

In Defense of Substantive Due Process

THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK. By *Madiba K. Dennie*. Random House. 2024. Pp. 286.

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Introduction

Originalism has a branding and substance problem.¹ If originalism is what it purports to be—impartial and value-free enforcement of the Founders’ intention and “the *only* approach to text that is compatible with democracy”²—more Americans would have faith in the Supreme Court and the constitutional validity of its decisions.³ In *The Originalism Trap*, Madiba

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1. See MADIBA K. DENNIE, *THE ORIGINALISM TRAP* 27 (2024) (“[O]riginalism pretends to facilitate faithfulness to the Constitution and constrain judicial discretion, but in reality, it has freed the Court to undermine core constitutional values and democratic principles for which the country claims to strive.”).

2. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 82 (2012).

3. See Joseph Copeland, *Favorable views of Supreme Court remain near historic low*, PEW RSCH. CTR.: SHORT READS (Aug. 8, 2024), <https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/> [https://perma.cc/E3Q4-MZGR]

Dennie provides a cutting critique of originalism, as applied by the Roberts Court's majority, describing it as a farcical search for the Founders' (or general public's) original intention and meaning as gleaned from the often amorphous historical record to determine what fundamental rights are "deeply rooted in this Nation's history and tradition" and worthy of constitutional protection.⁴

Dennie critiques originalism, a backward-looking method, by analyzing recent decisions in *Dobbs v. Jackson Women's Health Organization*, *Shelby County v. Holder*, and the Census cases—each revealing how originalism, under the guise of neutrality, produces results that are historically incoherent, doctrinally inconsistent, and democratically harmful.⁵ These cases, Dennie argues, are not faithful applications of constitutional principle but ideological outcomes filtered through the narrow worldview of monied, property-owning white men from the eighteenth century. By privileging that worldview, originalism becomes an antidemocratic force—rigid, literalistic, and blind to evolving norms of equality and inclusion.

In contrast, Dennie embraces the Constitution's brevity—just 4,543 words—as an invitation to interpretive openness and values-based reasoning. She argues that the Court's ideological capture and its inconsistent application of precedent demand a new interpretive modality: inclusive constitutionalism.⁶ This people-centered framework urges both lawyers and laypeople to interpret the Constitution in ways that advance its democratic promise and protect the full spectrum of rights Americans have come to expect. In this way, inclusive constitutionalism advances democracy by looking outside the four corners of the Constitution and beyond 1865, considering precedent, practicalities, and democratic social movements to avoid sacrificing marginalized communities on the "altar of originalism."⁷

Dennie's defense of substantive due process is central to this project. She traces substantive due process's deep doctrinal roots to show that it is not judicial invention but the product of a century-long dialogue among

(noting that "[f]ewer than half of Americans now express a favorable opinion of the [Supreme] [C]ourt, while about half (51%) have an unfavorable view"). Public perception of the Court notably declined following a series of high-profile originalist decisions. See Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Lows*, PEW RSCH. CTR.: SHORT READS (July 21, 2023), <https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/> [<https://perma.cc/NZ27-C7X3>] (reporting that "[f]ollowing a series of high-profile rulings addressing such issues as affirmative action, LGBTQ rights and student loans, the share of Americans with a favorable opinion of the U.S. Supreme Court has declined to its lowest point in public opinion surveys dating to 1987").

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

5. DENNIE, *supra* note 1, at 7, 31, 150 (discussing *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013), *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019), and *Dep't of Com. v. House of Representatives*, 525 U.S. 316 (1999)).

6. DENNIE, *supra* note 1, at 50, 87, 187–88.

7. DENNIE, *supra* note 1, at 93.

courts, advocates, legislators, and the public—a doctrine grounded in the Constitution’s purpose rather than frozen in its past. *The Originalism Trap* provides an accessible historiography of substantive due process doctrine, which Dennie argues is misunderstood as a house standing on constitutional sand.

As the Constitution faces a moment of rapid reinterpretation amid judicial shifts and mounting threats to privacy, liberty, and democracy, *The Originalism Trap* is a necessary intervention. Dennie’s critique is both searing and hopeful, grounded in legal history yet oriented toward a more emancipatory constitutional future. She invites us to imagine a legal order that recognizes the rights and humanity of all people, not just those enshrined by the Founders’ limited vision. In doing so, she exposes originalism not as a principled interpretive method but as a political strategy—one that demands a reckoning.

In this review I aim not merely to amplify Madiba Dennie’s indictment of originalism but to press and deepen it. I map the conservative movement’s deliberate scaffolding of modern originalism—Powell memos, think tanks, public-interest firms, the Constitution in Exile currents—and show how that movemental architecture turned an interpretive theory into a political instrument vulnerable to capture by bad actors seeking durable legal wins. I also add two threads that Dennie neglects: a historiographic rejoinder that the Founders’ own practices (the Decision of 1789; Marshall’s *McCulloch* reasoning) point toward purposive, pragmatic interpretation rather than neat ossification and a jurisprudential defense of substantive due process that situates it in a long, cross-ideological dialogue, not judicial activism. These contributions sharpen Dennie’s claim that originalism is less a neutral method than a movement strategy, and they locate the danger in its political provenance as much as in its doctrinal seams.

Part I explores Dennie’s version of originalism’s evolution as an interpretive theory, placing its origins in the political backlash against racial integration following *Brown v. Board of Education*⁸ and the desire to resurrect *Plessy v. Ferguson*’s⁹ formalistic reasoning on race and the scope of the Fourteenth Amendment. Part II considers originalism’s fallacies in contradicting the Framers’ intentions, ignoring the Second Founding’s rich antistatist history and frustrating the Constitution’s animating principles of justice, equality, privacy, and liberty, as Dennie argues. Part III grapples with the originalist critique of substantive due process as judicial activism, exploring its jurisprudential development and acceptance by justices of all ideological stripes since *Lochner v. New York*,¹⁰ situated in

8. 347 U.S. 483 (1954).

9. 163 U.S. 537 (1896), *overruled by*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

10. 198 U.S. 45 (1905).

social movements that expanded “We the People” and our conception of fundamental rights. Part IV highlights Dennie’s narrative of the prior century’s inclusive constitutional progress achieved through substantive due process, which the Court fully embraced until recently. Lastly, Part V examines inclusive constitutionalism’s interpretive and political virtues and vices concluding that it is a more logical, consistent, and inclusive alternative to originalism.

I. Originalism’s Origins

Dennie rejects the myth that originalism has always existed as a neutral, apolitical method of constitutional interpretation.¹¹ Instead, she situates its rise in direct reaction to the Supreme Court’s decision in *Brown v. Board of Education*, framing originalism not as timeless legal theory, but as a political response to public school desegregation.¹² In her opening chapter, “Heist,” Dennie traces originalism’s post-*Brown* ascent—from its early articulation in the Southern Manifesto to its entrenchment in the 1970s and ’80s through figures like Robert Bork, Justice Lewis Powell Jr., and Justice Antonin Scalia.¹³ Far from being rooted in the Founders’ own interpretive practices, originalism was popularized through a deliberate conservative strategy: a blend of legal advocacy, grassroots organizing, and intellectual infrastructure designed to reframe racial retrenchment as constitutional fidelity.¹⁴

Plessy v. Ferguson, the case that held racial segregation constitutional, is central to Dennie’s argument. In holding the Fourteenth Amendment did not exist to outlaw racial segregation or any stigmatic harm that the formerly enslaved cast upon themselves because of racial segregation, the Court viewed race through a formalistic lens disconnected from history and social meaning, understanding Black and white as racial categories devoid of social significance.¹⁵ This formalism is important because it declares that racial separation occasions no harm in the view of the Constitution. Instead, racial segregation is simply a reflection of human proclivities, an argument Dennie

11. DENNIE, *supra* note 1, at 185.

12. *Id.* at 21; see also Calvin TerBeek, “Clocks Must Always Be Turned Back”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 832 (2021) (“[T]he modern GOP’s constitutional ‘originalism’ grew directly out of resistance to *Brown*.”).

13. DENNIE, *supra* note 1, at 21–36.

14. See DENNIE, *supra* note 1, at 25 (explaining that under Meese’s leadership as Attorney General in President Reagan’s administration, he “endeavor[ed] to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment”), quoting Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 456, 464 (1986) (defining originalism in opposition to “radical egalitarianism,” arguing “the standard of interpretation applied by the judiciary must focus on the text and the drafter’s original intent”).

15. DENNIE, *supra* note 1, at 19; CONSTITUTIONAL LAW STORIES 189 (Michael C. Dorf ed., 2d ed. 2009).

argues augurs the colorblind equal protection jurisprudence to come.¹⁶ To colorblind constitutionalists and many originalists, even if race imbued social, political, and legal benefits and disadvantages, the Fourteenth Amendment was decidedly *not* enacted to disrupt broader racial and social inequalities or vindicate the inexhaustive nature of civil rights and liberties protected by the Bill of Rights.¹⁷

Despite *Plessy*'s utter reprehensibility in reasoning and conclusion, its constitutional arguments held sway with many lawyers, including one who would become an influential Supreme Court Justice. As a law clerk during the term when *Brown* was argued, self-proclaimed originalist and future Chief Justice of the Supreme Court, William Rehnquist, opined *Plessy* should not be overruled because, in judicial decision-making, the "majority decides the rights of the minority."¹⁸ Rehnquist argued, as *Plessy* did, that the Founders did not intend for the Fourteenth Amendment to remediate the racial caste system slavery wrought and bring about social equality.¹⁹ If the Court found that the Reconstruction Founders intended the Fourteenth equalize the racial caste system, the Court would exceed its constitutional power in "read[ing] its own sociological values into the Constitution," representing an affront to separation of powers and judicial restraint principles.²⁰

16. DENNIE, *supra* note 1, at 22.

17. See DENNIE, *supra* note 1, at 23 (recounting that "[p]rominent political conservatives spoke out against *Brown*'s methodology and outcome as illegitimate," "advocated resistance to integration and marshaled a breadth of legal arguments to cast *Brown* as constitutionally unsound." Dennie further notes that line of argument was "the crucial backdrop against which originalism began to formalize . . ."); Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEXAS L. REV. 1053, 1058 (2014) ("It is difficult to understand modern American attitudes toward law without contemplating how [white supremacy and judicial supremacy] intersect and interact. For many Americans, the refusal to acknowledge judicial supremacy is personified by advocates of white supremacy during the post-*Brown* era."). See generally Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 U. PA. J. CONST. L. 1241 (2024).

18. See Memorandum from Supreme Court Law Clerk William Rehnquist, to J. Robert H. Jackson (1952) [hereinafter Rehnquist Memo], <https://www.govinfo.gov/content/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-16-6.pdf> [https://perma.cc/2SZD-E384] (explaining "that this is an unpopular and unhumanitarian position for which I have been excoriated by 'liberal' colleagues, [sic] but I think *Plessy v. Ferguson* was right and should be re-affirmed."); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 699–700 (1976). Chief Justice Rehnquist stated:

Nevertheless, I greatly doubt that even men like Thad Stevens and John Bingham, leaders of the radical Republicans in Congress, would have thought any portion of the Civil War Amendments except section five of the fourteenth amendment, was designed to solve problems that society might confront a century later. I think they would have said that those amendments were designed to prevent from ever recurring abuses in which the states had engaged prior to that time.

Id.

19. Rehnquist Memo, *supra* note 18.

20. Rehnquist Memo, *supra* note 18.

The Rehnquist Memo connects the ideological dots between political conservatism and originalism. Specific to *Brown*, Rehnquist and other political conservatives believed the Fourteenth Amendment should not be interpreted to protect minority rights affirmatively, but only to ensure equal treatment, which segregation did not offend in their eyes.²¹ While *Brown* was decided unanimously (perhaps perversely incentivized through the operation of the interest-convergence theory),²² Rehnquist's arguments against integration did not exist in a silo. They were eventually incorporated into the post-*Brown Southern Manifesto*, which argued the Constitution should be interpreted with fealty to its "originalism, text, precedent, structure, prudence, and tradition" to undermine and challenge *Brown*'s reasoning and holding, illustrating originalism's foundational connection to resistance against racial progress.²³

To Dennie, *Brown* provides an unassailable example of how and why originalism's claim to neutrality through mythically algorithmic omniscience into the ratifiers' minds is woefully misguided and embedded with unavoidable sociolegal value judgments undermining its core organizing belief.²⁴ In *Brown*, the Court solicited additional briefing on the Fourteenth Amendment's original history and intention from both parties, who proffered archival evidence supporting their opposing positions on the constitutionality of segregation.²⁵ The NAACP Legal Defense Fund argued that Reconstruction Era debates evinced an intention to "destroy America's racial caste system, root and branch, by translating the principle of absolute equality into broad constitutional language."²⁶ In retort, Kansas's brief centered originalism, which had not yet come to linguistic recognition, in arguing the Court lacked constitutional authority to interpret the Fourteenth in a manner that diverged from the Founders' intention. Kansas argued the constitutional authority was broadly concerned with only the literal text—protecting fundamental rights of "life, liberty, and property"—not school desegregation specifically, as Rehnquist also argued in his memo.²⁷ The Attorney General

21. See DENNIE, *supra* note 1, at 19 (asserting that *Brown* highlighted the Fourteenth Amendment's guarantee of equal protection).

22. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) ("[T]he economic and political advances at home and abroad that would follow the abandonment of segregation . . . provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples.").

23. Driver, *supra* note 17, at 1063.

24. DENNIE, *supra* note 1, at 20–22.

25. Brief for Appellants in Nos. 1, 2 & 4 & for Respondents in No. 10 on Reargument at 43, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

26. DENNIE, *supra* note 1, at 20.

27. Brief for the State of Kansas on Reargument at 15, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The brief contains text-based arguments to limit recognition of fundamental civil rights and liberties.

also provided historical evidence that the Fourteenth Amendment established broad principles of equality at its adoption. However, he did not argue that there was strong and conclusive evidence it was explicitly drafted to prohibit segregation.²⁸

Faced with tripartite interpretations from parties whose motives were all supported (albeit, to varying degrees) by the vast and contradictory historical record, the Court had to make value judgments about the historical evidence before them. This is precisely what courts are called upon to do, in addition to employing other interpretive tools like precedent, tradition, purposes, values, and consequences, as Justice Breyer and others have observed through experience.²⁹ In part, this is why the Court rejected the “proto-originalism” advocated by Kansas, finding that original intentions supported by the historical record were helpful but not dispositive to the case.³⁰

In overruling *Plessy*, the Court drew on considerations outside the Constitution’s four corners, finding countervailing interests in education’s centrality in American life and the principle of racial equality recognized in the Constitution’s Reconstruction Amendments, and rejecting originalism as the interpretive tool in the dispute.³¹ As Dennie argues *Brown*’s reasoning makes clear that had the Court adopted Kansas’ “proto-originalist” argument, it would not be making a *neutral* determination; the Court would have made a value judgment about the constitutional propriety of segregation supported by discordant history and original intention.³² In this way, originalism does not constrain the historical search for original meaning through objective principles but “encourages lawyers to go spelunking through archives for whatever they want to find” in support of their argument in hopes that the majority of Justices will agree.³³

28. Supplemental Brief for the United States on Reargument, at 48–49, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

29. See STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* 4 (Simon & Schuster, 1st ed. 2024) (noting that “all judges will use [non-originalist] tools at one time or another”); Jamal Greene, *The Meaning of Substantive Due Process*, 31 CONST. COMMENT. 253, 256–57 (2016) (explaining constitutional law as “a set of resources for making constitutional arguments . . . within a limited number of domains – the text, historical materials, precedents, prudential arguments, and so forth”).

30. DENNIE, *supra* note 1, at 22–23.

31. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954). Here, the Court states explicitly that:

[W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id.

32. DENNIE, *supra* note 1, at 22–23.

33. *Id.*

Noting this reality, Dennie argues history and original meaning alone cannot be the guiding light in Equal Protection Clause jurisprudence, because it privileges the perspectives of those in power in 1787 and 1865, which necessarily excludes the enslaved, Indigenous people, and women, who collectively comprise over half of America's population.³⁴ To Dennie, *Brown* represents a rejection of originalist reasoning and an embrace of an antiracist Constitution that centers inclusive democratic principles in defining the scope of equal protection.³⁵ In the debate about the Fourteenth Amendment's meaning, two views dominate: colorblind constitutionalism, the idea that *Brown* meant all distinctions based on race are unconstitutional, and the antisubordination view, that equality means actively dismantling inequality by recognizing and considering its impacts; on these questions, originalists and inclusive constitutionalists are wholly at odds.³⁶

Two years after *Brown*, nearly one hundred members of Congress endorsed the *Southern Manifesto*, which argued *Brown* was wrongly decided, offering a defense of segregation and a new vision for interpreting the Constitution's equal protection jurisprudence: originalism.³⁷ Dennie characterizes the Manifesto as a racist jeremiad but more importantly as a legal blueprint for a new modality of constitutional interpretation; this framework would *neutrally* prevent the Constitution from endorsing broadscale changes to equalize the racial caste system in the way *Brown* did, which the manifesto characterized as politics, not constitutional law.³⁸ The manifesto rejected the antisubordination view of the Fourteenth Amendment adopted by *Brown*. To Dennie, the manifesto was the inertia behind the pendulum swing that resulted in the originalist-dominated Court; it represented what Professor Kimberlé Crenshaw terms "race, reform, and retrenchment," the idea that formal civil rights reform through the judiciary repackages racism through novel methods of constitutional interpretation (originalism), which then facilitate the continued legal subordination of racial minorities through destructive precedents.³⁹

Originalism accomplishes racial regression, as envisioned by the manifesto, in critiquing *Brown* as divorced from the Constitution's text, as

34. *Id.* at 21–22.

35. *Id.* at 21–23.

36. *Id.*

37. *Id.* at 23.

38. *Id.*; see also S. DOC. NO. 102-4, at 4460 (1965) (“[T]he Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land.”).

39. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1337–38, 1346–47, 1349 (1988) (critiquing the Reagan Administration's originalist interpretation of civil rights laws as embracing legal formalism in centering colorblindness and the Framers' original intentions to undermine racial equality facilitated by the judiciary).

the word “education” is absent from the Constitution (rigid textualism).⁴⁰ It further relies on history and tradition, noting that the Reconstruction Congress provided for segregated schools at the time of ratification, and on precedent, like *Plessy*, which constitutionally sanctioned segregation (precedent, legal formalism, judicial restraint).⁴¹ The Manifesto also argues, familiarly, that the Constitution’s federalist structure precludes the Court from intervening in states’ rights to enforce subjective notions of equality, pointing to the lack of federal involvement in northern states to desegregate schools although history indicates otherwise (structuralism).⁴² Couched in “neutrality,” originalism privileges rigid textualism, history and tradition, formalism, and structuralism to prevent the Fourteenth Amendment’s aspirations of racial equality, and this formalism had great appeal as a counterweight to the perceived overreaches of the “liberal” Warren Court.⁴³

Absent from Dennie’s narrative but present in the historical record was an originalist revolution that caught wind after Barry Goldwater’s presidential loss in 1964 when conservatives were searching for a new political and legal strategy to advance originalism with the help of future Supreme Court Justice Lewis Powell, Jr.⁴⁴ In 1971, Powell wrote a memo encouraging conservatives to engage in judicial activism to counteract the advances by the Warren Court. This set originalism on a multifaceted path with the help of public-interest firms engaging in impact litigation to change the law, law professors as proselytizing surrogates, and think tanks that produced policy papers to lobby legislators and advance judges who embrace originalism.⁴⁵

In his memo, Powell both recognized and sought to confront the “left” whose ideas were “more welcomed and encouraged by other elements of society than ever before in our history,” calling upon conservatives to use the judiciary as intended, as an instrument for “social, economic, and political

40. DENNIE, *supra* note 1, at 23; *see also* S. Doc. No. 102-4 (1956) (“The original Constitution does not mention education . . . there was no intent that it should affect the system of education maintained by the States.”).

41. DENNIE, *supra* note 1, at 23; *see also* S. Doc. No. 102-4 (1956) (“The original Constitution does not mention education . . . there was no intent that it should affect the system of education maintained by the States.”).

42. DENNIE, *supra* note 1, at 23; *see also* S. DOC. NO. 102-4 (1956) (“We regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend . . . to encroach upon the reserved rights of the States and the people.”).

43. DENNIE, *supra* note 1, at 22–23.

44. *Id.* at 24–25; *see also* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES (Apr. 17, 2005), <https://www.nytimes.com/2005/04/17/magazine/the-unregulated-offensive.html> [<https://perma.cc/A2PN-33G5>] (introducing the conservatives post-Goldwater strategy).

45. *See* Rosen, *supra* note 44 (quoting Michael Greve at the American Enterprise Institute noting that “judicial activism will have to be deployed” to reach the movement’s goals because “[i]t’s plain that the idea of judicial deference was a dead end for conservatives from the get-go.”).

change” just like “the liberals.”⁴⁶ Months later, President Richard Nixon nominated Powell to the Court, where he was given an opportunity to actualize his strategy and ideology.⁴⁷ By the time Reagan entered office ten years later, the *Southern Manifesto*’s originalism and Powell-style legal infrastructure was fully operative, and the Department of Justice, run by an originalist acolyte, Edwin Meese III, was a petri dish for the lawyers attracted to its appeals on how to read the Constitution.⁴⁸ By the end of the Reagan Administration, originalism had caught wind in legal academia, the halls of Congress, public policy think tanks, the public lexicon, and the Supreme Court, which by political chance and intentional strategy had the opportunity to welcome an increasing number of its followers.⁴⁹ This, Dennie argues, is how originalism took hold of the Supreme Court.⁵⁰

In a 2005 *New York Times* article, Professor Jeffrey Rosen discussed the conservative backlash to *Brown* and its accompanying constitutional arguments, in tandem with Richard Epstein’s libertarian perspective on the austere scope of federal power, which Judge Douglas Ginsburg called the Constitution in Exile movement.⁵¹ This movement, like any, was sectarian, with some focusing on the limited nature of the Commerce Clause and the unconstitutional existence of the regulatory state to embrace particular economic interests, while others focused on undoing the Court’s recognition of unenumerated rights and embrace of racial integration as a fundamental equal protection principle.⁵² Despite the fractures, what brought these sects together was a collective aggrievement with “activist” justices advancing personal social principles that Powell, Jr. advocated for in his memo; a notion the Court had gone “too far” in using the Constitution to mandate racial integration and recognize the right to abortion and privacy, advancing

46. Memorandum from Lewis F. Powell Jr., to Eugene B. Sydnor, Jr., Chairman of the Education Committee of the U.S. Chamber of Commerce 2, 26–27 (Aug. 23, 1971).

47. See *id.* at 26–27 (detailing Powell’s strategy for implementing his ideology); see also DENNIE, *supra* note 1, at 25 (discussing Powell’s confirmation).

48. Jamal Greene, *On the Origins of Originalism*, 88 TEXAS L. REV. 1, 13 (2009). Professor Greene notes:

Originalism is the instrument and the beneficiary of a deliberate decision by former Attorney General Edwin Meese and others to structure the Reagan Justice Department’s critique of the Warren and Burger Courts in jurisprudential terms. Abetted by organizations like the Federalist Society and think tanks like the Center for Judicial Studies, Meese began a campaign during Reagan’s second term to promote publicly the view that originalism is the only way to control activist judges.

Id.

49. *Id.* at 13–14, 17–18.

50. DENNIE, *supra* note 1, at 185.

51. Rosen, *supra* note 44.

52. See *id.* (reporting that “[f]or the ‘Constitution in Exile’ movement, that world is the era of Republican dominance in the United States from 1896 through the Roaring Twenties . . . American courts during that period steadfastly preserved an ideal of free enterprise, routinely striking down laws that were said to restrict economic competition.”).

unconstitutional “radical egalitarianism,” as Attorney General Meese III described in a 1985 speech before the American Bar Association.⁵³ In this way, Dennie argues that originalism is not a naturally occurring way to read the Constitution; it was not advanced or even used by many of the Founders after its ratification.⁵⁴ Instead, it forced its way into legal acceptance by “activating academics and social movements, making the ideology politically salient” and appealing to conservative policy preferences on race, rights, and democracy.⁵⁵

Intrinsically, the type of sociolegal movement originalism represents is not necessarily wrong. To an extent, it is a necessary outgrowth and function of democracy. What troubles people who read the Constitution like Dennie, are the interpretive and practical realities of its effectuation as a “professionalization of white patriarchal grievance politics.”⁵⁶ While the Constitution in Exile movement is absent from Dennie’s retelling of originalism’s origin story in explicit reference, it is present in subtext in critiquing originalism as a product of a political movement irascibly aggrieved by policies that many Americans and legal scholars view as an equitable vindication of the Constitution’s ideals on issues like organized labor, racial justice, and women’s equality and liberation.⁵⁷ The “trap,” as Dennie sees it, is originalism’s political repackaging as an interpretive modality centering on judicial restraint, respecting separation of powers and the country’s founding ideals instead of a political reaction to racial integration and rejection of the Warren Court’s pursuit of egalitarianism in interpreting the Constitution.⁵⁸

II. Originalism Fallacies

Debates over how to interpret the Constitution have persisted since its ratification and are unlikely to end given the Constitution’s central role in American politics, law, and culture.⁵⁹ Yet amid the ever-shifting terrain of

53. See DENNIE, *supra* note 1, at 25 (describing originalist efforts to push back against social advancements).

54. See *id.* at 5 (explaining that the Founders “did not want generations of Americans to be bound to their view of the [Constitution]”).

55. See *id.* at 185 (“[T]he conservative legal movement wanted people to think about the law in a different way and found that they could make that happen with sufficient numbers of sufficiently organized people.”).

56. See *id.* at 26 (expressing concern at the developments that led to “our regrettable present position where, for the first time in history, self-described originalists dominate the Supreme Court”).

57. *Id.* at 25.

58. See *id.* at 24 (“It is not by accident that [originalist] legal arguments reinforce opposition to equal rights: the development of originalism as a legal theory is inextricable from the development of a palatable cover story for reactionary politics.”).

59. See JACK N. RAKOVE, ORIGINAL MEANINGS 5 (1996) (describing the importance of constitutional debates through American history).

interpretive theory, one principle endures: the Founders designed the Constitution to be adaptable, believing that the “character” of the Constitution “must be tested by the experience of the future.”⁶⁰ The records of the Constitutional Convention reflect this intentional fluidity, revealing a “bewildering array of intentions” from over two thousand participants and their constituents—far too varied and conflicting to yield any single, empirically verifiable understanding of the text.⁶¹ As Dennie emphasizes, no definitive or objective meaning can emerge from such discordant voices.⁶² Invoking a visual metaphor, relying on “original meaning” in constitutional law resembles a Jackson Pollock painting—fragmented and chaotic in methodology and practice.

This section elaborates on originalism’s fallacies as told by Dennie and questions originalist reliance on the Founders’ intentions by revisiting the Decision of 1789 and *McCulloch v. Maryland* to provide historical context and support for Dennie’s inclusive constitutionalism as deeply rooted in constitutional law’s history and tradition.⁶³ While Dennie rejects any reliance on the Founders for persuasive support as originalism places the past on a pedestal, privileging white men in the 1776 racial caste system, I argue that Founding-era post-ratification decisions look more like Dennie’s inclusive constitutionalism, and reveal originalism’s improprieties.

The quest for original meaning begins with the premise that the Founders wanted their thoughts to govern the document into perpetuity. This is not obvious from the historical record. For example, in *Federalist 37*, James Madison stated the Constitution’s meaning would be “obscure and equivocal” upon ratification.⁶⁴ Madison believed the Constitution’s meaning could only be “liquidated . . . through a series . . . adjudications.”⁶⁵

If originalists care about the Founders’ notion of the Constitution’s original meaning and intention, they should give weight to the fact that Founders as prominent as James Madison recognized the legitimacy of

60. See *id.* (quoting Madison); cf. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990) (arguing originalism is the only approach that “meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy. Only that approach is consonant with the design of the American republic.”).

61. See RAKOVE, *supra* note 59, at 6, 17 (explaining that Madison himself treated his notes as private property because he thought that the proceedings “could never be regarded as the oracular guide in expounding the Constitution.”).

62. See DENNIE, *supra* note 1, at 21 (“[D]etermining the original intent of a provision can be a Herculean task. A group of drafters may have varied desires and expectations, leading to at least as many original intentions as there are individuals who wrote and ratified the Constitution.”).

63. 1 ANNALS OF CONG. 384; 17 U.S. 316 (1819).

64. THE FEDERALIST NO. 37, at 198 (James Madison) (Barnes & Noble Classics ed., 2006) (noting that like “[a]ll new laws,” the Constitution’s meaning would be “more or less obscure and equivocal” upon ratification, and that its meaning would need to be “liquidated and ascertained by a series of particular discussions and adjudications”).

65. *Id.*

interpretive principles beyond original public meaning. Yet, they do not, perhaps, because originalists do not treat all history equally.⁶⁶

Considered, for instance, the first significant construction of the Constitution: The Decision of 1789. The Decision of 1789 is known as the first significant construction of the Constitution, as it was decided during a time when Congress constructed constitutional meaning.⁶⁷ In the First Congress, members debated whether the President's appointment power included the power to remove executive officers as Article Two's text was devoid of explicit enabling language.⁶⁸ Of course, one would not be surprised to learn that in the absence of precise text answering the question, the Founders disagreed about the meaning of the document they just wrote. In *Federalist* 77, Alexander Hamilton opined that giving the President removal power would violate the separation of powers principles inherent in the structure of the Constitution because the Senate was given the power of advice and consent, not the President unilaterally.⁶⁹ In contrast, James Madison thought the Constitution's advice and consent requirement applied to removals as a matter of grammar, but he ultimately endorsed the President's removal power, appealing to his perception of the Constitution as providing capacious and broad presidential power.⁷⁰

What did the Founders do when the Constitution's text provided no explicit provision on the President's ability to remove appointees confirmed by the Senate, and the Founders disagreed on the meaning of the Constitution they wrote? They did what Congress did in the Decision of 1789 and considered the animating forces undergirding the Constitution and the practical need for a strong executive to act swiftly in times of national uncertainty by appealing to the Constitution's structure and purpose, as Dennie's inclusive constitutionalism provides consideration for.⁷¹ During the debates, the Founders reasoned that requiring the Senate's approval to remove executive officers could practically take weeks or even months given the state of physical and communicative infrastructure. In that circumstance, the President could be powerless in preventing nefarious action. A strong executive required the Founders to make the semantic leap of logic necessary

66. See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2164 (2022) (Breyer, J., dissenting).

67. Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORN. L. REV. 1021, 1022–23 (2006).

68. *Id.*

69. THE FEDERALIST NO. 77, at 396 (Alexander Hamilton) (The Gideon ed., 2001) (“It has been mentioned as one of the advantages to be expected from the cooperation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint.”).

70. Prakash, *supra* note 67, at 1034, n.95.

71. DENNIE, *supra* note 1, at 182–83 (arguing how inclusive constitutionalism considers the requirements of the Constitution and still does not overlook marginalized groups).

to find that appointment power includes the power to remove without Senate approval by considering text, logic, pragmatism, and political realities and exigencies.

Just as the Decision of 1789 provides enlightening views on how the Founders addressed ambiguous constitutional questions, so too does *McCulloch v. Maryland*.⁷² In *McCulloch*, the Court ascertained the scope of Congress's power to create a national bank without the explicit text in Article I, which defines Congress's legislative authority in great detail.⁷³ Chief Justice John Marshall did not rely solely on the Founders' intent, text, or original public meaning in his analysis. Instead, he relied on Article I and the Necessary and Proper Clause's text and their "spheres," past practice, workability, and the constitutional purpose of a legislature to reach what is recognized as the appropriate conclusion on congressional authority.⁷⁴

Textually, the word "bank" does not appear in Article I or anywhere in the Constitution. Marshall acknowledges this, which is why he draws upon other interpretive modalities to analyze the question.⁷⁵ In finding Congress had the power to create a Bank, Marshall drew constitutional meaning from relevant considerations outside the four corners of the Constitution: Congress's past legislation creating a bank, the need for resources to fund the national defense, and the grammatical elasticity of the Necessary and Proper Clause as a structural bookend to the most extended list of explicit authority in the Constitution.⁷⁶ As a matter of workability and pragmatism, Marshall understood the pressing need to interpret the Constitution broadly and generously to give Congress the intended power even if it is not explicitly listed in Article I.⁷⁷ This fluid interpretation provides the Court with the power to address future needs—a core purpose of the Constitution that Marshall captured eloquently in the opinion:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. In considering this question, then, we must never forget that it is a constitution we are expounding. [The] constitution [was] intended to

72. See *McCulloch v. Maryland*, 17 U.S. 316, 367 (1819) (addressing whether a national bank is required "to execute any of the express powers of the government").

73. *Id.* at 425.

74. BREYER, *supra* note 29, at 121–22.

75. See *McCulloch*, 17 U.S. at 324 (1819) ("It is not enough to say, that it does not appear that a bank was not in the contemplation of the framers of the constitution. It was not their intention, in these cases, to enumerate particulars.").

76. BREYER, *supra* note 29, at 121.

77. See *McCulloch*, 17 U.S. at 421 (noting that the Constitution must be interpreted broadly to allow Congress to carry out the duties assigned to it).

endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.⁷⁸

If an actual Founder, in one of the earliest interpretations of the Constitution used history, the philosophical nature of a constitution and its purposes, Constitutional text, and workability to reach a conclusion on the scope of unenumerated Congressional power, then why are originalists committed to stripping constitutional interpretation to original public meaning and understanding at the time of ratification? Why should a court be so austere in expounding upon a document as complex and grammatically fluid as the Constitution? To Dennie, the answer is political: it is an “outcome-oriented ploy to disguise oppressive choices as constitutional requirements.”⁷⁹

Assuming *arguendo*, Founders’ intention/original public meaning was meant to govern, interpreters face another challenge: singular original intention fails to capture the diversity of thought reflected in the Constitutional Convention and Reconstruction Era.⁸⁰ Even if it did, what are we to make of the constellation of thought on constitutional meaning in 1787? Deciding which interpretation governs is not as easy as empirically tallying the Founders’ thoughts and deciding on the interpretation intended by the majority or plurality. This is why originalism cannot be objective, as Dennie repeatedly notes.⁸¹ Judges are meant to judge and make value decisions, and exercising discretion is inherent in the job and the title.⁸² In a sense, originalism is an abdication of the judicial duty to actually judge and not simply compute a purportedly neutral result based on the subjectively distilled history of the over 2,000 participants to the constitutional convention. Lastly, given sexism, racism, and the legal subordination of marginalized groups when the Constitution was written and significantly amended after the Civil War, relying on the Founders for justice and liberation in the modern era is truly a Sisyphean fool’s errand, as Audre Lorde and Dennie counsel that the “master’s tools will never dismantle the master’s house.”⁸³

78. See *McCulloch*, 17 U.S. at 407, 415.

79. DENNIE, *supra* note 1, at 28.

80. See *id.* at 21 (arguing that “determining the original intent of a provision can be a Herculean task. A group of drafters may have varied desires and expectations, leading to at least as many original intentions as there are individuals who wrote and ratified the Constitution.”).

81. *Id.* at 28.

82. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“Those who apply the rule to particular cases, must of necessity expound . . .”).

83. DENNIE, *supra* note 1, at 32–33; AUDRE LORDE, THE MASTER’S TOOLS WILL NEVER DISMANTLE THE MASTER’S HOUSE, *reprinted in* SISTER OUTSIDER: ESSAYS AND SPEECHES 112 (1984).

III. In Defense of Substantive Due Process

Originalists' most consistent and central tenet decries substantive due process as fake law, existing as an exercise in raw political power unmoored by the Constitution's text despite the existence of the Ninth Amendment, which provides for the protection of rights not specifically enumerated.⁸⁴ Dennie's defense of substantive due process doctrine undermines originalists' main critique of it—that law is constructed by judges in particular social and political contexts; it does not simply exist. Judges make law, and any legal doctrine developed by courts, like the ability to even review laws for their constitutionality, is constructed.⁸⁵ Therefore, arguments that purport to delegitimize substantive due process doctrine as manufactured by activist judges must, too, concede that modalities of constitutional interpretation, like originalism, do not, and cannot be considered more legitimate because empirically assessing the original public meaning of intentionally broad phrases cannot be done with certainty requiring originalists to construct and contort law as they fill in the historical gaps of an era in which all judges have no shared historiography of.

This Part discusses Dennie's confrontation with originalist attacks that label substantive due process as illegitimate, ahistorical, and untethered from the Constitution's text through a historical survey of landmark cases from *Lochner* to *Loving*, *Lawrence*, and *Obergefell*.⁸⁶ Her review underscores how originalism privileges the values of 18th- and 19th-century elites while disregarding the Ninth Amendment, the antistatutory purposes of the Reconstruction Amendments, and the dynamic, democratic potential of constitutional interpretation. Ultimately, she presents substantive due process as a legitimate, deeply rooted doctrine—one that enables courts to uphold unenumerated rights essential to human dignity—and calls for a broader,

84. See *Timbs v. Indiana*, 586 U.S. 146, 159 (2019) (Thomas, J., concurring) (critiquing the substantive due process doctrine as oxymoronic and without any “textual constraints”).

85. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 171 (1803) (“[W]hether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts”).

86. 198 U.S. 45 (1905) (finding a constitutional right to contract under one's own terms as an extension of a fundamental economic right); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that parents have an inherent constitutional right to educate their child as they wish and teachers had a right to engage in their profession under the substantive due process doctrine); *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting) (arguing for a capacious view of the Fourteenth Amendment's conception of “liberty” to encompass the right to contraceptive access); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (utilizing Justice Harlan's dissent in *Poe* to strike down the statute it challenged, making access to contraceptives a fundamental right); 388 U.S. 1 (1967) (extending substantive due process rights to encompass interracial marriage); 539 U.S. 558 (2003) (striking down criminal laws prohibiting same-sex intimacy as an extension of the right to privacy and liberty established in *Griswold*); 576 U.S. 644 (2015) (holding that same-sex marriage is a fundamental right under the substantive due process doctrine).

people-centered constitutionalism that reflects contemporary understandings of justice and equality.

Originalism's coalescing grievance with substantive due process is that the Fourteenth Amendment's "life, liberty, and property" protection is linguistically *procedural*, meaning that it cannot protect *substantive* fundamental rights; after all, how could a process, a series of actions, be substantive?⁸⁷ Even if they can be, originalists argue that the Fourteenth Amendment lacks textual strictures to define what fundamental rights should be considered, inviting unconstitutional judicial action.⁸⁸ But, if the Court adopts this view, how could "process" be "indifferent to the substance of the associated loss?" More precisely, why "confuse a theory of language with a theory of interpretation?"⁸⁹ Essentially, Dennie argues that even if the Due Process Clause is textually limited to *process*, the term modifies "life, liberty, or property," demanding courts interpret what gives *substance* to those liberties.

Dennie's defense of substantive due process begins with *Lochner*. In *Lochner*—decided during an era of regulatory growth to protect workers' health and safety—the Court held the constitutionally unenumerated right to contract to perform extraneous amounts of work that might threaten a person's health and safety was a fundamental right under the Fourteenth Amendment's Due Process Clause, challenging the perspective the clause merely protected procedural rights.⁹⁰ In the constitutional law canon (or anti-canon, as Dennie notes), *Lochner* is a case so controversial in its underlying facts and full-throated embrace of substantive due process that jurists and scholars of all ideological stripes bemoan the holding and the era it wrought. The decision invalidated legislation that infringed on the freedom to contract, no matter how imbalanced the power differential was, and disregarded the state interest in protecting health, safety, and public morals.

On one side, ideologically conservative jurists like Chief Justice John Roberts excoriate *Lochner* as judicial activism, critiquing the decision as "not

87. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 24–25 (Amy Gutmann ed., 1997). Justice Scalia explains:

By its inescapable terms, [the Due Process Clause] guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the process that our traditions require—notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.

Id.

88. See *id.* (criticizing the use of the Due Process clause to guarantee liberties beyond process as "judicial lawmaking").

89. Greene, *supra* note 29, at 268.

90. 198 U.S. 45, 64 (1905).

interpreting the law,” but making it.⁹¹ On the other, those who embrace the doctrine in its modern form are perturbed by its association with a case entrenching power and economic inequality by exploiting labor contracts, a policy position most inclusive constitutionalists repudiate.⁹² In reconciling *Lochner*’s result from the doctrine it created, Dennie notes an important distinction: “[u]sing the law to protect marginalized people and diffuse power is different from using the law to keep power concentrated in the hands of a few. Inclusive constitutionalism understands the former as encouraged by the democratizing mission of the Reconstruction Amendments and the latter as prohibited by it.”⁹³

What troubles substantive due process believers, Dennie argues, is the uncomfortable tension in applying the doctrine to enlarge economic rights and the exploitative rights of employers through freedom of contract in *Lochner* and its partial abrogation thirty years later in *West Coast Hotel Company v. Parrish*, protecting workers from sub-market wages by arguing what Conservative jurists argue now: “the Constitution does not speak of freedom of contract.”⁹⁴ Even more, why should a liberty, privacy, and equality-based doctrine be used to advance capitalistic rights, which, in turn, entrench racial disparities, because that is antithetical to the Fourteenth Amendment’s antidisubordination purpose.⁹⁵

To Dennie, this tension is irrelevant as *Lochner* and *West Coast Hotel Company* more accurately represent a temporary jurisprudential skirmish over the judiciary’s role in the American economy and, even more, the modern “doctrine formed over time repudiates *Lochner*’s sins.”⁹⁶ Intervening case law, she argues, explicates the proper scope of the doctrine in *Meyer* and *Pierce v. Society of Sisters*, which found unenumerated fundamental rights for teachers to engage in their livelihoods and parents to direct the education of their children as a part of constitutional liberty and privacy in 1925,

91. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 162 (2005) (from subpart “Nomination of John G. Roberts, Jr. of Maryland, to be Chief Justice of the United States: Tuesday, September 13, 2005”).

92. DENNIE, *supra* note 1, at 60.

93. *Id.*

94. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391(1937).

95. *Id.* at 391–92 (asserting that “the liberty safeguarded . . . requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people” and those safeguards can include reasonable limitations on the right to contract).

96. DENNIE, *supra* note 1, at 60; *see also* *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes Jr., J. dissenting) (“The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same . . . is interfered with by [many state laws regulating the general welfare]. The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.”); *West Coast Hotel*, 300 U.S., at 390 (holding that “economic conditions” warranted a reconsideration of the propriety of wage regulation laws); Rehnquist Memo, *supra* note 18 (opining that “[a]fter the Civil War, business interest came to dominate the court”).

reasoning the Fourteenth Amendment protects substantive rights like the right to engage in common occupations of life, to marry, and to raise children as integral components of constitutional liberty.⁹⁷ And, in post-*West Coast Hotel* cases, justices of all political and interpretive ideological persuasions agree that substantive due process is a legitimate constitutional concept. Most eloquently, Justice Frankfurter, explained

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But *basic rights do not become petrified as of any one time*, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of “inclusion and exclusion.”⁹⁸

Justice Frankfurter’s definition of substantive due process augured its birth into official term, as constructed through Justice Douglas’s dissent in *Poe v. Ullman* recognizing the clauses’ substantive protection of rights, the Court’s infamous recognition of the Bill of Rights’ “penumbras” and “emanations” in *Griswold v. Connecticut* and its jurisprudential progenies.⁹⁹ In this way, Dennie discredits arguments that substantive due process is made from whole cloth or merely an invention of the activist Warren Court; it is settled jurisprudence developed by justices of all ideologies and political persuasions, informed by “decades of dialogue between advocates and the people they represent, the judiciary, and other actors engaged in explicating

97. DENNIE, *supra* note 1, at 55; *Meyer v. Nebraska*, 262 U.S. 390 (1923) (emphasis added); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

98. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

99. See *Poe v. Ullman*, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting) (explaining that “[w]hen the Framers wrote the Bill of Rights they enshrined in the form of constitutional guarantees those rights—in part substantive, in part procedural—which experience indicated were indispensable to a free society”); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”) (citing *Poe v. Ullman*); DENNIE, *supra* note 1, at 66 (observing *Griswold* “gave generations of conservative lawyers fodder for bullying their liberal colleagues, and made lawyers cringe with secondhand embarrassment”).

interconnected constitutional principles.”¹⁰⁰ *Loving v. Virginia*, the next case in the canon, represents this assertion perfectly and is yet another rebuke of originalism.

In defending Richard and Mildred Lovings’ criminal prosecutions on Virginia’s anti-miscegenation law, Virginia argued, in originalist tradition, that the Framers’ intent was dispositive. The Framers did not understand the Fourteenth Amendment to protect a right to marry outside of one race; its ratification did not affect state laws that criminalized it and state and federal courts that enforced the prohibition.¹⁰¹ In challenging their prosecution, the Lovings and their advocates argued otherwise: the Fourteenth Amendment was intended to be “open-ended and meant to be expounded in light of changing times and circumstances to prohibit racial discrimination.”¹⁰² Drawing on the existing body of Substantive Due Process jurisprudence, they argued that because *Brown* held racial segregation a violation of the Equal Protection Clause and *Griswold* held that there was a fundamental right to marital privacy in the provision of contraceptives, the Fourteenth Amendment’s ant子subordination purposes were relevant guiding principles for the Court.¹⁰³ The Lovings argued that if these precedents were applied, Virginia’s anti-miscegenation law deprived their right to liberty in denying them the fundamental right to marital privacy and nondiscrimination.¹⁰⁴ Once again, the Court rejected originalist arguments claiming the Constitution’s meaning was fixed in 1787 and 1865 to find a fundamental right to interracial marriage in the Fourteenth Amendment’s Due Process Clause, guided by racial equality and ant子subordination principles, to confront laws that advance racial caste systems. The *Loving* decision encapsulates what it means to consider the Constitution’s animating principles when considering the right to privacy under the Fourteenth Amendment, Dennie asserts.¹⁰⁵

Five years later, in *Eisenstadt v. Baird*, the Court drew upon its holding and dicta in *Griswold* to find that Massachusetts’ ban on contraceptives for single women constituted an Equal Protection Clause violation because it failed the rational basis test in treating married women differently from unmarried women, and more importantly, because it conflicted with “fundamental human rights” and individual privacy to be recognized and

100. DENNIE, *supra* note 1, at 85; see Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 638 (2022) (“[W]here the progressive judge trusts in judicial norms to eventually bring about a more just society, the movement judge engages in the hard work of shifting fundamental understandings of how the law operates [to shape constitutional meaning].”).

101. DENNIE, *supra* note 1, at 69–70.

102. *Id.* at 71.

103. *Id.* at 71–72.

104. *Id.*

105. See *id.* at 74–75 (asserting that *Loving* was among those cases that “built an interpretative foundation” supporting recognition of “rights pertaining to privacy and intimacy associations”).

protected under the Fourteenth Amendment.¹⁰⁶ In the Court's closing paragraph, it justifies its decision as firmly rooted in the Reconstruction Amendments focus on protecting minority groups

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation, and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.¹⁰⁷

Dennie argues that this proclamation and the seven decades of jurisprudence establishing, applying, and defining the substantive due process delineations are the ballast supporting the Court's decision in *Roe v. Wade*.¹⁰⁸ Collectively, these cases establish that the Bill of Rights is not exhaustive; hence, the Ninth Amendment—and the right to privacy in intimate life—is an animating principle undergirding enumerated rights.

But, thirteen years after *Roe*, in the midst of dueling social and political movements over morality, the Court underwent an ideological shift rightward because of Presidents Richard Nixon and Ronald Reagan's judicial appointments (Justices Burger, Powell, Rehnquist, and O'Connor).¹⁰⁹ Dennie argues that these facts are central in understanding how and why the tension between the Court's interpretive modalities, one focusing on history and tradition (originalism), the other on equality, antisubordination, nondiscrimination, and privacy (non-originalism), came to a crossroads in the Court's same-sex rights jurisprudence.¹¹⁰ *Bowers v. Hardwick* illustrates the dehumanizing results that can flow from originalism and reliance on anachronistic social norms in construing the Fourteenth Amendment.¹¹¹

Although the specific question at issue in *Bowers* was quite specific—whether the Constitution conferred a fundamental right to same-sex activity—the Court took it upon itself to theorize about its institutional role in the constitutional order in identifying unenumerated fundamental rights.

106. 405 U.S. 438, 443 (1972) (recognizing that the Court of Appeals concluded that the statute limiting contraception “conflicted ‘with fundamental human rights’” under *Griswold* and agreeing that the prohibition on contraception violates the Equal Protection Clause).

107. *Id.* at 454 (quoting *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949)).

108. DENNIE, *supra* note 1, at 74.

109. *Id.* at 75.

110. *Id.*

111. *See generally* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding no constitutional right to same-sex sodomy, which is not rooted in the nation's history and tradition).

In this endeavor, the Court distinguished, but did not (yet) disclaim that prior substantive due process cases dealing with child-rearing, education, marriage, and access to contraception did not extend to same-sex activity because the vast majority of states criminalized that activity, indicating the claimed right was *not* “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty.”¹¹² In critique, Dennie emphasizes how rooting the baseline for fundamental rights in historical understandings perversely operates to privilege those who were in power and recognized as full citizens in 1787 in the realm of civil rights and civil liberties.¹¹³ Illustrating this, the Court held that consensual same-sex relations were not the type of activity the Founders intended the Constitution protect.¹¹⁴ This reasoning would later be employed to overturn *Roe*.¹¹⁵

Pithily, Dennie understands the *Bowers* rationale as follows: “How can criminalizing homosexuality be unconstitutional when we’ve always criminalized homosexuality?”¹¹⁶ This, Dennie argues, is originalism at work interpreting the Fourteenth Amendment despite holding, with decisive majorities that the criminalization of abortion, interracial marriage, and segregation laws could not stand under the same Amendment.¹¹⁷ Dennie’s *Bowers* analysis unveils the Court’s cognitive dissonance, contrasting these holdings and the mode of analysis used to reach them to conclude that substantive due process doctrine reflects “America’s growth over time [while] originalism denies everything we’ve learned and calls that principled wisdom.”¹¹⁸

After *Bowers*, Justice Scalia was appointed to the Court during a time when originalism could not be more in vogue.¹¹⁹ Because of this, Dennie centers one of Justice Scalia’s first opinions (a deeply fractured plurality) in *Michael H. v. Gerald D.*—a case concluding the Constitution provides no fundamental right for fathers to obtain visitation rights for their biological children—to explain how originalists endeavor to define unenumerated fundamental rights, taking a rigidly austere history and text-based approach as an alternative to the capacious view of liberty established by substantive

112. 478 U.S. 186, 190, 194 (1986).

113. DENNIE, *supra* note 1, at 75.

114. *See generally* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

115. *See* Reva B. Siegel, *The History of History and Tradition: The Roots of Dobb’s Method (and Originalism) in Defense of Segregation*, 133 YALE L.J. FORUM 99, 101 (2023) (explaining that *Dobbs* determined fundamental rights by counting the number of states that criminalized activities at the time of the Constitution’s founding, an interpretive method used to justify *Plessy* and the *Southern Manifesto*).

116. DENNIE, *supra* note 1, at 76.

117. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986); DENNIE, *supra* note 1, at 76–77.

118. DENNIE, *supra* note 1, at 77.

119. *Id.*

due process doctrine decades ago.¹²⁰ In *Michael H.*, Justice Scalia disclaimed the notion of substantive due process, instead calling it judicial activism, reasoning the Constitution’s “purpose is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones.”¹²¹ Alternatively, he proposed that fundamental rights and liberties under the Due Process Clause could only be those “traditionally protected by our society” and “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” based on an earlier plurality decision also relied upon in *Bowers*.¹²² This test, Justice Scalia opined, was wholly consistent with the existing line of substantive due process cases discussed above, a contradiction that did not escape his colleague’s critiques in both concurrence and dissent.¹²³

Assessing the history and tradition test, Dennie implores the reader to consider the why; why do originalists want to determine fundamental rights by counting state practices at the time of the Fourteenth Amendment’s ratification? Is it a genuine self-imposed restriction on Article III power justified by the Constitution’s text, or does it seek to indemnify state practices from judicial review unnecessarily? *Lawrence* and *Obergefell* provide an indication, Dennie argues.

In 2003, *Lawrence* held the criminalization of same-sex intimate relations unconstitutional, declaring it a fundamental right under the Fourteenth Amendment, overturning *Bowers*.¹²⁴ In doing so, the Court considered history a mere “starting point” for substantive due process inquiries, centering the importance of movements creating “emerging awareness” about the scope of liberty and privacy in intimate associations.¹²⁵ So, what changed between *Bowers* and *Lawrence*? The Constitution’s text remained static, but the political and interpretive ideology of the justices on the Court changed, as did social mores influenced by movements for LGBTQ+ equality.¹²⁶ Originalism would fail to consider these democratic and egalitarian changes while inclusive constitutionalism centers them.

This section of *The Originalism Trap* demonstrates how democracy, the Constitution’s meaning, and the scope of individual liberties are all in a state

120. *Id.* at 78.

121. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 n.2 (1989).

122. *Id.* at 122 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

123. *Id.* at 132 (O’Connor & Kennedy, JJ., concurring) (“This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area.”).

124. 539 U.S. 558, 578 (2003).

125. *Id.* at 572.

126. *Contrast* 478 U.S. 186, 191–92 (1986) (arguing that there is no fundamental right to engage in consensual same-sex intimate relations), *with* 539 U.S. at 576–77, 579 (noting that nations across the world have taken steps to protect the rights of LGBTQ+ adults).

of flux, demanding that we all engage and pay attention. If one believes the quest to form “a perfect Union” represents a teleological narrative of constitutional progress that ends in full democratic inclusion and equality of intergenerationally subjugated people whose fundamental rights to privacy and liberty in the most intimate aspects of life are protected, Dennie’s examples of and arguments for inclusive constitutionalism place the reader in a paracosm—a world in which the Constitution is consistently interpreted and applied to immortalize rights the vast majority of Americans want and expect the Supreme Court to safeguard. This utopian vision certainly contrasts with the history and reality of constitutional law, which Justice Ruth Bader Ginsburg famously noted as a pendulum, swinging between legal and political ideologies that exercise majority power to create meaning out of the Constitution’s text and purposive values.¹²⁷ However, Dennie’s review of substantive due process doctrine reminds us that such a world can exist if the Court is not the final arbiter of constitutional meaning, which inclusive constitutionalism contemplates.

IV. Originalism Is Antidemocratic

One of Dennie’s strongest arguments against originalism is it undermines the Constitution’s emancipatory promise by disregarding the transformative impact of the Reconstruction Amendments and the evolving understanding of “We the People.” Through democracy and reproductive rights cases, she demonstrates how originalist reasoning selectively invokes history to entrench inequality and strip marginalized communities of political power and fundamental rights.

In analyzing originalist judicial opinions at the Supreme Court, one theme is clear: originalists *rarely* invoke the powerful history of Reconstruction and how it transformed the Constitution from a document “primarily concerned with federal-state relations and the right of property into a vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government.”¹²⁸ Throughout her book, Dennie makes reference to

127. Louis Nelson, *Ruth Bader Ginsburg: We’re ‘Not Experiencing the Best of Times’*, POLITICO (Feb. 24, 2017), <https://www.politico.com/story/2017/02/ruth-bader-ginsburg-the-state-of-america-235340> [<https://perma.cc/3CU3-SPPJ>].

128. See Amarica’s Constitution: *Originalism on Trial*, at 8:30–9:19 (Apple Podcasts, Aug. 10, 2022), <https://akhilamar.com/podcast-2/page/30/> [<https://perma.cc/8USC-JV8Y>]. In this episode, Akhil Amar emphasized:

[M]any conservative originalists . . . don’t lavish the same kind of attention on the amendments—especially the Civil War amendments and the twentieth century amendments (the income tax amendment or the 1960s amendments)—and these later amendments talk about, for example, the right to vote again, and again and again. Conservative originalists don’t pay enough attention to the understanding of those later amendments, which are designed to make amends for some of the flaws of the original

the postbellum Constitution’s animating principles, its “North Stars,” if you will, that “form a more perfect union” and advance equality and liberty. Dennie’s inclusive constitutionalism seeks to redistribute public and judicial esteem to the Reconstruction Amendments’ purposes in reading and interpreting the Constitution to advance nondiscrimination and enforce equality—to be actively antiracist and emancipatory, as scholars believe it can be, and a “repudiation of a long history of racism,” as Eric Foner notes.¹²⁹ The Court has vindicated the Reconstruction Amendments’ purposes to advance racial equity in decisions like *Brown*, *Loving*, *Roe*, *Katzenbach*, and their progeny, and the Court can do so again. This Part explores Dennie’s arguments about originalism’s failures and inconsistencies by analyzing *Shelby*, *Dobbs*, and the Trump Census cases to expose originalism as a methodology that prioritizes outdated and exclusionary norms over democratic inclusion.

A. *Census*

Dennie asserts that the Constitution cannot be understood without acknowledging the purposive movement-influenced trajectory to define and expand who it provides for — “we the people,” and how to enumerate them every decade, whether by horse-riding U.S. Marshals or through advances in technology. Under the 1787 Constitution, “We the People” were largely property-owning white men, as women, Indigenous people, the enslaved, and everyone in between were not recognized as full citizens for the purpose of apportioning representation because of their subjugated positions in law and public life. The Three-Fifths Clause operated to count enslaved people in apportioning representation under a governance system that denied their humanity, as reflected in the reprehensible *Dred Scott* decision.¹³⁰ Undeniably, this decision reflected the animus of the Founders’ antidemocratic, racist compromise to secure Southern support for the Constitution. Dennie centers *Commerce v. New York*, in which plaintiffs successfully challenged the addition of a citizenship question to the Census, in telling an inclusive history that illuminates who “We the People” are and the dangers of allowing originalism to stymie an accurate count based on

document. And those amendments, to repeat, not only explicitly but implicitly modify the proper interpretation of earlier texts.

Id.

129. See generally Randall Kennedy, *Racist Litter*, LONDON REVIEW OF BOOKS (July 2020) (reviewing ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019)), <https://www.lrb.co.uk/the-paper/v42/n15/randall-kennedy/racist-litter> [<https://perma.cc/8UQ2-PZHW>].

130. *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1856) (enslaved party) (“We think [enslaved people] are not [constituent members of this sovereignty], and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution”), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

antiquated enumeration methods and dictionaries from 1773, as originalists would prefer.¹³¹

The Constitution requires that the Census count the “whole Number of free *Persons*,” not citizens.¹³² This endeavor has always been difficult, given its expansive nature. Because of this, the Census Bureau identifies “hard to count” communities that are historically undercounted based on demographic factors, access issues, and socioeconomic considerations that prevent individuals from participating and receiving the benefits that flow from Census participation. To accurately capture the number of persons in these communities and fulfill the promise of the Enumeration Clause, the Census Bureau, relying on the Congressional mandate in the Census Act, used statistical sampling to reduce and eliminate undercounts of hard-to-count communities.

In *Department of Commerce v. House of Representatives*, the Court held the Census Act’s text (never mind its intentions) prohibits the use of statistical sampling despite the method’s potential to improve the accuracy of the Census, particularly with regard to historically undercounted communities like Black, Indigenous, and Latino people.¹³³ Although the case was decided on statutory grounds, Dennie draws attention to it because Justice Scalia’s concurrence embarked on an originalist analysis exploring the constitutional question about sampling.¹³⁴

In his concurrence, Justice Scalia opined that the Constitution’s text and tradition precluded the Census Bureau, even with Congressional permission, from sampling to supplement undercounts literally because (1) three 1787 Dictionaries defined “enumeration” as an actual count, not estimation, (textualism) (2) the Census Acts of 1790 and 1800 required enumerators to visit every house in person, (history) and, (3) methods to supplement undercounts were not utilized in and around 1787 (tradition).¹³⁵ This type of originalism is, as the dissenting opinion notes, “absurd.”¹³⁶ Instead of valuing pragmatism and deferring to Congress’s intent, originalism relies on centuries-old definitions and notions of “enumeration” to constrain the

131. 139 S. Ct. 2551, 2575–76 (2019); DENNIE, *supra* note 1, at 161.

132. U.S. CONST. Art. I § 2, cl. 3 (emphasis added).

133. 525 U.S. 316, 334 (1999); *see id.* at 354 (Breyer, J., dissenting in part) (emphasizing that statistical sampling would improve accuracy “not only among minority but also among majority populations,” and “any special emphasis the Census Bureau might place on including racial and ethnic minority neighborhoods . . . would be justified . . . to ensure proper counts among groups that history shows have been undercounted”).

134. *See id.* at 346 (Scalia, J., concurring) (finding that it is “unquestionably doubtful whether the constitutional requirement of an “actual Enumeration,” is satisfied by statistical sampling” for reasons of text and tradition).

135. *Id.* at 347–48.

136. DENNIE, *supra* note 1, at 180, quoting *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316, 362 (1999) (Stevens, J., dissenting).

government's power to properly apportion resources and representation in a democratic system. In this way, originalism is antidemocratic.

Dennie also reminds us of the antidemocratic and results-oriented nature of originalist arguments used to justify the Trump Administration's desire to add a citizenship question to the Census questionnaire despite the Constitution's command that the Census count every person, not citizen. In attempting to find a legal rationale, the Administration reasoned that history and text indicate the Founders intended apportionment to be based on inhabitants with legal domicile and status, meaning citizenship. When proposing this argument to higher-ups in the Administration, the author voiced concern that his line of reasoning risked "sugar-coating" the Constitutional history.¹³⁷ However, to originalists, despite the text, the argument is as simple as: "people in the seventeenth century thought apportionment was just for citizens entitled to participate in the electoral process, and so we should too."¹³⁸ That, Dennie argues, is how originalism quite literally seeks to undermine multiracial democracy.

B. *Voting Rights Act*

Dennie argues originalism stymies progress toward equal political representation, torpedoes stare decisis, and operates to actively undermine multiracial democracy, despite Congress' 2006 judgment that the Voting Rights Act of 1965 (VRA) should remain law until 2036 given voter suppression's overwhelming and hegemonic nature. Dennie situates her critique of the Court's democracy docket in the context of post-Obama racial resentment, the January 6 insurrection, and international expert judgments that U.S. democracy is "backsliding."¹³⁹ In her third chapter, "Stealing Our Elections," Dennie centers *Shelby County v. Holder* as a prime example, where the Court struck down the Voting Rights Act's preclearance formula using the judicially invented "equal sovereignty" principle rejected by prior precedents.¹⁴⁰ Dennie critiques *Shelby* and other democracy decisions in noting originalism's absence as a modality of interpretation, ignoring the Reconstruction Amendments' race-conscious origins, overriding Congress's bipartisan judgments based on factual findings, and inventing new constitutional doctrine to justify diluting one of the most effective laws in the country's history.

Dennie understands *Northwest Austin v. Holder* as the harbinger signaling a constitutional challenge to the VRA's preclearance regime,

137. DENNIE, *supra* note 1, at 166.

138. *Id.* at 167.

139. *Id.* at 104–06.

140. *Id.* at 106–08; *see generally* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016) (arguing that the equal sovereignty principle is a justifying mechanism for arbitrary court decisions about federalism upholding conservative power).

centers *Shelby* as the dam that opened the floodgates to effectively nullify the VRA's most powerful provision, and critiques *Brnovich v. DNC* as an extratextual and (un)originalist interpretation of the Fifteenth Amendment and Section 2. In doing so, Dennie makes plain the Court's results-oriented, selective, and inconsistent application of originalism in policing access to democracy for historically subjugated groups.¹⁴¹

To Dennie, *Shelby* was not a surprise given Justice Roberts' ascension to the Court after lobbying against the Voting Rights Act's reauthorization as an attorney in President Reagan's Department of Justice, Justice Alito's participation in "Operation Eagle Eye," in which he asked voters for proof of citizenship outside of polling places in Arizona, and Justice Thomas' general antipathy for the Voting Rights Act as documented in *Holder v. Hall*.¹⁴² To some, including Dennie, *Northwest Austin* was an easter egg in that the Court, for the first time in the statute's existence since 1965, questioned its constitutionality by citing a relatively novel "equal sovereignty principle," requiring that Congress identify the compelling purpose justifying treating states disparately through a narrowly tailored statute that would undergo strict-scrutiny-style analysis.¹⁴³

In keeping with Dennie's commitment to situate constitutional law in political and historical contexts, she emphasizes that after forty-four years of successful existence and the election of the country's first Black president, the Court, for the first time, questioned the VRA's constitutional propriety using a principle previously invoked to hold Black people could not be citizens in *Dred Scott v. Sanford*, and rejected by the Court forty-three years prior in *South Carolina v. Katzenbach*.¹⁴⁴ This, she argues, laid the

141. See DENNIE, *supra* note 1, at 106 ("The selective invocation underscores that originalism is just a tool used when convenient and that we can choose to decide cases another way.")

142. See generally Maureen Edobor, *Brnovich: Extratextual Textualism*, 26 U. PA. J. CON. L. 1495 (2024) (critiquing the Court's Voting Rights Act jurisprudence in reference to the Fifteenth Amendment's ratifying history and the Justices' political engagement with its effectuation); *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring) (arguing Congress "devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success. In doing so, we have collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation.")

143. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). Here, the Court states:

Distinctions can be justified in some cases. "The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared." But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets. These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another.

Id.

144. DENNIE, *supra* note 1, at 109–10; *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *S.C. v. Katzenbach*, 383 U.S. 301 (1966).

groundwork for *Shelby*, holding the VRA’s preclearance formula an unconstitutional exercise of Congress’ remedial power under the Reconstruction Amendments and a violation of the Tenth Amendment’s alleged “equal sovereignty principle.”¹⁴⁵ Dennie critiques *Shelby* in its abandonment of nearly five decades of precedent. But, more importantly, she draws attention to what the opinion excludes—originalist reasoning—indicating the haphazard nature of its application to reach what she considers a pre-ordained result.¹⁴⁶

In centering *Shelby* as the apotheosis of a *political* brand of originalism, passage, Dennie critiques the decision on three grounds. One, the decision ignores the Fifteenth and Fourteenth Amendment’s historical context and original public meaning, which Justice Ketanji Brown Jackson later articulated in her first democracy case on the Supreme Court:

It [is] clear . . . that the Framers themselves adopted the Equal Protection Clause, the Fourteenth Amendment, the Fifteenth Amendment, in a race-conscious way. That they were, in fact, trying to ensure that people who had been discriminated against, the [F]reedmen [during the] Reconstruction period were actually brought equal to everyone else in the society.”¹⁴⁷

Two, the *Shelby* Court substituted its own policy judgments on the nature of racial discrimination in voting for that of Congress, violating the separation of principles and opening the door to a hegemonic state of voter suppression as a normative baseline.¹⁴⁸ And three, originalists on the Court essentially made up a new doctrine, the equal sovereignty principle, to justify ignoring Reconstruction-era history and the policy judgment of five Congresses to place more power in “we the states” rather than “We the People” entrenching democratic inequalities.¹⁴⁹ In Dennie’s words, the Court “concluded that the federal government must sanction Black inequality in order for states to be equal under law,” just as they did in *Dred Scott*.¹⁵⁰

Even if the Court’s evisceration of preclearance based on congruence and proportionality and the equal sovereignty principle were accepted as constitutionally legitimate, Justice Scalia’s questioning during *Shelby*’s oral argument casts more doubt about the decision’s claim to political or judicial

145. DENNIE, *supra* note 1, at 113,115.

146. See generally Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016) (“The principle of equal sovereignty, as initially articulated by courts and subsequently explained by *Shelby County*, is an invented tradition that courts have used to justify independent determinations about federalism.”)

147. DENNIE, *supra* note 1, at 117; Transcript of Oral Argument at 58, *Allen v. Milligan*, 599 U.S. 1 (2023) (No. 21-1086), slip op.

148. DENNIE, *supra* note 1, at 118.

149. *Id.* at 117.

150. *Id.* at 109–10.

neutrality, as he certainly says the “quiet part out loud”: “I think [the VRA’s bipartisan and unanimous reauthorization] is attributable, to a phenomenon that is called perpetuation of racial entitlement. It’s been written about. Whenever a society adopts a racial entitlement, it is very difficult to get out of them through the normal political process.”¹⁵¹ Essentially Scalia counsels that it is the judiciary’s constitutional role to “take one for the team” and hold part of a law unconstitutional because Congress cannot change it for itself without facing political backlash?¹⁵² It is unclear where one finds text in Article III to justify this perspective.

While striking down the most powerful provision of a superstatute, Chief Justice Roberts noted that Section 2 of the VRA could cure the ills preclearance contemplated because it is “permanent” and “applies nationwide” to any denial or abridgement of the right to vote based on race.¹⁵³ However, eight years later, in *Brnovich v. DNC*, the Court dealt the VRA another blow, significantly weakening Section 2, representing what Duncan Hosie terms a “stealth reversal,” substantively overturning a precedent or eroding the effectiveness of a law without acknowledging doing so.¹⁵⁴

In *Brnovich*, the Court effectively nullified Section 2 by erecting ultra vires legal standards and “guideposts” to evaluate voting qualifications, prerequisites, standards, practices, and procedures that were intended to, and do have a disparate impact and discriminatory effect on VRA protected classes.¹⁵⁵ The Court’s newly created “guideposts” were not based on the rich legislative history of the Fifteenth Amendment or Voting Rights Act and its five subsequent bipartisan reauthorizations through 2006 or properly applied canons of statutory interpretation. Instead, these “guideposts” are judicially fabricated to end the so-called “racial entitlement” the Act purportedly creates, bearing little resemblance to the Fifteenth Amendment’s original racial equity purpose and the Court’s prior legal precedents, while failing to invoke originalist reasoning.¹⁵⁶

C. Dobbs

Roe v. Wade was not just a judicial milestone; it was a product of social and political movements—a triumph of inclusive constitutionalism and

151. Transcript of Oral Argument at 47, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

152. *Id.*

153. *Shelby Cnty. v. Holder*, 570 U.S. 529, 537 (2013).

154. See generally Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 58 U.C. DAVIS. L. REV. 1323 (2025) (arguing that the Roberts Court has relied on this mechanism of jurisprudential change to bolster its short-term institutional efficacy while pursuing unpopular doctrinal shifts).

155. See Edobor, *supra* note 142, at 1498 (analyzing the *Brnovich* decision).

156. *Id.*

democratic expansion. For nearly half a century, *Roe* secured what seemed like an irrevocable liberty: the right to make deeply personal decisions about marriage, procreation, family, and bodily autonomy. These rights enabled fuller participation in the democratic process and affirmed that privacy and personhood were not privileges reserved for a few. But in *Dobbs v. Jackson Women's Health Organization*, the Supreme Court reversed course.¹⁵⁷ Applying an originalist framework, the majority held that the right to abortion was not “deeply rooted in this nation’s history and tradition,” despite ample evidence to the contrary.¹⁵⁸ In her assessment of *Dobbs*, Dennie makes plain that words, and the interpretation thereof, are how the law constrains or expands government power, subverts equality, and undermines constitutional liberty and the power of social movements, particularly the women’s rights movement of the 1960s.¹⁵⁹

Dennie counters the *Dobbs* majority’s historical narrative by reclaiming a broader, often-erased history of reproductive autonomy.¹⁶⁰ Long before legislatures sought to regulate abortion, people—especially Black women under slavery—sought to control their reproductive lives. Enslaved women, often subjected to sexual violence, induced abortions with herbal remedies and passed these practices down through midwifery networks.¹⁶¹ This lived history is not only older than most legislative prohibitions but is intertwined with the Reconstruction Amendments’ explicit goal of eradicating the “badges and incidents” of slavery, including forced pregnancy and family separation.¹⁶² As Representative John Creswell put it, the enslaved “could not say . . . my wife, my child, my body”—rights that the Reconstruction Congress aimed to restore for the formerly enslaved and courts expanded for women.¹⁶³

Dobbs, Dennie argues, ignores this emancipatory constitutional tradition. By interpreting the Fourteenth Amendment through the lens of a society that did not recognize women as legal persons, the Court made a political decision, not a neutral constitutional one. The majority cloaked its value judgments in the language of originalism, but the outcome reflects a deliberate choice to privilege historical exclusion over present-day equality.

157. 142 S. Ct. 2228 (2022).

158. *Id.* at 2242.

159. DENNIE, *supra* note 1, at 87–89.

160. DENNIE, *supra* note 1, at 88.

161. *Id.*

162. *Id.* at 89.

163. Cong. Globe, 38th Cong., 2d Sess. 120 (1865).

The slave could sustain none of those relations which gave life all its charms. He could not say my home, my father, my mother, my wife, my child, my body. It is for God to say whether he could say my soul. The law pronounced him a chattel, and these are not the rights or the attributes of chattels.

In doing so, *Dobbs* reveals originalism's core flaw: its reliance on a past that denied full citizenship to many in order to limit rights in the present.

Dennie concludes that interpreting the Constitution based solely on the Framers' intent or "original public meaning" inherently narrows who is included in constitutional discourse. It excludes "We the People" in favor of the few white, male property holders who were considered citizens in 1787. *Dobbs* and similar decisions illustrate the danger of this approach: it renders fundamental rights contingent on outdated social norms and undermines the democratic project promised by the Reconstruction Amendments. For Dennie, inclusive constitutionalism offers a better path—one that honors the Constitution's potential to grow with the people it governs, embracing social movements for greater liberty and equality.

V. Inclusive Constitutionalism

Justice Antonin Scalia once conceded that while originalism is "not perfect," it is preferable to any alternative.¹⁶⁴ Dennie strongly disagrees, characterizing originalism not as an honest interpretive method, but as a tool used by the conservative legal movement to "steal the Constitution."¹⁶⁵ In its place, she offers inclusive constitutionalism—a framework that disentangles constitutional interpretation from originalism and reorients it toward the Reconstruction Amendments' transformative commitments to racial justice, equality, and liberty. Unlike originalism, which fixates on original meaning, practice, and tradition in 1787 or 1865, inclusive constitutionalism embraces the role of social movements, evolving democratic values, and lived experience in shaping the Constitution's meaning.¹⁶⁶ Congress once interpreted the Constitution for itself. Dennie reminds us that Presidents, too, have refused to enforce Supreme Court rulings they viewed as unjust for better or worse.¹⁶⁷ History confirms that the people—through protest, politics, and participation—have been the engine of constitutional change, from enfranchisement amendments to desegregation; inclusive constitutionalism centers this.¹⁶⁸

164. Mary Wood, *Scalia Defends Originalism as Best Methodology for Judging Law*, UNIV. OF VA. SCH. OF LAW (Apr. 20, 2010), <https://www.law.virginia.edu/news/201004/scalia-defends-originalism-best-methodology-judging-law> [<https://perma.cc/83LH-DXUB>].

165. DENNIE, *supra* note 1, at 42, 184.

166. *Id.* at 38.

167. *Id.* at 186–87.

168. See Eric Foner, *The Most Patriotic Act*, THE NATION (Sep. 20, 2001), <https://www.ericfoner.com/articles/092001nation.html> [<https://perma.cc/2NTQ-XQPH>] (defining civil liberties as inheritances "of a long history of struggles: by abolitionists for the ability to hold meetings and publish their views in the face of mob violence; by labor leaders for the power to organize unions . . . ; by feminists for the right to disseminate birth-control information without violating the obscenity laws").

Dennie's theory is rooted in a populist constitutional tradition that insists interpretation belongs not just to courts, but to the people. In her final chapter, "Taking It All Back," she envisions inclusive constitutionalism as an interpretive method that centers marginalized communities and weighs the law's impact on political, economic, and social participation.¹⁶⁹ Echoing Justice Thurgood Marshall's reflections on the Constitution's bicentennial, Dennie argues that the Reconstruction Amendments created a new constitutional order—one not yet fully realized because of the Court's countermajoritarian tendencies.¹⁷⁰ Her approach is grounded in movement-driven legal change: that rights are not bestowed from on high, but claimed and legitimized by communities demanding justice.¹⁷¹ Indeed, it was public outrage after *Dred Scott* that helped spark the Civil War and gave rise to the Reconstruction Amendments. In our own time, the backlash to *Dobbs v. Jackson Women's Health Organization*—including ballot measures enshrining abortion rights in state constitutions—demonstrates Dennie's point: people, not judges, are the true custodians of constitutional meaning.¹⁷²

Movements have always forced or played decisive roles in facilitating equitable constitutional change without a constitutional amendment directly on point. For example, in 1956, the Court held segregated busing unconstitutional; in 2003, the Court held the criminalization of same-sex intimacy unconstitutional; and in 2015, the Court found a fundamental right to same-sex marriage, all arising from the Fourteenth Amendment's text, which has remained static since its ratification in 1868.¹⁷³ All these decisions were made because mass movements "transformed the legal terrain by putting [their] constitutional vision into practice."¹⁷⁴ In other words, these decisions could not come to pass without democratic action that demanded evolving definitions of the right to privacy and equality largely accepted by the public and established as the hegemonic constitutional norm.

Considering the unsettling lesson of the 2024 presidential result, Dennie's movement-centered account forces a darker follow-up question: what if a democratically energized majority—acting through apparently constitutional processes and electoral mandates—chooses to displace precedents that earlier social movements had made functionally stable? That question is not merely hypothetical. As Kim Lane Scheppelle has argued, "autocratic legalists" exploit precisely the marriage of electoral legitimacy and legal form: they use votes to drive legal reforms that hollow out checks,

169. DENNIE, *supra* note 1, at 187–88.

170. *Id.* at 37–39.

171. *Id.* at 195–96.

172. 597 U.S. 215 (2022).

173. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Lawrence v. Texas* 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

174. DENNIE, *supra* note 1, at 189.

disable accountability, and cloak illiberal ends in the language of law, so that the autocratic design appears—at least on its face—to be ordinary constitutional change enabled by “the people.”¹⁷⁵

This phenomenon, autocratic legalism, sits squarely in the same family as competitive authoritarianism: regimes that preserve the trappings of democracy while systematically biasing institutions to foreclose meaningful opposition and judicial review.¹⁷⁶ Read through this lens, social movements are double-edged instruments: they can build consensus and expand rights, but they can also be the vehicle by which a mobilized majority effectuates durable, legally sanctioned retrenchment precisely because law and elections together can furnish a plausible, durable veneer of constitutional legitimacy.

That danger is magnified when judges begin to speak the language of populism. Judicial populism, scholarship shows, borrows the rhetoric and epistemology of political populism: it insists on singular “correct” answers to messy, plural, and contestable questions, disparages compromise and institutional give-and-take, and casts judicial work as the discovery of an unambiguous, one-true-meaning rather than the adjudication of competing public claims.¹⁷⁷ When judicial populism dovetails with movement-engineered originalism, the result is institutional capture: method becomes a talisman, the judge’s ostensible fidelity to “the text” masks active policy choices, and legal reasoning is repackaged as technical necessity rather than contested politics. That is how democratic form becomes a functional shield for illiberal ends; how a court’s claim to be “methodically right” makes it easier for majoritarian energies to convert electoral wins into lasting limits on dissent, rights, and the checks that make democracy resilient.

In recognizing how rapidly constitutional norms can change and disorient the legal system and citizens’ expectations and reliance interests, Dennie concedes that movements can also change the Constitution’s meaning for the worse, perpetually “steer[ing] us toward collective justice or jeopardy.”¹⁷⁸ In centering democratic social movements as integral to constitutional change, Dennie also recognizes the necessity of sustaining multifaceted and multifield efforts through electoral politics and the substance of those campaigns to fortify and legitimize lasting social change through the Court.¹⁷⁹

To illustrate her argument, Dennie revisits the dramatic reversal between *Minersville School District v. Gobitis* and *West Virginia v. Barnette*

175. Kim L. Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 568–69 (2018).

176. STEVEN LEVITSKY & LUCIAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 6–7 (2010).

177. Anya Bernstein and Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 284 (2021).

178. DENNIE, *supra* note 1, at 40.

179. *Id.* at 196.

where the Court first upheld, then struck down, mandatory flag salutes in public schools.¹⁸⁰ In *Gobitis*, the Court constitutionalized compelled nationalism, dismissing First Amendment free exercise concerns that led to widespread violence against Jehovah's Witnesses whose religion forbade saluting any flag as a form of idolatry.¹⁸¹ Outrage followed: journalists condemned the ruling, legal scholars critiqued it, public opinion turned, and President Roosevelt refused to endorse it.¹⁸² Just three years later, the Court reversed itself in *Barnette*, citing legal scholarship and real-world harms.¹⁸³ This shift exemplifies Dennie's point: constitutional meaning is not immutable, and the Court is not above the people—it reacts to them.

Dennie's vision is not about surrendering interpretation to the whims of the majority, but about grounding constitutional meaning in the Constitution's animating values—especially the Reconstruction Amendments—and recognizing that courts must consider history, precedent, and practical realities. *United States v. Carolene Products*'s famous footnote signaled this duty by requiring heightened scrutiny of laws that burden marginalized groups.¹⁸⁴ Inclusive constitutionalism builds on this, demanding that courts not retreat into the faux formalism of originalism, but reckon with the Constitution's emancipatory potential. Ultimately, Dennie argues that real constitutional change requires more than judicial reasoning. It requires people pushing their claims in multiple forums, asserting alternative interpretations, and compelling institutions to respond through collective action.¹⁸⁵

180. 310 U.S. 586 (1940); 319 U.S. 624 (1943).

181. See generally 310 U.S. 586 (1940); see also DENNIE, *supra* note 1, at 190–92 (explaining “the Court’s ruling precipitated a sharp increase in violence against Jehovah’s Witnesses. The ACLU documented attacks against nearly 1,500 adherents to the faith in 355 separate instances across 44 states in 1940.”).

182. Dennie, *supra* note 1, at 192–93.

183. See generally 319 U.S. 624 (1943); see also DENNIE, *supra* note 1, at 194–95:

[S]ome legal scholars contend that credit for the decision really belongs to ‘those who refused to accept the Court’s 1940 pronouncements on the meaning of the Constitution, minority rights, and religious liberty.’ There is evidence for this assessment in the opinion itself. The decision cites several law journal articles that were written by people who weren’t Jehovah’s Witnesses and nonetheless opposed *Gobitis*.”

184. 304 U.S. 144, 152 n.4 (1938) (“[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

185. DENNIE, *supra* note 1, at 218.

Conclusion

The Originalism Trap is a book for everyone—and it should be required reading for anyone trying to make sense of the seismic shifts in constitutional law on democracy, guns, and reproductive rights, even as the Constitution’s text has remained unchanged. Dennie’s sweeping and incisive defense of substantive due process raises a fundamental question: what better reflects democratic legitimacy—judicial doctrine shaped through decades of engagement between advocates, communities, judges, and lawmakers, or a narrow search through centuries-old texts for fragmented glimpses of “original public meaning” drawn from eras that excluded most people from citizenship, personhood, and power? Dennie forcefully answers: the former. *The Originalism Trap* insists that constitutional meaning belongs not just to courts or to the Framers, but to the people—and that reclaiming that authority is essential to any vision of a truly inclusive democracy.