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A Return to Black Codes: How the *Dobbs* Decision Debilitated the 14th Amendment

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Abstract: Substantive due process, drawn from the 14th Amendment, has been a consistent judicial doctrine for establishing and protecting the rights and liberties of Black citizens in the face of systemic racism. This prompts a question for political consideration and investigation: if the 14th Amendment is a constitutional equilibrium for rights Black citizens would otherwise not enjoy, could the rescission of a right decided and sustained by the 14th Amendment that is not racially explicit have negative racial implications for Black Americans? This study answers this question through an atheoretical case study on the ruling in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade*. This study finds that the ruling in *Dobbs* weakened the 14th Amendment by allowing parameters to be placed on substantive due process. Though the question before the Court was the constitutionality of Mississippi's abortion law, the implications of weakening the 14th Amendment are that it allows for the legal and cultural revitalization of Black exclusion that existed under the Black Codes, which has already come to fruition in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and the end of affirmative action.

Keywords: *Roe*; *Dobbs*; 14th Amendment; Black Codes; substantive due process



Citation: Lewis, Timothy Elijah. 2024. A Return to Black Codes: How the *Dobbs* Decision Debilitated the 14th Amendment. *Social Sciences* 13: 539. <https://doi.org/10.3390/socsci13100539>

Academic Editors: Athena M. King, Linda M. Trautman, Stephanie L. Williams and Tiffany Willoughby-Herard

Received: 3 March 2024

Revised: 3 June 2024

Accepted: 9 October 2024

Published: 11 October 2024



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1. Introduction

The contemporary use of the 14th Amendment has been to ensure civil rights and civil liberties for marginalized groups, specifically Black Americans (Walton et al. 2017). *Brown v. Board of Education* (1954) and *Loving v. Virginia* (1967) are widely known examples where the Supreme Court used the 14th Amendment to extend or safeguard unenumerated rights for Black citizens because there was a violation of substantive due process. These examples are more salient when the intent of the 14th Amendment is revealed. A historical investigation of the 14th Amendment would objectively inform us that the intent of the Amendment was primarily to achieve racial equity for Black citizens, which would be difficult considering the residual effects of slavery (Toland 2006). This prompts a question for political consideration and investigation: if the 14th Amendment is a constitutional equilibrium for rights Black citizens would otherwise not enjoy, could the rescission of a right decided and sustained by the 14th Amendment that is not racially explicit have negative racial implications for Black Americans? To put it in a simpler manner, would a non-racial decision that weakens the 14th Amendment have racial implications for Black citizens? This study concludes that the ruling in *Dobbs v. Jackson Women's Health Organization* (2022), which overturned *Roe v. Wade* (1973), though not explicitly about race, allows for the legal and cultural disenfranchisement of Black Americans—the exact societal environment that characterized the Black Codes.

In the next section, this study provides a contextual historiography of the 14th Amendment. This historiography demonstrates that the 14th Amendment was drafted solely as a constitutional measure of antiracism to remedy the anti-Black racism that denied newly freed Black persons unenumerated rights White people enjoyed, especially in the South. Next is an explanation of substantive due process, also known as substantive doctrine. Then, to investigate the posed research question, the study outlines an atheoretical case study of the

Dobbs decision to ascertain if there are anti-Black racial implications. In this type of case study, I review the Supreme Court's decision in *Dobbs*, but I am not searching for evidence in support of already theorized causal variables; rather, I am looking for "understanding" the basis of the Supreme Court's decision (Kaarbo and Beasley 1999, p. 374). This understanding is achieved because atheoretical case studies "provide good descriptions" of the case only (George and Bennett 2005, p. 104). The study concludes with a thorough discussion of anti-Blackness resulting from the *Dobbs v. Jackson Women's Health Organization* (2022) ruling and realized in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) and the end of affirmative action, which was only possible because of the *Dobbs* decision.

2. A Historiography of the 14th Amendment

A historiography is often accepted as the "study of the history of historical study" (Becker 1938, p. 20). However, Eileen Ka-May Cheng (2008) states that a historiography is both a field of study and a practice one can employ to study and criticize how history around a particular subject has developed. As a practice, it is more than a simple notation of historical works on a subject. It is a process by which one can properly understand history, requiring an established method by which the historian develops the historical narrative. In this historiography, I use the commentaries of credentialed historian Dr. Frank Toland, Ph.D., to identify primary sources written by individuals or agents in government prior to the ratification of the 14th Amendment.¹ Situating the historical context in which the 14th Amendment was passed in primary sources written before the passage of the ratification of the 14th Amendment not only limits any interpretive bias on my part but also provides a more accurate intent of the Amendment's composition. Toland instructed that one cannot understand the historical context, intent, or aim of the 14th Amendment without understanding the legal framework of citizenship under which the 14th Amendment was comprised and ratified (Toland 2006). Toland asserted that the intent of the 14th Amendment was, in part, to address the citizenship of the newly freed slaves. Toland begins by noting the existence of the Black Codes—legal and extralegal measures to reinstitute many of the policies that existed under slavery and ensure Black people would never achieve equality or equity (Fleischman et al. 2014). The laws and norms sought to prevent Black people, then often referenced as "Negro", from receiving mortgages, loans, and voting, and sought to humiliate Black people in everyday life with statutes such as "sidewalk laws"—Black people had to give the right-of-way to White people on the sidewalk and do so in a way that pleased White people. Under the Codes, there could be no social or political equality for Black people (Toland 2006; Davis n.d.).

Toland then backtracks to help the audience understand the legal framework of the 1800s before the Civil War, pointing to Joseph Story's *Commentaries on the Constitution*. Joseph Story was an Associate Justice in the U.S. Supreme Court and composed a three-volume treatise to systematically outline and detail the Constitution. In Book III, Chapter 40, Story attempts to clarify what he perceives as inconsistencies in language and interpretation regarding Article IV of the Constitution, specifically the concept of citizenship addressed in Article IV, Section II. Story believed the language of Article IV, Section, put to rest many of the difficulties that arose under the Articles of Confederation. He states, "The intention of this [first] clause [in Article IV, Section II] was to confer on them, if one may so say, a general citizenship" (Story 1833).² This meant that if a person gained citizenship in one state, then that citizenship had to be recognized in another state, conferring on the person all the privileges and rights of citizenship.

However, this notion that state citizenship equated to national citizenship posed a real dilemma for slave-holding states, especially considering the rise of the abolition movement and fugitive slaves. With abolition becoming popular in the North and slaves escaping to the free states, this clause, if applied universally, would dictate that once a fugitive slave's citizenship was recognized by the free state, then slave-holding states in the South could make no claim on the slave; even if the slave returned to the slave-holding state, they could not be reintroduced back into slavery because that slave-holding state would have had to

acknowledge the citizenship granted in the free state. However, there would have been no way slave-holding states would have agreed to this. Therefore, the third clause of Article IV, Section II, was necessary. It states

“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due”.

Not only does this clause work against slaves escaping to freedom for notions of acquiring citizenship, but it also undermines any notion of “ordinary judicial investigations” that White people would have been privileged to because guilt or innocence was made out at trial. However, because slaves were considered property, they were not granted trials. This meant that even once in a free state, slaves had to understand their perpetual servitude status. As Story notes, “In the cases of fugitive slaves, there would seem to be the same necessity of requiring only prima facie proofs of ownership, without putting the party to a formal assertion of his rights by a suit at the common law” (Story 1833).³ A Black person in a free state, even if never a slave, had to only look like an escaped slave to be captured and enslaved. Essentially, Joseph Story states that the rules of citizenship enjoyed by Whites did not apply to Blacks, even those residing in free states. This interpretation of the Constitution was codified as one of the national Slave Codes with the Fugitive Slave Act of 1850.⁴

Understanding that the Civil War led to the freeing of slaves, the matter of citizenship had to be addressed in the Reconstruction Amendments—13th, 14th, and 15th Amendments—as some components of the amendments had to rectify the racialized citizenship under the Black Codes, which replaced the Slave Codes. Toland (2006) affirms that the intent of the 14th Amendment was to do that very thing and affirms more primary sources in this affirmation, beginning with the Civil Rights Act (1866), because it gives context for the racial disadvantages that the government sought to remedy for the former slaves. The Act states as follows:

“all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude. . . shall have the same right, in every State and Territory in the United States”.

The Act intended to create citizenship by affirming a standard of no differentiation in the rights granted without consideration of race. However, the Act of 1866 failed to dismantle the inequity of the Black Codes and failed to grant any notion of citizenship that was recognized nationally, particularly in the South. As a matter of fact, legal and extralegal racism that fed the creation of the Black Codes increased following the conclusion of the Civil War—a system of justice that “erred on the Black side with undue severity, injustice, and discrimination” (DuBois 1903, p. 84). This was especially true regarding areas not listed explicitly as rights in the Constitution, such as mortgages, personal loans, and voting, as the 15th Amendment had not yet been comprised. Thus, the intent of the 14th Amendment expanded and had two purposes when relating to the issue of racialized citizenship that existed under the Black Codes. The first was to address the racialized citizenship written into Article IV, explained by Joseph Story. Secondly, it needed to address that most states, even after the Civil War, embraced differential treatment for Black citizens compared to White citizens, which failed under the Civil Rights Act (1866) (Toland 2006). In this context, one understands the remedial intent of the 14th Amendment, as it intends to secure rights and privileges for those systemically excluded (i.e., Black citizens). This intent is elucidated further in another primary source—the Report of the Joint Committee on Reconstruction. The Joint Committee on Reconstruction are the actual crafters of the Amendment, and they affirm the following:

“Slavery had been abolished by constitutional amendment (referring to the 13th Amendment). A large proportion of the population had become, instead of mere chattels, free men and citizens. [Thus] It was impossible to abandon them, without securing them their rights as free men and citizens”. (para. 5)

“...the entire point of the Amendment was to secure rights of the freed former slaves”.⁵

3. Understanding Substantive Due Process

Toland’s discussions of the historical reality, which rests upon primary sources from the period, help us understand the primary intent of the 14th Amendment. But what does the 14th Amendment actually do in regard to citizenship? The 14th Amendment affirms citizenship for any person naturalized in the U.S.; however, it is a national definition of citizenship, not based upon the state of residence, as was explained by Joseph Story’s interpretation of Article IV ([U.S. Senate n.d.](#)). The amendment does so because it accepts one indisputable fact—all citizens will not be treated the same by a State. Citizens must be protected against States because States in democracies are concerned with the public interest, and “public sentiment regulates broadly applied treatment”, not treatment of the minority ([Paterno 2014](#), p. 1819). To this end, the 14th Amendment ensures “due process,” or guarantees “equal participation of all, without distinction,” and “equal protection,” which guarantees the “full and equal protection to all classes of citizens” ([Report of the Joint Committee on Reconstruction 1866](#), para. 5).

The Joint Committee on Reconstruction characterizes equal protection and due process as one concept of citizenship in a system of federalism. These are two components of one concept, which is characterized in this manuscript as “substantive due process”. Equal protection addresses what the government cannot restrict to its citizens, especially if enjoyed by some segment of the population, and due process addresses how it must ensure this ([Kernell et al. 2020](#); [Paterno 2014](#)). Only because of Court action are these often framed as two separate, even oppositional, judicial concepts ([Paterno 2014](#)). However, both aspects get at the single concept of legal fairness, which is the fundamental question when assessing citizenship. Substantive due process can also be referred to as “substantive doctrine”. It allows the judiciary to protect, ensure, or even create rights in the name of fairness, even if those rights are unenumerated ([Kernell et al. 2020](#)). In contemporary judicial disputes, the Supreme Court has used substantive doctrine in several instances, establishing rights not textually stated in the Constitution, such as establishing the right to obtain contraception in [Griswold v. Connecticut \(1965\)](#) or the right to private consensual sexual acts in [Lawrence v. Texas \(2003\)](#).

4. A Case Study of *Dobbs*

To assess the *Dobbs* decision, I employ a case study rather than developing a quantitative model, such as automated text analysis, which, for example, would seek an understanding of the decision through the frequency and association of terms. However, the case study is a stronger method of assessment for this area because case studies are not “theory-determined” ([George and Bennett 2005](#), p. 42). This means I do not assess the Court’s decision with variables in mind. More specifically, I employ an atheoretical case study, as explained by [Kaarbo and Beasley \(1999\)](#). In this type of case study, the researcher generally investigates the case. I dismiss the probable causes and only infer causality from the text of the Court’s decision. This approach limits preconceived notions or theories about the case in question, which alleviates bias, even if that bias is based on the existing literature.

For this case study, I attempt to be as comprehensive as possible by beginning with the constitutional basis for the *Roe* decision, looking at the questions that the Supreme Court addressed throughout the decades regarding abortion, and then looking at the [Dobbs v. Jackson Women’s Health Organization \(2022\)](#) decision for details, aims, and implications. Lastly, I limit myself to the majority decision, as it is the Court’s decision, and

concurring or dissenting opinions only serve as records of individual Justices' judicial viewpoints (Krutz 2021).

4.1. Background to the Dobbs Decision

The underlying question before the U.S. Supreme Court in the *Dobbs* case, which rescinded abortion as a federal right (returning regulation to the states), was as follows: Did the Court act constitutionally in the *Roe* decision 49 years earlier? This is a legitimate question, considering that there is no constitutional text outlining the right to an abortion, and with the decision in *Roe*, the Court enshrined an unenumerated right, similar to *Brown v. Board of Education*. In *Roe*, the court addressed the debate over the “right to privacy” versus the State’s interest and its right to enforce regulations.⁶ In its ruling, the Supreme Court acknowledges that there is no explicit mention of a right to privacy in the Constitution but shows the past rulings, using the 1st, 4th, 5th, 9th, and 14th Amendments to create “areas or zones of privacy” (153). But simultaneously, it affirms that “a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life” (154). The Court went on to say, “The privacy right involved, therefore, cannot be said to be absolute,” affirming that the Courts and States have an obligation to regulate liberties (155).

After reaffirming both a right to privacy and a necessity of State regulation, the Court applied substantive due process to extend the right of privacy to include abortion decisions by enshrining an unenumerated right and ensuring equal treatment of this right by giving guidance on the regulatory power of the State. As a result of *Roe*, abortion was a federal right (with limited regulations from the State) that had not existed before 1973, and this right rested upon the Court’s interpretation of substantive due process held in the 14th Amendment. The Court used an amendment designed to address the issue of racialized citizenship to extend a right across state lines to all women.

Over the next five decades, abortion made its appearance before the Supreme Court several times in attempts to overturn *Roe*. The first attempt was *Harris v. McRae* (1980), in which the Court did not re-negotiate the contract but provided further regulation by ruling that Medicaid funding could not be used for abortions. The second attempt was *Webster v. Reproductive Health Services* (1989).⁷ The question before the Court in *Webster* was as follows: Did the Missouri restrictions unconstitutionally infringe upon the right to privacy or the Equal Protection Clause of the Fourteenth Amendment—the constitutional basis for the *Roe* decision? The *Webster* ruling weakened *Roe* in that it allowed states to determine when life began, but the Court did not re-negotiate the contract, as the federal right to an abortion still existed. The Court upheld the conventional medical wisdom that a fetus’s viability starts at the beginning of the third trimester, sometime between the 24th and 28th week. However, the Court allowed states to place further restrictions on abortions, such as a ban on public assistance for non-therapeutic abortions (Harris 1989). The third attempt is arguably the most well-known case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). *Casey* not only reaffirmed *Roe* but strengthened *Roe* by including abortion under the right to autonomy. *Casey* accepted the conservative argument that there may be “rights of the unborn”. However, those rights should not place an “undue burden” (i.e., substantial obstacles) in the path of a woman, particularly if the fetus has not reached a point of viability. The final attempt to overturn abortion was in *Gonzales v. Carhart* (2007), in which the Court decided the Partial-Birth Abortion Ban Act of 2003 was not unconstitutionally vague and did not impose an undue burden on the right to an abortion.

4.2. The Dobbs Decision

In the *Dobbs* decision, the Court addressed a Mississippi law “that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as ‘viable’ outside the womb” (para. 9). It must be stated, though obvious, that as with all the preceding cases on the constitutionality of abortion, the question before the Supreme Court was not an explicitly racial question.

When assessing the ruling, the Court acknowledged the legitimacy of substantive due process as a method to grant rights not explicitly stated in the Constitution. This placed a hurdle before the Court as the basis of extending privacy to include abortion rested on substantive due process. However, to overcome this hurdle, the Court chose to use judicial review on itself, accusing itself of an error in how it decided *Roe*. And while the method of employing judicial review is legitimate, the Court offered no constitutional justification for this. This posed a conundrum for the Court in that it admitted the method of substantive due process is valid to address such unenumerated rights but overturned *Roe* because abortion is not an enumerated right. To settle this judicial paradox, the Court applied unconstitutional principles to the constitutional basis of substantive due process. The opinion stated the following:

“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’ The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law”. (*Dobbs v. Jackson Women’s Health Organization* 2022, p. 5)

In essence, abortion is too novel of an unenumerated right to be upheld at the federal level, an argument not rooted in constitutionality. Though defended four times before the Court after *Roe*, the Court set a precedent that because abortion as a right is only decades old, its grounding in the 14th Amendment is irrelevant, as it is simply too juvenile of a right.

Beyond the Court’s affirmation that abortion is not mentioned in the Constitution and is thus too novel of a right to be upheld as an unenumerated right, the Court felt that applying a national standard on abortion undermined the democratic processes in each state, even if those processes created differential rights. In writing the Court’s opinion, Justice Alito quotes not the Constitution but former Justice Scalia’s dissent in the *Casey* case, stating, “The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting” (*Dobbs v. Jackson Women’s Health Organization* 2022, p. 6). The Court makes an argument for sustaining the core of democracy, voting. However, the citizens did not vote directly on Mississippi’s Gestational Age Act. It was passed on party lines in the state’s legislature with no direct voice of the citizenry (Hassan 2022). This delegitimizes the Court’s premise that the creation of rights undermines the democratic processes in states, especially if the citizens never vote on the issue at hand.

Some may be predisposed to refute this assessment of the *Dobbs* decision under the premise of a textualist lens regarding the respective composition of the Court. However, this case study dismisses the inclination to explain the *Dobbs* ruling as a result of textualist conservative Justices who seek to be originalists. Scott Gerber (2022) characterizes Clarence Thomas as the “most unabashed proponent of conservative originalism”. (para. 5). Thomas’s own words support this label while simultaneously undermining that originalism guided the Justices in the *Dobbs* decision. Only months before the overturning of *Roe v. Wade*, Thomas wrote the Court’s decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) and said,

“The job of the judges is not to resolve historical questions in the abstract. . . it relies on ‘various evidentiary principles and default rules. . .’ Courts are thus entitled to decide a case based on the historical record”. (*New York State Rifle & Pistol Association, Inc. v. Bruen* 2022, Footnote 6)

Thomas admits that the textualist/originalist tradition that he and other conservative Justices subscribe to is rooted in accurate historical records that expound on the brevity of the Constitution. Thus, if textualism was the compelling force for the conservative Justices deciding the *Dobbs*, then some form of the historical narrative presented in this paper

would, at minimum, be referenced by those Justices. However, the absence of a substantive reliance on the relevant historical text from the decision allows one to rule out originalism as a cause for the overturning of *Roe v. Wade*.

5. Discussion and Implications

The overturning of *Roe* in the *Dobbs* decision weakens the notion of substantive due process because it places parameters, or dare I say conditions, on *what* and *how* civil rights and civil liberties are protected, which, according to Hanes Walton et al. (2017), is the 14th Amendment's primary contemporary use. In *Dobbs*, the first parameter is that unenumerated rights must be intertwined with the history and tradition of America. In regard to abortion, "until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion" (*Dobbs v. Jackson Women's Health Organization* 2022, p. 15). This parameter or condition is not rooted in constitutionality but in traditionalism. The second parameter is that unenumerated rights should be decided by the vote of the state's citizenry. In regard to abortion, the Court informed that "the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people" (*Dobbs v. Jackson Women's Health Organization* 2022, p. 44). This is a more radical standard in that it directly subverts substantive due process, as substantive due process would prohibit the state's denial of certain rights when enjoyed by another portion of the population, yet there are times when the majority in the democratic process is the cause of unequal protections. Because the *Dobbs* decision prioritized traditionalism and other aspects over proper understandings of substantive due process, it disregarded the inherent equity built into the 14th Amendment and moves the U.S. towards authoritarianism. A dismissal of equal protection or due process births authoritarianism in the U.S. "in practice", according to Marlies Glasius (2018), because it creates the conditions for "patterns of action that sabotage [government] accountability to the people" by disabling citizen voices (p. 517). If there is no equity in the 14th Amendment, or if that equity can only be employed after certain conditions are present, then subsequent judicial decisions will repeatedly quiet, or attempt to quiet, those most reliant on substantive due process claims, creating the unaccountable pattern Glasius (2018) references.

If one were to apply these two parameters when there is a racially explicit question before the Court, I surmise that the equal protection and due process components of the 14th Amendment that make up substantive due process will be ignored, and there will be an unveiling of the pattern that disables citizens' voices, specifically Black citizens. The decision would not be in favor of racial equity because racial equity, like abortion, is a novel idea in America, as for most of the country's history, "separate but equal" was the law and cultural norm. Alan Jenkins (2023) details the "turbulent relationship between law and [racial] equity" that has occupied the majority of the nation's history (p. 61). Even with legal wins, such as the end of racial segregation in *Brown v. Board of Education* (1954), the current culture still allows the nation's schools to be essentially separate and unequal, based largely on race, not to mention the apparent lack of equity in areas of policing, healthcare, and basic human rights (Jenkins 2023). If the African American Civil Rights Movement is seen as the spark of racial equity as a national issue, not regional, as was the abolition of slavery, then racial equity is only 70 years old—a novel issue. Therefore, one could reasonably conclude that if a racially explicit novel idea that had some states in opposition was to be before the Court, then the Supreme Court's weakening of the substantive due process, which it achieved through the placement of arbitrary parameters, would lead to an outcome antagonistic to racial equity. This presupposition became supposition when the Court ended the use of race-based affirmative action in higher education with its decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023).

Affirmative action was an institutional response to institutional racism. In 1961, President Kennedy started affirmative action with Executive Order 10925 because qualified Black contractors who placed bids for government work were not being considered, even while meeting all the qualifications. The order states, "The contractor will take affirmative

action to ensure that applicants are employed, and that employees are treated [fairly] during employment, without regard to their race, creed, color, or national origin". Kennedy institutionalized the policy as a response to institutional racism. This practice was adopted by colleges and universities in the 1960s as they accepted that college campuses and their respective policies were reflective and contributory to the racial exclusion Black citizens and other racial minorities experienced perpetually. According to Richard Sander (2012), affirmative action was expanded to education in the late 1960s, partly to alleviate the White guilt private colleges felt in using legacy admission policies, a form of admission preference that gives credence to students related to alums.

And, similar to abortion, affirmative action was an unenumerated right (though extended to institutions) initially decided and defended by the Supreme Court beginning with *Regents of the University of California v. Bakke* (1978), where the Court upheld affirmative action with the 14th Amendment.⁸ The Court upheld the practice in some form in *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas at Austin* (2016). However, the *Dobbs* decision allowed the Court to attack novel unenumerated rights like affirmative action, and it did so in the *Harvard* case by affirming substantive due process, similar to what had been carried out in *Dobbs*, but the Court only affirmed the equal protection clause and not the due process clause. This allowed the Court to take a position that affirmative action itself was wrong. And by focusing on the *what*, the Court excused itself from addressing the *how*, saying, "It is unclear how courts are supposed to measure any of these goals" (*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* 2023, p. 6). The Harvard decision is part of the pattern that disables citizens' voices that Glasius (2018) discussed. In addition, the ending of affirmative action gives some legitimacy to divisive racial narratives often observed in authoritarian systems. The narratives surrounding challenges to affirmative action painted Black people as the culprits for White failures, as seen in the political discourse surrounding *Fisher v. University of Texas*.⁹ However, with the end of affirmative action, these narratives are legitimized and are indicative of an authoritarian system, according to Panayota Gounari (2018). Gounari (2018) says that a "U.S.-style" authoritarian system will use ethnic, racial, and political minorities as the "scapegoat for most if not all current woes and subsequently construe the respective group as dangerous and as a threat" (p. 210). An authoritarian system thrives on villainizing the "other", pointing out differences, not for remedial policies, but to pit groups against each other. Still, how does this decision bring back the Black Codes?

Because of the *Dobbs* decision, three re-emerging phenomena from the Black Codes will be seen. One of the blossoming areas of historical study is the gendered criminalization of Black women that existed under the Black Codes, according to Khalil Muhammad (2022). Muhammad notes that the conditions for Black women during the Black Codes could be described by the "exclusionary politics of protection", a phrase borrowed from Kali Gross. Essentially, laws and accepted standards would work against Black women, and with the *Dobbs* decision, the lack of protection for Black women will be exacerbated, specifically in the area of reproductive health. Kira Eidson (2023) writes about how the maternal mortality crisis for Black women will only worsen as a result of the *Dobbs* decision. Eidson (2023) discusses how the accepted practices of financial institutions lead to redlining and confine pregnant Black women to "high and medium-Black serving hospitals" because of where they live. These hospitals have higher rates of morbidity, which will only increase because of the *Dobbs* ruling. And even though a 2022 CDC report provided statistics that infant mortality rates for Black birthing women were 2.4 times that of White birthing women before the *Dobbs* decision, the issue will worsen now. This is because the decision allows such variation in care that these medium- and high-serving hospitals will have little to no policies or structures to protect or prioritize the health of Black women (Eidson 2023).

Another characterization of the Black Codes was Black exclusion (Toland 2006). Muhammad (2022) goes further and argues that one of the goals of the Black Codes was to limit the newly gained citizenship and associated rights that would come to freed Blacks. Now that the Supreme Court has set a precedent in *Dobbs* of placing parameters on the 14th

Amendment, Black exclusion and limitations will continue, if not increase, because racial equity rarely aligns with Americanist idealism. The limiting and exclusion of Black people is evinced by the end of affirmative action. Until 1976, the numbers of Black students in colleges were so low that the U.S. government did not even count them. However, because of affirmative action, 7% of students at top colleges are Black (O'Brien 2024). And while some opponents of affirmative action note that 7% is not in parity with the 14% of the Black population at collegiate age (18–24), what they fail to acknowledge is that affirmative action and the consideration of race in college admissions produce some, though limited, access noted by these statistics. Inclusion for Black Americans in predominantly White institutions is now fragile, so fragile that as a result of the *Dobbs* and, consequently, *Harvard* decisions, even minority scholarships are being targeted as discriminatory against White people (O'Brien 2024).

Finally, because the Supreme Court removed race from the motive of the 14th Amendment's substantive due process approach, doctrines of race neutrality and colorblindness will dominate over notions of racial equity and diversity. Though some may afford an idealistic aspiration to race neutrality, the problem with such a society is that it is a society that ignores racism and refuses to address it. The Black Codes were fully characterized by Black neglect in the face of obvious racism, and a race-neutral or colorblind society does the same but appeases the White moral self-image that most contemporary aversive racists possess (Dovidio and Gaertner 2000). Because the Court interpreted the 14th Amendment counterintuitive to its historical intent, the Court engaged in dehistoricization, a populist behavior that occurs in authoritarian systems (Gounari 2018). The re-contextualization of the 14th Amendment as race-neutral was an attempt at colorblind approaches that sustain the racist anti-Black aspects of society.

“Color-blind ideology purports to not notice race in an effort not to appear racist, [asserting] that ending discrimination merely requires treating individuals as equally as possible. . . [However] colorblindness, by overlooking the cumulative and enduring ways in which race unequally shapes life. . . actually reinforces and sustains an unequal status quo”. (Bell et al. 2016, p. 138)

Colorblindness sustains racism because when one ignores race, one also ignores racialized disparities and experiences. If the 14th Amendment is race-neutral, then it cannot serve as a remedy to racialized citizenship. By making the 14th Amendment race-neutral, any implementation of substantive due process that considers racial remedy automatically becomes discriminatory. Under this interpretation of the Amendment, there can be no remedy to matters of racialized citizenship because a consideration of race, even in the light of racism, is inherently unequal. This brings back the Black Codes because it creates a national judicial system that provides no relief for Black citizens.

6. Conclusions

The Black Codes were legislative attempts to limit any notion of citizenship newly freed Blacks could exercise. However, the 14th Amendment was a constitutional effort towards securing those rights by directly addressing the notion of racialized citizenship that existed during slavery and was replicated under the Black Codes. Therefore, if the Supreme Court allowed the ideals of American traditionalism and state participation to serve as conditions, the Court would weaken the singular concept of legal fairness embodied in substantive due process. This is exactly what happened in *Dobbs v. Jackson Women's Health Organization* (2022).

Even though the question addressed in *Dobbs* was not explicitly racial, by weakening the 14th Amendment—drafted to ensure citizenship despite race—the Court regressed to a time of overt legal and cultural limiting of Black citizenship. This does not mean that the country prior to 2022 had reached racial equity, and this decision reverted the country backward. However, the overt nature of racism had declined in recent decades (Jacobson 1985), and this decision will give a pathway to the overt anti-Black legal and cultural structure that characterized the Black Codes. And this more emboldened anti-Blackness can be easily

hidden under insincere notions of colorblindness. However, therein lies the responsibility of Black scholarship, as Black scholarship often aims to instruct in a way that empowers the citizenship that the 14th Amendment was intended to secure. Though it is not the responsibility of Black people to remedy inequitable outcomes they had no power to create, Black scholarship is often pivotal to contextualizing change that leads to civic action. From Du Bois's *The Souls of Black Folk* to Kendi's *How to Be an Antiracist* (Kendi 2019), public-facing scholarship encourages public engagement! Black scholarship often combats authoritarian dehistoricization and teaches the public about the racialized outcomes of government action, which White people often fail to understand, let alone address. Therefore, if the anti-Black outcomes of the *Dobbs* decision are to be exposed, it will be because Black scholarship is relentless in educating the public!

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: No new data were created or analyzed in this study. Data sharing is not applicable to this article.

Conflicts of Interest: The author declares no conflict of interest.

Notes

- ¹ Dr. Frank Toland, Ph.D. is a famed African American Historian specializing in anti-Black legal history in America. He served as faculty at Tuskegee University, an internationally acclaimed historically Black university, for sixty years.
- ² Book III, Chapter 40, Section 1800.
- ³ Book III, Chapter 40, Section 1806.
- ⁴ The Slave Codes served as the foundation for many of the Black Codes, and though most were created at the state level, there were some Slave Codes that were national such as the Fugitive Slave Act.
- ⁵ Quote taken from the questioning of Associate Justice Ketanji Brown Jackson in the oral argument of *Allen v. Milligan* (2023).
- ⁶ The Texas law is Chapter 9 of Article 15 of the Texas Penal Code, and is partly provided in the Footnotes of *Roe v. Wade* (1973). It reads: "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused. . . If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder".
- ⁷ The "rights of the unborn" were pivotal in the *Webster* case, as Missouri Law SS 118.205 stated that "[t]he life of each human being begins at conception", and that "unborn children have protectable interests in life, health, and wellbeing". This was the basis for legal theory and an unborn fetus requires that all state laws be interpreted to provide unborn children with the same rights enjoyed by other people.
- ⁸ According to John Jeffries's (1994) biography of Justice Powell (as explained by Sander 2012), Powell's considerations were more than the compelling interest of the state versus the exclusion of quotas used by the University of California. Powell wanted to establish a "narrowly tailored" unenumerated right, specifically for Black applicants to colleges and universities. He felt "some time was needed to give Black a foothold in the leadership rungs of society. . . He wanted a solution that seemed to curtail preferences while not precluding them" (Sander 2012, p. 285)".
- ⁹ In *Fisher v. University of Texas at Austin* (2016) many of the White conservatives narratives focused on five Black and Latino students with lower test scores than Abigail Fisher that received provisional admission to the University of Texas.

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