that threatens our identity to function as one nation.

The rise in state power must be checked by a strong federal Congress that can restore a functioning modern society. Congress very much was an active branch that shaped our democracy. Most people in the United States think that the defining feature of democracy is *one person, one vote*.[159] This is a modern conception of democracy, another right formed and protected by the Warren Court in a series of cases, including the 1964 *Reynolds v. Sim* decision.[160]

But the defining feature of democracy, as envisioned by the Founders, is a system of checks and balances.[161] The Founders created three co-equal branches of government: one to make the laws, one to execute them, and one to interpret them. For a democracy to survive, they must all be in conversation with each other.[162] At times, one branch may have a superior claim.[163] But for a democracy to function, no one branch can take all the power for itself.[164]

Massachusetts is an example of how the branches of a functioning government are still working together. In 2014, a woman wearing a dress was seated on a train.[165] A man named Michael Robertson took out his cell phone and surreptitiously took a photograph of the woman's crotch. A police officer observed what happened and arrested Mr. Robertson.[166] The prosecutor charged him with the crime known colloquially as being a Peeping Tom—observing someone who is partially nude.[167] Mr. Robertson moved to dismiss these charges on the grounds that he did not violate that law because it applied to people who were partially nude and the woman on the train was fully clothed.[168]

The highest court in Massachusetts, the Supreme Judicial Court, agreed and struck the charges.[169] In so doing, the Supreme Judicial Court noted that the crime at issue is what is known as "upskirting" and the Peeping Tom statute did not apply to it.[170] In supporting its view, the Court found two other states that had written criminal statutes to apply to this conduct.[171] The Court made clear that it is fully reasonable for legislatures

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[159] *See* Reynolds v. Sim, 377 U.S. 533 (1964).

[160] *Id.* at 565 ("Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.").

[161] Legal Information Institute, *Separation of Powers*, CORNELL LAW SCHOOL, https://perma.cc/5XL6-TLQ9.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] Com. v. Robertson, 467 Mass. 371, 373 (2014).

[166] *Id.*

[167] *Id.*

[168] *Id.* at 374.

[169] *Id.* at 380–81.

[170] Com. v. Robertson, 467 Mass. 371 (2014).

[171] *Id.* at 380 n.17 (citing Florida and New York laws that criminalize upskirting).

to criminalize this conduct, but Massachusetts had failed to pass a law that did.[172]

In response to this decision, not a single lawmaker attacked the Court for being soft on crime or being activist judges. Instead, the lawmakers showed up to work and, within three days, wrote a criminal statute that prohibited the conduct of upskirting.[173] On that very same day, Governor Deval Patrick signed the law and noted that it was needed to "modernize[] the Commonwealth's criminal voyeurism laws to outlaw what is known as 'upskirting.'"[174] This law remains intact, and the Supreme Judicial Court has not attacked its constitutionality or propriety.

This is how the three branches are supposed to work. In Massachusetts, the judiciary found a defect in the laws as they applied. The Court struck down the law—but did so in a manner that clarified how that defect could be cured. Within three days, the legislature cured the defect, and the Governor signed the new law. No one attacked any branch as overstepping or being activist. Notably, the judiciary struck down a law in a manner that permitted the other branches to cure the problem. No one branch had the ultimate power. All three branches worked like the game "rock, paper, scissors." Whatever advantage one branch had at any given time, it was temporal—not a permanent taking of power.

This stands in stark contrast to how the U.S. Supreme Court under Chief Justice Roberts and Congress—as controlled by Senator Mitch McConnell—operates. For the Supreme Court, it has been steadily making decisions in a manner that ensures that its branch has the last word, instead of offering a path to correction. The 2015 Citizens United case overturned 100 years of precedent, which then struck down all attempts by Congress to limit campaign contributions made by corporations and hidden groups.[175] The result of this decision is that dark money has flooded into our electoral system. From 2010 to 2018, $2.9 billion was spent in federal elections, and only 100 people contributed 78 percent of the funds to influence voters.[176] The cure for a new campaign finance scheme is not like the upskirting situation in Massachusetts, where the legislature can draft a new bill. The only means to overturn Citizens United is a constitutional amendment, an arduous process that last occurred in 1992.[177]

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[172] *Id*. at 380 ("[T]he proposition that a woman, and in particular a woman riding on a public trolley, has a reasonable expectation of privacy in not having a stranger secretly take photographs up her skirt. The proposition is eminently reasonable, but § 105 (*b*) in its current form does not address it.").

[173] Haimy Assefa, *Massachusetts Legislature Passes "Upskirting Ban,"* CNN (Mar. 7, 2014), https://perma.cc/3N9D-NUSC.

[174] *Patrick Signs Bill: 'Upskirting' Now Illegal*, WBUR (Mar. 7, 2014), https://perma.cc/2B3U-4YDS.

[175] Citizens United v. Federal Election Comm'n, 588 U.S. 310, 319 (2010) (overruling *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203–20 (2003) and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)).

[176] Tim Lau, *Citizens United Explained*, BRENNAN CENTER FOR JUSTICE (Dec. 12, 2019), https://perma.cc/2R3X-GHQU.

[177] The Twenty-Seventh Amendment was enacted in 1992 and bars congressional pay changes from occurring until the new congressional term. Const. Amend XXVII.

The Supreme Court, and other judges who were picked to pursue a partisan agenda, are flexing their muscle too in creating new judge-made doctrines such as the "non-delegation doctrine" to strike down the ability for the agencies to issue regulations.[178] It is remarkable that in January 2022, the Supreme Court said that the Occupational Health and Safety Administration lacks legal authority to regulate a new deadly virus on an emergency basis based on a regulation that authorizes emergency regulation of "new hazards" and "physically harmful" agents.[179] In April 2022, a federal district court judge, whom President Trump appointed when she was in her 30s, explained that the Centers for Disease Control and Prevention lacks all legal authority to control and prevent diseases.[180] By June 2022, the Supreme Court will continue its attack on the reach of the executive branch by deciding *West Virginia v. EPA*,[181] a case that the Supreme Court appears ready to limit the legal authority for the Environmental Protection Agency to protect the environment.[182]

It is also notable that many Supreme Court decisions could be altered with congressional action. Up until 2009, after every Supreme Court term, it was common for Congress to enact new laws that overturned or changed the decisions.[183] This conversation between the branches is a critical one—because at any given time, sometimes the just result comes from the judiciary, sometimes the President, sometimes the Congress. Without having a conversation about the issues, however, inaction simply shuts down the debate, and attention is no longer spent on solving issues that need redress.

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[178] The non-delegation doctrine is predicated on the principle that the bedrock foundation of democracy is a separation of powers between the three branches of government in which each serves its own unique purpose of writing laws (Congress), interpreting laws (the Judiciary), and executing laws (the Executive branch). An important component of this separation is which branches of government are made up of elected officials, and thereby, answer to the people. n an important point, the current judges who are championing non-delegation doctrine as an important check on the administrative state are ones who identify as Originalists–the theory that the Founders had superior knowledge and their wisdom can be gleaned and must be followed. Professors Mortenson and Bagley conducted an exhaustive survey of the debates in the first congressional sessions. Their conclusion is that there is no historical support for the Founders to have meaningful concerns over Congress's ability to delegate its power to agencies. "The nondelegation doctrine has nothing to do with the Constitution as it was originally understood. You can be an originalist or you can be committed to the nondelegation doctrine. But you can't be both." Mortonson & Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021).

[179] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S.Ct. 661, 676 (2022) (Breyer, J., dissent) ("Who decides how much protection, and of what kind, American workers need from COVID–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?").

[180] Health Freedom Def. Fund, Inc. v. Biden, No. 8:21-CV-1693-KKM-AEP, 2022 WL 1134138, at *1 (M.D. Fla. Apr. 18, 2022) (Miezelle, J).

[181] *West Virginia v. Environmental Protection Agency*, OYEZ, https://perma.cc/T6BW-T2SS.

[182] *Id*.

[183] In Geduldig v. Aeillo, 417 U.S. 484, 497 n.21 (1974) and again in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the majority opinions notoriously claimed that discrimination towards pregnant women is not based on gender because the employer may hire all "pregnant persons," which is not based on sex. "[T]he exclusion of pregnancy from coverage under California's disability-benefits plan was not in itself discrimination based on sex." 429 U.S. at 135. In response, and in overturning both decisions, in 1978, Congress passed the Pregnancy Discrimination Act of 1978. *See also* Reva B. Siegel, *You've Come A Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1878 (2006).

The last time that Congress responded to a Supreme Court decision was in 2009. This is when Obama ran on the promise to overturn the Supreme Court's *Ledbetter* decision that said women who got less pay than men had no standing to go to sue.[184] In response, in 2009, Congress passed the Lily Ledbetter Act said, *no*, the new law is that women can sue when they get less pay for the same job.[185]

Congress has been functionally shut down since then. Why did Congress stop being the critical third branch in government? Because the filibuster stops the Senate. It is highly ironic that the filibuster is causing this problem because do you know what word is not in the Constitution? The filibuster. And it is a word that means "pirate" in Dutch. In 1917, the Senate codified this rule.[186] The Republican minority now invokes it for every single bill introduced by President Biden, and consequently, nothing passes based on a simple majority.[187]

It is critical for Congress to return to its proper place in a functioning democracy by acting as a third branch of government and participating in the conversation over policies and controversies. The filibuster is preventing this from happening, which is why it is critical for Congress to reform or abolish it from its current usage that only obstructs movement.[188] To give Congress the opportunity to correct this inaction is for the voters to elect officials who are committed to a restoration of institutional legitimacy and a functioning modern government. This cannot happen unless people vote.

C. The Critical Need for People to Vote

The most profound and lasting impact a person can make in the United States is exercising their right to vote. In 2020, America had the highest voter turnout for President in over 100 years. However, it was only 66% of the eligible voters.[189] In Sweden, Australia, Iceland, Japan, and Denmark it is more than 80% of voters.[190] Most of Europe is higher than 70%.[191]

The United States is supposed to lead the world in democracy. But yet, United States citizens are not voting as other democracies are, and the

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[184] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628 (2007), *overturned due to legislative action* (Jan. 29, 2009).

[185] Pub. L. No. 111-2 (Jan 29, 2009); Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 29, 2009), https://perma.cc/KH7U-DVHU.

[186] *Filibuster*, U.S. SENATE, https://perma.cc/5R37-58A6.

[187] Anthony Zurcher, *Filibuster: The Biggest Obstacle to Biden Getting His Way*, BBC (Apr. 21, 2021), https://perma.cc/6PS9-YGKL.

[188] Chait, *supra* note 100 ("Many Democratic critics of the filibuster say McConnell is lying [about not abolishing the rule]. 'When the opportunity presents itself, there's no doubt in my mind that they'll change the rules to pass a bill criminalizing abortion federally,' says Senator Chris Murphy.").

[189] Drew Desilver, *Turnout Soared in 2020 As Nearly Two-Thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RESEARCH CENTER (Jan. 28, 2021), https://perma.cc/575W-R23L.

[190] Drew Desilver, *In past elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RESEARCH CENTER (Nov. 3, 2020), https://perma.cc/7LLY-2XLD.

[191] *Id*.

federal government and state governments are not seeking to make voting easier. To the contrary, in response to the record-breaking voter turnout in 2020, nineteen states—including Montana—made it harder for people to vote by passing thirty-three laws that restricted how and when someone can vote.[192] Even more outrageous, fourteen states passed laws that "intensify[] their control over how elections are run and how votes are counted."[193] In five states—Georgia, Florida, Kansas, Kentucky, and Montana—passed laws to permit "the legislature . . . to usurp[] election authority that previously belonged to other state officials."[194] This means that a legislature could assign electors in a presidential election in direct conflict with the popular vote's selection of who the voters want to be their president.[195]

It is critical that people understand how important voting is—how essential it is in selecting congressional representatives, state representatives, and governors who will determine the immediate response to the overturning of *Roe v. Wade* and the longer impact of correcting the imbalance of power. Voting is also the only path toward Congress again becoming a vibrant and participatory branch of government.

1. But Why Vote? The Candidates Are the Same (Short Answer: Not True)

People tell me they do not vote because *it will not make a difference. The parties are the same.* Do you know who perfected that nonsense? Richard Nixon made this message a core of voter suppression.[196] When Nixon realized he could not win the youth, the Black community, and the cities, he stopped campaigning there—he wanted to ignore them, to tell them, you do not matter.[197] We do not matter.[198] Nixon in essence told them, *don't bother voting, JFK and I are the same. The Republican and*

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[192] *Voting Laws Roundup: October 2021*, BRENNAN CENTER (Oct. 4, 2021), https://perma.cc/8PTL-JLAD.

[193] Ari Berman, *14 GOP-Controlled States Have Passed Laws to Impede Free Elections*, MOTHER JONES (June 10, 2021), https://perma.cc/J672-FEGW.

[194] *Id*.

[195] John Eastman advocated for this to occur in an effort to overturn the 2020 presidential election. *See* Andy Craig, *States Legislatures Can't Overturn Presidential Election Results*, Cato Institute (May 11, 2022) (noting that Eastman's correspondence around the January 6 insurrection reveals "a more serious and pernicious legal theory central to most of Eastman's claims: that state legislatures have some constitutional power to overturn, alter, or 'decertify' their state's presidential election results. This theory is constitutionally erroneous and should be firmly rebuked as part of preventing future attempts at election subversion.").

[196] *See generally* Gloria Steinem, *In Your Heart You Know He's Nixon*, N.Y MAG. (Oct. 28, 1968), https://perma.cc/6VDF-J42X; James Boyd, *Nixon's Southern Strategy*, N.Y. TIMES (May 17, 1970), https://perma.cc/RL8X-2WQQ.

[197] *Id*.

[198] *Id*.

Democratic parties are essentially the same.[199] *Only small differences exist, so please stay home.*[200]

When anyone thinks their vote does not matter, it very much does. If one's vote did not matter, why would nineteen states change their laws out of fear one would use it? If one's vote did not matter, why would the Republican Party promote cynicism by saying there is no difference between the parties? That is not true. In Montana, we have Republicans running for state offices on the promise to rewrite the Montana Constitution and end the right of privacy.[201] In Congress, we have Republicans promising to pass a federal law banning all abortions after six weeks.[202]

It matters who is in office. It is critical for voters to visit the websites of candidates running for Congress and the Montana House and Senate. Did they include abortion rights as an issue they will fight to protect? If so, and if these rights are important, those are the candidates one should vote for, work for, and help get elected.

2. But Why Vote? It's Futile (Short Answer: Not True)

I also hear people say they do not vote *because it is futile. They voted in 2020, and look what happened. Nothing.*

Social justice takes more than one election. Those who opposed *Roe v. Wade* worked for fifty years to get the victory they wanted. Here is the issue: 70% of Americans support abortion rights[203]—but the people who consistently vote are in the 30% who do not. If you support our constitutional right to form our own families, get to the polls.

Martin Luther King, Jr., spoke eloquently about how "the arc of the universe is long, but it bends toward justice."[204] I am not a fan of that quote because it is often misunderstood. It is a problem if people assume that justice will happen and they do not have to work for it.

Susan B. Anthony spent her life working for women's right to vote.[205] She died in 1906.[206] She did not live to see the Nineteenth Amendment ratified in 1920.[207] Martin Luther King, Jr., was assassinated as he worked

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[199] *Kennedy-Nixon Presidential Debate Transcript*, COMMISSION ON PRESIDENTIAL DEBATES (Sept. 26, 1960), https://perma.cc/GBJ4-7F8R ("The things that Senator Kennedy has said many of us can agree with.").

[200] *Id*.

[201] *Proposed 2022 Ballot Issues*, MONTANA SECRETARY OF STATE, https://perma.cc/FU8Y-AJ6P.

[202] Kitchener, *supra* note 98.

[203] Spocchia, *supra* note 59.

[204] Dr. Martin Luther King Jr., Remaining Awake Through a Great Revolution, Address at the National Cathedral (Mar. 31, 1968).

[205] Editors, *Susan B. Anthony*, HISTORY (Feb. 25, 2022), https://perma.cc/S7BB-56T8.

[206] *Id*.

[207] *Id*.

for racial justice.[208] He was killed in April 1968.[209] In July 1968, Congress passed the Civil Rights Act of 1968, the first down payment to fulfill his dream.[210] Susan B. Anthony and Martin Luther King, Jr., did not give up after one election cycle. Neither can any of us. For democracy to work, "vote" will need to be a verb. It will have to be something we work for in every single election for the rest of our lives.

3. But Why Vote? One Vote Doesn't Make a Difference (Short Answer: Not True)

I lastly hear people say they do not vote *because they do not see the point. It is one vote. It is one of hundreds at the local level, one of thousands at the state level, one of millions at the federal level.*

I have clients who were born in countries without the right to vote in a fair and free election. My clients from Russia, Cuba, Haiti, Venezuela, El Salvador, Guatemala, Nigeria, Ghana, Kenya, Cameroon, China, Tibet, Iran, Iraq, Syria, and Myanmar disagree with their government. When they peacefully protested, they were arrested and beaten. When they cast a vote, their vote was not secret, and they were arrested and beaten for not voting the right way. The right to vote was so important to them that they had to flee. For them, their one vote was worth the price of losing their home, their family ties, and their country.

When people do not have the right to vote, they know how essential the vote is to control our own life. That is the same right we want protected by the federal right to personal liberty and the right to form our family.

My father has a saying. He always told me that acts of kindness might seem small. Like drops of rain. They fall from the sky. They are soft. They are unobtrusive. It is a mistake to think that they do not make a difference. Because when these soft drops of water combine, water is the only force that can level mountains and carve up valleys.

That is also the force of the vote.

One vote may seem small, but when we, the 70% who believe in *Roe v. Wade*, show up and vote in every election, whether it be school board elections, midterm elections, or the presidential election. When we encourage our friends, family, and neighbors to do the same, when we volunteer to register voters to vote in every election for every candidate who stands up for *Roe v. Wade*, we will absolutely see a difference.

The Supreme Court is most likely going to issue a decision that will end modern life as we know it. By overturning *Roe v. Wade*, some states again will ban and criminalize the decisions that we make to form our families and to form our own life. But when this day happens, it will not be the final word. If we vote, we will be able to rebut the Supreme Court's

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[208] Amy Sherman, *Tracing Civil Rights Legislation Before and After Martin Luther King Jr.'s Death*, POLITIFACT (June 8, 2020), https://perma.cc/R7LY-GRMS.

[209] *Id*.

[210] *Id*.

political statement with our own, a statement that salvages the intended meaning of the Fourteenth Amendment as it has been applied over the past century. It will take much more than one election, but if we vote, we will be able to respond to the Supreme Court decision by re-engaging in the project of Reconstruction to ensure our democracy reflects our ability to form our own families on our own terms. If we vote, we will be able to shape our future. Our democracy demands, and requires, no less.