ORIGINALISM AND THE DEMOCRATIC PROCESS: MAJORITARIAN ARGUMENTS IN THE CASE LAW OF THE US SUPREME COURT

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Summary

The paper explores the tension between originalism, the theory of constitutional interpretation which posits that the original meaning of constitutional provisions should be authoritative, and the counter-majoritarian elements that are deeply embedded in the US Constitution. This is done through analysis of selected case law of the US Supreme Court in which the originalist Justices decided to protect the democratic process as a superior constitutional value instead of protecting the minority whose rights were not secured in the fora based on majority rule. The analysed case law entails the three central decisions of abortion jurisprudence (Roe v. Wade, Planned Parenthood of Southeastern Pennsylvania v. Casey, and Dobbs v. Jackson Women's Health Organization), and the seminal decision which legalised same-sex marriage in the US (Obergefell v. Hodges). The analysis shows that the Justices who applied originalist methodology and decided to leave the rights of the minority to the mercy of the majority were not neutral and faithful to the constitutional text as they claimed, but rather made value choices which revealed majoritarian vision of democracy under originalism.

Keywords: *originalism; constitutional interpretation; democracy; abortion; same-sex marriage.*

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1 INTRODUCTION

Originalism is a theory in constitutional law of the United States of America (US) which posits that constitutional interpretation should aim to decipher the authoritative original meaning of constitutional provisions.[1] Originalists claim that their approach of uncovering the original public meaning[2] of constitutional provisions is normatively desirable since it allows judges to decide constitutional disputes in a value-neutral manner.[3] *A contrario*, evolution of the meaning of constitutional provisions via judicial interpretations is seen as inappropriate value imposition.[4]

This contribution aims to demonstrate that there is an inherent tension between originalism and counter-majoritarian elements that are deeply embedded in the fabric of the US Constitution.[5] Specifically, it will be argued that originalism boosts a majoritarian conception of democracy which marginalizes judicial protection of minority rights.[6] Moreover, it will be shown that the proclaimed neutrality of originalism is only illusory, and that originalist methodology can be understood as a rhetorical tool which hides "political practice"[7] - one that is inimical to judicial interpretations that aim to rebalance the power in society in order to protect minorities.

The second section will elaborate the theoretical framework of the following case law analysis to explain how conceptual underpinnings of originalism distort the constitutional promise of minority protection and inevitably weaken the functioning of the system of checks and balances. The remaining part of the article analyses selected case law of the Supreme Court of the United States (Supreme Court) which encompasses disputes about rights and liberties of minorities which could not have been safeguarded in the democratic process.[8] The first case law study analyses the

1 See Keith E. Whittington, "Originalism: A Critical Introduction," *Fordham Law Review* 82, no. 2 (2013): 375-409. For a competing theory that accepts constitutional evolution by judicial interpretations, see David A. Strauss, *The Living Constitution* (New York: Oxford University Press, 2010).

2 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law: An Essay* (Princeton: Princeton University Press, 1997), 37-38.

3 Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47, no. 1 (1971): 1-35.

4 Bork, "Neutral Principles," 9-10; Scalia, *A Matter of Interpretation*, 38-39.

5 See, *inter alia*, Alexander Hamilton, "The Federalist no. 78," in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* (London: Penguin Books, 1987), 436-442; Erwin Chemerinsky, "Foreword: The Vanishing Constitution," *Harvard Law Review* 103, no. 1 (1989): 43-104; Ronald Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," *Fordham Law Review* 65, no. 4 (1997): 1263 *et seq*.

6 Chemerinsky described and criticised the "majoritarian paradigm", i.e. the idea that majority rule is the central tenet of the US Constitution that trumps counter-majoritarian mechanisms (most notably, judicial review) which express the need for upholding equality and individual liberty. Chemerinsky, "Foreword", 74 *et seq*. For a similar account of the relationship between originalism and majoritarianism, see Dworkin, "The Arduous Virtue of Fidelity," 1263 *et seq*.

7 Robert Post, and Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," *Fordham Law Review* 75, no. 2 (2006): 545-574.

8 The terms democratic process and political process are used interchangeably to denote the decision-making process in institutions essentially based on majority rule.

"U-turn" jurisprudence of abortion rights - from its almost half a century long federal protection, which started in 1973, to its overruling in 2022, while the second case law study focuses on the issue of same-sex marriage.

The analysis will showcase that Justices who applied originalism endorsed a value choice - one that did not protect the minority in the constitutional dispute - and concealed it with arguments of respect for political process and democracy.[9] These findings indicate that originalism is neither value-neutral nor faithful to the constitutional text. On the contrary, the value choices endorsed by Justices who applied originalism reveal a deeply misguided, majoritarian conception of democracy under originalism.

2 PRESERVING STABILITY OF MEANING V. ACCEPTING JUDICIAL (RE)BALANCING OF POWER: TWO DIVERGENT CONCEPTIONS OF THE COUNTER-MAJORITARIAN ESSENCE OF THE CONSTITUTION[10]

Originalism is a theory of constitutional interpretation that requires interpreter's fidelity to "original public meaning" which constitutional provisions apparently had in the time of their adoption.[11] "Original public meaning" as an interpretive construct is based on the methodological concept of "fixed meaning" which should preserve the essence of the Constitution, i.e. its insulation from majoritarian decision-making, by preventing judicially imposed "constitutional amendments" that respond to the will of the majority.[12] Reliance on the concept of "fixed meaning" rejects the basic premise of the competing theory of living constitutionalism, namely the necessity of evolution of constitutional meaning by judicial interpretations in present-day circumstances.[13] In words of Justice Scalia, "[i]f the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that."[14] Therefore, adherence to fixed meaning in constitutional interpretation is understood as a guarantee that judges would not distort the counter-majoritarian purpose of the Constitution and interpret it in line with the will of present-day majorities. Originalist critique of living constitutionalism rests on a premise that the Constitution would lose its counter-majoritarian essence if judges, as

9 For further discussion on hidden value choices in originalist reasoning, see Erwin Chemerinsky, *Worse Than Nothing: The Dangerous Fallacy of Originalism* (New Haven and London: Yale University Press, 2022), 179-181.

10 This theoretical section is based on Niko Jarak's article "A Counter-Majoritarian Critique of Originalism" that has been accepted for publication in *Zagrebačka pravna revija* 13, no. 2 (2024). The section briefly summarizes the main points that are developed in that article, using it as a theoretical framework of case law analysis that follows.

11 Whittington, "Originalism," 380. For the Bill of Rights (the first 10 amendments to the US Constitution) the main point of reference is the year 1791.

12 Scalia, *A Matter of Interpretation*, 46-47.

13 Erwin Chemerinsky, *Interpreting the Constitution* (New York: Praeger, 1987), 45 *et seq.*; Chemerinsky, *Worse Than Nothing*, 14 *et seq*.

14 Scalia, *A Matter of Interpretation*, 47.

officials that lack democratic legitimacy, interpreted it in line with understanding of current political majorities.[15]

The described disagreement reveals two divergent models of implementing counter-majoritarian essence of the Constitution in constitutional interpretation.

According to Scalia's originalist model, constitutional interpretation ought to protect the integrity of constitutional text (and its meaning) from mutations by means of judicial interpretation.[16] The meaning of constitutional provisions is fixed once adopted and its counter-majoritarian core lies in the fact that it can be amended only by a supermajority, and not by ordinary legislative majorities. Consequently, the judiciary should be faithful to the original, fixed meaning, in order not to alter the meaning of the Constitution in line with the will of the current majority *outside of the amendment process*. This conception is *purely procedural* because it is based on the procedural requirement of supermajority in the amendment process[17] and ignores the substantive values of protecting societal minorities from the "mischiefs of [majority] faction"[18] which openly require judges to rebalance power in the society. Instead, originalism asks judges as authoritative interpreters[19] of the Constitution to be constrained by the consensus of historical majorities[20] which is understood as the only legitimate interpretation. Furthermore, originalists use the interpretive tool of "constitutional silence" which posits that judges should defer to the legislature in situations which are not explicitly regulated by the Constitution.[21] Originalists understand this deference as an expression of neutrality,[22] notwithstanding all possible fatal repercussions for rights of minorities.[23] Combining the fidelity to historical majoritarian consensus and deference to current majorities, originalism reinforces the idea that majority-rule is the cornerstone of American democracy and "a value superior to other values."[24] This view which boosts majority-rule and conceptualizes judicial review as "suspect"[25] because it is counter-majoritarian is known as "majoritarian paradigm,"[26] or, in Dworkin's words, "the majoritarian premise."[27] The

15 Scalia, *A Matter of Interpretation*, 46-47.
16 Scalia, *A Matter of Interpretation*, 47.
17 Article V of the US Constitution.
18 James Madison, "The Federalist no. 10," in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* (London: Penguin Books, 1987), 126.
19 See Chemerinsky, *Interpreting the Constitution*, 86-105.
20 Chemerinsky, *Worse Than Nothing*, 78. Construction of original public meaning depends on how the majorities in certain historical periods understood certain constitutional provisions.
21 Catherine L. Langford, *Scalia v. Scalia: Opportunistic Textualism in Constitutional Interpretation* (Tuscaloosa: The University of Alabama Press, 2017), 101; Bork, "Neutral Principles," 10.
22 Bork, "Neutral Principles," 10.
23 Chemerinsky, *Worse Than Nothing*, 92-114.
24 Chemerinsky, "Foreword," 75.
25 Chemerinsky, "Foreword," 75.
26 Chemerinsky, "Foreword," 74-75.
27 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996), 15-16.

theoretical root of this idea can be traced back[28] to Bickel's "counter-majoritarian difficulty" which describes judicial review as a "deviant institution in American democracy" because it contravenes majority-rule.[29] "[E]quat[ing] democracy with simple majoritarianism" and understanding judicial review as a deviant institution fosters a "myopic" conception of democracy because "a true democracy demands institutions that stand somewhat apart from majoritarian politics - including, crucially, independent courts that may serve as a check on majoritarianism."[30] Originalism insists on adherence to majoritarian consensus as a constraint on judicial interpretation and thereby fosters this type of "myopic,"[31] majoritarian democracy.[32] Therefore, Scalia's argument according to which living constitutionalism would lead to majoritarian interpretations of the Constitution does not seem so convincing. On the contrary, it is the theory of originalism that denigrates the judiciary into an institution that ought to be limited by majoritarian consensus, without capability to shape constitutional doctrine in line with its own understanding of law that is free of majoritarian constraints.

On the other hand, living constitutionalism proposes a different model of implementing substantive counter-majoritarian features of the Constitution which considers the complex interaction of different institutions of government in the framework of checks and balances. It takes into account the disbalance of power that characterizes decision-making processes in institutions that primarily cater to the will of the majority.[33] In this vein, judicial shaping of the meaning of open-textured and general constitutional provisions[34] that is responsive to societal context and power dynamics is a legitimate enterprise which heeds the constitutional requirement of protecting minority groups.[35] Judges are not constrained by majoritarian consensus, whether historical or present-day. Living constitutionalism sets the system of checks and balances in motion by emphasizing the counter-majoritarian role of the judiciary in institutional sense, allowing judges to define the meaning of constitutional provisions in a dialogue[36] with institutions primarily based on majority-rule. Originalism, emphasizing the protection of the stability of constitutional meaning throughout different time periods, twists the counter-majoritarian promise of the

28 Chemerinsky, "Foreword," 71.

29 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven and London: Yale University Press, 1986), 18.

30 Melissa Murray, and Katherine Shaw, "*Dobbs* and Democracy," *Harvard Law Review* 137, no. 3 (2024): 760, 762.

31 Murray, and Shaw, "*Dobbs* and Democracy," 760.

32 For example, Nelson Tebbe criticised the use of the concept of democracy in *Dobbs v. Jackson Women's Health Organization* as an argument to overrule *Roe v. Wade*, arguing that "democratic societies are characterized not by majoritarianism, but by *political equality*" as an essential trait of an "egalitarian system of government." Nelson Tebbe, "Does *Dobbs* Reinforce Democracy?" *Iowa Law Review* 108, no. 5 (2023): 2366, 2379.

33 See Chemerinsky, *Interpreting the Constitution*, 27-36.

34 Chemerinsky, *Worse Than Nothing,* 181-184.

35 Chemerinsky, *Worse Than Nothing*, 166 *et seq*. See also Strauss, *The Living Constitution*.

36 Ruth Bader Ginsburg, "Speaking in a Judicial Voice," *New York University Law Review* 67, no. 6 (1992): 1198.

Constitution into a mere procedural requirement (of supermajority in the amendment process) and transforms it into deference to political majorities. From the perspective of living constitutionalism, the process of adopting constitutional amendments and altering the Constitution's meaning via supermajorities *complements* the evolution of the meaning of constitutional provisions in adjudication.[37] This interplay of both (super)majoritarian and counter-majoritarian inputs in defining the meaning of the Constitution is what accounts for an efficient system of constitutional checks and balances - it provides for a just balancing of competing interests of minorities and majorities in a society.[38]

These theoretical conceptions underpinning the *nexus* between originalism and majoritarianism are used as a framework for the following case law analyses. The cases which are analysed show that originalists, both in the majority and as dissenters, refused to protect (fundamental) rights of minorities in the name of "neutrality" and deference to the democratic process, leading to elevation of the majoritarian conception of democracy and debilitation of the counter-majoritarian role of the judiciary. Originalism denies the legitimacy of judicial "creation"[39] of the meaning of constitutional provisions contrary to the will of political majorities which seriously weakens the system of checks and balances. Under originalism, the judiciary as the main institutional counter-majoritarian force is obliged to follow the (historical) majoritarian consensus and is therefore subordinated to majority-rule. Instead of coordinating majoritarian decision-making and judicial protection of minorities as equally valuable institutional avenues, and enabling both judges and other actors in primarily majoritarian institutions to define the meaning of constitutional provisions, originalism elevates majoritarianism as the superior value.

3 THE ABORTION TRILOGY AND CONSTRUCTION OF RIGHTS: REWRITING OR RECALIBRATING THE CONSTITUTION?

The issue of striking a balance between the right of a woman to terminate a pregnancy and the authority of States to regulate abortion first came before the Supreme Court in 1973 in *Roe v. Wade*[40] (hereinafter: *Roe*). The Supreme Court relied on the right to privacy established in *Griswold v. Connecticut*[41] (hereinafter: *Griswold*) and decided it included the right of a woman to undergo an abortion. Rather than in the penumbral reasoning[42] used in *Griswold*, the right to privacy in *Roe* was localized within the (substantive)[43] due process clause of the 14th

37 Chemerinsky, *Worse Than Nothing*, 112.
38 See Madison, "The Federalist no. 10"; Hamilton, "The Federalist no. 78".
39 Scalia, *A Matter of Interpretation*, 22.
40 *Roe v. Wade* 410 U.S. 113 (1973).
41 *Griswold v. Connecticut* 381 U.S. 479 (1965) is the decision in which the Supreme Court struck down as unconstitutional a law which criminalised purchase and use of contraceptives for married couples.
42 See Glenn H. Reynolds, "Penumbral Reasoning on the Right," *University of Pennsylvania Law Review* 140, no. 4 (1992): 1334-1337.
43 The theory of substantive due process holds that the notion of liberty in the 14th amendment's

amendment.[44] Consequently, the Supreme Court invalidated the Texas law which made abortion illegal in all circumstances except when life of the woman was threatened. Furthermore, the Supreme Court weighed the right of a woman against the interest of States to protect prenatal life which generated the central holding that States could not prohibit abortions before viability, i.e. before the point in time when a fetus could survive outside the womb.[45] The decision generated the trimester framework according to which States could regulate abortion only during the second and the third trimester - in the second trimester the States could regulate abortion procedures to protect woman's health, and in the third trimester States could ban abortion with exceptions to protect the life and health of the pregnant woman.[46] This framework was in force for almost 20 years. In the 1992 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*[47] (hereinafter: *Casey*), the Supreme Court had the opportunity to assess the issue of abortion once again through reviewing a Pennsylvania law which imposed certain restrictions on abortion.[48] The ruling upheld the central holding of *Roe* according to which the right of a woman to undergo an abortion is protected under the due process clause of the 14th amendment to the Constitution. However, the decision in *Casey* overruled the trimester framework and allowed the States to regulate abortion during the first trimester as long as the regulation did not impose an undue burden upon the woman's right to undergo an abortion.[49] The majority held that the requirement of spousal notification did impose an undue burden on the right of a woman to have an abortion.[50] The plurality opinion[51] written by Justices O'Connor, Souter and Kennedy (all nominated by

due process clause ("…nor shall any State deprive any person of life, liberty, or property, without due process of law") protects certain substantive rights, such as right to privacy. See "National Archives - The Constitution of the United States: A Transcription," accessed March 13, 2023, https://www.archives.gov/founding-docs/constitution-transcript.

44 Erwin Chemerinsky, "Substantive Due Process," *Touro Law Review* 15, no. 4 (1999): 1508.

45 The point of viability is between the 23rd and 24th week of pregnancy. See *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022), Opinion of the Court, 52 - slip opinion, https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

46 *Roe v. Wade* 410 U.S. 113 (1973), Opinion of the Court, 164-165.

47 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992).

48 These included the requirements that a woman should give her informed consent, abortion providers should provide the woman with specific information at least 24 hours before the procedure, parents should give informed consent for minors, the spouse of the married woman should be notified, and abortion providers should report certain information. See *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992), syllabus, 833.

49 A regulation poses an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* Opinion of the Court, 877. This standard of review replaced the strict scrutiny standard applied in *Roe v. Wade*. Under strict scrutiny, the State had to show that the regulation pursued a compelling governmental interest and was narrowly tailored to achieve that interest. See "Legal Information Institute - Strict Scrutiny," accessed March 10, 2023, https://www.law.cornell.edu/wex/strict_scrutiny.

50 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992), Opinion of the Court, 893.

51 A plurality opinion is a controlling opinion of the Court which no majority joined in full.

Republican presidents) thus confirmed "the essential holding" of *Roe*.[52]

Throughout the course of its existence as settled law, *Roe* had been attacked using the argument of legitimacy. In his dissenting opinion in *Roe*,[53] Justice White asserted that the majority invented the constitutional right to have an abortion without health indications out of the blue - it was not based on "the language or history of the Constitution" - and the holding disregarded the States' interest in protecting prenatal life.[54] Moreover, he labelled the decision in *Roe* as "an exercise of raw judicial power" that should have been "left with the people and to the political processes the people have devised to govern their affairs" due to controversies surrounding the issue of abortion.[55] Although Justice White was not a self-declared originalist since originalism had just started to emerge at the time *Roe* was decided, his argumentation would become the classic originalist formula in future cases.

In 1992 when *Casey* was decided, Justice Scalia and Justice Thomas, who both are self-declared originalists, took part in the decision. Justice Scalia dissented, joined by Chief Justice Rehnquist and justices White and Thomas. Scalia's dissent expanded the formula which Justice White used in his dissent in *Roe*. The core of the opinion holds that the question of regulating abortion is a divisive policy issue with a strong value component. Therefore, it should "be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[56] When "reasonable people disagree, government may take one position or the other."[57] Justice Scalia puts forth that the right to undergo an abortion is "a liberty in the absolute sense" but "the Constitution says absolutely nothing about it, and the longstanding traditions of American society have permitted it to be legally proscribed."[58] It follows that Justice Scalia embraces the concept of "constitutional silence" which disqualifies judicial protection of (controversial) unenumerated rights.[59] The test Justice Scalia finds relevant in examining whether the right to abortion is protected by the Constitution relates to exploring the wording of constitutional provisions and longstanding American traditions.[60] Moreover, the national traditions have to be taken "at the most specific level" as a form of restraint on judicial law-making - identifying the most specific traditions leaves less room for the Supreme Court to reflect upon what the Constitution should protect instead of

52 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992), Opinion of the Court, 846.
53 The opinion was published with the companion case *Doe v. Bolton* 410 U.S. 179 (1973).
54 *Doe v. Bolton* 410 U.S. 179 (White, J., dissenting), 221-222.
55 *Doe v. Bolton* 410 U.S. 179 (White, J., dissenting), 222.
56 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 979.
57 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 979.
58 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 980.
59 Langford, *Scalia v. Scalia*, 101.
60 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 980.

what it does protect.[61] Justice Scalia then concludes that neither the text nor specific traditions protect the right to abortion, so he would have upheld the Pennsylvania law under rational basis standard of review.[62]

The rest of Justice Scalia's attack on the plurality opinion could be divided in two segments for the purpose of this analysis. The first one concerns the attack on the "reasoned judgment" of the plurality opinion which endorses a value (i.e. political) choice in contrast to his "humble" and neutral methodology of recognizing specific traditions.[63] Considering the standard of undue burden, Justice Scalia found it both "manipulable" and "unworkable."[64] According to Justice Scalia, the plurality opinion adopted a value choice, and disguised it as "reasoned judgment."[65] Regarding the political controversy in question, the decision "elevat[ed] it to the national level where it is infinitely more difficult to resolve."[66] For Justice Scalia, the problem of abortion should not have been "resolved uniformly, at the national level."[67] Of course, invoking defence of federalism could be read as a "proxy" for defending conservative outcomes in States with traditionalist views on abortion.[68] For a vehement defender of federalism in terms of advocating for larger autonomy of States, Justice Scalia did not have a hard time abandoning the principle when it would *not* yield conservative outcomes.[69] However, the same argument could equally be made for justices who mostly hold liberal views and also invoke regulatory autonomy of States only when it is convenient.[70] For these reasons, the federalism argument does not seem convincing on its own without touching upon the substance of the case and accepting that balancing of constitutional values,[71] such as the right to bodily autonomy and

61 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 981. See Heather K. Gerken, "Larry and Lawrence," *Tulsa Law Review* 42, no. 4 (2007): 848-849.

62 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 981. Under rational basis standard of review, the challenger has to prove that there is no rational connection between the statute and a legitimate state interest. See "Legal Information Institute - Rational Basis Test," accessed March 13, 2023, https://www.law.cornell.edu/wex/rational_basis_test.

63 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 982, 997.

64 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 986.

65 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 983.

66 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 995.

67 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 995.

68 See Vanessa Baird, and Tonja Jacobi, "How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court," *Duke Law Journal* 59, no. 2 (2009): 211.

69 Jack M. Balkin, "*Bush v. Gore* and the Boundary Between Law and Politics," *The Yale Law Journal* 110, no. 8 (2001): 1442.

70 Balkin, "*Bush v. Gore*," 1442.

71 See Chemerinsky, "Foreword," 87 *et seq.*

the protection of prenatal life, is a legitimate exercise of constitutional adjudication. Justice Scalia explicitly rejected the idea of balancing due to its value dimension, describing the controlling "opinion [as a] verbal shell game [that conceals] raw judicial policy choices concerning what is 'appropriate' abortion legislation."[72] When the Supreme Court strikes down laws restricting access to abortion it is making a value judgment and a policy choice because it took a side in the debate. On the other hand, the Supreme Court is faithful to the Constitution if it leaves the issue to the will of the State legislatures. The false neutrality of originalism is evident because both judicial outcomes are necessarily value choices. Therefore, claiming that value balancing is appropriate only in fora of majority rule is not an adequate account of constitutional interpretation in these hard cases.[73]

The second line of criticism relates to the issue of Supreme Court's legitimacy and its public perception amid an ideological divide. The plurality opinion addressed the controversies surrounding the subject matter and stated that "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[74] Moreover, the plurality opinion openly grasped legitimacy concerns and admitted that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[75] Justice Scalia was not impressed - he exclaimed that "The Imperial Judiciary lives."[76] Instead of interpreting law, Justice Scalia thought the Supreme Court was trying to identify some form of social consensus to resolve a deep conflict.[77] The dissent even drew a deeply misguided parallel[78] between the theory of substantive due process used in *Roe* and the reasoning in the 1857 Supreme Court decision *Dred Scott v. Sandford*[79] (hereinafter: *Dred Scott*) which held that African Americans cannot become US citizens.[80] Considering that *Dred Scott* is widely regarded as "the" worst case ever decided by the Supreme Court,[81] the

72 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 987.

73 On constitutional interpretation in hard cases, see Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88, no. 6 (1975): 1057-1109.

74 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992), Opinion of the Court, 867.

75 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992), Opinion of the Court, 867.

76 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 996.

77 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 1000.

78 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) (Scalia, J., dissenting), 998.

79 *Dred Scott v. Sandford* 60 U.S. (19 How.) 393 (1857).

80 For a compelling criticism of this analogy, see Jamin B. Raskin, "*Roe v. Wade* and the *Dred Scott* Decision: Justice Scalia's Peculiar Analogy in *Planned Parenthood v. Casey*," *The American University Journal of Gender, Social Policy & the Law* 1, no. 1 (1992): 6-84.

81 See Richard A. Primus, "Canon, Anti-Canon, and Judicial Dissent," *Duke Law Journal* 48, no.

analogy is a powerful, but dishonest rhetorical tool. *Dred Scott* excluded a whole race from the protection of the US legal system, thereby reinforcing inequality and racial subordination. On the other hand, *Roe* was - if anything - inclusive, and it advanced women's equal citizenship[82] by extending constitutional protection to their fundamental, reproductive rights. For these reasons, comparing constitutional recalibration in *Roe* with constitutional apostasy in *Dred Scott* is profoundly erroneous.

Before proceeding with the analysis of the final part of "the abortion trilogy," it should be noted that *Roe* did have certain weaknesses. Justice Ginsburg's criticism of *Roe* pointed out two central problems. First, the reasoning in *Roe* would have been more convincing if it relied "on the women's equality dimension of the issue" instead of employing the right to privacy as the avenue for protecting reproductive rights of women.[83] Second, Justice Ginsburg argued that incrementalism in adjudication would have boosted both a higher level of public acceptance regarding abortion jurisprudence, and a more sound legal narrative.[84] She claimed that "[d]octrinal limbs too swiftly shaped, experience teaches, may prove unstable."[85] *Roe* "invited no dialogue with legislators"[86] since the decision did not "merely [strike] down the extreme Texas law"[87] but it "displaced virtually every state law then in force" on abortion restrictions.[88] The magnitude of judicial resolution of this issue only fuelled the "vocal right-to-life movement" and consequently curtailed the trend of liberalization of abortion restrictions.[89] Justice Ginsburg argued for a constructive, strategic, and far-sighted approach to constitutional adjudication which fosters judicial minimalism[90] and takes into account various social phenomena, but she did not question the legitimacy of the decision. Furthermore, in his often-quoted article "The Wages of Crying Wolf: A Comment on *Roe v. Wade,*" Ely claimed that *Roe* was "not constitutional law" but rather a draft of a statute.[91] Ely said the following: "Were I a legislator I would vote for a statute very much like the one the Court ends up drafting."[92] The trimester framework indeed more resembled a product of legislative deliberation rather than one of judicial craftsmanship. It is true that *Roe* might have been too ambitious and too abrupt in its effort to balance the two conflicting sides of the public debate on abortion. Notwithstanding its problems, *Roe* still managed

2 (1998): 256.

82 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting), 23.

83 Bader Ginsburg, "Speaking in a Judicial Voice," 1200.

84 Bader Ginsburg, "Speaking in a Judicial Voice," 1198.

85 Bader Ginsburg, "Speaking in a Judicial Voice," 1198.

86 Bader Ginsburg, "Speaking in a Judicial Voice," 1205.

87 Bader Ginsburg, "Speaking in a Judicial Voice," 1199.

88 Bader Ginsburg, "Speaking in a Judicial Voice," 1199.

89 Bader Ginsburg, "Speaking in a Judicial Voice," 1205.

90 See "Legal Information Institute - Judicial Minimalism," accessed March 10, 2023, https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/judicial-minimalism.

91 John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *The Yale Law Journal* 82, no. 5 (1973): 947.

92 Ely, "The Wages of Crying Wolf," 926.

to successfully safeguard women's reproductive rights for almost 50 years. It was saved by three justices nominated by Republican presidents not so much in an effort to preserve the counter-majoritarian role of the Supreme Court regarding the issue of abortion, but to demonstrate how this institution is insulated from political pressure.[93]

The originalist attack on *Roe* culminated in 2022 when the conservative majority of the Roberts Court in *Dobbs v. Jackson Women's Health Organization* (hereinafter: *Dobbs*) upheld a Mississippi law that prohibited abortions after only 15 weeks of pregnancy. The *Dobbs* majority did not stop here - the decision also overruled *Roe* and left the issue of regulating abortion entirely to the discretion of the States. Justices split along ideological lines (5-4), with (conservative) Chief Justice Roberts staying in the minority regarding the explicit overruling of *Roe*, while at the same time assenting to its implicit overruling by upholding the Mississippi law.[94] Instead of eliminating federal protection of the right of a woman to undergo an abortion in one case, it could be said that Chief Justice Roberts advocated for incremental curtailment of abortion rights. It was the originalist methodology of the majority opinion written by Justice Alito that generated the outcome of the case.[95] In essence, the ruling recycled the arguments from Justice Scalia's dissent in *Casey*, adding that *Roe* was "egregiously wrong" because the right to abortion is found neither in the text of the Constitution nor was it rooted in the history and tradition of the American people.[96] It follows that the issue of whether women should be allowed to end a pregnancy is to be decided by the democratic process in each State.[97] The ruling asserted that the Supreme Court is not an appropriate institution for protecting reproductive rights of women.[98] They should rather persuade other citizens in institutions that are based on majoritarian decision-making because the Supreme Court cannot "usurp" this power from the people.[99]

It does not seem that the *Dobbs* majority was immune to political pressure since the opinion acknowledged how "Americans continue to hold passionate and widely

93 The dissenters in *Dobbs* described the three justices who wrote the plurality opinion in *Casey* in the following words: "The Justices who wrote those words - O'Connor, Kennedy, and Souter - they were judges of wisdom. They would not have won any contests for the kind of ideological purity some court watchers want Justices to deliver. But if there were awards for Justices who left this Court better than they found it? And who for that reason left this country better? And the rule of law stronger? Sign those Justices up. They knew that 'the legitimacy of the Court [is] earned over time'." *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting), 60.

94 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022) (Roberts, C. J., concurring in judgment), 2.

95 See Reva Siegel, "Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism - and Some Pathways for Resistance," *Texas Law Review* 101, no. 5 (2023): 1127-1204.

96 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022), Opinion of the Court, 6, 12.

97 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022), Opinion of the Court, 6.

98 The right to abortion was not found in the text of the Constitution and it was not rooted in the Nation's history and tradition. For criticism, see Siegel, "Memory Games," 1135-1137.

99 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022), Opinion of the Court, 14.

divergent views on abortion, and state legislatures have acted accordingly."[100] Hence, referencing unconstitutional behaviour of some States as an additional argument to overrule a 49-year-old precedent might not be the most prudent argumentative choice. In examining reliance interests under stare decisis analysis, Justice Alito said that the decision in *Dobbs* "returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power."[101] This subversive reading of individual liberties, according to which the Supreme Court empowers women as political subjects while at the same time reducing their rights to mere objects of majoritarian decision-making, is a form of gaslighting which does not amount to protecting the minority.[102] Moreover, acknowledging that there are women who are "pro-life" in order to claim that the minority in question is not monolithic and thus its interests should not be protected judicially, indicates that the Supreme Court fails to recognize gender-based discrimination and instead reinforces paternalistic narratives. This attempt to deny women the status of a minority group in the abortion issue resembles Ely's argument that "[c]ompared with men, women may constitute such a 'minority'; compared with the unborn, they do not."[103] In that sense, the Supreme Court implies that women are not necessarily a minority worthy of protection in this case, meaning that the States can frame the issue of abortion differently and constitute the unborn as the weaker party.[104] However, *Roe* did not consider only interests of women - it struck a balance between the rights of a woman and the State's interest in protecting prenatal life. Such value balancing is not visible in *Dobbs*, where the State legislatures are released of any significant constraints.

In his concurring opinion, Justice Kavanaugh reiterated the classic originalist argument of neutrality which Bork made back in 1971[105] - "In my judgment, on the issue of abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral. The Court today properly heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic

100 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022), Opinion of the Court, 4.

101 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022), Opinion of the Court, 65.

102 However, several authors have emphasized the flaws in the system of majoritarian decision-making from another point of view, arguing that state legislatures are not the best suited institutions for protection of women's reproductive rights because of their *antidemocratic* features and democratic deficit caused by partisan gerrymandering and the overall underrepresentation of women. See David Landau, and Rosalind Dixon, "*Dobbs*, Democracy, and Dysfunction," *Wisconsin Law Review* 2023, no. 5 (2023): 1569-1614; Aliza Forman-Rabinovici, and Olatunde C.A. Johnson, "Political Equality, Gender, and Democratic Legitimation in *Dobbs,*" *Harvard Journal of Law & Gender* 46, no. 1 (2023): 81-130; Murray, and Shaw, "*Dobbs* and Democracy," 768-772, 777-785.

103 Ely, "The Wages of Crying Wolf," 934-935. See also Murray, and Shaw, "*Dobbs* and Democracy," 801-802.

104 See also Shaw and Murray, "*Dobbs* and Democracy," 801-802.

105 Bork, "Neutral Principles," 10.

process."[106] Justice Kavanaugh defends the majority opinion with the argument of respect for neutrality as a form of faithfulness to the Constitution, leaving the fate of numerous women to the regulatory choices of State legislatures.[107]

Leaving the regulation of abortion entirely to the States' discretion seriously endangers the personal autonomy of women as the weaker party in this conflict of values. The *post- Roe* world opens the door to elimination of women's reproductive rights on state levels throughout "enact[ing] new, reviv[ing] pre-1973 laws, or trigger[ing] post-1973 dormant laws [that] deny the right to abortion."[108] It is also worth bearing in mind that the issue of prohibiting access to abortion is largely intersectional - it accentuates racial and financial inequality among women.[109] Legislative prohibition of abortion in a certain State disproportionately affects women with less financial resources who are then unable to travel to other states to receive this service.[110] Among other things, this reality gives rise to "back-alley abortions" which will end fatally for many women.[111]

The three dissenters[112] responded to the majority's abdication from the counter-majoritarian role of judicial review with the following words: "We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals - yes, including women - to make their own choices and chart their own futures. Or at least, we did once."[113] Furthermore, the dissenting opinion criticised the concurring opinion by Justice Thomas who posited that the Supreme Court should revisit all of its substantive due process precedents.[114] The majority opinion did distinguish between *Roe* and other substantive due process decisions, such as *Griswold*, on the basis that abortion relates

106 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022) (Kavanaugh, J., concurring), 2.

107 It should be noted that Justice Kavanaugh does not exclude that Congress, a federal authority, could regulate abortion. *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022) (Kavanaugh, J., concurring), 10.

108 Ana Horvat Vuković, and Biljana Kostadinov, "Constitutional Court of the Republic of Croatia and the 'Abortion Decision' - Context, Implications, and Challenges to Implementation," *Iustinianus Primus Law Review* 13, no. 2 (2022): 6, citing Elizabeth Nash, and Lauren Cross, "26 States Are Certain or Likely to Ban Abortion Without *Roe*: Here's Which Ones and Why", accessed September 30, 2024, https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-whichones-and-why.

109 See The Guardian, "Black Women Could See a 33% Increase in Pregnancy-Related Deaths Post-Roe. Why?," accessed March 13, 2023, https://www.theguardian.com/commentisfree/2022/jun/27/abortion-black-women-roe-wade.

110 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting), 2.

111 See Maggie Koerth, "What the History of Back-Alley Abortions Can Teach Us about a Future Without Roe," accessed March 13, 2023, https://fivethirtyeight.com/features/what-the-history-of-back-alley-abortions-can-teach-us-about-a-future-without-roe/.

112 Justices Breyer, Sotomayor and Kagan writing together in one voice.

113 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting), 7.

114 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022) (Thomas, J., concurring), 7.

to destroying prenatal life, which supposedly makes it different.[115] However, the majority did not explain the reason for this difference - why did it elevate the state interest in protecting prenatal life over other state interests in substantive due process case law? An analogous argument, one of the overarching state interests in protecting procreation could, for instance, be made regarding the use of contraceptives, and so on. Therefore, even if the majority opinion formally rejected Justice Thomas's radical view on substantive due process cases, it did not provide a clear standard for discerning why *Dobbs* is different. The dissenters rightly asserted that Justice Thomas "is not with the program" which is visible from his concurring opinion.[116]

The *Dobbs* ruling cast a large shadow on implied rights in the Constitution. Instead of protecting women, originalist approach invoked the protection of the democratic process as the upmost value, leaving most private aspects of one's life to public vote.

After examining the landmark cases of abortion jurisprudence, the following subsection will analyse the seminal case on same-sex marriage which Justice Thomas urged to be overruled in the future.

4 CUTTING THE DEBATE ON SAME-SEX MARRIAGE SHORT: WHAT LIMITS DOES THE CONSTITUTION PLACE ON THE POLITICAL PROCESS?

The final case that will be analysed is the landmark ruling in *Obergefell v. Hodges*[117] (hereinafter: *Obergefell*) in which the Supreme Court held that the interaction of the 14th amendment's guarantees of due process and equal protection requires the States to solemnize same-sex marriages, as well as to recognize same-sex marriages validly performed out of state. After striking down as unconstitutional the portion of the *Defense of Marriage Act* that accepted a heteronormative definition of marriage for purposes of federal law in the 2013 case of *United States v. Windsor*,[118] the ruling in *Obergefell* marked the ultimate triumph of marriage equality. The majority opinion written by Justice Kennedy held that it is a violation of the equal protection clause to exclude same-sex couples from the fundamental right to marry, writing that "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[119] The Supreme Court's methodology in deciding this case unquestionably rejected originalism.[120]

The dissenting voices of Justices Scalia and Thomas, as well as of Chief

115 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022), Opinion of the Court, 71.

116 *Dobbs v. Jackson Women's Health Organization* 597 U.S. (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting), 25.

117 *Obergefell v. Hodges* 576 U.S. 644 (2015).

118 *United States v. Windsor* 570 U.S. 744 (2013).

119 *Obergefell v. Hodges* 576 U.S. 644 (2015), Opinion of the Court, 671.

120 Chemerinsky, *Worse Than Nothing*, 29. For another similar analysis of the *Obergefell* majority's refusal to equate democracy with majoritarianism, see Murray, and Shaw, "*Dobbs* and Democracy", 792-794.

Justice Roberts and Justice Alito, argued that the proper platform for resolving the controversy of marriage equality was the political process. This line of argument demonstrates very well how originalism favours majority rule in a system based on values of individual liberty, equality and dignity.

The dissenting opinions revolve around several recurring themes. The dissenting justices relied on the fact that prior to *Obergefell*, there were 36 States that had same-sex marriage, and there were others that kept the traditional definition.[121] The overall message of the four dissenters is that the Supreme Court in *Obergefell* halted the democratic process and substituted the will of "nine unelected lawyers" for the will of the People.[122] Justice Scalia made a sharp distinction between majoritarian and counter-majoritarian decision-making.[123] In a democracy, the decision on whether same-sex marriage should be legal is reserved for institutions that are based on majority rule.[124] This claim is backed by the invocation of original meaning of constitutional provisions as authoritative. Justice Scalia emphasised that "[w]hen the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so."[125] Justice Thomas found the majority opinion as "deviating from the original meaning" of the 14th amendment.[126] Chief Justice Roberts articulated the common originalist argument of neutrality and concluded that the Constitution is neutral on the issue and thus places no restrains on the will of the electoral majority regarding the question of legality of same-sex marriage.[127]

The dissenters in their respective dissents discern various positive values that are intrinsic to the democratic process. The political process based on majority rule is "a protection of liberty" since it safeguards the People's freedom to govern themselves.[128] That process is based on careful deliberation which fosters public debate on complex issues.[129] In that debate, every voice contributes to the overall result.[130] The result of a political process also generates a sense of fairness that stems from legitimacy of a democratic victory.[131] Moreover, the issue at question in the case also involved a strong federal dimension - the diversity of jurisdictions necessitates a diversity of policy choices, which, in turn, advances pluralism.[132] To

121 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Scalia, J., dissenting), 714.
122 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Scalia, J., dissenting), 717.
123 "A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy." *Obergefell v. Hodges* 576 U.S. 644 (2015) (Scalia, J., dissenting), 717.
124 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Scalia, J., dissenting), 717-718.
125 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Scalia, J., dissenting), 715.
126 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Thomas, J., dissenting), 726.
127 "The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with '[t]he whole subject of the domestic relations of husband and wife'." *Obergefell v. Hodges* 576 U.S. 644 (2015) (Roberts, C.J., dissenting), 690.
128 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Thomas, J., dissenting), 732.
129 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Roberts, C. J., dissenting), 710.
130 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Roberts, C. J., dissenting), 710.
131 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Roberts, C. J., dissenting), 710.
132 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Alito, J., dissenting), 741-742.

that extent, Justice Alito held that the majority threatened the principle of federalism and "facilitate[d] the marginalization of the many Americans who have traditional ideas" through its judicial value imposition.[133] For these reasons, the political process is better suited to decide whether respective States should opt for marriage equality or not. Furthermore, Justice Alito relied on a slippery slope type of argument[134] to argue that the judiciary is simply not well-equipped for making a policy decision of such magnitude that could yield unpredictable consequences.[135] Justice Thomas also argued that the political process is better suited for this decision because majoritarian institutions are better equipped to accommodate conflicting interests, such as the question of how to protect religious sentiments of those who oppose same-sex marriage.[136] Accordingly, the actors who engage in democratic deliberation "could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process."[137] The interconnectedness of religion and rights of same-sex couples loudly echoes throughout the dissents. The majority opinion holds that those who oppose marriage equality have in some sense wounded same-sex couples.[138] The dissenters understood this as saying that those who hold traditionalist views on marriage are bigots.[139] They tried to rebut that implicit claim by defending arguments of opponents of same-sex marriage, focusing mostly on the importance of religious liberty and procreation as legitimate concerns against same-sex marriage.[140] The general idea is that one side of the debate, which provided sound argumentation for its position, was abruptly silenced without legitimacy.[141] Hiding under the argument of respect for political process, the dissenters managed to articulate their own opposition to same-sex marriage, and still preserve the façade of neutrality. Justice Alito exclaimed that "ultimate sovereignty rests with the people, and the people have the right to control their own destiny."[142] Of course, when the majority unreasonably excludes a minority from an institution such as marriage, they do not control their own destiny. Instead, they exercise control over the destiny of the minority. The democratic process can hardly protect the minority interests in the face of a strong opposition of those in the majority. The dissenters did not even try to

133 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Alito, J., dissenting),742.

134 "The decision will also have other important consequences. It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women." *Obergefell v. Hodges* 576 U.S. 644 (2015) (Alito, J., dissenting), 741.

135 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Alito, J., dissenting), 740.

136 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Thomas, J., dissenting), 734.

137 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Thomas, J., dissenting), 734.

138 *Obergefell v. Hodges* 576 U.S. 644 (2015), Opinion of the Court, 658-659.

139 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Alito, J., dissenting), 741. Although the majority opinion did reflect upon the unequal treatment of gays and lesbians, it also acknowledged the need for protecting free speech rights of those who oppose same-sex marriage for religious reasons. *Obergefell v. Hodges* 576 U.S. 644 (2015), Opinion of the Court, 680.

140 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Roberts, C.J., dissenting), 691; *Obergefell v. Hodges* 576 U.S. 644 (2015) (Alito, J., dissenting), 738-739.

141 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Alito, J., dissenting), 741-742.

142 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Alito, J., dissenting), 741.

grapple with the issue of power rebalancing that the majority opinion clearly intended to achieve.

Furthermore, all four dissenters were concerned with the notion of judicial supremacy,[143] i.e., the idea that the power of judicial review places the courts above other two branches of government.[144] The main target of attack upon the *Obergefell* majority was the alleged lack of disciplined methodology that can constrain the Supreme Court in identifying unenumerated constitutional rights.[145] For example, Justice Thomas argued that liberty embedded in the due process clause can be understood only in its negative sense as "freedom from governmental action."[146] Under this definition of liberty, the right to marriage is understood as a right to "governmental entitlements" which is not a fundamental right.[147] Moreover, Justice Thomas reduces the liberty inherent in due process to mean only "freedom from physical restraint and imprisonment."[148] Consequently, same-sex couples do not suffer this kind of coercion. This narrow conception of liberty is antagonistic to all cases decided on the basis of substantive due process.[149] Additionally, the argument of same-sex couples being free from governmental coercion seems even less compelling considering that Justice Thomas voted against declaring sodomy laws unconstitutional in *Lawrence v. Texas*.[150] Justice Thomas also brushed aside the race analogy,[151] which the majority relied upon, as "offensive," arguing that antimiscegenation laws were purely a relic of slavery.[152] Chief Justice Roberts highlighted his concerns with the methodology of the majority opinion stating that "[a]llowing unelected federal judges to select which unenumerated rights rank as 'fundamental' - and to strike down state laws on the basis of that determination - raises obvious concerns about the judicial role."[153] It follows that any methodology followed in identifying implied rights that is not grounded in history and tradition of the Nation grants justices the power to decide cases according to their personal convictions. The dissenters concluded that

143 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Roberts, C. J., dissenting), 708.
144 Suzanna Sherry, "Why We Need more Judicial Activism," *Vanderbilt Public Law Research Paper* no. 13-3 (2013): 2.
145 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Roberts, C. J., dissenting), 699.
146 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Thomas, J., dissenting), 726.
147 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Thomas, J., dissenting), 726.
148 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Thomas, J., dissenting), 731.
149 Leslie C. Griffin, "Dissenting Justices in Obergefell Committed Original Sin Against Marriage Equality," accessed March 13, 2023, https://blogs.lse.ac.uk/usappblog/2015/06/29/dissenting-justices-in-obergefell-committed-original-sin-against-marriage-equality/.
150 Griffin, "Dissenting Justices." *Lawrence v. Texas* 539 U.S. 558 (2003) is an important ruling which overruled case *Bowers v. Hardwick* 478 U.S. 186 (1986) that upheld the constitutionality of laws that criminalised same-sex sexual intimacy.
151 The majority opinion relied on the ruling in *Loving v. Virginia* 388 U.S. 1 (1967) which held that antimiscegenation laws (laws that prohibited interracial marriage) were unconstitutional. See *Obergefell v. Hodges* 576 U.S. 644 (2015), Opinion of the Court, 664. Also see Samuel W. D. Walburn, "The Loving Analogy: Race and the Early Same-Sex Marriage Debate," *The Purdue Historian* 8, no. 1 (2017): 1-14.
152 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Thomas, J., dissenting), 730.
153 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Roberts, C.J., dissenting), 695.

same-sex marriage is a relatively new phenomenon, and, as such, right to same-sex marriage is not a part of American tradition. However, the dissenters wrongly framed the issue as a search for the fundamental right to same-sex marriage.[154] The originalist orientation towards identifying specific instead of general values is hostile to an expansive reading of equality. When the Supreme Court ruled in *Loving v. Virginia* that the prohibition on interracial marriage violates the equal protection clause it did not have to ascertain that there exists a right to interracial marriage, but whether racial classifications in relation to marriage were violative of the equal protection clause.[155] In other words, the problem should be approached at the proper level of generality.[156] Originalists simplify the constitutional issue at stake with abstract invocations of the need for respecting the political process and majoritarian decision-making. Justice Thomas even resorted to philosophical acrobatics and boldly claimed that the ruling in *Obergefell* would not advance the dignity of same-sex couples because dignity is not a constitutional category, and even if it were one, it cannot be given or taken away by the government because it is "innate" to individuals.[157] Certainly, the *Obergefell* majority never intended to imply that dignity is not intrinsic to human beings and that it can be literally taken away - the problem is that the government can behave as if a certain group of individuals deserves no dignity, and inflict dignitary harm in the process. In that respect, dignity is an essential part of the equal protection clause that prohibits unjustified discrimination. The political process may come up with the results that do not value dignity of the minority. Therefore, the dissenters did not identify the limits which the principle of equality places upon majority rule in relation to the debate on same-sex marriage.

Contrary to these originalist views, the majority opinion in *Obergefell* held that the "dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."[158] The judiciary was designated to be an actor in the political process in order to safeguard the substantive principle of equality from "ill humours"[159] that lurk in majoritarian institutions. In *Obergefell*, the Supreme Court recognized that the equality of the minor party - regarding that particular issue - was not safeguarded in the democratic process. On the other hand, originalists preferred to sacrifice the minority for the sake of political process, and under the pretext of legitimacy.

154 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Alito, J., dissenting), 737.
155 *Loving v. Virginia*, Opinion of the Court 388 U.S. 1 (1967), 11-12.
156 See Peter J. Smith, "How Different Are Originalism and Non-Originalism?" *Hastings Law Journal* 62, no. 3 (2011): 707-736; Gerken, "Larry and Lawrence," 845-849.
157 *Obergefell v. Hodges* 576 U.S. 644 (2015) (Thomas, J., dissenting), 735.
158 *Obergefell v. Hodges* 576 U.S. 644 (2015), Opinion of the Court, 677.
159 Hamilton, "The Federalist no. 78," 440.

5 CONCLUDING REMARKS

The analysis of selected Supreme Court cases demonstrated that application of originalism lead to majoritarian resolutions of constitutional disputes. Whether in the majority or in the dissent, originalist perspectives failed to protect the minority. Instead, originalists protected majoritarian value choices and left the fate of the minority to the democratic process. This protection of the democratic process as a value in itself is meaningless if the disbalance of power that is intrinsic to fora based on majority rule remains unaddressed in the constitutional dispute. Purely procedural understanding of counter-majoritarian features of the Constitution according to which judicial interpretations should be constrained by majoritarian consensus seriously weakens the possibility of protecting minority rights in courts.

In *Dobbs*, the Supreme Court claimed that women do not necessarily have minority status in an issue that concerns their bodily autonomy. On the issues of same-sex marriage, originalists decided to give the majority a *carte blanche* for moral tyranny.

Constitutional silence[160] that implies neutrality, and hence leaves the constitutional issue at hand to the democratic process, is an originalist construct that seemingly prevents the discussion of the merits of the case involving a minority whose rights have been infringed.[161] Instead of openly engaging with substantive issues of constitutional controversy, originalism "reduc[es] these questions of values into mere questions of 'competence'."[162] However, the substantive issues are indirectly addressed using the rhetorical device of defending the soundness of arguments of one party in the case in order to legitimise their position in the public debate. The analysis showed that originalists concealed their refusal to substantively protect the minor party with the argument of respect for democratic process.[163] The originalist concept of "neutrality" is therefore a doctrinal tool which is used to synchronize constitutional interpretation with the will of political majorities.

Justice Kennedy wrote in *Obergefell* that the "nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[164] It is true that it is hard to recognize manifestations of inequality in one's own time considering that inequality is deeply enshrined into tradition, it is systemic, and society takes it as granted.[165] The role of the judiciary essentially pertains to recognizing inequality when the majority fails to heed the Constitution. Courts are supposed to go against the legislative majority by

160 See Langford, *Scalia v. Scalia*, 101; Bork, "Neutral Principles," 10.
161 Chemerinsky, "Foreword," 87.
162 Chemerinsky, "Foreword," 87.
163 See also Chemerinsky, *Worse Than Nothing*, 179-181.
164 *Obergefell v. Hodges* 576 U.S. 644 (2015), Opinion of the Court, 664.
165 See Chemerinsky, *Worse Than Nothing*, 173.

shaping constitutional doctrine in a counter-majoritarian manner. Open-textured and general constitutional provisions allow judges to derive a value worth protecting and make it effective through interpretations which protect those who cannot be heard in the democratic process. The principled character[166] of constitutional provisions makes them flexible enough to cover instances of inequality which the legislative majority failed to recognize in time. On the other hand, originalism is fatal to this inquiry. It is a theory of interpretation that is incapable of addressing the asymmetry of power that is immanent to democratic process.

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Sažetak

ORIGINALIZAM I DEMOKRATSKI PROCES: MAJORITETNI ARGUMENTI U PRAKSI VRHOVNOG SUDA SAD-A

U radu se istražuje tenzija između originalizma, točnije teorije ustavnog tumačenja prema kojoj je izvorno značenje ustavnih odredbi autoritativno, i protuvećinskih elemenata koji su duboko ugrađeni u Ustav SAD-a. Analiziraju se odabrane odluke Vrhovnog suda SAD-a u kojima su suci Vrhovnog suda koji su primjenjivali originalizam odlučili zaštititi demokratski proces kao superiornu ustavnu vrijednost, nasuprot zaštiti manjina čija prava nisu bila osigurana u institucijama koje se temelje na vladavini većine. Analizirane odluke uključuju tri glavne odluke o pravu na pobačaj (Roe protiv Wadea, Planned Parenthood of Southeastern Pennsylvania protiv Caseya i Dobbs protiv Jackson Women's Health Organization) i ključnu odluku koja je legalizirala istospolni brak u SAD-u (Obergefell protiv Hodgesa). Analiza pokazuje kako, unatoč tvrdnjama pojedinih sudaca u njihovim mišljenjima, sudačka primjena originalističke metodologije prema kojoj su prava manjine bila ostavljena na milost većine nije neutralni iskaz vjernosti ustavu. Naprotiv, suci vođeni originalističkom metodologijom izvršili su odabire vrijednosne prirode koji otkrivaju majoritetnu vizuru demokracije.

***Ključne riječi**: originalizam; tumačenje ustava; demokracija; pobačaj; istospolni brak.*

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