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Cherry-Picking History: Witchcraft, the Common Law, and the Weaponization of Substantive Due Process

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CHERRY-PICKING HISTORY: WITCHCRAFT, THE COMMON LAW, AND THE WEAPONIZATION OF SUBSTANTIVE DUE PROCESS

ABSTRACT

In 2021, the Supreme Court sharply altered its substantive due process analysis in *Dobbs v. Jackson Women's Health Organization*, reversing the 49-year-old decision in *Roe v. Wade* to establish abortion access as a constitutional right. The Court reframed its substantive due process analysis as a two-step test, requiring a right to be narrowly framed and “deeply rooted in history and tradition” before it could be analyzed as “implicit in the concept of liberty,” instead of its previous balancing test that involved a broad description of the right. In the *Dobbs* majority opinion, the Court cherry-picked elements of common law jurisprudence as its chosen “history and tradition” to strike down *Roe v. Wade*. In doing so, the Court demonstrated its ability to weaponize substantive due process with originalist theory, threatening to utilize the very doctrine that many civil liberties are based in to strike those down.

This Note uses a combination of historical analysis and social science to criticize this approach to substantive due process, using one of the common law authorities the *Dobbs* majority cited—scholar and witch-hunter Sir Matthew Hale—as an example of the type of history the Court has the potential to recreate. It argues that the Court’s decision to treat Hale as a legal authority enshrines the culture of oppression through witch-hunting that contributed to the Salem Witch Trials, paving the way for a legally enforceable codified morality. It ultimately concludes with a criticism of the overutilization of common law and an assertion of alternate means to argue abortion rights, combined with a prediction of the potential downfall of substantive due process.

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INTRODUCTION

Men feared witches and burnt women.

—Brandeis, J.¹

The common law is a mutable concept that relies in large part on a common sense interpretation of the writings of long-dead legal scholars.² In *Dobbs v. Jackson Women's Health Organization*, the majority opinion relies in large part on this common law tradition while drastically warping the Court's substantive due process jurisprudence.³ The majority's decision to drastically alter constitutional doctrine, combined with its choice of common law authorities, has illuminated the intent of the conservative supermajority to weaponize doctrinal arguments to undermine civil rights.

Justice Samuel Alito, writing for the majority, cites Henry de Bracton, Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone as "common-law authorities."⁴ These men, legal scholars from the early modern period, all defined abortion as a crime in some manner.⁵ While they all espoused period-typical views that are antithetical to modern standards, the Court's praise of Sir Matthew Hale without context is particularly alarming. Hale was a jurist and self-proclaimed witch-hunter whose legal theories acted as a justification for those in charge of the Salem Witch Trials of the seventeenth century.⁶

1. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

2. *See Common Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

3. *See discussion infra* Section I.A.

4. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 242 (2022).

5. *Id.*; *see also discussion infra* Section IV.B.

6. *See* Jill Elaine Hasday, *On Roe, Alito Cites a Judge Who Treated Women as Witches and Property*, WASH. POST (May 9, 2022, 5:00 PM), <https://www.washingtonpost.com/opinions/2022/05/09/alito-roe-sir-matthew-hale-misogynist> [https://perma.cc/F7GT-D3X4].

The Court has reframed its substantive due process analysis, focusing only on an originalist interpretation of rights “deeply rooted in history and tradition.”⁷ The *Dobbs* Court weaponized that doctrine by cherry-picking the history it prefers. In doing so, the Court has chosen to inappropriately apply traditional morals under the guise of common law, creating and affirming the deeply American history and tradition of creating and persecuting an enemy.

The current Supreme Court’s decision to support its policy decisions based on the common law theories of a long dead witch-hunter and his kin enshrines a dangerous interpretation of “history and tradition” that includes the Salem Witch Trials, moralizing law, and establishing only the rights granted to the privileged few in the eighteenth century. Alternate methods of asserting abortion rights that would have some level of textual support, such as an application of the Ninth Amendment or the Equal Protection Clause, would be possible ways to reassert the most critical aspects of substantive due process, but these methods are unlikely to succeed within the framework of the current Court’s rationale.

I. A CHANGE IN SUBSTANTIVE DUE PROCESS

A. A New Interpretation of History and Tradition

When recognizing substantive due process rights, the current Supreme Court seems to now look *only* to rights that are “deeply rooted in this Nation’s history and tradition.”⁸ Previous Courts have instead taken a logical, philosophical approach: a semi-balancing test with “history and tradition” derived from both recent and long-past times.⁹ The *Glucksberg* test, which the current Court used in *Dobbs*,¹⁰ requires that a right be “deeply rooted in . . . history and tradition” and “implicit in the concept of ordered liberty.”¹¹ The second prong of *Glucksberg* required a “careful description” of the interest in question.¹² This narrow framing prong was subsequently ignored in later substantive due process cases. Writing for the majority in *Obergefell v. Hodges*, Justice Kennedy explicitly denounced this framing, instead questioning whether the right of marriage as broadly construed is

7. See discussion *infra* Section I.A.

8. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); see *supra* Introduction (explaining that the current Court has shifted).

9. See Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66–67 (2006).

10. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 298 (2022).

11. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

12. *Id.* at 721.

sufficient as a liberty interest required by the Fourteenth Amendment.¹³ Kennedy then sharply criticized the *Glucksberg* narrow framing approach by clarifying that “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”¹⁴

In direct contrast to this strong precedent, the *Dobbs* majority relies solely on an interpretation of the *Glucksberg* analysis that limits it to *only* rights that were present at the time of the enactment of the Fourteenth Amendment. The Court does not ask the question previously asked in *Roe*—if one has a right to privacy—but asks instead about specific abortion rights.¹⁵ Furthermore, the Court grounds this test in a warped analysis of “liberty,” stating that the second prong of the *Glucksberg* test requires a historical analysis to determine what “liberty” might mean.¹⁶ Through this reasoning, it has acted exactly as Kennedy warned against; the analysis is now a question that *only* rests on the question of history, acting completely against precedent.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed *Roe v. Wade* by reason of precedent and “reasoned judgement,” evaluating the liberty interests of abortion access.¹⁷ However, in *Dobbs v. Jackson Women’s Health Organization*, the current Court emphasizes its lack of focus on modern liberty interests when overruling *Casey*.¹⁸ Like *Casey*, *Lawrence v. Texas* is derived from an originalist analysis, wherein the Court stated that the “laws and traditions in the past half century are of most relevance here.”¹⁹

The dicta in *Dobbs* expresses opposition to this approach, stating that there is no fundamental right to an abortion in part because “[u]ntil the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion.”²⁰ While the *Dobbs* Court attempted to state that its reasoning should only

13. *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (using previous cases about marriage rights to demonstrate that *Obergefell* ought to be decided on whether marriage as an institution is a fundamental right, and not if same-sex marriage is a fundamental right).

14. *Id.* at 671–72.

15. *Dobbs*, 597 U.S. at 255–56.

16. *See id.* at 237–39.

17. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849, 852–53 (1992), overruled by *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

18. *Dobbs*, 597 U.S. at 239 (stating that the Court “must guard against the natural human tendency to confuse what [the Fourteenth] Amendment protects with [the Court’s] own ardent views about the liberty that Americans should enjoy.”).

19. *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003).

20. *Dobbs*, 597 U.S. at 241.

be applied to *Roe* and *Casey*, its language sets up a potential appeal to overturn any fundamental substantive due process rights which are not deeply rooted in the current Court's definition of "history and tradition."²¹ Justice Scalia's *Lawrence* dissent seems to encapsulate the direction the current Court is heading: "an 'emerging awareness' is by definition not 'deeply rooted in this Nation's history and traditions,' as we have said 'fundamental right' status requires."²²

B. Common Law and History

The United States is officially and explicitly *not* a Christian nation.²³ However, Christianity and common law doctrine are inexorably linked. Because the American legal system is derived from English common law, it has a firm basis in religious law, and courts often use this context and its ethics when applying unwritten law and reasoning.²⁴ While the religion itself may not be entrenched in law, Christian mores and ethics are used to define rights and wrongs.²⁵ Use of Christian values is even codified; most states enacted reception statutes mandating use of English common law in their state constitutions.²⁶ While no modern jurist would claim that Christianity is at the *center* of current law, the common law's roots are so entrenched in religious values that they remain part of the ethical reasoning and historical analysis courts perform.²⁷

21. *Id.* at 260–62.

22. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

23. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."); Treaty of Peace and Friendship Between the United States of America and the Bey and Subjects of Tripoli of Barbary, U.S.-Tripoli, art. XI, Nov. 4, 1796, 8 Stat. 154 ("[T]he [G]overnment of the United States of America is not in any sense founded on the Christian religion . . .").

24. See Jayson L. Spiegel, *Christianity as Part of the Common Law*, 14 N.C. CENT. L. REV. 494, 494–96 (1984) (describing early uses of religion to frame case law).

25. See A. H. Wintersteen, *Christianity and the Common Law*, 38 AM. L. REG. 273, 285 (1890) ("Christianity, as an ethical system, pervades, and, as we believe, sustains, modern society. Its pervading force furnishes the law, and to custom, lofty standards of right and wrong, whose adoption both makes and promises a better race because of it.").

26. Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798–800 (1951); see, e.g., VA. CODE ANN. § 1-200 (2022) ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."); WASH. REV. CODE § 4.04.010 (2022) ("The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.");

27. See Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & HIST. REV. 27, 27 (1998).

This application to case law can be seen in both *Bowers v. Hardwick* and *Washington v. Glucksberg*. While *Bowers* has been overturned by *Lawrence*, its dicta remain highly relevant when looking to originalist analysis. The *Bowers* majority cites a long history of sodomy laws as a basis for declaring that there is not a fundamental right to consensual, homosexual sodomy,²⁸ and Chief Justice Burger's concurrence expands upon that idea:

[T]he proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.²⁹

These "ancient roots" are drawn from the Old Testament, invoking the destruction of Sodom and Gomorrah in the book of Genesis and the proscription against homosexual activity from the book of Leviticus.³⁰ Thus, it follows that the choice of "history and tradition" depends on the majority and can be sourced from anywhere between 1200 BCE to fifty years ago, allowing the author of an opinion to cherry-pick their preferred lens of history.³¹

Glucksberg similarly looks to both common law opinions and contemporary views of suicide and assisted suicide, describing it as a "backdrop of history, tradition, and practice."³² The *Glucksberg* Court looked first to early common law and its condemnation of suicide, to the point of criminalizing the act, before continuing an analysis of early American history, and finally, contemporary values.³³

28. *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986).

29. *Id.* at 196–97.

30. See *Genesis* 19:5–8, 24–29 (King James); *Leviticus* 18:22 (King James).

31. See *Hebrew Bible*, ENCYC. BRITANNICA (Feb. 9, 2024), <https://www.britannica.com/topic/Hebrew-Bible> [<https://perma.cc/X2CB-BCE5>]; *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (stating that the last fifty years of history is the most important). For a further discussion of judicial cherry-picking in *Dobbs*, see Cari Jackson, *The Dangers of Judicial Cherry-Picking*, SCOTUSBLOG (July 1, 2022, 7:07 PM), <https://www.scotusblog.com/2022/07/the-dangers-of-judicial-cherry-picking> [<https://perma.cc/CD3H-TMLH>].

32. *Washington v. Glucksberg*, 521 U.S. 702, 710–19 (1997).

33. *Id.*

The Court states that while attitudes have changed, “our laws have consistently condemned, and continue to prohibit, assisting suicide. . . . we have not retreated from this prohibition.”³⁴ The *Dobbs* Court claims to apply the *Glucksberg* test, but further antiquates it by heavily relying upon common law authorities to illustrate the majority’s preferred history—at the expense of considering contemporary values.³⁵

In the *Dobbs* majority opinion, Justice Alito cites a list of long-dead white men as the experts on common law, stating that these men are the best legal minds to determine this issue: Henry de Bracton, Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone.³⁶ The authorities that have determined the right of modern people to access abortion care all lived somewhere between about 800 years ago to about 250 years ago.³⁷ While common law is a critical cornerstone of the American legal system, relying solely on common law authorities creates an echo chamber in which only certain voices can be heard.³⁸ There are no dissenting opinions from women English common law legal scholars of the era, as women were not permitted to practice law in Britain until 1919.³⁹ These same common law scholars are heavily criticized for their other opinions, including promoting marital rape exemptions and the belief that women forfeit most or all of their rights upon marriage.⁴⁰

The *Dobbs* majority cherry-picked common law theories, ignoring any alternate common law analyses; the American Historical Association submitted an *amicus curiae* brief detailing the common law definition of abortion, explaining that abortion was not recognized prior to “quickening” (when fetal movement occurred, sometimes as late as 25 weeks), as prior to that, the fetus did not exist separately

34. *Id.* at 719.

35. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 260–61 (2022). The majority argues that the dissent is misrepresenting their argument, stating that they have reviewed tradition and practices beyond the nineteenth century, but still relies most heavily on common law authorities.

36. *Id.* at 242–45, 251. While the Court has cited common law authorities in the past, it is emphasized here as troubling due to the Court’s significant reliance on these authorities.

37. See *Henry de Bracton*, ENCYC. BRITANNICA (Feb. 16, 2024), <https://www.britannica.com/biography/Henry-de-Bracton> [<https://perma.cc/5LFY-J437>] (published his major treatise circa 1235); *Sir William Blackstone*, ENCYC. BRITANNICA (Feb. 16, 2024), <https://www.britannica.com/biography/William-Blackstone> [<https://perma.cc/RC8W-ZGMV>] (died 1780).

38. See Matt Ford, *What Samuel Alito Gets Wrong About English Common Law*, NEW REPUBLIC (May 11, 2022), <https://newrepublic.com/article/166414/alito-roe-english-common-law> [<https://perma.cc/R3F5-NZ2J>].

39. *Id.*

40. *Id.* For further criticism on these scholars, see discussion *infra* Section II.B (examining Matthew Hale, specifically).

from the pregnant person.⁴¹ The brief details the rise of stricter statutes criminalizing abortion as a result of “alarming newspaper stories about women’s deaths from abortion” and the efforts of the newly formed American Medical Association, driven in part by women “shunning their proper roles as mothers” and white Protestants reproducing at lower rates than immigrant Catholics.⁴² Contrary to the claims of the *Dobbs* majority, there is common law precedent of legal abortions; there is no settled view on abortion, only a settled view by the majority’s selection of common law authorities.

The validity of originalist theory is heavily debated,⁴³ especially regarding substantive due process; as the jointly authored *Dobbs* dissent states, “‘people’ did not ratify the Fourteenth Amendment. Men did.”⁴⁴ So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women’s liberty, or for their capacity to participate as equal members of our nation.”⁴⁵ The *Lawrence* majority wrote a similarly scathing criticism of a purely originalist legal analysis:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.⁴⁶

Whether an oppressive law ought to be upheld because of its history or struck down because of its oppression thus comes down to a matter of choice of law and sources.⁴⁷

41. Brief *Amici Curiae* American Hist. Ass’n & Organization of Am. Historians in Support of Respondents at 2, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) [hereinafter AHA Amicus Brief].

42. *Id.* at 3–4.

43. *Brown v. Board of Education* and *Loving v. Virginia* are often at issue, as the Framers clearly would have been in favor of segregated schools and anti-miscegenation laws. For attempts to frame these arguments through an originalist lens, see Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J. L. PUB. POL’Y 457, 458 (1995); David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L. Q. 213, 216 (2015).

44. See, e.g., sources cited *supra* note 43.

45. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 372 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

46. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

47. See Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 421–22 (2006).

C. *Morality Interests*

A contentious battle rages regarding whether it is appropriate to define morality as a state interest. The *Casey* majority explicitly rejected that, stating that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”⁴⁸ However, both common law legal theorists and Supreme Court justices have vastly differing opinions on legal moralism.⁴⁹

The “morality interests” stated by Justice Scalia in his *Lawrence* dissent⁵⁰ act as an appropriate foil to the majority opinion in *Dobbs*, which couches its morality question in a claim that *Roe* was instead the case which improperly questioned morals.⁵¹ However, the *Dobbs* court tries to differentiate the issue at hand from other substantive due process cases by pointing to the “critical moral question posed by abortion”⁵² and the heightened State interest in protecting fetal life.⁵³

Morality interests have been used to uphold public indecency statutes and bans on obscenity and pornography by the Supreme Court.⁵⁴ Even still, the Court has previously tended to hold morality as an insufficient basis for legislation, or has imposed its own view of morality on the law.⁵⁵ It is conservative morals, however, which tend to be used as an excuse to enforce restrictions against marginalized

48. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992).

49. See *supra* Introduction; Richard Galvin, *Legal Moralism and the U.S. Supreme Court*, 14 *LEGAL THEORY* 91, 109 (2008).

50. State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. The impossibility of distinguishing homosexuality from other traditional “morals” offenses is precisely why *Bowers* rejected the rational-basis challenge. “The law,” it said, “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”

Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

51. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 264, 268 (2022).

52. *Id.* at 257.

53. *Id.* at 262.

54. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567–68 (1991) (“Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973) (“In an unbroken series of cases extending over a long stretch of this Court’s history, it has been accepted as a postulate that ‘the primary requirements of decency may be enforced against obscene publication’”) (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

55. See Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 *PENN STATE L. REV.* 139, 152 (2012).

populations.⁵⁶ The Rehnquist Court in particular has previously been criticized for imposing its members' personal moralities on the law.⁵⁷ Conversely, in their dissents, conservative members of the Court have often criticized the liberal justices for making so-called political choices, especially regarding the rights of minority populations.⁵⁸

Legal philosophy plays a large role in a justice's determination of cases before them; most recent justices have been legal positivists, but both Justices Thomas and Gorsuch are proponents of natural law philosophy.⁵⁹ Referred to as "a brooding omnipresence in the sky"⁶⁰ by Justice Holmes, natural law is closely tied to a Christian sense of morality and is embraced by the Catholic church.⁶¹ This application of a specific set of morals indicates that, to Court's current conservative supermajority, morals-based decision-making is acceptable and—depending on the set of morals in question—often desirable.⁶²

56. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) ("The law . . . is constantly based on notions of morality . . .").

57. See STEPHEN E. GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* 62 (2000) (stating that conservative jurists "replace the requirements of the democratic system with substantive conservative values.").

58. Justice Scalia in particular was a strong proponent of these criticisms, especially regarding LGBTQ+ rights, believing the court to be "governing from the bench" in these decisions. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 714 (2015) (Scalia, J., dissenting) (calling the legalization of gay marriage a "practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty [that] robs the People of . . . the freedom to govern themselves."); *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."); *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting) (describing the Court's decision to overturn a state amendment that prevented any state actor from taking action to recognize homosexuals or bisexuals as a protected class as having "no foundation in American constitutional law, and barely pretend[ing] to. . . . Striking it down is an act, not of judicial judgement, but of political will.").

59. Aaron Epstein, *The Supreme Court—The Natural Law According To Clarence Thomas*, SEATTLE TIMES (Aug. 30, 1991), <https://archive.seattletimes.com/archive/?date=19910830&slug=1302739> [<https://perma.cc/T5T9-JQFG>]; J. Paul Kelleher, *Neil Gorsuch's "Natural Law" Philosophy Is a Long Way from Justice Scalia's Originalism*, VOX (Mar. 20, 2017, 8:20 AM), <https://www.vox.com/the-big-idea/2017/3/20/14976926/gorsuch-natural-law-supreme-court-hearings> [<https://perma.cc/5SLT-B8X5>].

60. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

61. See Derek Rotty, *Natural Law and Moral Virtues Bring Independence From Tyranny*, NAT'L CATHOLIC REG. (July 11, 2022), <https://www.ncregister.com/blog/natural-law-virtues-and-independence> [<https://perma.cc/4D4J-WHD9>].

62. See Nancy C. Unger, *The Supreme Court Letting States Mandate Morals Will End Badly*, WASH. POST (July 13, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/07/13/supreme-court-letting-states-mandate-morals-will-end-badly> [<https://perma.cc/8AL6-D245>].

II. MORALITY AND CHOICE OF AUTHORITY

A. *Modern Moral Choices*

Both liberal and conservative Courts alike have tended to frame abortion as a fundamentally hard choice, calling it “a difficult and painful moral decision.”⁶³ This moralizing differs from the approach of many people who *get* abortions, who simply view it as a medical procedure.⁶⁴ By agreeing to include dicta stipulating that abortions are not simple decisions, previous liberal Courts left the door open to the application of over-moralizing forces.⁶⁵ Furthermore, the Court often uses the term “mother” when referring to the person seeking an abortion and “child” or “baby” when referring to the fetus, acquiescing to pro-life nomenclature.⁶⁶ This type of rhetorical device is not unique to the Supreme Court; the anti-choice movement especially has long used language that codes the decision to receive an abortion as a character flaw.⁶⁷

This rhetoric is again seen in the *Dobbs* decision: the majority lists purported legitimate state interests that would allow a ban on abortion access to pass rational basis review.⁶⁸ These interests include things like “respect for and preservation of prenatal life . . .” and “protection of maternal health and safety . . .”⁶⁹ This type of language paints childbirth as the morally “good” option and—by presenting “the elimination of particularly gruesome or barbaric medical procedures . . .” as another interest—abortion as the morally “bad” option.⁷⁰

63. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

64. *See, e.g.*, Janet Harris, *Stop Calling Abortion a ‘Difficult Decision’*, WASH. POST (Aug. 15, 2014, 10:18 AM), https://www.washingtonpost.com/opinions/stop-calling-abortion-a-difficult-decision/2014/08/15/e61fa09a-17fd-11e4-9349-84d4a85be981_story.html [https://perma.cc/Y543-CB4S]. Additionally, an overwhelming majority (over 95%, according to a recent study) of those who obtain abortions are confident that it was the right choice for them. Laura Kurtzman, *Five Years After Abortion, Nearly All Women Say It Was the Right Decision, Study Finds*, U.C. S.F. (Jan. 13, 2020), <https://www.ucsf.edu/news/2020/01/416421/five-years-after-abortion-nearly-all-women-say-it-was-right-decision-study> [https://perma.cc/BME7-FZGU].

65. *See, e.g.*, *Gonzales*, 550 U.S. at 159 (“Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision.”).

66. *Id.*

67. *See* CELESTE MICHELLE CONDIT, *DECODING ABORTION RHETORIC* 173–80 (1990) (discussing the framing of abortion as a “last resort,” among other apologetic terminology even from the pro-choice movement).

68. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 300–01 (2022).

69. *Id.* at 301.

70. *Id.*

The morality interests that the *Dobbs* Court is so fixated on are exemplified by many of its choices of authority. The Court's paternalistic tendencies are visible not only in the language of the opinions, but in the very choice of modern authority made.

B. A Witch-Hunter as a Modern Authority

Dobbs cites English jurist Sir Matthew Hale—a known witch-hunter who tried and executed two women as witches—as an authority on modern law.⁷¹ Hale perfectly exemplifies the dangers posed by unrestricted cherry-picking of law; by establishing his legal scholarship as part of the “history and tradition” of the United States, the Court is opening the door to a tacit approval of his other assertions. When the Court calls him a brilliant legal mind almost 350 years after his death (and an ocean away), it gives him an inappropriate level of authority over the bodily autonomy of modern people. This choice becomes almost poetic, as Americans have been hunting and punishing witches—literally and metaphorically—since colonial times, and so using his reasoning is ironically appropriate for the conservative majority.

As a “legal authority,” Hale is questionable. He is credited with the creation of the marital rape exemption,⁷² and called for the death penalty for all types of witchcraft:

[I]t is enacted, 1. That if any person shall use, practice, or exercise any invocation or conjuration of any evil or wicked spirit, 2. Or shall consult, covenant with, entertain, employ, feed, or reward any wicked or evil spirit, to or for any intent or purpose, 3. Or take up any dead man, woman, or child, out of his or their grave, or any other place, or the skin, bone, or any other part of any dead person, to be employ[e]d in any manner of witchcraft, sorcery, charm, or [e]nchantment, 4. Or shall use, practice, or exercise any witchcraft, sorcery, charm, or [e]nchantment, whereby any person shall be [killed], destroy[e]d, wasted, consumed, pined, or lamed in his or her body or any part thereof, [e]very such person or persons, their aiders, abettors and counsellors being thereof convict and attaint shall suffer death as a felon without clergy.⁷³

71. *Id.* at 242 (listing Hale as one of “the ‘eminent common-law authorities’”); see David Eryl Corbet Yale, *Sir Matthew Hale*, ENCYC. BRITANNICA (Mar. 11, 2024), <https://www.britannica.com/biography/Matthew-Hale> [<https://perma.cc/NC8Q-DAM8>].

72. Hasday, *supra* note 6.

73. MATTHEW HALE, *HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN* 694–95 (1847).

However, Hale's opinion on abortion seems to be a bit more liberal when read closely:

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is [killed], it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, [though] it be a great crime, and by the judicial law of *Moses* (*Exod.* xxi. 22.) was punishable with death.⁷⁴

The *Dobbs* majority cites this statement, using Hale's use of the term "great crime" as proof that abortion was criminal.⁷⁵ However, the majority takes this phrase grossly out of context; Hale does not describe abortion as a *secular* crime, merely ecclesiastical.⁷⁶ At the beginning of Hale's treatise, he divides crimes that are punishable by law as either "ecclesiastical" or "temporal."⁷⁷ This division reflects the jurisdiction of the courts; temporal crimes or "felonies" were tried in secular courts as crimes against the state.⁷⁸ Conversely, ecclesiastical crimes like abortion were not considered felonies, and instead had been held outside the jurisdiction of secular courts since Anglo-Saxon times.⁷⁹

When questioning the applicability of Hale's beliefs to modern law, his other legal theories should be included. Notably, Hale was a proponent of the very spectral evidence utilized in the Salem Witch Trials—admitting it in one of the witchcraft trials he presided over—and the Salem court cited Hale as a legal authority as justification for its use.⁸⁰ Inclusion of these laws would completely shift current evidence law and deeply affect all doctrine, demonstrating the danger of cherry-picking some theory without including all of it.

III. LEGALLY JUSTIFIABLE WITCHCRAFT

A. Moral Panics

Throughout history, majority populations have used minority groups as both scapegoats and threats; this "othering" bonds a

74. *Id.* at 433.

75. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 243 (2022).

76. Cyril C. Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L. F. 335, 350 (1971).

77. *Id.*

78. *Id.*

79. *Id.* at 350–51.

80. Nathan Dorn, *Evidence from Invisible Worlds in Salem*, LIB. CONG. IN CUSTODIA LEGIS BLOG (Aug. 20, 2020), <https://blogs.loc.gov/law/2020/08/evidence-from-invisible-worlds-in-salem> [<https://perma.cc/AP7M-KSBK>].

people together, as there is “no better way to promote a war than by portraying the enemy as a blood-thirsty beast that must be killed in self-defense.”⁸¹ The majority culture either creates or exacerbates an internal, deviant threat—a “folk devil”—to unite against.⁸² Deviant behavior that transgresses established norms or is widely accepted as undesirable can be weaponized as a form of social control, creating moral panics, and in extreme circumstances, witch hunts.⁸³

A moral panic is an overreaction to a social or cultural problem, whether real or imagined. In modern times, they are often the result of news media overselling the prevalence (or existence) of a threat, leading to a cultural shunning of the deviant behavior or group. Stanley Cohen, the creator of the sociological theory of a moral panic, emphasized its relation to the mass media:

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight.⁸⁴

While not necessarily a novel occurrence, moral panics have become more commonplace in the last century. Significant moral panics have included the War on Drugs, Satanic ritual abuse, and “stranger danger.” To this day, parents worry that their children’s Halloween candy has been laced with razor blades or drugs, a myth that has been passed along since the 1960s, despite no evidence of any child ever being seriously injured or killed by their Halloween haul.⁸⁵ Moral panics range from the absurd—such as blaming the

81. DAVID LIVINGSTONE SMITH, *LESS THAN HUMAN: WHY WE Demean, ENSLAVE & EXTERMINATE OTHERS* 130 (2011).

82. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 2 (1972).

83. *Id.* at 44 (“[A]gents of social control are more likely to be believed than deviants . . .”).

84. *Id.* at 1.

85. Caroline Mimbs Nyce, *The Halloween Scare That Won’t Go Away*, *THE ATLANTIC* (Oct. 29, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/halloween-candy-drugs-fentanyl-panic/671919> [<https://perma.cc/3FW3-4FMP>]. As stated in the article, the only known death-by-trick-or-treat incident occurred when a parent intentionally murdered their child with poisoned Halloween candy.

tabletop game *Dungeons & Dragons* for driving young players to demon worship, suicide, and even murder⁸⁶—to the serious, like creating a mythologized threat of “killer weed” that has led to decades of hundreds of thousands of marijuana arrests per year and the widespread incarceration of mostly Black people.⁸⁷

Witch hunts are functionally moral panics that have been so greatly exacerbated as to be institutionalized, leading to a systematic persecution of the perceived threat.⁸⁸ These falsified threats are often thought to be so antithetical to a “correct” society that normative standards of prosecution may give way in the name of societal cohesion or safety; the ends justify the means. Witch hunts are often waged against more overpowering, amorphous threats. Witchcraft and communism—two targets of witch hunts—are not visible acts that can be prosecuted but are ideas. Due to the invisible nature of these concepts, the burden of proof seems to be on the accused, defeating the lauded American history and tradition of “innocent until proven guilty.” Moreover, *anyone* can be accused, and therefore, anyone can be guilty. The threat could be coming from any direction.

B. Salem, Massachusetts

The Salem Witch Trials of the late seventeenth century were arguably the most infamous witch hunts, especially in American culture. However, similar incidents had already been happening in Europe for centuries. European witch hunts were shockingly prolific: between 1400 and 1650, as many as half a million people were executed, having been accused of consorting with the devil.⁸⁹ Up to 85% of these victims were women.⁹⁰ These previous trials fostered a common law precedent and norm that allowed for the execution of fourteen women, five men, and two dogs on the charge of witchcraft in Salem, Massachusetts, by the end of the century.⁹¹

Between January 1692 and May 1693, more than 200 people were accused of witchcraft and twenty-five were killed in the Massachusetts

86. Clyde Haberman, *When Dungeons & Dragons Set Off a 'Moral Panic'*, N.Y. TIMES (Apr. 17, 2016), <https://www.nytimes.com/2016/04/18/us/when-dungeons-dragons-set-off-a-moral-panic.html> [https://perma.cc/UW7G-PAW7].

87. Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 ANN. R. SOCIO. 149, 153 (1994); ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 4–5 (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [https://perma.cc/YNP8-PCAN].

88. See COHEN, *supra* note 82, at 233.

89. Goode & Ben-Yehuda, *supra* note 87, at 150.

90. *Id.*

91. STACY SCHIFF, THE WITCHES 3–5 (2015).

Bay Colony.⁹² Nineteen of the 156 formally charged were executed by hanging, one was pressed to death under a rock after refusing to enter a plea, and at least five died in jail.⁹³ The trials would only end when the wife of Governor William Phips was questioned as a suspected witch.⁹⁴

In Salem, Massachusetts, the accused witches were almost all women, many of whom deviated from the Puritan norms in some fashion, daring to be widows, divorcees, impoverished, or women of color. The first person executed was Bridget Bishop, who was “known for dressing exotically . . . , drinking at taverns, fighting publicly with her husbands and generally disregarding Puritan societal standards.”⁹⁵ She was one of many “unruly” women, who were often the most vulnerable, to be accused.⁹⁶

The first three suspects initially accused—Sarah Good, Sarah Osborne, and Tituba—started this trend. Sarah Good and her husband were poor and generally unpopular, and, after her accusation and subsequent loss of property, were considered ungrateful when they had to beg for food or shelter.⁹⁷ She was found guilty, imprisoned, and executed, and her four-year-old daughter was also found guilty of using witchcraft after her mother’s arrest.⁹⁸ Sarah Osborne was a widow who lived with her second husband before their marriage, and who challenged standard inheritance practice by claiming her first husband’s estate for herself instead of her children.⁹⁹ The legal battle with her children ended when she was accused of witchcraft, and she later died in prison.¹⁰⁰ Tituba was an Indian woman who was enslaved by Minister Samuel Parris, whose daughter and niece made the first accusations of witchcraft.¹⁰¹ She went on to

92. Jess Blumberg, *A Brief History of the Salem Witch Trials*, SMITHSONIAN MAG. (Oct. 24, 2022), <https://www.smithsonianmag.com/history/a-brief-history-of-the-salem-witch-trials-175162489> [<https://perma.cc/EV69-GV9E>]. The total number of accused may differ between sources.

93. *Id.*; Olivia B. Waxman, *The 3 Biggest Myths About the Salem Witch Trials*, TIME (Oct. 8, 2022, 7:00 AM), <https://time.com/6220728/salem-witch-trials-hocus-pocus-2-myths> [<https://perma.cc/B8MB-HTNG>].

94. Blumberg, *supra* note 92.

95. Connie Hassett-Walker, *What the Salem Witches Can Teach Us About How We Treat Women Today*, WASH. POST (June 10, 2018, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/10/what-the-salem-witches-can-teach-us-about-how-we-treat-women-today> [<https://perma.cc/UM3W-4W6P>].

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Stacy Schiff, *Unraveling the Many Mysteries of Tituba, the Star Witness of the Salem Witch Trials*, SMITHSONIAN MAG. (Nov. 2015), <https://www.smithsonianmag.com>

confess to witchcraft, vividly describing demonic visions and admitting that she had signed the devil's book.¹⁰²

The Salem Witch Trials sprang from a period of cultural upheaval, using a combination of biblical law and common law to justify the persecution and prosecution of these individuals.¹⁰³ Spectral evidence was permitted in the courtroom, meaning that witnesses were able to claim that the accused individuals had appeared in a dream or vision to harm their victims from a distance.¹⁰⁴ Spectral evidence was previously uncommon in Salem. However, when the old charter was abolished and a new one instituted, it became unclear which rules applied to the courts. The new charter was weaponized by leaders to efficiently proceed with trials.¹⁰⁵ It was denounced even at the time; Increase Mather, the president of Harvard, stated that "[i]t were [sic] better that ten suspected witches should escape than one innocent person be condemned."¹⁰⁶

C. *The Historical Descendants of Witch Hunts*

The term "witch hunt" was used in its literal sense for centuries, but in the beginning of the twentieth century it took on an idiomatic definition, and thereafter was enshrined into the political and cultural lexicon.¹⁰⁷ One of the most infamous witch hunts was the governmental response to the heightened fears of the Second Red Scare, from the late 1940s to the 1950s, popularly known as

/history/unraveling-mysteries-tituba-salem-witch-trials-180956960 [https://perma.cc/W3G8-CJUQ].

102. *Id.*

103. There are multiple theories as to the exact cause of the trials, generally invoking capitalism, religion, or social function—or some combination—as the exact cause. Isaac Reed, *Why Salem Made Sense: Culture, Gender, and the Puritan Persecution of Witchcraft*, 1 CULTURAL SOCIO. 209, 213 (2007).

104. Dorn, *supra* note 80. The accused were not condemned on spectral evidence alone; nonspectral evidence was given by neighbors who testified about other acts of witchcraft. Nonspectral acts of witchcraft included the general use of poppets and potions. Wendel D. Craker, *Spectral Evidence, Non-Spectral Acts of Witchcraft, and Confession at Salem in 1692*, 40 HIST. J. 331, 332 (1997). This distinction only further explains why someone who deviated from Puritan norms would be a typical victim; neighbors generally did not accuse well-liked people of witchcraft.

105. Dorn, *supra* note 80.

106. Blumberg, *supra* note 92.

107. The first political use was likely in 1919, when a witness at a Senate investigation into World War I German and Bolshevik propaganda efforts warned the committee to avoid sinking into a witch hunt, and, when questioned on his meaning by a Senator, said, "I mean this, Senator. You are familiar with the old witch-hunt attitude, that when people get frightened at things and see bogies, then they get out witch proclamations, and mob action and all kinds of hysteria take place." Steve Hendrix, *The Salem Witch Trials: Why Everyone from Trump to Woody Allen Still Invokes Their Hysteria*, WASH. POST (Oct. 17, 2017, 2:40 PM), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/17/the-great-american-witch-hunt-salems-executions-trumps-tweets-and-woody-allens-words> [https://perma.cc/9VUZ-EN8V].

McCarthyism. Anti-communism beliefs did not appear overnight; the early Cold War era was characterized by the nuclear arms race and affiliated espionage.¹⁰⁸ These legitimate threats morphed into a moral panic about creeping Communism.¹⁰⁹ Both political and social forces demonized communism and communist countries, giving the country an “us versus them” mentality that led to accusations of individuals wholly unrelated to espionage activity.¹¹⁰

“McCarthyism” began before Senator Joseph McCarthy was ever elected. In 1947, then-President Truman issued Executive Order 9835, requiring “loyalty” from civil service employees.¹¹¹ An employee would be found “disloyal” if they were a member of or sympathetic to a “totalitarian, fascist, communist, or subversive . . .” organization.¹¹² McCarthy’s rhetoric moralized communism. In 1950, McCarthy gave his famous “Enemy from Within” speech, calling for a “moral uprising” and stating that “we are engaged in a final, all-out battle between communistic atheism and Christianity.”¹¹³ He purported the existence of Communist Party members or sympathizers within the State Department, citing 57 individuals in one speech and 205 in another.¹¹⁴

The Red Scare occurred over 250 years after the Salem Witch Trials, but the two cultural panics are more alike than seen at first blush. Arthur Miller was inspired to write *The Crucible* when he visited Salem in 1952 and found the practices of the witch trials to be very similar to the practices of the Congressional anti-communist committees.¹¹⁵ While a cursory analysis of these separate historical events can identify a crucial difference—magic is not as real as Communism *as a societal theory*—the reality of the threat is immaterial when the cultural context parallels the events so neatly.

108. This era included the 1947 arrest and 1950 imprisonment of State Department Official Alger Hiss, the 1950 confession of physicist Klaus Fuchs, and the 1951 arrests and 1953 executions of Julius and Ethel Rosenberg. These high-profile cases were connected to Soviet acquisition of state secrets—including the infiltration of the Manhattan Project—and the visibility of these spies likely added fuel to an already disdainful national view of communism. See Louis Menand, *Joseph McCarthy and the Force of Political Falsehoods*, NEW YORKER (July 27, 2020), <https://www.newyorker.com/magazine/2020/08/03/joseph-mccarthy-and-the-force-of-political-falsehoods> [https://perma.cc/Y5QL-JXTV].

109. *Id.*

110. *Id.*

111. Robert Justin Goldstein, *Prelude to McCarthyism: The Making of a Blacklist*, PROLOGUE, Fall 2006, <https://www.archives.gov/publications/prologue/2006/fall/agloso.html> [https://perma.cc/M8G3-WZR7]; Exec. Order 9835, 12 Fed. Reg. 1935 (Mar. 25, 1947).

112. Exec. Order 9835, 12 FED. REG. 1935, 1938 (Mar. 25, 1947).

113. Joseph McCarthy, *Enemies from Within Speech Delivered in Wheeling, West Virginia* (Feb. 20, 1950).

114. Menand, *supra* note 108.

115. Arthur Miller, *Why I Wrote “The Crucible”*, NEW YORKER (Oct. 13, 1996), <https://www.newyorker.com/magazine/1996/10/21/why-i-wrote-the-crucible> [https://perma.cc/92YY-68F7].

Miller himself argued that the historical beliefs of witchcraft validate the analogy:

In the seventeenth century . . . the existence of witches was never questioned by the loftiest minds in Europe and America; and even lawyers of the highest eminence, like Sir Edward Coke, a veritable hero of liberty for defending the common law against the king's arbitrary power, believed that witches had to be prosecuted mercilessly. Of course, there were no Communists in 1692, but it was literally worth your life to deny witches or their powers, given the exhortation in the Bible, "Thou shalt not suffer a witch to live." There had to be witches in the world or the Bible lied.¹¹⁶

The dramatized threat of witches is thus markedly similar to the artificially magnified threat of Communism in the mid-twentieth century: the enemy had to exist to uphold the very functions of society due to the necessity of othering.

Concurrent with and ancillary to the Red Scare, the lesser known "Lavender Scare" framed LGBTQ+ people as threats to national security.¹¹⁷ The Lavender Scare began in truth during Congressional inquiries in response to Senator McCarthy's "Enemies from Within" speech,¹¹⁸ when John Peurifoy, then-Deputy Undersecretary for Administration at the State Department, testified that ninety-one employees had been dismissed from the State Department between 1947 and 1949 due to their sexuality.¹¹⁹ In response, the Senate ordered the formation of an Investigation Committee that would "determine the extent of the employment of homosexuals and other sex perverts in Government; to consider reasons why their employment by the Government is undesirable; and to examine into the efficacy of the methods used in dealing with the problem."¹²⁰ The Hoey Committee (unofficially named after chairperson Senator Clyde R. Hoey) produced a report in December of 1950 entitled "Employment of Homosexuals and Other Sex Perverts in Government" that called for the dismissal of gay and lesbian employees.¹²¹ The Hoey report stated that gay and lesbian employees were both "generally unsuitable" and "constitute security

116. *Id.*

117. See *The Lavender Scare—The Origin of the Policy to Exclude Homosexuals from Federal Service*, NSA (Oct. 10, 2018), <https://www.nsa.gov/portals/75/documents/news-features/declassified-documents/history-today-articles/10%202018/10OCT2018%20The%20Lavender%20Scare%20%20The%20origin%20of%20the%20policy%20to%20exclude%20homosexuals%20from%20Federal%20service.pdf> [https://perma.cc/2WSR-AZWM].

118. DAVID K. JOHNSON, *THE LAVENDER SCARE* 15–16 (2004).

119. *Id.* at 17.

120. SUBCOMM. ON INVESTIGATIONS, COMM. ON EXPENDITURES IN THE EXECUTIVE DEPT'S, *EMP. OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOV'T 1* (1950).

121. *Id.*

risks.”¹²² The theory hypothesized that gay and lesbian employees were more easily blackmailed than heterosexuals despite no evidence to support this claim.¹²³

The government quickly responded: agencies began firing queer employees and, in 1953, then-President Eisenhower issued Executive Order 10450.¹²⁴ Executive Order 10450 revoked Truman’s Executive Order 9835 of 1947 and expanded the security criteria for government jobs, as well as adding sexual orientation (therein called “sexual perversion”) as a reason for job termination.¹²⁵ While some elements of the order were weakened during the Clinton administration,¹²⁶ the order was only explicitly repealed in 2017.¹²⁷

The convergence of the Red Scare and the Lavender Scare exacerbated the scale at which the government and public responded to these “threats.”¹²⁸ While the two groups are undeniably different, they were both seen as subversive and as a threat to traditional social mores.¹²⁹ As in any witch hunt, the public saw a threat from within, and the so-called deviant minority was martyred for the sake of the larger culture.

IV. *DOBBS* AS A MODERN WITCH HUNT

A. *Spectral Evidence*

The modern adaptation of “spectral evidence” is similarly ominous to its presence in Salem; even before *Dobbs*, Texas Senate Bill 8 created a Salem-style methodology. SB 8, known as the “bounty hunter law” to opponents, allows citizens to sue anyone who performs or assists in the performance of an abortion and rewards them with

122. *Id.* at 3.

123. *See, e.g.*, 96 CONG. REC. 5401 (1950) (statement of Rep. Cliff Clevenger) (“It is not only conceivable but highly probable that many security risks are loyal Americans; however, there is something in their background that represents a potential possibility that they might succumb to conflicting emotions to the detriment of the national security. Perhaps they have relatives behind the iron curtain and thus would be subject to pressure. Perhaps they are addicted to an overindulgence in alcohol or maybe they are just plain garrulous. The most flagrant example is the homosexual who is subject to the most effective blackmail. It is an established fact that Russia makes a practice of keeping a list of sex perverts in enemy countries and the core of Hitler’s espionage was based on the intimidation of these unfortunate people.”).

124. *See* Exec. Order 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953).

125. *Id.*

126. *See* Exec. Order 12968, 60 Fed. Reg. 40245 (Aug. 2, 1995); Exec. Order 13087, 63 Fed. Reg. 30097 (May 28, 1998).

127. Exec. Order 13764, 82 Fed. Reg. 8115 (Jan. 17, 2017).

128. *See* Douglas M. Charles, *Communist and Homosexual: The FBI, Harry Hay, and the Secret Side of the Lavender Scare, 1943–1961*, 11 AM. COMMUNIST HIST. 101, 103 (2012).

129. *Id.* at 103–04.

a cash bounty if they are successful.¹³⁰ Additionally, the law instructs courts to award at least \$10,000 in damages to a successful plaintiff.¹³¹ The largest Texas anti-abortion group has made multiple attempts to set up a whistle-blower website that would allow citizens to report anonymous tips.¹³² This has the potential to destroy lives; Texas has given the masses the choice to be judge, jury, and executioner (metaphorically, but \$10,000 plus legal fees is untenable for many people, especially the most vulnerable populations). By allowing its citizens to target specific potential defendants—especially if an anonymous whistle-blower reporting method ends up functional—Texas has opened itself up a level of false reports that rival Salem’s. Incentivizing neighbors to report on each other sets a dangerous precedent, and this has the potential to expand.¹³³ Other states have considered adopting this method of enforcement after trigger laws went into effect post-*Dobbs*.¹³⁴

This modern “spectral” evidence is similar in another method too: there can be hard data presented after an accusation. In Salem, nonspectral evidence could be presented as support for the accusation.¹³⁵ Now, there is the potential of selling personal data to obtain non-“spectral” evidence. Prosecutors and other law enforcement may have the option to obtain data from telecommunication companies; there are few legal protections that would deter companies like Apple or Google from selling health, geolocation, or financial data.¹³⁶

B. Manipulation of Law

The *Dobbs* Court clearly decided on a result and then picked the history it wished to apply, as is made clear when examining the number of arguments and history it was offered in the form of amicus curiae briefs.¹³⁷ The Court disregarded briefs from a wide variety

130. Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [https://perma.cc/93V9-X6TW].

131. *Id.*

132. Meryl Kornfield, *A Website for ‘Whistleblowers’ to Expose Texas Abortion Providers Was Taken Down—Again*, WASH. POST (Sept. 6, 2021, 6:26 PM), <https://www.washingtonpost.com/nation/2021/09/06/texas-abortion-ban-website> [https://perma.cc/4BXK-XKFQ].

133. Bowman, *supra* note 130.

134. *Id.*

135. See Craker, *supra* note 104, at 332.

136. See CHRIS D. LINEBAUGH, CONG. RSCH. SERV., LSB10786, ABORTION, DATA PRIVACY, AND LAW ENFORCEMENT ACCESS: A LEGAL OVERVIEW 4–5 (2022).

137. There were over 140 amicus curiae briefs filed for the *Dobbs* Court, many of which included historical narratives crafted to be applicable to the case at hand. Allison

of authorities including the American Historical Association,¹³⁸ the American College of Obstetricians and Gynecologists (joined by twenty-four other prominent medical associations including the American Medical Association),¹³⁹ and the American Bar Association,¹⁴⁰ all of which argued on different grounds that the well-settled issue of constitutional abortion access should not be overturned.¹⁴¹ There was even a brief filed for the United States in support of upholding *Roe* and *Casey*.¹⁴² The Court disregarded all of these when it opted to focus on history.

Much of the historical information cited in the *Dobbs* majority looks to be pulled straight from at least one of the amici curiae briefs about the history of abortion submitted in support of overturning *Roe*.¹⁴³ Many of these briefs are written by legal scholars or anti-choice organizations—not historians.¹⁴⁴

Orr Larsen, *The Supreme Court Decisions on Guns and Abortion Relied Heavily on History. But Whose History?*, POLITICO (July 26, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/07/26/scotus-history-is-from-motivated-advocacy-groups-00047249> [https://perma.cc/63BH-757C].

138. AHA Amicus Brief, *supra* note 41.

139. Brief of Amici Curiae Am. College of Obstetricians and Gynecologists, et al. in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392). The Court *clearly* disregarded this brief when justifying an abortion ban as a means of *protecting* pregnant people's health, as the ACOG brief makes it *very* clear that the medical community supports abortion access—not bans—on health and safety grounds. *Id.* at 15–26.

140. Brief of *Amicus Curiae* American Bar Association in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392).

141. For more of the key briefs filed, see Ellena Erskine, *We Read All the Amicus Briefs in Dobbs So You Don't Have To*, SCOTUSBLOG (Nov. 30, 2021, 5:24 PM), <https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-don-t-have-to> [https://perma.cc/FW9Z-RP69]. For a full docket list of all briefs filed, see Docket No. 19-1392, <https://www.supremecourt.gov/docket/docketfiles/html/public/19-1392.html> [https://perma.cc/762R-FLTD].

142. Brief for The United States as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392).

143. *Compare* Brief *Amicus Curiae* of the Thomas More Society in Support of Petitioners at 2, 9–15, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392) [hereinafter Thomas More Amicus Brief] (discussing quickening at great length in detail and listing all nineteenth century statutes and cases about abortion—any information that the Court would need—in footnotes 8–14) *with* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 248 (2022) (listing all statutes cited in the Thomas More Society Brief in Appendices A & B); *see also* Brief for Professors Mary Ann Glendon & O. Carter Snead as Amici Curiae in Support of Petitioners, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) [hereinafter Glendon & Snead Amicus Brief] (detailing every common law source that the *Dobbs* opinion cites).

144. *See, e.g.*, Brief of *Amici Curiae* Scholars of Jurisprudence John M. Finnis & Robert P. George in Support of Petitioners, *Dobbs v. Jackson*, 597 U.S. 215 (2022) (No. 19-1392) [hereinafter Jurisprudence Scholars Amicus Brief] (jurisprudence scholars); Thomas More Amicus Brief, *supra* note 143 (a conservative public interest firm with a history of litigating anti-abortion matters); Glendon & Snead Amicus Brief, *supra* note 143 (law professors).

the right than any other conservative Court.¹⁵² However, theoretical alternatives to substantive due process do exist as applied to abortion. While the ideal option for the stability of the Court would be to realign with *stare decisis* policies and return to the previous *Glucksberg* balancing test, there are options that may be used in the future to restore or reaffirm civil rights.

A. Ninth Amendment

The Ninth Amendment has been offered by multiple academics as an alternative framework to substantive due process as an unenumerated right.¹⁵³ However, the Supreme Court and the majority of Courts of Appeals have never based a decision on Ninth Amendment grounds.¹⁵⁴ When offered as an alternative to substantive due process, one of the main benefits is that it has textual support from the Constitution.¹⁵⁵ While its text is vague at first glance—“[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”¹⁵⁶—if used correctly, it has the ability to provide textual support for the right to privacy.¹⁵⁷ A Ninth Amendment claim would not require a historical analysis, but instead a determination of the legitimacy of governmental regulations balanced with the privacy interests at hand.¹⁵⁸ An adjudicative methodology such as this would avoid the elements of civil rights claims that rely on the discretion of the judges.¹⁵⁹ Cases like *Bowers* and *Lawrence* would have been much less reliant on their cultural contexts; there would be no need to change the time frame of history that the analysis was based on.¹⁶⁰

B. The Equal Protection Clause

A similarly unlikely alternative to substantive due process analysis is the use of the Equal Protection Clause of the Fourteenth

152. *Id.*

153. See, e.g., Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000); Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169 (2003); Gerald G. Watson, *The Ninth Amendment: Source of a Substantive Right to Privacy*, 19 J. MARSHALL L. REV. 959 (1986).

154. Niles, *supra* note 153, at 89.

155. *Id.* at 137.

156. U.S. CONST. amend. IX.

157. See Niles, *supra* note 153, at 114.

158. *Id.* at 115.

159. *Id.* at 152.

160. *Id.*; see *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (holding that the previous fifty years were most relevant).

Amendment.¹⁶¹ Current and previous Courts have objected to the lack of textual support for various substantive due process tests. However, if the Court used differing levels of scrutiny to determine how narrowly to define a right, it would ground substantive due process analysis in Constitutional text.¹⁶²

The Supreme Court has long recognized the differing levels of scrutiny applied to Equal Protection claims, deriving the determination based on the class of the group affected. Laws targeting specific subjugated groups “may call for a correspondingly more searching judicial inquiry”¹⁶³ and a resultingly more skeptical analysis of the constitutionality of the law. While this is a potential alternative method to settle legislative divide over substantive due process the politics of the current Court strongly reaffirm the likelihood that it will continue to cherry-pick and abuse a “history and tradition” analysis. These alternatives are possible, but improbable.

CONCLUSION

The Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* has put the framework of many civil rights at risk. By altering previous substantive due process analysis doctrine to focus solely on history, the *Dobbs* Court completely undermined the use of the Fourteenth Amendment as a shield for minority interests. Furthermore, it demonstrates its potential to weaponize this new doctrine in its choice of authority. By citing common law authorities that include a witch-hunter, the Court has demonstrated its ability to intentionally disregard *stare decisis* by misapplying ideas without their context; in effect, the Court is almost pulling justifications out of thin air. It has looked at medieval history without proper context and apparently found it to be an acceptable source of law, and it has used its own morality to determine the future of one of the most critical doctrines. There are alternate adjudication methods, but it is clear that this supermajority conservative Court is building the framework to fit the decision, and not the other way around.

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161. See U.S. CONST. amend. XIV.

162. See, e.g., Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling Obergefell and Glucksburg*, 21 LEWIS & CLARK L. REV. 245, 247–53 (2017).

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

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