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Dobbs and Democracy

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In Dobbs v. Jackson Women's Health Organization*, Justice Alito justified the decision to overrule* Roe v. Wade *and* Planned Parenthood of Southeastern Pennsylvania v. Casey *with an appeal to democracy. He insisted that it was "time to heed the Constitution and return the issue of abortion to the people's elected representatives." This invocation of democracy had undeniable rhetorical power: it allowed the* Dobbs *majority to lay waste to decades' worth of precedent, while rebutting charges of judicial imperialism and purporting to restore the people's voices. This Article interrogates* Dobbs*'s claim to vindicate principles of democracy, examining both the intellectual pedigree of this claim and its substantive vision of democracy.*

In grounding its decision in democracy, the Dobbs *majority relied on a well-worn but dubious narrative: that* Roe*, and later* Casey*, disrupted ongoing democratic deliberation on the abortion issue, wresting this contested question from the people and imposing the Court's own will. The majority insisted that this critique had always attended* Roe*. However, in tracing the provenance of the democratic deliberation argument, this Article finds more complicated intellectual origins. In fact, the argument did not surface in* Roe*'s immediate aftermath, but rather emerged years later. And it did so not organically, but through a series of interconnected legal, movement, and political efforts designed to undermine and ultimately topple* Roe *and* Casey*. The product of these efforts, the* Dobbs *majority's claim that democracy demanded overruling* Roe *and* Casey*, was deployed to overcome the force of stare decisis in* Dobbs *— and may ultimately reshape the scope and substance of the Court's stare decisis analysis in future cases.*

Having identified the intellectual origins of the democratic deliberation argument and its contemporary consequences, this Article examines the contours of the Dobbs *majority's vision of democratic deliberation. We show that although* Dobbs *trafficked in the rhetoric of democracy, its conception of democracy was both internally inconsistent and extraordinarily limited, even myopic. The opinion misapprehended the processes and institutions that are constitutive of democracy, focusing on state legislatures while overlooking a range of other federal, state, and local constitutional actors. As troublingly, it reflected a distorted understanding of political power and representation — one that makes political power reducible to voting, entirely overlooking metrics like representation in electoral office and in the ecosystem of campaign finance. The opinion was also willfully blind to the antidemocratic implications of its "history and tradition" interpretive method, which binds the recognition of constitutional rights to a past in which very few Americans were meaningful participants in the production of law and legal meaning. The deficits of the* Dobbs *majority's conception of democracy appear even more pronounced when considered alongside the Court's recent and active interventions to distort and disrupt the functioning of the electoral process. Indeed,* Dobbs *purported to "return" the abortion*

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question to the people and to democratic deliberation at the precise moment when the Court's own actions have ensured that the extant system is unlikely either to produce genuine deliberation or to yield widely desired outcomes.

Ultimately, a close examination of the Dobbs *majority's invocation of democracy suggests that the majority may have employed the values and vernacular of democracy as a means to a different end. As we explain, the majority's embrace of democracy and democratic deliberation allowed it to shield its actions from claims of judicial activism and overreach. More profoundly, and perhaps paradoxically, the opinion may lay the groundwork for the eventual vindication and protection of particular minority interests — those of the fetus. With this in mind, the* Dobbs *majority's settlement of the abortion question is unlikely to be a lasting one. Indeed, aspects of the opinion suggest that this settlement is merely a way station en route to a more permanent resolution — the recognition of fetal personhood and the total abolition of legal abortion in the United States.*

INTRODUCTION

On August 2, 2022, Kansas voters overwhelmingly rejected a proposed constitutional amendment that would have written abortion protections out of the state constitution.[1] Three days later, Indiana passed and signed into law one of the most restrictive abortion bans in the country.[2]

These events occurred less than two months after the Supreme Court overturned *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[4] once the twin pillars of the Court's abortion jurisprudence, in *Dobbs v. Jackson Women's Health Organization*.[5] And, because both events were framed in public debates as referenda on *Dobbs* and the future of reproductive rights, some commentators suggested that these developments vindicated the *Dobbs* majority's assertion that "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives."[6]

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[1] Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html [https://perma.cc/X2L5-XLK5]; Katie Bernard & Lisa Gutierrez, *"No" Prevails: Kansas Votes to Protect Abortion Rights in State Constitution*, KAN. CITY STAR (Aug. 5, 2022, 5:23 PM), https://www.kansascity.com/news/politics-government/election/article263832087.html [https://perma.cc/4NQA-5AMM].

[2] Arika Herron, *Indiana Adopts Near-Total Abortion Ban as Governor Signs SB 1 into Law*, INDIANAPOLIS STAR (Aug. 6, 2022, 6:07 PM), https://www.indystar.com/story/news/politics/2022/08/05/indiana-abortion-law-passed-final-vote-to-come/65391000007 [https://perma.cc/ZG2J-9SBE].

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

[4] 505 U.S. 833 (1992).

[5] 142 S. Ct. 2228 (2022).

[6] *Id.* at 2243; *see* Editorial, *Kansas, Abortion and the Supreme Court*, WALL ST. J. (Aug. 4, 2022, 6:48 PM), https://www.wsj.com/articles/kansas-and-the-supreme-court-samuel-alito-roe-v-wade-john-harris-david-von-drehle-abortion-dobbs-11659650794 [https://perma.cc/L37U-KWZN] ("[T]he vote defeating a constitutional amendment to overturn a state Supreme Court ruling on abortion is a rousing vindication of Justice Alito's majority opinion overturning *Roe v. Wade*."); Press Release, Susan B. Anthony Pro-Life America, Indiana Joins 14 States with Strong Laws Protecting Life (Aug. 6, 2022), https://sbaprolife.org/newsroom/press-releases/indiana-joins-

It is unsurprising that these two events would prompt such a response. After all, Justice Alito's majority opinion in *Dobbs* maintained that the political process was the proper venue for resolving the competing interests at stake in the abortion debate.[7] On the majority's telling, its decision laying waste to nearly fifty years' worth of precedent was a necessary corrective to an egregious act of judicial overreach. According to the *Dobbs* majority, the Court in *Roe* and *Casey* had stripped the American people of "the power to address a question of profound moral and social importance."[8] In so doing, it had "short-circuited the democratic process by closing it to the large number of Americans who dissented"[9] from these two decisions.

Despite this lofty talk of returning the abortion question "to the people,"[10] the *Dobbs* majority's conception of democracy quickly collapses upon close examination. The rhetoric of democracy in *Dobbs* is both revealing and hollow: it is revealing in that its paeans to democracy flow from strategic choices made in the political sphere about how to criticize and delegitimize the Court's abortion jurisprudence, as well as from scholarly critiques of *Roe*; it is hollow in that the conception of democracy it displays is profoundly limited. Indeed, some might argue that the majority's invocation of the values and vernacular of democracy is at once instrumental and cynical. That is, the *Dobbs* majority's interest in returning the abortion question to the American people was likely not in service of the settlement of a vexed and contentious issue. Rather, the majority's insistence on democratic deliberation may simply be a way station en route to the pro-life movement's desired resolution: the complete abolition of legal abortion.

The Article proceeds in five parts. Part I provides an intellectual history of the democratic deliberation argument, tracing the emergence and evolution of the rhetoric of democratic deliberation in the Court's abortion cases. As we note, although the rhetoric of democratic deliberation is briefly glimpsed in the dissenting opinions in 1973's *Roe v. Wade* and *Doe v. Bolton*[11] and 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the bulk of the initial criticism of

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14-states-with-strong-laws-protecting-life [https://perma.cc/6QEE-U3Z9] ("After the *Dobbs* decision sent this issue back to the people in June, the process has worked the way it is supposed to. Elected officials made critical decisions after hearing from thousands of Hoosiers. The Indiana experience is illustrative for other states because it envisions new protections for life in Indiana based on the will of the people, highlighting that our work will continue in the future."); Howard Kurtz, *Behind the Kansas Abortion Shocker: Why Some Red States Don't Want a Total Ban*, FOX NEWS (Aug. 4, 2022, 3:03 AM), https://www.foxnews.com/media/behind-kansas-abortion-shocker-why-some-red-states-dont-want-total-ban [https://perma.cc/M4NR-D3XR] ("What happened in Kansas is what the Supreme Court, and defenders of its abortion ruling, say they wanted.").

[7] *Dobbs*, 142 S. Ct. at 2277.

[8] *Id.* at 2265.

[9] *Id.*

[10] *Id.* at 2259.

[11] 410 U.S. 179 (1973).

these decisions took aim at the Court's conception of the rights at stake. Put differently, the initial critique of *Roe* and its recognition of the abortion right — in and outside of the Court — was not about the decision's disruption of democratic deliberation, but rather about its misapprehension of the nature of fundamental rights.

In time, as the Court's personnel changed, social movement mobilization in opposition to abortion intensified, and new scholarly critiques of *Roe* and abortion rights emerged, the arguments against *Roe* evolved. Rather than focusing principally on the Court's misunderstanding of fundamental rights, *Roe* skeptics (on and off the Court) began to embrace and advance the democracy-grounded arguments that once had been peripheral in abortion discourse. On this emerging account, *Roe*'s fatal flaw was not simply that it misunderstood fundamental rights; instead, *Roe* was wrong because it imposed the Court's policy preferences on the country, wresting the abortion issue from state legislatures, which were in the process of resolving these disputes.

After tracing the intellectual history of the democratic deliberation argument in and outside of the Court, Part II considers the jurisprudential implications of the *Dobbs* Court's association of *Roe* with disrupted democratic deliberation. As we explain, the *Dobbs* Court's reiteration of the disrupted democratic deliberation narrative went beyond simply justifying overruling *Roe* and *Casey*; it also fundamentally altered the scope and substance of the stare decisis calculus. Under *Casey*, courts were required to consider a range of factors, including the decision's workability and the quality of its reasoning, in determining whether to depart from an existing precedent.[12] They could also consider whether there is a "convincing justification" that warrants a break from long-standing precedent.[13] On one level, the *Dobbs* Court's emphasis on democratic deliberation may simply have created a new justification: the existence of ongoing popular debate on an issue of "profound moral and social importance" about which there exists a "national controversy."[14] On another level, however, the *Dobbs* Court's focus on democratic deliberation may have signaled its willingness to bypass conventional stare decisis analysis altogether if it views a precedent as so contentious and divisive that the underlying question should be decided through the political process, rather than through judicial resolution.[15]

Having established the *Dobbs* Court's interest in democratic deliberation, Parts III and IV pivot to consider the strength of this commitment

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[12] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

[13] *See id.* at 867.

[14] *Dobbs*, 142 S. Ct. at 2265.

[15] Of course, there are rights associated with issues of increasing public significance — gun rights, for example — that this Court views as inviolable and sacrosanct, seemingly oblivious to the prospect of majoritarian preferences and democratic deliberation. For further discussion of this dynamic, see Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 859 (2023) [hereinafter Murray, *Children of Men*].

to democracy. Part III first challenges the Court's apparent conception of democracy. It then examines both the specific ways the majority opinion invoked the prospect of democratic deliberation, and the deep democratic myopia that undergirded the opinion's assessment of the current electoral landscape. As we explain, this myopia assumed different forms. First, the Court displayed a crabbed understanding of the venues and contexts in which democratic deliberation occurs, treating democracy as coextensive with state legislative activity and rendering invisible state courts, state executives, the federal government, local officials, and mechanisms of direct democracy. Second, the Court imagined the democracy it sought to facilitate as unidirectional, producing more restrictive, rather than more protective, abortion policies. Third, the Court's discussion of women's political participation suggested that political power can be measured by voter turnout alone, overlooking critical metrics like representation in electoral office and in the ecosystem of campaign finance. Finally, the historical method the Court announced and deployed to determine whether the abortion right is constitutionally protected links contemporary constitutional meaning to positive law enacted by a polity in which women and most people of color were utterly absent — an interpretive method that belies any meaningful commitment to democracy.

After identifying these deficits in the *Dobbs* Court's discussion of democracy, Part IV considers the Court's actual commitment to the prospect of democratic deliberation. As we explain, the Court's insistence on returning abortion to the people for democratic deliberation stands in stark contrast to its recent decisions actively distorting and disrupting the democratic landscape to which the Court now consigns the abortion question. To this end, this Part also considers the ways in which the Court routinely — and selectively — gestures to the political process and democratic debate as a means of avoiding judicial interventions that would secure the rights and status of underrepresented groups.

Finally, Part V comes full circle to consider the Court, *Dobbs*, and the relationship between democracy and judicial review. Here, we argue that the Court's invocation of democracy and democratic deliberation in *Dobbs* serves both rhetorical and substantive ends. In terms of rhetoric, the appeal to democracy and democratic engagement allows the majority to avoid claims of judicial activism and overreach. Substantively, however, the interest in democratic values may be more profound. As we explain, woven throughout the opinion's appeals to democracy and democratic deliberation are nods to the interests of the fetus and unborn life. With this in mind, we maintain that the majority's interest in democracy and democratic deliberation may serve to scaffold an argument that posits the fetus as an entity with constitutional interests that the Court is obliged to protect.

Taken together, this Article's excavation of the intellectual history of democracy-oriented arguments, in tandem with its discussion of the

Dobbs Court's shallow and myopic commitment to democracy, make plain that *Dobbs* cannot be genuinely understood to rest on or to further democratic engagement, as the majority insists. Instead, the majority's invocation of democracy is yet another discursive move that deploys the vernacular and values of democracy for other ends.

I. The Evolution of an Argument

The majority opinion in *Dobbs* made much of the notion that *Roe v. Wade* disrupted ongoing state-level debate over abortion rights.[16] Moreover, according to Justice Alito, *Roe*'s critics immediately assailed the decision on the ground that it usurped the role of the people, substituting judicial judgment for democratic engagement on a fraught and divisive social issue.[17] Critically, this notion of disrupted democratic engagement ostensibly undergirds much of the majority's disdain for *Roe* — and ultimately, its overruling of this nearly fifty-year-old precedent.

The view that *Roe* disrupted ongoing democratic debate over abortion rights has long been part of the conventional wisdom around *Roe*.[18] Most, including the *Dobbs* majority, accept unquestioningly the account that from the start, *Roe* was understood as removing the abortion question from the people, who were in the throes of debating the issue for themselves.

But is this conventional wisdom correct? In the sections that follow, we trace the intellectual history of the disrupted democratic deliberation argument. As we show, although this narrative briefly surfaced in the dissents to *Roe v. Wade* and *Roe*'s companion case *Doe v. Bolton*, it receded almost immediately as critics focused instead on *Roe*'s logic vis-à-vis the identification of fundamental rights. It was only later, amidst changes in the Court's personnel, new scholarly critiques, and new grassroots mobilization against abortion, that the narrative of disrupted democratic deliberation took root and flourished as a core objection to *Roe* and the right it recognized.

A. Roe*'s Immediate Aftermath*

Although it will be remembered as an embattled decision,[19] *Roe v. Wade*, when it was decided in 1973, reflected relative consensus among

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[16] *See Dobbs*, 142 S. Ct. at 2265 ("The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*.").

[17] *Id.* at 2241.

[18] *See infra* section I.B, pp. 739–48.

[19] *See, e.g.*, Linda Greenhouse & Reva B. Siegel, Feature, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2030 (2011) ("*Roe* has become nearly synonymous with political conflict."). In fact, *Roe* was relatively uncontroversial when it was first announced and for some time afterwards. The decision's announcement was overshadowed by the death of

the Court's members.[20] Authored by a Republican appointee, Justice Blackmun, *Roe* was decided on a 7–2 vote in which both Republican- and Democratic-appointed Justices were in the majority.[21] The dissenting contingent was also bipartisan in nature.[22] Then-Justice Rehnquist, a recent Nixon appointee,[23] objected to both the Court's exercise of jurisdiction over the case[24] and the majority's conclusion that abortion was protected as a component of the right to privacy.[25] But Justice Rehnquist's dissenting opinion gestured only vaguely to the prospect of democracy and popular deliberation, noting debate and "changing" views on abortion[26] and linking the majority's decision in *Roe* to *Lochner v. New York*,[27] a 1905 decision in which the Court invalidated a New York progressive labor law.[28] In 1973, as today, *Lochner* was

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former President Lyndon Baines Johnson. *See* James D. Robenalt, *January 1973 Was a Monumental Month for America*, SLATE (Jan. 22, 2023, 5:59 AM), https://slate.com/news-and-politics/2023/01/roe-january-1973-politics-roadmap.html [https://perma.cc/S49J-R2EN]. And when Justice Stevens was confirmed to the Court in 1975, just two years after *Roe*, he was not asked a single question about *Roe* or abortion rights. *See* John Paul Stevens & Linda Greenhouse, Feature, *A Conversation with Justice Stevens*, 30 YALE L. & POL'Y REV. 303, 316 (2012); Linda Greenhouse, *Public Opinion & the Supreme Court: The Puzzling Case of Abortion*, DAEDALUS, Fall 2012, at 69, 78.

[20] It also engendered relative consensus among the commentariat. *See* Greenhouse, *supra* note 19, at 77 ("Newspaper commentary the morning after the decision was highly favorable, including in media markets far from centers of liberal sentiment. *The Atlanta Constitution*'s editorial called the decision 'realistic and appropriate,' despite the fact that in *Doe v. Bolton*, the companion decision to *Roe*, issued the same day, the Court had invalidated Georgia's abortion law, which was based on the American Law Institute model. Although *Roe* struck down a Texas law, newspapers in Texas praised the opinion, with the *Houston Chronicle* calling it 'sound' . . . ." (footnote omitted) (quoting DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 605–06, 873 (1994))).

[21] Roe v. Wade, 410 U.S. 113, 115 (1973). Justice Blackmun was joined by Republican-appointed Chief Justice Burger and Justices Brennan, Stewart, and Powell and Democratic-appointed Justices Douglas and Marshall.

[22] Then-Justice Rehnquist, a Republican appointee, and Justice White, a Democratic appointee, dissented in *Roe*.

[23] Justice Rehnquist was not on the Court when it heard the first argument in *Roe*, but by the time of the 1972 reargument, he and Justice Powell had replaced Justices Harlan and Black. Greenhouse, *supra* note 19, at 75.

[24] *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting) ("[A] necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit."); *id.* at 172 ("In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)) (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring))).

[25] *Id.* at 172 ("I have difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case.").

[26] *Id.* at 174 ("Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe.").

[27] 198 U.S. 45 (1905); *see Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) ("While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case." (citation omitted) (citing *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting))).

[28] *Lochner*, 198 U.S. at 64.

widely discredited as anticanonical;[29] although, as Professor Jamal Greene has noted, "the consensus over *Lochner*'s wrongness obscures deep disagreement over *why* it is wrong."[30]

Justice White, a Kennedy appointee, penned a dissent — joined by Justice Rehnquist — opposing both *Roe* and its companion case, *Doe v. Bolton*.[31] In that dissent, Justice White invoked democracy more directly. According to Justice White, the majority's decision in *Roe* was a stunning exercise of judicial overreach, stripping "the people and the legislatures of the 50 States" of the opportunity "to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand."[32] The *Roe* Court's "exercise of its clear power of choice" was particularly egregious "[i]n a sensitive area such as [abortion], involving as it does issues over which reasonable men may easily and heatedly differ."[33] In Justice White's view, such a contested — and contestable — issue "should be left with the people and to the political processes the people have devised to govern their affairs."[34]

But to be clear, in the immediate aftermath of *Roe*, Justice White was largely alone in voicing concern that the *Roe* Court had usurped an issue best left to the legislatures and to the people. And in the years immediately following *Roe*, Justice White's concerns about democratic deliberation appeared to recede as the Court's *Roe* skeptics focused on cabining the decision's reach. Three years after *Roe*, the Court's decision in *Planned Parenthood of Central Missouri v. Danforth*,[35] invalidating portions of a Missouri abortion statute, prompted few objections that explicitly sounded in the register of democratic deliberation.[36] Certainly, some members of the Court maintained that the parental-consent requirement challenged in *Danforth* was within the state legislature's purview to weigh and enact.[37] But, critically, even as members of the Court acknowledged the legislature's authority to regulate the provision of abortion services, no Justice raised the view that *Roe* was illegitimate because it improperly disrupted democratic debate on the abortion question. Likewise, in his partial dissent in *Danforth*, in which Chief Justice Burger and Justice Rehnquist joined, Justice White

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[29] *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 418 (2011) ("[*Lochner*] is inconceivable in the twenty-first century, as it was in the second half of the twentieth . . . ."); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 64 (1991) (discussing *Lochner*'s contemporary status as an anticanonical decision); David A. Strauss, Essay, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003) (same).

[30] JAMAL GREENE, HOW RIGHTS WENT WRONG 43 (2021).

[31] Doe v. Bolton, 410 U.S. 179, 221–23 (1973) (White, J., dissenting).

[32] *Id.* at 222.

[33] *Id.*

[34] *Id.*

[35] 428 U.S. 52 (1976).

[36] *See id.* at 92–101 (White, J., concurring in the judgment in part and dissenting in part).

[37] *Id.* at 102–14 (Stevens, J., concurring in part and dissenting in part).

emphasized the state's authority, even in the face of the interests protected in *Roe*, to enact the challenged laws.[38] He did not reiterate his earlier position that *Roe* deprived the people of the opportunity to decide the issue for themselves.

Critically, the notion that *Roe*'s fatal flaw was its disruption of ongoing democratic deliberation was also not explicit in the academic responses offered in the decision's immediate aftermath. To be sure, *Roe* sparked considerable debate among legal scholars, including, famously, Professor John Hart Ely's *Yale Law Journal* essay, *The Wages of Crying Wolf: A Comment on* Roe v. Wade (*Wages*).[39] But despite the *Dobbs* majority's reference to the essay as evidence that *Roe* drew immediate criticism,[40] in fact, Ely's critique largely focused on the constitutional basis for the Court's decision regarding the fundamental nature of the abortion right, the Court's failure to appropriately weigh the state's interest in protecting fetal life, and its disregard for the separation of powers.[41] Only later did Ely shift his focus from fundamental rights and state regulatory authority to consider *Roe*'s implications for democratic deliberation.[42]

In *Wages*, Ely charged the *Roe* Court with creating "this superprotected right [that] is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."[43] Ely focused far more on the

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[38] *Id.* at 93–94 (White, J., concurring in the judgment in part and dissenting in part).

[39] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) [hereinafter Ely, *Wages*].

[40] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022) (quoting Ely, *Wages*, *supra* note 39, at 926, 947).

[41] Ely, *Wages*, *supra* note 39, at 947 ("[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."). In this sense, Ely's *Wages* critique was largely presaged by Professor Robert Bork's 1971 essay *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), a broadside against many key antecedents to *Roe*. In that essay, published two years before *Roe*, Bork was particularly critical of *Griswold v. Connecticut*, 381 U.S. 479 (1965), an important *Roe* precursor in which the Court struck down a Connecticut prohibition on contraception, even for married couples. Bork, *supra*, at 8–10; *see also* Melissa Murray, *Sexual Liberty and Criminal Law Reform: The Story of* Griswold v. Connecticut, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 11, 11–32 (Melissa Murray et al. eds., 2019) (discussing *Griswold*). In terms that would foreshadow critiques of *Roe*, Bork denounced *Griswold*'s reasoning as "utterly specious," yielding an "unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it." Bork, *supra,* at 9. To the extent that Bork's critique of *Griswold* engaged the issue of democratic deliberation, it was largely implicit — that by recognizing a fundamental right, the *Griswold* Court had effectively removed the question of contraception regulation from the democratic process. *Id.* at 6.

[42] *See* Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1945–46 (2021) (critiquing Ely's later interest in the democratic implications of decisions like *Roe*). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) [hereinafter ELY, DEMOCRACY AND DISTRUST].

[43] Ely, *Wages*, *supra* note 39, at 935–36 (footnote omitted).

perceived weakness in the opinion's reasoning than on its disruption of democratic debate and engagement. And while Ely noted that the *Roe* majority had improperly "second-guess[ed] legislative balances,"[44] even that brief nod to the legislature appeared to conflate legislative regulatory action with democratic deliberation. But critically, the view that *Roe* allowed the Court to substitute its policy preferences for legislative action does not squarely encompass the view, later articulated in *Dobbs*, that *Roe*'s critical flaw was that it disrupted popular debate on the issue.

In the immediate aftermath of *Roe*, other scholarly critics likewise gestured only vaguely at the notion that the Court's decision foreclosed popular debate on the abortion question. Reflecting on *Roe* in the *Supreme Court Review*, Professor Richard Epstein focused on the *Roe* majority's effort to balance the woman's interest in terminating a pregnancy against the prospect of fetal life.[45] It was only in the final paragraph of his twenty-six-page article that Epstein nodded toward democratic deliberation, questioning why the Court would devote so many decisions to "insur[ing] that the political process will be . . . open and fair" only to circumvent state governments who were "responsive to the majority of [their] citizens."[46] Such efforts to enhance democratic participation, Epstein mused, were likely unnecessary in the face of the kind of judicial imperialism that *Roe* reflected.[47]

To be sure, these early critics' focus on countermajoritarianism and the identification of fundamental rights undergirded a broader institutional critique that sounded in the register of popular sovereignty: that, in issuing a decision that recognized a fundamental right to abortion, the Court removed the question from the legislative process and insulated the newly recognized right from public objections. Still, in *Roe*'s immediate aftermath, much of the judicial and scholarly criticism was less than explicit in its objection to frustrated democratic deliberation, focusing instead on the opinion's reasoning as to the scope and substance of fundamental rights. Though commentators nodded at the prospect of democratic deliberation, it was principally in the context of judicial imperialism in the denomination of fundamental rights. Indeed, it would take roughly ten years for the critique of *Roe* as disrupting ongoing democratic deliberation on the abortion issue to surface concretely.

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[44] *Id.* at 926.

[45] Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 181–84 (1973).

[46] *Id.* at 185.

[47] *Id.* ("Given its decision in the abortion cases, one wonders, at least for the moment, why they bothered [to decide the reapportionment cases]. The Texas statute, the Georgia statute, and a host of possible alternatives are not monuments to the ignorance of man. They are uneasy but reasonable responses to most troublesome questions. They should not be struck down as unconstitutional by the Supreme Court, particularly in an opinion that avoids in the name of privacy the hard questions that must be faced to reach that result.").

B. The Emergence of the Democratic Deliberation Argument

Shades of the democratic deliberation argument emerged in fits and starts in the years following *Roe*. And intriguingly, the interest in majoritarian deliberation of abortion policies and restrictions was most evident in the context of cases involving public funding for abortion services. In cases like *Maher v. Roe*[48] and *Harris v. McRae*,[49] both of which concerned the use of public funds for abortion services, briefs filed in support of the government policies emphasized the legislature's critical role in translating the public's preferences on abortion into public policy.[50]

By the time the most robust articulation of the democratic deliberation narrative surfaced again, it was ten years after *Roe*. In that decade, the membership of the Court changed. Justices Douglas and Stewart, who had been in the *Roe* majority, retired and were replaced by Justices Stevens and O'Connor. As importantly, backlash against *Roe* had begun to emerge as antiabortion mobilization intensified.[51] The Court's consideration of *City of Akron v. Akron Center for Reproductive Health, Inc.*[52] (*Akron I*), would reflect these changes on and off the court.

The Court in *Akron I* struck down a requirement that all second-trimester abortions be performed in hospitals, while sustaining several other abortion regulations.[53] Although the Court invalidated the challenged restriction, the decision prompted a spirited dissent from Justice O'Connor, a new Reagan appointee. Joined by Justices White and Rehnquist, the *Roe* dissenters, Justice O'Connor denounced *Roe*'s trimester framework as "unworkable,"[54] and accused the majority of using analysis "inconsistent both with the methods of analysis employed in previous cases dealing with abortion, and with the Court's approach to fundamental rights in other areas."[55] In addition to these concerns about *Roe*'s reasoning and logic, Justice O'Connor, herself a former state legislator, resurrected Justice White's earlier view that when presented "with extremely sensitive issues," like abortion, "the appropriate forum

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[48] 432 U.S. 464 (1977).

[49] 448 U.S. 297 (1980).

[50] Brief of the Appellant at 24–28, *Maher*, 432 U.S. 464 (No. 75-1440) ("It is not the function of the courts to judge the wisdom of legislative enactments but only to pass upon their legality." *Id.* at 24 (footnote omitted).). In its amicus brief filed in support of Connecticut, New Jersey officials echoed these concerns, similarly characterizing the question not simply as one concerning the fundamental right to an abortion, but rather as a "policy determination by the duly elected representatives of a state concerning the appropriate allocation of public funds for medical assistance to the poor." *See* Amicus Curiae Brief of the State of New Jersey at 5, *Maher*, 432 U.S. 464 (No. 75-1440).

[51] *See* Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, ORG. AM. HISTORIANS, https://www.oah.org/tah/november-3/abolishing-abortion-the-history-of-the-pro-life-movement-in-america [https://perma.cc/7J6T-BF83].

[52] 462 U.S. 416 (1983).

[53] *See id.* at 426.

[54] *Id.* at 454 (O'Connor, J., dissenting).

[55] *Id.* at 452–53.

for their resolution . . . is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'"[56]

Perhaps buoyed by the growing number of *Roe* skeptics on the Court, Justice White waded back into the fray to press the point that *Roe* usurped state legislatures' authority to decide the contested abortion issue — and to connect democratic deliberation to a more controversial point regarding the Court's duty to adhere to past precedents. Dissenting from the Court's decision in *Thornburgh v. American College of Obstetricians & Gynecologists*[57] invalidating several provisions of Pennsylvania's abortion law, Justice White reiterated his view that *Roe* "'departs from a proper understanding' of the Constitution."[58] But meaningfully, he also went further to make the case that stare decisis was not required in circumstances like *Roe*, where the decision "involve[s] our assumed power to set aside on grounds of unconstitutionality a state or federal statute representing the democratically expressed will of the people."[59] As Justice White explained, decisions like *Roe*, which identified an unenumerated right to choose an abortion, "find in the Constitution principles or values that cannot fairly be read into that document," and in so doing, "usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation."[60] In such circumstances, Justice White mused, "it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken."[61]

But if Justice White believed that stare decisis was not an inexorable command in circumstances where a decision intruded upon the prerogatives of the people and their representatives, other members of the Court were less convinced. Responding to Justice White's assertion that "hotly contested moral and political issue[s] . . . are to be resolved by the will of the people,"[62] Justice Stevens lodged an objection to unfettered majority rule.[63] Recalling Justice White's earlier vote to invalidate Connecticut's contraceptive ban in *Griswold v. Connecticut*,[64] Justice Stevens noted that abortion, like contraception before it, entailed issues "traditionally associated with the 'sensitive areas of liberty' protected

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56 *Id.* at 465 (quoting Maher v. Roe, 432 U.S. 464, 479–80 (1977)).

57 476 U.S. 747 (1986).

58 *Id.* at 788 (White, J., dissenting) (alteration in original) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985)).

59 *Id.* at 787.

60 *Id.*

61 *Id.*

62 *Id.* at 796.

63 *Id.* at 777–78 (Stevens, J., concurring).

64 381 U.S. 479 (1965).

by the Constitution."[65] In circumstances involving such sensitive issues, Justice Stevens maintained, "no individual should be compelled to surrender the freedom to make that decision for herself simply because her 'value preferences' are not shared by the majority."[66] That "the 'abortion decision' should be made . . . by the majority 'in the unrestrained imposition of its own, extraconstitutional value preferences,'"[67] was in Justice Stevens's view, a perversion of the Framers' intent.[68] After all, he mused, "the lawmakers who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority."[69]

Still, despite Justice Stevens's concerns, others endorsed Justice White's view that abortion was a sensitive issue best suited for democratic deliberation — and that *Roe*, because it effectively deprived the people of their right to decide the issue through majoritarian politics, was not entitled to ordinary stare decisis effect. In its brief in *Thornburgh* in support of Pennsylvania, the United States made the point plain. Stare decisis, it explained, "does not count so strongly" in circumstances "[w]here a judicial formulation affecting the allocation of constitutional powers has proven 'unsound in principle and unworkable in practice,' [and] where it 'leads to inconsistent results at the same time that it disserves principles of democratic self-governance.'"[70]

A few years later, in cases like *Webster v. Reproductive Health Services*[71] and *Ohio v. Akron Center for Reproductive Health*[72] (*Akron II*), Justice Scalia, another new Reagan appointee, articulated a related critique of *Roe* grounded in democratic deliberation. In *Webster*, decided in 1989, Justice Scalia wrote separately to emphasize that abortion was "a political issue" — and one that "continuously distorts the public perception of the role of this Court."[73] As a result of *Roe*, Justice Scalia lamented, the Court was flooded with "carts full of mail from the public, and streets full of demonstrators, urging us — their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will — to follow the popular will."[74] To Justice Scalia, *Roe* — and judicial resolution of issues properly reserved to the

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[65] *Thornburgh*, 476 U.S. at 777 (Stevens, J., concurring) (quoting *Griswold*, 381 U.S. at 503 (White, J., concurring in the judgment)).

[66] *Id.*

[67] *Id.* at 777–78 (quoting *id.* at 794 (White, J., dissenting)).

[68] *See id.* at 776 n.4.

[69] *Id.* at 781–82.

[70] Brief for the United States as Amicus Curiae in Support of Appellants at 21, *Thornburgh*, 476 U.S. 747 (Nos. 84-495 & 84-1379) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985)).

[71] 492 U.S. 490 (1989).

[72] 497 U.S. 502 (1990).

[73] *Webster*, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment).

[74] *Id.*

political process — risked upending the Court's institutional role, rendering it merely an adjunct of majoritarian politics. On this account, the Court's uneasy settlement of the abortion question only provoked more public outcry — and challenges to the Court's authority. A year later, in *Akron II*, Justice Scalia made the point more emphatically. Leaving the vexed question of abortion to the people was, he maintained, the only way to "produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process."[75] With this in mind, Justice Scalia urged his colleagues to "end [the Court's] disruptive intrusion into this field as soon as possible."[76]

By the time the Court revisited the question of *Roe*'s continued precedential value in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the issue of democratic deliberation was front and center in the arguments and decisionmaking. In a lengthy dissent from the plurality opinion reaffirming *Roe*, Justice Scalia elaborated Justice White's view of democratic deliberation. Abortion, Justice Scalia insisted, was an issue best left to the people: "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."[77] But critically, Justice Scalia went further than Justice White, crafting an argument that *Roe* had not only wrongfully preempted democratic deliberation on a contested issue, but also, in so doing, provoked a national controversy "by elevating [the abortion question] to the national level where it is infinitely more difficult to resolve."[78] As Justice Scalia explained, in stark contrast to abortion, the Court had left other contested issues, like the death penalty, to the states and the people — resulting in durable policy compromises that were "worked out at the state level."[79] By virtue of the Court's intervention, abortion now assumed national significance, eluding the kind of stable "state-by-state resolution" that characterized these other controversial questions.[80] This stalemate, Justice Scalia insisted, was a direct result of the *Roe* Court's wrongheaded intervention. "Pre-*Roe* . . . political compromise was possible."[81]

But if Justice Scalia viewed *Roe* — and *Casey* — as precluding popular resolution of a divisive issue, the *Casey* majority maintained that other popular concerns counseled in favor of retaining *Roe* and the abortion right. According to the plurality, discarding the principle of stare

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[75] *Akron II*, 497 U.S. at 521 (Scalia, J., concurring).

[76] *Id.*

[77] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[78] *Id.* at 995.

[79] *Id.*

[80] *Id.*

[81] *Id.*

decisis and overruling *Roe* would weaken the Court's legitimacy in the eyes of the public.[82] And "[u]nlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters," as "the loss of its principled character could not be retrieved by the casting of so many votes."[83] Moreover, to the extent that those seeking to overrule *Roe* emphasized the decision's impact on "the people," the plurality noted that "for two decades . . . people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[84] Though the plurality found it difficult to determine with specificity the reliance interests inherent in *Roe*, it made clear that there would be costs to overruling the decision "for people who have ordered their thinking and living around that case."[85]

Although Justice Scalia did not carry the day in *Casey*, his objections to *Roe* were easily translated into — and adopted by other conservative Justices in — the disposition of other controversial culture-war issues, including the legalization of same-sex marriage.[86] In 2015's *Obergefell v. Hodges*,[87] a 5–4 decision announcing constitutional protection for same-sex marriage, Justice Scalia bemoaned the Court's decision expanding the right to marry to include same-sex couples. "Until the courts put a stop to it," he lamented, "public debate over same-sex marriage displayed American democracy at its best."[88]

Justice Scalia was not alone on this front. The Chief Justice and Justices Thomas and Alito also raised the issue of frustrated democratic deliberation in the context of the marriage equality debate.[89] Notably, Chief Justice Roberts underscored his interest in democratic deliberation with a pointed reference to the work of another "thoughtful commentator."[90] In a 1985 article in the *North Carolina Law Review*, then-Judge Ruth Bader Ginsburg famously offered two critiques of the *Roe* decision: (1) that the Court had moved too aggressively to invalidate all criminal abortion statutes, preempting popular debate and provoking

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[82] *See id.* at 866 (majority opinion) ("There is a limit to the amount of error that can plausibly be imputed to prior Courts. . . . The legitimacy of the Court would fade with the frequency of its vacillation.").

[83] *Id.* at 868.

[84] *Id.* at 856.

[85] *Id.*

[86] We discuss in more detail these arguments *infra* section IV.B, pp. 785–97.

[87] 576 U.S. 644 (2015).

[88] *Id.* at 714 (Scalia, J., dissenting).

[89] *See id.* at 710 (Roberts, C.J., dissenting) ("By deciding this question under the Constitution, the Court removes it from the realm of democratic decision."); *id.* at 732 (Thomas, J., dissenting) ("The majority apparently disregards the political process as a protection for liberty."); *id.* at 736 (Alito, J., dissenting) ("Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.").

[90] *Id.* at 710 (Roberts, C.J., dissenting).

backlash; and (2) that the Court's understanding of the constitutional rights at stake was too narrowly focused on the privacy of the pregnant woman and the medical judgment of her physician, and failed to consider the equality dimensions of the abortion question.[91] Now that then-Judge Ginsburg was a member of the Court — and one of the five Justices who had voted to legalize same-sex marriage[92] — the invocation of her earlier writing was both strategic and substantive. Pointedly ignoring Judge Ginsburg's meditation on equality as a doctrinal home for the abortion right, Chief Justice Roberts instead focused on her observation that, prior to *Roe*, "[t]he political process was moving . . . [and] majoritarian institutions were listening and acting."[93] The Court's imperialism, then-Judge Ginsburg mused — and Chief Justice Roberts agreed — "was difficult to justify and appears to have provoked, not resolved, conflict."[94]

Scholars like Professors Reva Siegel and Linda Greenhouse have disputed then-Judge Ginsburg's assessment of pre-*Roe* progress on abortion liberalization.[95] As they maintain, the landscape for democratic change was far more complicated than then-Judge Ginsburg's description suggested.[96] And tellingly, despite her critique, as a member of the Court, Justice Ginsburg consistently voted to maintain the right to access abortion and contraception, linking reproductive freedom to women's equal citizenship.[97] Likewise, on the question of same-sex marriage, Justice Ginsburg joined Justice Kennedy's majority opinion in *Obergefell*, which noted that "democracy is the appropriate process for change" but only "so long as that process does not abridge

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91 *See* Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385–86 (1985).

92 *Obergefell*, 576 U.S. at 648.

93 *Id.* at 710 (Roberts, C.J., dissenting) (quoting Ginsburg, *supra* note 91, at 385).

94 *Id.* (quoting Ginsburg, *supra* note 91, at 385–86).

95 *See* Greenhouse & Siegel, *supra* note 19, at 2046–47.

96 *See id.* at 2031 (drawing on extensive pre-*Roe* sources "to raise questions about the conventional assumption that the Court's decision in *Roe* is responsible for political polarization over abortion").

97 Gonzales v. Carhart, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting) ("At stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny.'" *Id.* at 171 (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.)).). In *Gonzales v. Carhart*, Justice Ginsburg reasoned that women's "ability to realize their full potential . . . is intimately connected to 'their ability to control their reproductive lives,'" *id.* (quoting *Casey*, 505 U.S. at 856), and explained that at stake in abortion restrictions is not a "generalized notion of privacy [but] rather . . . a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature," *id.* at 172. *See also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 761 (2014) (Ginsburg, J., dissenting) ("[T]he contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being."); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2402 (2020) (Ginsburg, J., dissenting) ("Ready access to contraceptives and other preventive measures . . . both safeguards women's health and enables women to chart their own life's course.").

fundamental rights."[98] The opinion also observed that within our constitutional scheme, "individuals need not await legislative action before asserting a fundamental right."[99]

Despite Justice Ginsburg's nuanced position on *Roe*, her democratic-deliberation-inflected critique of the decision has loomed large in both conservative and mainstream legal discourse.[100] Professor Jeffrey Rosen, for example, embraced, as then-Judge Ginsburg did, the equality dimensions of the abortion right,[101] even as he decried the *Roe* Court's "aggressive unilateralism."[102] Professor Cass Sunstein suggested that *Roe* "may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents."[103] Meaningfully, Sunstein also repeated the claim that a more durable state legislative resolution of the abortion question was in the offing when *Roe* short-circuited the process of democratic deliberation.[104] As he explained in a law review article published as the Court was preparing to reconsider the abortion right in *Casey*, "*Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus."[105]

This strain of Justice Ginsburg's critique of *Roe* enjoyed pride of place in the majority's disposition of *Dobbs*. Justice Alito, who cited few women authors in a decision that would affect countless women, cited then-Judge Ginsburg with obvious relish for the proposition that *Roe* improperly intervened in an ongoing popular debate, "spark[ing] a

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[98] *Obergefell*, 576 U.S. at 676.

[99] *Id.* at 677. In his dissent, Chief Justice Roberts warned of the "consequences to shutting down the political process on an issue of such profound public significance." *Id.* at 710 (Roberts, C.J., dissenting).

[100] *See, e.g.*, Charles J. Cooper et al., Roe *and* Casey *Were Grievously Wrong and Should Be Overruled*, HARV. J.L. & PUB. POL'Y PER CURIAM, Fall 2021, at 3 (2021) (quoting then-Judge Ginsburg for the view that *Roe* increased antiabortion activism); Robert Post & Reva Siegel, Essay, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 408 & n.184 (2007) (referencing then-Judge Ginsburg's "influential critique of *Roe*"); Emily Bazelon, *Backlash Whiplash: Is Justice Ginsburg Right that* Roe v. Wade *Should Make the Court Cautious About Gay Marriage?*, SLATE (May 14, 2013, 3:08 PM), https://slate.com/news-and-politics/2013/05/justice-ginsburg-and-roe-v-wade-caution-for-gay-marriage.html [https://perma.cc/WV2M-Y44N] (quoting Justice Ginsburg's criticism of *Roe*: "it seemed to have stopped the momentum that was on the side of change").

[101] *See* Jason Harrow, *Ask the Author: Jeff Rosen, Part I*, SCOTUSBLOG (Aug. 21, 2006, 9:54 AM), https://www.scotusblog.com/2006/08/ask-the-author-jeff-rosen-part-i [https://perma.cc/NTE7-QCTM].

[102] JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 93 (2006).

[103] Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991).

[104] *See id.*

[105] *Id.* (footnote omitted).

national controversy that has embittered our political culture for a half century."[106]

But perhaps Justice Alito doth protest too much? On his telling, *Roe* was not only "egregiously wrong" because it was unmoored from constitutional text; it was wrong — perhaps primarily wrong — because it improperly preempted an ongoing public debate over abortion, provoking a generation's worth of backlash to abortion rights.[107] However, as we have traced, much of this narrative rests on unstable foundations. First, as several scholars have suggested, the popular debate to which Justice Alito adverted was more muted than his narrative suggested.[108] And, as we have detailed, at least initially, those who objected to the 1973 decision did so principally on the view that the decision misunderstood the nature of the rights at stake and reflected a brand of discredited judicial imperialism.

Second, the concern that *Roe* disrupted ongoing popular deliberation only emerged as countermobilization to abortion rights gained prominence. As scholarly and judicial critiques of *Roe* assumed their now-familiar contours, a related set of developments was unfolding in the antiabortion movement that had begun to coalesce in *Roe*'s wake. While abortion opponents were insistent on rolling back *Roe* with a court decision overruling the 1973 precedent, they also trained their attention on ratifying a federal constitutional amendment that would recognize and protect fetal life.[109] These efforts to amend the Constitution primarily took the form of a so-called Human Life Amendment, which would have explicitly protected fetal life.[110] Although some antiabortion politicians of the time introduced or proposed constitutional amendments that would have merely overturned *Roe* by returning the abortion question to the states, much of the organized antiabortion movement

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106 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 & n.4 (2022) (citing Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992)). Justice Alito, like many of his conservative fellow travelers, makes frequent use of a strategy once referred to as "'cross-quotemanship': citing or showcasing liberals in defense of conservative causes." ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 233 (2020) (citing PAUL R. CLANCY, JUST A COUNTRY LAWYER: A BIOGRAPHY OF SENATOR SAM ERVIN 237–38 (1974)) (discussing Senator Sam Ervin's reliance on liberal witnesses, in hearings aimed at defeating an effort to abolish the Electoral College).

107 *Dobbs*, 142 S. Ct. at 2243.

108 *See supra* section I.A, pp. 734–38.

109 *See* DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 213 (2016) ("Pro-lifers believed that a constitutional amendment would be a decisive victory for the unborn that would likely never be reversed. It would put a complete end to legal abortion in the United States and, more importantly, it would ensure that the unborn had constitutional rights that no one could abrogate."); MARJORIE J. SPRUILL, DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS 50 (2017).

110 These amendments are collected at *History of the Human Life Amendments*, HUM. LIFE AMEND., http://humanlifeamendment.com/index.php/history [https://perma.cc/US8D-MWP6]. *See also* Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of* Roe v. Wade, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 41, at 53, 72 & n.147.

withheld its support from such efforts if they did not also recognize fetal personhood. The National Right to Life Committee, which refocused its efforts in the wake of *Roe*,[111] even passed a resolution stating that "a 'States Rights' amendment would not effectuate . . . rejection of *Roe* but would rather reaffirm the Court's decision."[112] As legal historian Professor Mary Ziegler explains, "most movement members did not object to the *Roe* decision because the Court had removed the abortion question from the democratic process"; they objected because "the Court erred in leaving the unborn without the protection they deserved."[113] Banning abortion nationwide, not returning the issue to the states, was the movement's goal.[114]

It was only when this effort to enact a constitutional amendment that would enshrine fetal personhood stalled in the late 1970s that abortion opponents adopted new strategies. One strategy — championed by a young Justice Department lawyer named Samuel Alito[115] — involved chipping away at abortion access through regulations that made abortion increasingly difficult, expensive, or logistically complicated both to provide and to access.[116] These efforts included state-level restrictions on abortion funding,[117] and ultimately the Hyde Amendment, a federal appropriations rider that prohibited the use of federal funds, including Medicaid funds, for abortion, which the Court upheld in 1980.[118]

Significantly, the scuttling of the prospect of a constitutional amendment not only altered the substantive strategic priorities of the antiabortion movement, it also transformed their discursive strategies. With hopes of a fetal-personhood amendment dashed, many antiabortion

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111 *See* CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 177–79 (1998).

112 MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA 24 (2020) (alteration in original) (other alterations omitted) (quoting American Citizens Concerned for Life, Inc., Resolution Number Three (1973) (on file with the Gerald R. Ford Presidential Library)); *see also* MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 38–44 (2015) [hereinafter ZIEGLER, AFTER *ROE*] (discussing efforts to pass a "Fetal-Protective Amendment").

113 ZIEGLER, AFTER *ROE*, *supra* note 112, at 29. For a detailed discussion of the media campaign around abortion countermobilization, see Deana A. Rohlinger, *Friends and Foes: Media, Politics, and Tactics in the Abortion War*, 53 SOC. PROBS. 537, 548–54 (2006) ("NRLC successfully . . . placed the focus squarely on the unborn child. As a NRLC board member aptly noted, 'When the debate is about women, we lose. When the debate is about babies, we win.'" *Id.* at 554.).

114 Mary Ziegler, Lecture, *Canary in the Coalmine: What It Means to Lose a Constitutional Right*, 39 GA. ST. U. L. REV. 951, 966 (2023); *see* JENNIFER L. HOLLAND, TINY YOU: A WESTERN HISTORY OF THE ANTI-ABORTION MOVEMENT 88–89 (2020).

115 Memorandum from Samuel Alito, Assistant to the Solic. Gen., to Charles Fried, Solic. Gen. (May 30, 1985), *reprinted in* MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 663 (2015).

116 *See* ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 112, at 75 (noting that by the early 1980s, "[r]ather than criticizing the *Roe* Court for failing to recognize a right to life, abortion foes would sing the praises of individual restrictions").

117 *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977) (upholding Connecticut abortion funding prohibition).

118 Harris v. McRae, 448 U.S. 297 (1980); *see* Khiara M. Bridges, *Elision and Erasure: Race, Class, and Gender in* Harris v. McRae, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 41, at 117, 117.

activists began making arguments that sounded in the register of democratic deliberation — the idea that *Roe* had involved impermissible judicial overreach, and that abortion regulation should be a matter for states to address.[119] Critically, these arguments were part of a deliberate strategy to articulate an antiabortion position that was more politically palatable than the prospect of banning abortion in all circumstances. To be sure, for movement leaders and many Americans who identified as pro-life, the democracy argument was a second-best, intermediate position — one that was fundamentally incompatible with the substantive position that the fetus was a person, and that any process that terminated a pregnancy was tantamount to murder.[120] From this perspective, allowing the states to decide whether to prohibit or to permit and even protect abortion was difficult to defend. But, with the prospect of a constitutional amendment well out of reach, many activists viewed this intermediate position as a necessary way station on the path that could lead first to *Roe*'s reversal, and then to the elimination of all protection for abortion. And so, taking the long view, the movement hitched its wagon to the north stars of democracy and popular deliberation.

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As this history reveals, the democratic deliberation argument that undergirded the Court's disposition of *Dobbs* emerged in fits and starts, evolving and transforming over time to take its current form, which insists that *Roe* improperly preempted and frustrated ongoing democratic deliberation on the abortion question. To be sure, this contemporary articulation of the critique of *Roe* reflects essential aspects of earlier critiques, including critiques of *Roe*'s judicial imperialism. But the democratic deliberation argument, in its current form, is nonetheless meaningfully different from that which preceded it. Whereas the objections lodged in the immediate aftermath of *Roe* focused on the nature of the constitutional rights at stake and the contested nature of the abortion question, the present interest in democratic deliberation goes well beyond these concerns. As it has evolved — in tandem with the social movements opposing abortion in the wake of *Roe* — the democratic deliberation argument no longer objects to *Roe* solely on the view that the decision misidentified the right at stake and withdrew a contested issue from majoritarian politics; rather, it makes the case that, in addition to its flawed logic and incongruence with constitutional text, *Roe*'s countermajoritarianism is the crucial element that justifies abandoning stare decisis in order to overrule it.

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[119] ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 112, at 73, 75 ("In 1983, AUL attorneys . . . took on the role of master strategists. . . . AUL attorneys suggested that if a constitutional amendment would not work, the pro-life movement should take aim at *Roe v. Wade*." *Id.* at 73.).

[120] *See id.* at 66.

With this in mind, the following Part considers the implications of the *Dobbs* majority's embrace of the democratic deliberation argument for stare decisis and the consideration of extant precedents.

II. DEMOCRACY AND STARE DECISIS

In *Dobbs*, the Court invoked democracy and disrupted democratic deliberation to justify its decision to overrule *Roe* and *Casey*, two long-standing precedents of the Court. Under the principle of stare decisis, courts presumptively defer to past decisions on the same, or similar, issues.[121] And while a court may overturn its own precedent, stare decisis principles favor doing so only in the face of compelling circumstances.[122]

As we explain here, there are at least two ways to understand the *Dobbs* Court's particular moves with respect to the relationship between democracy, public opinion, and stare decisis. The first possibility is that the Court's invocation of democracy and democratic deliberation gestures toward an entirely new standard for stare decisis — one that holds that a past precedent is not entitled to stare decisis effect where its subject matter involves an issue that the Court believes to be of high salience to the American people, and where, in the Court's view, the precedent has interrupted the prospect of democratic deliberation of the issue. The second possibility is that an earlier decision's arguable interruption of democratic deliberation qualifies as a "special justification" that blunts the stare decisis force of a prior opinion. We further consider each of these below. We then investigate the possible implications of the Court's new approach to stare decisis, however it is best understood, for other important precedents.

A. A New Stare Decisis Test?

Although the *Dobbs* Court made plain its contempt for the core holdings of *Roe* and *Casey*, the test it employed in overturning those precedents was remarkably underspecified. The *Dobbs* majority criticized *Casey* for affirming "*Roe*'s 'central holding' based solely on the doctrine of stare decisis."[123] More particularly, the *Dobbs* majority took the view that "proper application of stare decisis required an assessment of the strength of the grounds on which *Roe* was based" — an inquiry that, according to the *Dobbs* majority, the *Casey* plurality failed to conduct.[124] The *Dobbs* Court therefore considered afresh "the question that the *Casey* plurality did not consider": whether "the Constitution, properly

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[121] *See* Melissa Murray, *The Supreme Court, 2019 Term — Comment: The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 309–10 (2020) (discussing stare decisis in lower courts and at the Supreme Court) [hereinafter Murray, *The Symbiosis of Abortion and Precedent*].

[122] *Id.*

[123] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022).

[124] *Id.*

understood, confers a right to obtain an abortion."[125] Upon concluding that the right to abortion was not deeply rooted in history and tradition, and not an essential component of ordered liberty,[126] the *Dobbs* majority then turned to consider explicitly the question of stare decisis.[127] But curiously, even as the *Dobbs* Court repudiated *Casey*'s view that the Constitution protected a right to abortion, it was far less clear about what its holding meant for *Casey*'s other jurisprudential contribution — the test it announced for stare decisis.[128]

For many years, *Casey* had supplied the canonical formulation of the Court's approach to stare decisis. And indeed, Supreme Court nominees have signaled their commitment to judicial restraint and the rule of law by pledging fealty to the principle of stare decisis.[129] *Casey* spent considerable time elaborating the role of stare decisis in its decision to retain and reaffirm *Roe*, explaining:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.[130]

The decision then proceeded to identify a series of factors that courts should consider in determining whether to defer to an extant precedent, including "practical workability," "reliance" on the precedent, as well as

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[125] *Id.*

[126] *Id.* at 2248.

[127] *Id.* at 2261.

[128] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (identifying a series of factors designed to "gauge the respective costs of reaffirming and overruling a prior case," *id.* at 854); *see also* Murray, *The Symbiosis of Abortion and Precedent*, *supra* note 121, at 328–30 (discussing *Casey*'s status as "precedent on precedent"); Serena Mayeri, *Undue-ing* Roe*: Constitutional Conflict and Political Polarization in* Planned Parenthood v. Casey, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 41, at 137, 151.

[129] *See, e.g.*, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.) ("Judges have to have the humility to recognize that they operate within a system of precedent . . . ."); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318–19 (2006) (statement of Judge Samuel A. Alito, Jr.) (noting that stare decisis is "important because it reflect[s] the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions"); *id.* at 454–55 ("[T]he Supreme Court has reaffirmed the decision [in *Roe*], sometimes on the merits, sometimes in *Casey* based on stare decisis, and I think that when a decision is challenged and it is reaffirmed that strengthens its value as stare decisis . . . ."); *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 74, 76, 135, 151, 202, 211, 261, 288 (2017) (statement of Judge Neil M. Gorsuch) (vowing to analyze cases with respect to "the law of precedent"); *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 173 (2018) (statement of Judge Brett M. Kavanaugh) (assuring the Senate Judiciary Committee of his commitment to precedent and noting that this system "comes from Article III itself").

[130] *Casey*, 505 U.S. at 854.

any significant developments in "related principles of law," and "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[131] Applying this lens to *Roe*, the lead opinion in *Casey* concluded:

> Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.[132]

Moreover, the *Casey* opinion intoned, "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[133] With these considerations in mind, *Casey* affirmed *Roe*'s "central holding" that the Constitution protected some measure of individual right to choose abortion.[134]

It is striking that *Dobbs* did not so much as note *Casey*'s status as "precedent on precedent"[135] in embarking on its own discussion of stare decisis. Rather, it offered what it described as five factors, that, taken together, "weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[136] For this five-part analysis, *Dobbs* cited just two precedents[137]: *Janus v. AFSCME, Council 31*[138] and Justice Kavanaugh's concurrence in *Ramos v. Louisiana*.[139] Meaningfully, in both *Janus* and *Ramos*, the Court overruled two 1970s-era precedents, *Abood v. Detroit Board of Education*[140] and *Apodaca v. Oregon*.[141]

It is perhaps unsurprising that the *Dobbs* Court focused mainly on *Janus* and *Ramos*. These two cases embodied the Roberts Court's preferred approach to stare decisis — an approach that it honed in a series of other cases where Justices on the newly constituted Court never mentioned *Roe* and *Casey*, but nonetheless appeared to be shadow-boxing

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131 *Id.* at 854–55 (citing, inter alia, Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); United States v. Title Ins. & Tr. Co., 265 U.S. 472, 486 (1924); Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989)); *see also id.* at 855–61 (applying this set of factors specifically to *Roe*).

132 *Id.* at 864.

133 *Id.*

134 *Id.* at 861, 879; *cf.* Murray, *The Symbiosis of Abortion and Precedent*, *supra* note 121, at 315 ("[I]n truth, *Casey*'s fidelity to *Roe* was selective — the joint opinion deferred to certain aspects of *Roe*, while abandoning others.").

135 Murray, *The Symbiosis of Abortion and Precedent*, *supra* note 121, at 328.

136 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

137 *Id.* at 2264.

138 138 S. Ct. 2448 (2018).

139 140 S. Ct. 1390, 1410 (2020) (Kavanaugh, J., concurring in part).

140 431 U.S. 209 (1977); *see Janus*, 138 S. Ct. at 2460.

141 406 U.S. 404 (1972); *see Ramos*, 140 S. Ct. at 1410.

with the future of a constitutional right to abortion.[142] In *Janus*, for example, Justice Alito's majority opinion discussed stare decisis at length without once citing *Casey*.[143] Instead, the Court's analysis focused on the merits of the underlying constitutional claim — whether a union fair-share fee arrangement violated the First Amendment — and whether the 1978 *Abood* case had incorrectly concluded it did not.[144] Forced to reckon with *Abood* as precedent, the Court dispatched quickly with its five-part stare decisis test, focusing principally on the first two factors — the earlier precedent's error and its poor reasoning.[145] Relying on these considerations, the *Janus* Court concluded that these concerns obviated the need to adhere to *Abood*.[146] In this regard, *Janus*'s perfunctory performance of stare decisis made clear that the pressing question in determining whether to follow an extant precedent was simply whether the current Court agreed with the earlier Court's substantive conclusions.

Decided two years after *Janus*, *Ramos* approached the question of whether to overrule a long-standing precedent, *Apodaca v. Oregon*, in a similar fashion. As with *Janus*, the *Ramos* majority failed to cite *Casey*; the Kavanaugh concurrence cited it only to make the point that *Casey* itself had overruled several abortion precedents[147] (presumably in an effort to broaden support for the position that overruling precedents is sometimes justified). *Ramos*, like *Janus*, began with a thorough meditation on the correct answer to the substantive question at issue — whether the Sixth Amendment right to conviction by a unanimous jury applied in state as well as federal court.[148] After concluding that it necessarily did,[149] the *Ramos* Court then invoked its understanding of the traditional stare decisis factors: "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision."[150] Justice Gorsuch's majority opinion then offered a complex rationale under which the key precedent, *Apodaca*, was not owed full stare decisis effect, given its fractured status.[151]

In a lengthy concurrence, Justice Kavanaugh sought to clarify this approach to stare decisis, offering a framework that emphasized that under the Court's "precedents on precedent," some "special justification"

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142 Cases decided in the same timeframe as *Janus* and *Ramos* that implicated similar dynamics included *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019); *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1492 (2019); and *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018).

143 *See Janus*, 138 S. Ct. at 2478–86.

144 *See id.* at 2463–78.

145 *See id.* at 2463–69, 2479–81.

146 *Id.* at 2478.

147 Ramos v. Louisiana, 140 S. Ct. 1390, 1412 n.1 (2020) (Kavanaugh, J., concurring in part).

148 *Id.* at 1397–402 (majority opinion).

149 *Id.* at 1397.

150 *Id.* at 1405 (quoting Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)).

151 *See id.* at 1403–04.

is required "[t]o overrule a constitutional decision."[152] With this in mind, Justice Kavanaugh collapsed the seven distinct stare decisis factors identified in earlier cases[153] into three broad factors: (1) whether the decision was not just "garden-variety" wrong, but "grievously or egregiously wrong";[154] (2) whether the prior decision has "caused significant negative jurisprudential or real-world consequences";[155] and (3) whether "overruling the prior decision [would] unduly upset reliance interests."[156]

Taken together, *Janus*, *Ramos*, and Justice Kavanaugh's *Ramos* concurrence offered different versions of *Casey*'s stare decisis calculus, but not radically different ones. And on its face, the *Dobbs* majority deployed a stare decisis calculus that resembled the tests used in *Janus* and *Ramos*, and even *Casey*.[157] But in its *application* of this test, the *Dobbs* majority may have broken new ground. The five-factor test that the *Dobbs* majority referenced at the beginning of its stare decisis analysis makes no explicit mention of democracy or democratic deliberation. Yet, the majority opinion emphasized repeatedly the importance or salience of democracy and democratic deliberation — and *Roe*'s disruption of democratic deliberation.

In the section titled "The Nature of the Court's Error," the *Dobbs* majority explained that "*Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law *of little importance* to the American people."[158] But it was not just that *Roe* and *Casey* concerned issues of great import — it was that these were issues that "the Constitution unequivocally leaves for the people."[159] In this regard, the Court's decisions in *Roe* and *Casey* "usurped" the people's authority to decide these questions for themselves.[160] To underscore the point, the majority connected its denunciation of *Roe*

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[152] *Id.* at 1413 (Kavanaugh, J., concurring in part) (quoting, inter alia, Allen v. Cooper, 140 S. Ct. 994, 1003 (2020)). Justice Kavanaugh connected this "special justification" notion to the "strong reasons" Justice Alito referenced in *Janus*. *Id.* at 1414; Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018) (noting "the importance of following precedent unless there are strong reasons for not doing so").

[153] *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part) ("The stare decisis factors identified by the Court in its past cases include: the quality of the precedent's reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent.").

[154] *Id.*

[155] *Id.* at 1415.

[156] *Id.*

[157] After a lengthy refutation of *Roe* and *Casey*'s conclusion that the Constitution protects a right to abortion, the *Dobbs* majority invoked a five-part stare decisis test that considered these cases in terms of "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

[158] *Id.* (emphasis added).

[159] *Id.*

[160] *Id.*

and *Casey* to other historical rulings, citing with approval *West Coast Hotel Co. v. Parrish*,[161] a 1937 decision in which the Court also "overruled decisions that wrongly removed an issue from the people and the democratic process."[162]

To be sure, the *Dobbs* majority did not suggest that it was reformulating the long-standing test for stare decisis deference. But taken together, the majority's novel approach to the questions of fidelity to precedent is striking. Under the *Dobbs* formulation, in addition to the factors announced in *Casey* and discussed in *Janus* and *Ramos*, courts are justified in overruling extant precedents in circumstances where the precedent involves important or sensitive subject matter, and where the Court's earlier intervention halted or thwarted democratic deliberation. And critically, these democracy-inflected codicils to the traditional stare decisis factors are not only novel — they are almost entirely *subjective*. That is, it is for the reviewing court to determine whether an issue is of profound importance to the electorate.[163] And it is for the reviewing court to determine whether earlier judicial interventions constitute a disruption of democratic deliberation.

The same charges of subjectivity also might be lodged against the previously announced stare decisis factors. That is, reliance, workability, and faulty reasoning might all be in the eye of the beholding court. What distinguishes these democracy-inflected factors from the traditional stare decisis factors articulated in *Casey* and referenced in *Janus* and *Ramos* — and indeed, makes them so concerning — is the fact of their rhetorical power. By overruling extant precedents in the name of the people, the Court may take dramatic steps that serve a different brand of judicial imperialism — all while cloaking the maneuver in the mantle of democracy and popular sovereignty.

B. Interrupted Democracy as a "Special Justification"?

As discussed above, in the years immediately preceding *Dobbs*, the Justices of the Roberts Court clashed over the nature and strength of stare decisis in a series of cases involving 1970s-era precedents.[164] A number of these cases sought to identify the sort of "special justification" that would justify a departure from stare decisis. In *Ramos*, Justice Gorsuch's majority opinion pointed to the fact that the Court's 1972 opinion in *Apodaca v. Oregon* "failed to appreciate the 'racist origins' of

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[161] 300 U.S. 379 (1937).

[162] *Dobbs*, 142 S. Ct. at 2265.

[163] *Cf.* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012–13 (2023) (describing the Court's new major questions doctrine, which considers subjective evaluations of "majorness," such as the Court's assessment of the policy as "politically significant" or "controversial").

[164] *See supra* pp. 751–53.

the [challenged] rule" permitting nonunanimous jury verdicts.[165] The earlier Court's failure to grapple with the racism embedded in the legal rule, the *Ramos* Court concluded, constituted a "special justification" that justified departing from stare decisis.[166]

And in the run-up to *Dobbs*, it appeared that the Court might rely on some version of this racially inflected argument to strike down *Roe* and *Casey*.[167] Indeed, Justice Thomas's concurrence in the denial of certiorari in 2019's *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*[168] gestured in this direction.[169] There, Justice Thomas "associated abortion with eugenics and the rise of the modern birth control movement,"[170] apparently laying the groundwork for a determination that race — and the imperative of remedying past discrimination in the name of racial justice — furnished the "special justification" required to overrule *Roe* and *Casey*.[171]

But if *Ramos* and *Box* prioritized an interest in remedying past racial injustices as a "special justification" in the stare decisis analysis, then *Dobbs* has gone further to identify remedying past judicial impositions on *democracy and ongoing democratic deliberation* as constituting a "special justification" for departing from extant precedent.

While the introduction of a new special justification category may appear to be a relatively modest change to the existing stare decisis calculus, this development is cause for alarm. The question of whether democratic deliberation was ongoing — and productively moving toward some state-level resolution — is not an objective assessment. As we have discussed, the question of whether *Roe* interrupted ongoing democratic debate on abortion rights has been — and continues to be — the subject of considerable debate.[172] As the *Dobbs* majority presented it, the question of whether a past precedent improperly arrested ongoing popular debate is subject entirely to whether five members of

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165 Murray, *The Symbiosis of Abortion and Precedent*, *supra* note 121, at 332 (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020)).

166 *Ramos*, 140 S. Ct. at 1405, 1413 (Kavanaugh, J., concurring in part) (explaining that *Apodaca*'s precedential value was diminished by the "implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws," *id.* at 1405); *see also* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2080–83 (2022) [hereinafter Murray, *Race-ing* Roe] (discussing *Ramos*); Murray, *The Symbiosis of Abortion and Precedent*, *supra* note 121, at 332 (discussing *Ramos*).

167 *See* Murray, *Race-ing* Roe, *supra* note 166, at 2028.

168 139 S. Ct. 1780 (2019).

169 *Id.* at 1783 (Thomas, J., concurring); *see also* Murray, *Race-ing* Roe, *supra* note 166, at 2028–31 (discussing Justice Thomas's concurrence in *Box*).

170 Murray, *Race-ing* Roe, *supra* note 166, at 2028.

171 *Id.* at 2030 ("[T]he *Box* concurrence provides a roadmap to lower courts and abortion opponents to challenge *Roe* on the grounds that the abortion right allegedly is rooted in racial injustice and results in disproportionate impacts on minority groups.").

172 *See supra* section I.B, pp. 739–48.

the Court agree that it did. Far from remedying judicial imperialism, the introduction of this new special justification is itself the embodiment of judicial imperialism. And, as importantly, the invocation of democratic deliberation provides cover for this kind of judicial imperialism. It insists that the Court is not imposing its own view of extant precedents, but rather is simply overruling these precedents in order to vindicate the rights of the people and to preserve democratic engagement. It is an enlargement of the judicial role under the guise of narrowing it. And it has potentially alarming implications for other cases and issues that may involve similarly fraught and divisive questions.

C. Implications for Other Cases

What other precedents of the Court might a new stare decisis formulation implicate? What prior precedents might be affected by a Court that is increasingly willing, even eager, to identify "special justifications" that justify departing from precedent? If the Court's new vision of stare decisis is concerned with an issue's "importance to the American people,"[173] and whether an earlier opinion "usurped the power to address a question of profound moral and social importance,"[174] it is likely that *Obergefell v. Hodges*, in which the Court held that the Constitution did not permit states to restrict marriage to opposite-sex couples,[175] is high on the list of possible targets.

The Court decided *Obergefell* during a moment of undeniable churn in state marriage laws. Just two Terms earlier, the Court in *United States v. Windsor*[176] invalidated Section 3 of the Defense of Marriage Act[177] (DOMA), which limited the definition of marriage under federal law to heterosexual couples. Although Justice Kennedy's opinion for the Court in *Windsor* singled out "state sovereign choices about who may be married,"[178] pointedly noting that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State,"[179] Justice Scalia was unconvinced. In dissent, he predicted that the majority's conclusion that "DOMA is motivated by 'bare . . . desire to harm'" same-sex couples could easily be extended "to reach the same conclusion with regard to state laws denying same-sex couples marital status."[180]

Sharing Justice Scalia's concerns about the sweeping possibilities of the *Windsor* majority opinion, Chief Justice Roberts dissented

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173 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

174 *Id.*

175 Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

176 570 U.S. 744 (2013).

177 1 U.S.C. § 7 (2018), *invalidated by* United States v. Windsor, 570 U.S. 744, *and amended by* 1 U.S.C. § 7 (Supp. IV 2022).

178 *Windsor*, 570 U.S. at 771.

179 *Id.* at 775.

180 *Id.* at 799 (Scalia, J., dissenting) (quoting *id.* at 795 (majority opinion)).

separately to emphasize the states' "historic and essential authority to define the marital relation."[181] The point was a subtle defense of state-level democratic deliberation. On Chief Justice Roberts's telling, the states had long enjoyed the authority to define marriage for their residents, and the chosen definition of marriage ostensibly reflected the preferences of a majority of the state's voters. *Windsor*, the Chief Justice underscored, did no more than reaffirm the state's authority to define marriage, and going forward, states were free to express their residents' preferences for "the traditional definition of marriage."[182]

If the Chief Justice nodded subtly to the prospect of democratic deliberation in defining marriage, Justice Scalia was more straightforward in voicing his concerns. In his lengthy *Windsor* dissent, Justice Scalia emphasized both the importance of marriage in public life and the importance of debates about marriage equality. As he explained: "Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by good people on all sides."[183] On this account, he observed, the issue was one that properly was being debated in the political process through "plebiscites, legislation, persuasion, and loud voices — in other words, democracy."[184]

Justice Alito echoed these objections in his own dissent in *Windsor*. Explaining that "[o]ur Nation is engaged in a heated debate about same-sex marriage,"[185] Justice Alito insisted that both Edith Windsor, the *Windsor* respondent, and the federal government were, despite the limited nature of their claims before the Court, intent on disrupting that debate and "enshrin[ing] in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference."[186] Doing so, Justice Alito maintained, would require the Court to act beyond its constitutionally prescribed role. The Constitution, Justice Alito intoned, "simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials."[187]

Two years later, in *Obergefell v. Hodges*, a 5–4 majority of the Court concluded that the Constitution recognized a right to same-sex marriage,[188] answering the question that had lurked at the periphery of *Windsor*.[189] The decision prompted a series of vehement dissents, all of

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[181] *Id.* at 776 (Roberts, C.J., dissenting) (quoting *id.* at 768 (majority opinion)).
[182] *Id.*
[183] *Id.* at 801 (Scalia, J., dissenting).
[184] *Id.*
[185] *Id.* at 802 (Alito, J., dissenting).
[186] *Id.*
[187] *Id.* at 810.
[188] Obergefell v. Hodges, 576 U.S. 644, 675 (2015).
[189] *See Windsor*, 570 U.S. at 810 (Alito, J., dissenting).

which underscored the state's prerogative to define marriage, as well as the democratic underpinnings of such authority.[190] Writing separately, Justice Scalia sounded the alarm, "call[ing] attention to this Court's threat to American democracy."[191] Chief Justice Roberts's dissent struck similar notes, accusing the Court of having "seize[d] for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question."[192] Justices Thomas and Alito agreed: *Obergefell*, and by that logic, *Windsor*, represented the Court's usurpation of issues that were properly being debated and deliberated by the people.[193]

Recalling the language of these dissents in the Court's consideration of same-sex marriage is revealing. These dissents bear a striking resemblance to much of the stare decisis reasoning on display in *Dobbs*. The dissenters in *Windsor* and *Obergefell* emphasized the presence of an issue of significant salience to the public, in addition to the significant ongoing public debate the Court's intervention halted. If these indeed are now important factors in identifying a precedent's likelihood of being overruled, there is every reason to fear that *Obergefell* could be next.

While the Court's present supermajority suggests that *Obergefell* could be a likely candidate for reconsideration, in truth, the *Dobbs* Court's approach to stare decisis, if fairly applied, could also call into question other recent decisions like *District of Columbia v. Heller*[194] and *New York State Rifle & Pistol Ass'n v. Bruen*,[195] both of which considered the scope and substance of the Second Amendment. If *Obergefell* is understood as interrupting ongoing state-level debates on the issue of marriage equality, then surely a similar critique could be levied against *Heller* and *Bruen*.

As with marriage equality, the public was, for years, engaged in an active debate over gun rights and gun safety laws. And often, these debates, like the debates over marriage equality, took on different policy contours in different jurisdictions. In 2007, one year before the Court decided *Heller*, gun safety laws varied widely across states.[196] In 2021,

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190 *See Obergefell*, 576 U.S. at 686–87 (Roberts, C.J., dissenting); *id.* at 713 (Scalia, J., dissenting); *id.* at 722 (Thomas, J., dissenting); *id.* at 736 (Alito, J., dissenting).

191 *Id.* at 713 (Scalia, J., dissenting).

192 *Id.* at 687–88 (Roberts, C.J., dissenting).

193 *See id.* at 732–33 (Thomas, J., dissenting); *id.* at 740–41 (Alito, J., dissenting) (quoting *Windsor*, 570 U.S. at 809–10 (Alito, J., dissenting)).

194 554 U.S. 570 (2008).

195 142 S. Ct. 2111 (2022).

196 For example, out of 65 key gun control laws across several categories, 13 states had fewer than 15 of these laws in place, while 10 states and the District of Columbia had more than 30 of these laws in place. *See the Country: Gun Law Navigator*, EVERYTOWN FOR GUN SAFETY, https://maps.everytownresearch.org/navigator/country.html [https://perma.cc/89PN-P3DT]. These included laws relating to background checks, criminal records, domestic violence, drugs and alcohol, mental illness, minimum age requirements, permitting processes, and "other." *Id.* Further,

one year before *Bruen* was decided, the variance in the number of gun control laws in place per state was similarly notable.[197] Critically, over the past fifteen years since *Heller* was decided, different states have had vastly different sets of gun control laws.[198] These variations in policy approaches to the issue of gun control and gun violence all make clear that at the time *Heller*, and subsequently *Bruen*, were decided, there was no coordinated national policy response to the issue of gun rights, as well as wildly variable views — democratic deliberation, if you will! — within different jurisdictions about the appropriate policy interventions.

And yet, despite the wide variation in legislative responses across jurisdictions, the Court in *Heller* and *Bruen* interrupted this active debate over gun rights and gun safety to recognize a muscular and expansive right to keep and bear arms.[199] On this account, if judicial disruption of an extant debate over an issue of high salience to the public is the criteria for reconsidering past precedent — however recently decided — then *Heller* and *Bruen*, as much as *Obergefell*, are ripe for reconsideration.

Of course, it is highly unlikely that the Court, as currently constituted, would reconsider *Heller* and *Bruen*, the twin pillars of a reinvigorated Second Amendment. Perhaps more likely is the reconsideration of *Obergefell* — and indeed, at least two members of the current Court have indicated their receptivity to doing so.[200] Further, the addition of the new Trump Justices, whose own views of stare decisis have effected significant changes in the Court's jurisprudence,[201] suggests that there is a possible majority that, at the very least, would be willing to consider whether judicial resolution of marriage equality went too far, frustrating

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certain kinds of gun control laws were well-represented across states (13 of the 65 laws were maintained by over 30 states). *Id.* By contrast, other gun control laws were only put in place by a small number of states (35 out of the 65 laws were maintained by fewer than 15 states). *Id.*

197 For example, out of 65 key gun control laws, 14 states had fewer than 15 of these laws in place, while 17 states and the District of Columbia had more than 30 of these laws in place. *Id.* Further, certain kinds of gun control laws were well-represented across states (9 of the 65 laws were maintained by over 30 states). *Id.* By contrast, other gun control laws were only put in place by a small number of states (22 of the 65 laws were maintained by fewer than 15 states). *Id.*

198 *See id.*

199 *Heller*, 554 U.S. at 636; *Bruen*, 142 S. Ct. at 2156.

200 *See* Davis v. Ermold, 141 S. Ct. 3, 3–4 (2020) (Thomas, J., joined by Alito, J., respecting the denial of certiorari) ("[T]his petition provides a stark reminder of the consequences of *Obergefell*. By choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix." *Id.* at 4.). Notably, in this unusual statement, Justices Thomas and Alito characterized *Obergefell* as "bypass[ing the] democratic process." *Id.* at 3.

201 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1402 (2020) (opinion of Gorsuch, J.); *id.* at 1414 (Kavanaugh, J., concurring in part); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring); Allen v. Milligan, 143 S. Ct. 1487, 1517 (2023) (Kavanaugh, J., concurring in part).

the will of the people, even as it overlooks such deliberation in other contexts.[202]

* * *

Having canvassed the implications of *Dobbs* for stare decisis and the Court's jurisprudence more generally, the following Part takes seriously the *Dobbs* majority's claim that overruling *Roe* and returning the abortion question to the states — and the people — is the appropriate outcome. As this Part explains, despite the majority's rhetorical paeans to democracy, its understanding of democracy and democratic deliberation and participation is shockingly myopic and limited. Moreover, due in large part to the Court's own decisions in the areas of voting rights and election law, the landscape in which democratic deliberation of the abortion question is fated to occur has been woefully distorted, making the prospect of meaningful democratic debate and deliberation elusive.

III. MYOPIC DEMOCRACY

The *Dobbs* majority insisted that its opinion rested on and implemented principles of democracy.[203] But the irony of *Dobbs* is that it purported to "return" the issue of abortion to the democratic process while revealing an extraordinarily limited, even myopic, conception of democracy.[204] This includes myopia in terms of the processes and institutions that the Court understands as constitutive of democracy; myopia in orientation — that is, the direction of change the opinion expects the mechanisms of democracy to produce; myopia in the opinion's conception of political power and of who is properly within the political community; and myopia in the Court's failure to grasp the antidemocratic quality of the method it utilizes for identifying the rights worthy of protection.

The sections that follow detail these limitations in the Court's conception of democracy. But in focusing on these limitations, we do not mean to suggest that they are the *only* such limitations. Indeed, there is perhaps a more fundamental problem with the Court's conception of democracy, which is that it appears to equate democracy with simple majoritarianism.[205] In fact, however, genuine democracy arguably demands much more.[206]

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202 *See* Murray, *Children of Men*, *supra* note 15, at 858–59.

203 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

204 *See id.*

205 *Id.* at 2277; *see also* DANIELLE ALLEN, JUSTICE BY MEANS OF DEMOCRACY 68 (2023) ("Majority vote is just one mechanism for operationalizing popular sovereignty.").

206 NeJaime & Siegel, *supra* note 42, at 1910.

A. Alternative Conceptions of Democracy

We do not aim to offer here a novel theory of democracy. But political theorists have identified a number of core features of democracy, and we briefly discuss them in turn. First, and perhaps most importantly, any meaningful conception of democracy requires that citizens enjoy genuine political equality, which Professor Jeremy Waldron has described as "the foundation of democracy."[207] As a practical matter, this means that all members of the polity must possess both an equal right to participate and an equal and meaningful opportunity to participate in decisions about collective self-governance.[208] It also means that, in matters of self-governance, individuals must stand in relation to one another as political equals, without distinction and without formal hierarchies.[209]

In addition, although regular elections are of course a core feature of democracy, the fact of elections is merely a baseline: democracy requires genuine competition and meaningful choice at those elections.[210] It also requires procedures that are conducted "under certain background conditions."[211] There is, of course, active debate about the character, scope, and necessity of those background conditions, but at a minimum they include features like the opportunity for meaningful deliberation,[212] as well as some key predicates to that deliberation — the opportunity to engage in speech and expression; an independent press; the ability to associate.[213]

Democracy may also contain, as Professor Nelson Tebbe has suggested, a prohibition on the coercion of citizens "for reasons that are inaccessible to them, or that they could never understand or accept."[214]

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[207] JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 37 (2016).

[208] *See* NeJaime & Siegel, *supra* note 42, at 1910.

[209] Nelson Tebbe, Essay, *Does* Dobbs *Reinforce Democracy?*, 108 IOWA L. REV. 2363, 2366–67 (2023) ("What differentiates [democracies] from monarchies . . . is the absence of a hereditary nobility or any other structural stratification in public life. . . . Membership in the political community does not require perfect economic or social parity, but it does necessitate an absence of structural subordination in public life."); Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160, 167–68 (2021) ("Democracy . . . demands the elimination of economic and social inequalities to the extent that no one can dominate anyone else and everyone can equally exercise power.").

[210] *See* Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 686 (2004) (reviewing RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003)); Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 43 (2004) [hereinafter Pildes, *The Constitutionalization of Democratic Politics*].

[211] NeJaime & Siegel, *supra* note 42, at 1910.

[212] AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 12 (1996); *see also* Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 364 (1997).

[213] Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 88 (2018).

[214] Tebbe, *supra* note 209, at 2367.

This principle does not, of course, require that individuals approve of or desire regulations to which they are subject. But they "must be able to cognize, and contend with, the laws' purposes."[215]

The protection of minorities, who may face impediments in protecting their interests in majoritarian politics, is also a critical aspect of meaningful democracy. As the political philosopher Danielle Allen argues, when it comes to the core features of democracy, "[m]inority-protecting mechanisms . . . are just as important as majority vote."[216] Those mechanisms can take the form of identifying alternative sites at which, and ways in which, electoral minorities can exercise political power.[217]

Relatedly, on many accounts — including that of political theorist Robert Dahl — pluralism is a central feature of American democracy.[218] Here, we mean pluralism not just in terms of the processes of negotiation, competition, and contestation by which interest groups form shifting coalitions to advance policy goals, but also in the sites and sources of democracy. That is, for America to have a functioning democracy, "[i]nstead of a single center of sovereign power there must be multiple centers of power, none of which is or can be wholly sovereign."[219] As philosopher Timothy Garton Ash recently explained in an interview: "[W]hat distinguishes a tyranny of the majority from a genuine democracy is *precisely pluralism*. It's not majority-takes-all. It's the fact that there are *anti-majoritarian institutions*."[220] This means that a functioning democracy not only reflects the popular will but does so in the face of antimajoritarian influences or devices that coexist within majoritarian institutions. On this account, a true democracy demands institutions that stand somewhat apart from majoritarian politics — including, crucially, independent courts that may serve as a check on majoritarianism.[221]

Again, this account of the features of a functioning democracy is not intended to be fully detailed and comprehensive. Instead, in offering these broad brushstrokes, we seek only to emphasize that meaningful

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[215] *Id.*

[216] ALLEN, *supra* note 205, at 68; *see also* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 4–6 (1994) (discussing, inter alia, the importance of measures to protect minority participation in democratic processes).

[217] Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748–50 (2005); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102, 1104 (2005).

[218] *See* ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 24 (1967).

[219] *Id.*

[220] Interview by Chris Walsh with Timothy Garton Ash, Professor, Univ. of Oxford, *transcribed in Pluralism Is the Lifeblood of a Genuine Democracy*, GEORGE W. BUSH PRESIDENTIAL CTR. (Feb. 23, 2021), https://www.bushcenter.org/publications/pluralism-is-the-lifeblood-of-a-genuine-democracy [https://perma.cc/7QHA-LMCC] (emphasis added).

[221] Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1570 (2015) (arguing that courts "seem relatively well-suited" to protecting disempowered groups).

democracy entails more than a system by which important decisions are made by plurality or majority vote. Against this backdrop, a close examination of the *Dobbs* Court's deployment of democracy reveals profound limitations in the Court's conception of democracy, even on the Court's own (limited) terms.

B. Examining the Court's Myopia

Mindful of what a more robust conception of democracy might entail, we now turn to the Court's more limited vision of democracy. As we detail below, even on the Court's cramped understanding of democracy as coextensive with majoritarianism, a close examination of *Dobbs* reveals the Court's appeal to democracy to be shallow, underdeveloped, and profoundly cynical.

1. Institutional Myopia. — First, when the *Dobbs* majority discussed democracy, it focused almost exclusively on state legislatures, repeatedly invoking those bodies as the paradigmatic representation of democracy.[222] Consider the Court's claim that its decision to overrule *Roe* "allows women on both sides of the abortion issue to seek to affect the *legislative* process."[223] Or its explanation that "the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the 'original constitutional proposition' that 'courts do not substitute their social and economic beliefs for the judgment of *legislative* bodies.'"[224] Or its insistence that "the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of *legislative* bodies.'"[225]

But state-level *democracy* is in no way coextensive with state *legislative* activity, as Justice Alito seemed to suggest in *Dobbs*. In fact, as scholars like Professor Miriam Seifter have shown, state legislatures are often the least representative institutions in state government,[226] largely because of the gerrymandering that the Supreme Court has approved.[227] Further, the emphasis on state legislatures as arbiters of democracy belies the role that state *judiciaries* have played in interpreting state

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[222] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2279 (2022).

[223] *Id.* at 2277 (emphasis added).

[224] *Id.* (emphasis added) (quoting Ferguson v. Skrupa, 372 U.S. 726, 729 (1963)).

[225] *Id.* at 2283–84 (emphasis added) (quoting *Ferguson*, 372 U.S. at 729–30); *see also id.* at 2259 ("Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.").

[226] Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1755–77 (2021); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 862 (2021).

[227] *See infra* section IV.A, pp. 777–85.

constitutional provisions, including to protect reproductive rights.[228] Surely Justice Alito knew that state courts in places like Iowa and Kansas had found abortion protections in state constitutions,[229] and that in many states, judicial candidates run for office statewide.[230] On this account, some jurists on state high courts are selected by many more voters than select the average member of a state legislature — perhaps by even more voters than select a majority of the state legislature.[231]

To be clear, the point is not that elected judges "represent" voters in precisely the same way legislative representatives do,[232] or are imagined as doing.[233] Rather, our point is more straightforward and modest: that state judges and state courts are critical players in state-level democracy.[234]

Beyond the role of state courts in state democracy, state executive-branch officials are also important players in forging state law.[235] Executive-branch officials, again in contrast to state legislative officials, are typically elected statewide.[236] Governors may veto restrictive abortion laws, including on grounds of state constitutional principles.[237]

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[228] *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1921–26 (2023).

[229] Hodes & Nauser, MDS, P.A. v. Schmidt, 440 P.3d 461, 502 (Kan. 2019); Planned Parenthood of the Heartland, Inc. v. Reynolds, 915 N.W.2d 206, 212 (Iowa 2018), *overruled by* Planned Parenthood of the Heartland, Inc. v. Reynolds, 975 N.W.2d 710, 746 (Iowa 2022).

[230] Bulman-Pozen & Seifter, *supra* note 226, at 873; *see* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2117–18 (2010).

[231] Wisconsin is illustrative. There, members of the state supreme court are typically elected with over 50% of the statewide support. For example, Justice Karofsky was elected to the Wisconsin Supreme Court in 2020 with 55.2% of the vote (855,573 votes), beating Daniel Kelly, the incumbent, who received 44.7% of the vote (693,134 votes). *Jill Karofsky*, BALLOTPEDIA, https://ballotpedia.org/Jill_Karofsky [https://perma.cc/CZ22-K8KG]. In 2022, the Democratic Governor, Tony Evers, won 51.2% statewide (1,358,774 votes), while the Republican Party retained control of both chambers of the state legislature by a significant margin. *Wisconsin Governor Election Results*, N.Y. TIMES (Nov. 30, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-wisconsin-governor.html [https://perma.cc/RHE9-Z737]; *Party Control of Wisconsin State Government*, BALLOTPEDIA, https://ballotpedia.org/party_control_of_Wisconsin_state_government [https://perma.cc/DYD3-Z7T7]; Hope Karnopp, *Did Wisconsin Republicans Achieve a Veto-Proof Supermajority in the Legislature in the 2022 Election?*, WIS. WATCH (Nov. 14, 2022), https://wisconsinwatch.org/2022/11/did-wisconsin-republicans-achieve-a-veto-proof-supermajority-in-the-legislature-in-the-2022-election [https://perma.cc/W6XJ-TVUM] (reporting that beginning in 2023, Wisconsin Republicans will hold approximately 64% of seats in the state Assembly, and 67% of seats in the state Senate).

[232] *See* Pozen, *supra* note 230, at 2048–51.

[233] Seifter, *supra* note 226, at 1756. For a discussion of the Supreme Court's role in facilitating the type of gerrymandering necessary to produce these results, see *infra* section IV.A, pp. 777–85.

[234] *See, e.g.*, Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1258–61.

[235] *See, e.g.*, Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 232–34 (2014).

[236] *See id.* at 232 & n.84.

[237] *See, e.g.*, Bruce Schreiner, *Kentucky Governor Vetoes Proposed 15-Week Abortion Ban*, PBS (Apr. 8, 2022, 7:54 PM), https://www.pbs.org/newshour/politics/kentucky-governor-vetoes-proposed-15-week-abortion-ban [https://perma.cc/NZY8-E3G9].

Attorneys general, who in most states are elected,[238] may utilize enforcement discretion,[239] and even intervene in ongoing litigation,[240] to implement abortion policy. Other state officials, whether appointed or independently elected,[241] may issue rules and take other regulatory action that facilitate or impede access to abortion.[242] They, too, are absent from the Court's conception of state-level democracy. So are local officials, who are important players in implementing abortion policy[243] and are similarly absent from the majority's discussion.

Perhaps even more conspicuous is the Court's failure to mention the prospect of *direct* democracy in its discussion of democratic deliberation on the abortion issue. Today, roughly half of the states have at least some mechanisms by which the people can make and change policy directly, without any legislative intermediaries.[244] The post-*Dobbs* era has already seen significant activity on this front, with a number of states relying on ballot initiatives and voter referenda to protect reproductive rights under state law, as well as attempts — so far unsuccessful — to use direct democracy to curtail those rights.[245]

Beyond overlooking the array of opportunities for state-level democratic deliberation, Justice Alito's *Dobbs* opinion was also curiously silent on the prospect of the *federal* legislature as a site of future

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[238] *Shaw*, *supra* note 235, at 232 ("In forty-three states, the attorney general is popularly elected.").

[239] *See, e.g.*, Zoë Richards, *Dozens of Elected Prosecutors Say They Will Refuse to Prosecute Abortion Care*, NBC NEWS (June 24, 2022, 10:38 PM), https://www.nbcnews.com/politics/politics-news/dozens-elected-prosecutors-say-will-refuse-prosecute-abortion-care-rcna35305 [https://perma.cc/Y54Z-63P4].

[240] *See, e.g.*, Cameron v. EMW Women's Surgical Ctr., 142 S. Ct. 1002, 1012 & n.5 (2022).

[241] For a discussion of divided roles within state executive branches, see William P. Marshall, Essay, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006).

[242] *See* Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 324–25 (2022); Katherine Shaw, *State Administrative Constitutionalism*, 69 ARK. L. REV. 527, 528 (2016).

[243] *See generally* B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081 (2021) (discussing the role of local governments in expanding and limiting reproductive rights); Kaitlin Ainsworth Caruso, *Abortion Localism and Preemption in a Post-*Roe *Era*, 27 LEWIS & CLARK L. REV. 585 (2023) (highlighting the ways in which local governments have acted both to impede and to facilitate access to abortion).

[244] *Initiative and Referendum States,* NAT'L CONF. ST. LEGISLATURES (Mar. 15, 2023), https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-states [https://perma.cc/2Q4H-38SU]; *see also* Bulman-Pozen & Seifter, *supra* note 226, at 883–84 & n.136; JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 94 (2006).

[245] Smith & Glueck, *supra* note 1; Aprile Rickert, *Kentucky Voters Reject Amendment that Would Have Affirmed No Right to Abortion*, NPR (Nov. 9, 2022, 9:37 AM), https://www.npr.org/2022/11/09/1134835022/kentucky-abortion-amendment-midterms-results [https://perma.cc/C946-LESC]; Olivia Weitz, *Montana Voters Reject So-Called "Born Alive" Ballot Measure*, NPR (Nov. 10, 2022, 1:38 PM), https://www.npr.org/2022/11/10/1134833151/montana-midterms-results-born-alive-abortion [https://perma.cc/GWS9-5KTF]; Mitch Smith & Ava Sasani, *Michigan, California and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES (Nov. 10, 2022), https://www.nytimes.com/2022/11/09/us/abortion-rights-ballot-proposals.html [https://perma.cc/VLP3-QXWX]; Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, AP NEWS (Nov. 7, 2023, 11:31 PM), https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270 [https://perma.cc/EZN4-RUU4].

democratic deliberation on abortion rights. Congress, of course, could regulate abortion under federal law; indeed, in 2003, Congress prohibited an abortion procedure it termed "partial-birth abortion,"[246] and the Court upheld that law in the 2007 case *Gonzales v. Carhart*.[247] Despite this recent history, there is not a whisper of the possibility of federal legislation in Justice Alito's majority opinion — a fact made all the more notable by Justice Kavanaugh's explicit acknowledgement of this possibility in his concurrence.[248]

In short, democracy is not coextensive with state legislatures, particularly given the formalized conception of the state legislature on display throughout the *Dobbs* opinion.[249] But it is nonetheless striking, and likely no accident, that the opinion chose to single out state legislatures as the paradigmatic engine of state-level democratic deliberation. As a result of their inherent structure, as well as the effects of gerrymandering, state legislatures are likely today to be less responsive to and reflective of majority will than other democratic institutions.[250] Tellingly, state legislatures' failures to implement the policy preferences of voters is particularly stark when it comes to abortion: consider a state like Oklahoma, where fifty-one percent of the population supports access to legal abortion in most or all circumstances, but in which the state legislature has enacted one of the most sweeping abortion bans in the country.[251]

2. Directional Myopia. — In addition to equating democracy with state-level legislative action, the *Dobbs* majority appeared fixated on deploying democracy in one direction — limiting, rather than expanding, access to abortion. Specifically, the opinion insisted that overturning *Roe* and returning the issue of abortion to the states (or at least state legislatures) would "allow[] women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion,

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246 Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531).

247 550 U.S. 124, 168 (2007).

248 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) ("The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States *or Congress* — like the numerous other difficult questions of American social and economic policy that the Constitution does not address." (emphasis added)).

249 *See* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (2014) ("[A mode of formalism] blinds courts to any more contingent, specific features of institutional behavior, or to . . . the ways in which the institution actually functions in particular eras in which the institution is embedded within distinct political, historical, and cultural contexts.").

250 Indeed, the Court considered last Term a case that involves the question of whether the state legislature enjoys a special role in one aspect of our democracy: state regulation of congressional elections. Moore v. Harper, 143 S. Ct. 2065, 2089 (2023); *see also* Litman & Shaw, *supra* note 234, at 1238 & n.10, 1272–73.

251 Aliza Forman-Rabinovici & Olatunde C.A. Johnson, *Political Equality, Gender, and Democratic Legitimation in* Dobbs, 46 HARV. J.L. & GENDER 81, 103 (2023).

lobbying legislators, voting, and running for office"; it also noted that "[w]omen are not without electoral or political power."[252]

But tellingly, the Court's repeated references to democratic deliberation imagined democratic interventions that *curtail*, rather than preserve or expand, reproductive rights. For example, the majority explained: "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."[253] Similarly, the opinion reasoned: "The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*. . . . Together, *Roe* and *Casey* represent an error that cannot be allowed to stand."[254] Indeed, the only time the opinion spoke in concrete terms about abortion regulation, it credited potential state efforts to make abortion more restricted, and less accessible. There was one passing mention of a state that might wish to protect abortion.[255] But that reference was paired with a much more detailed reference to the Mississippi law challenged in *Dobbs*, whose proponents the Court credited as animated by a belief that "abortion destroys an 'unborn human being.'"[256]

It is true, of course, that *Roe* and *Casey* limited only state efforts to restrict or prohibit abortion. But given the majority's repeated reminders that, before *Roe*, debate was occurring and proponents of liberal abortion rights had succeeded in some measure in persuading their fellow citizens of the rightness of their cause,[257] it is curious that the *Dobbs* opinion did not admit the possibility that democratic deliberation might yield outcomes that are *favorable* to abortion rights. With all of this in mind, the majority's failure to make plain that its decision did not impede democratic efforts to protect abortion rights is, by itself, revealing.

This oversight is especially pronounced when compared to Justice Kavanaugh's separate concurrence, which despite its praise for the majority's historical reasoning,[258] staked out a somewhat different position. There, Justice Kavanaugh suggested that states could not seek to

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[252] *Dobbs*, 142 S. Ct. at 2277.

[253] *Id.* at 2284.

[254] *Id.* at 2265.

[255] *Id.* at 2257.

[256] *Id.* ("In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an 'unborn human being.'" (quoting MISS. CODE ANN. § 41 to 41-191(4)(b) (West 2022))).

[257] *Id.* at 2241 n.4 (citing Ginsburg, *supra* note 106, at 1208 ("*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue.")).

[258] *See id.* at 2304 & n.1 (Kavanaugh, J., concurring).

prohibit interstate travel for abortion care[259] and reiterated the view that the Constitution is "neutral" on abortion.[260] To wit:

> To be clear . . . the Court's decision today *does not outlaw* abortion throughout the United States. On the contrary, the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. Through that democratic process, the people and their representatives may decide to allow or limit abortion. As Justice Scalia stated, the "States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so." Today's decision therefore does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion.[261]

Justice Kavanaugh's language is striking — both in its endorsement of a state-by-state settlement of the abortion question, and in highlighting the majority's neglect of any discussion (or even acknowledgment) of the prospect of state-level democratic efforts to protect abortion rights.

3. Political Power Myopia. — The *Dobbs* majority opinion's limited view of the direction of democratic change is matched by its exceedingly limited vision of political power. According to the majority, "[w]omen are not without electoral or political power."[262] Critically, on this conception, political power is reducible to voting and perhaps running for office.[263] But who decides that women have ample political power? It is true, as Justice Alito noted,[264] that when it comes to participation, women today are registered to vote and turn out to vote at higher rates than men.[265] But — even putting to one side the significant obstacles women, who are often the principal caregivers in the family, must surmount to actually exercise the franchise[266] — if we use any metrics beyond simply voting to measure democratic participation, the empirical portrait looks decidedly different.

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[259] *Id.* at 2309.

[260] *Id.* at 2305, 2310.

[261] *Id.* at 2305 (citation omitted) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part)).

[262] *Id.* at 2277 (majority opinion).

[263] *Id.* (noting women's ability to "to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office").

[264] As support for its claim that "women are not without . . . political power," the majority noted that "the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so"; it specifically pointed to Mississippi, where, in 2020 "women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots." *Id.* (citing *Voting and Registration in the Election of November 2020, Table 4b. Reported Voting and Registration, By Sex, Race, and Hispanic Origin, For States: November 2020*, U.S. CENSUS BUREAU, https://www2.census.gov/programs-surveys/cps/tables/p20/585/table04b.xlsx [https://perma.cc/YSW3-ZECG]).

[265] *See Gender Differences in Voter Turnout*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/voters/gender-differences-voter-turnout [https://perma.cc/322S-8HNC].

[266] *See* Pamela S. Karlan, *Election Law and Gender*, *in* OXFORD HANDBOOK OF AMERICAN ELECTION LAW (Eugene Mazo ed. forthcoming 2024) (manuscript at 14) (on file with the Harvard Law School Library).

When it comes to membership in state and local government, for example, women are grossly underrepresented. Today, women occupy 32.7% of the 7,386 seats in state legislatures.[267] In some states, the number of women serving in the state legislature is far lower; in Mississippi, for instance, where *Dobbs* arose, the state legislature is composed of 14.4% women.[268] In West Virginia the number is 11.9%,[269] and in Tennessee it is 15.2%.[270] This underrepresentation in state legislatures is striking — particularly in view of Justice Alito's suggestion that democratic deliberation of the abortion question should properly be reserved for state legislatures. State and local executive-branch offices are even more lopsided: Today, in cities and towns with populations over 30,000, only 25.8% of mayors and comparable local officials are women.[271] And governorships fare still worse: a mere twelve U.S. states, and the U.S. territory of Guam, have women in the governor's mansion.[272]

The composition of the federal legislature is also uneven in terms of gender representation. Just 25 women serve in the United States Senate, and 125 women serve in the United States House of Representatives.[273] These figures represent only about a quarter of each chamber. And notably, the women who do attain seats in the federal legislature tend to be significantly older than their male counterparts.[274] Research suggests that women enter elected office later in life, often after having children or even after their children have left home.[275] In the 116th Congress, for example, the average age for members was forty-seven; by contrast, the average age for female members was sixty-four, nearly twenty years older.[276] The most recent election, post-*Dobbs*, reflected a narrowing of this gap, with an average age of forty-six for Congress's incoming women members, much younger than the average age of women in Congress overall.[277]

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[267] *Women in State Legislatures 2023*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2022#table [https://perma.cc/PG2N-LKX8].

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Women Mayors in U.S. Cities 2023*, CTR. FOR AM. WOMEN & POL. (Sept. 2023), https://cawp.rutgers.edu/facts/levels-office/local/women-mayors-us-cities-2022 [https://perma.cc/7ZDY-JQE9] ("As of September 2023, per CAWP research and population data from the U.S. Census, of the 1,616 mayors and officials who perform mayoral functions of U.S. cities, towns, and minor civil divisions with populations over 30,000, 417, or 25.8%, were women.").

[272] *Women in Statewide Elective Executive Office 2023*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels-office/statewide-elective-executive/women-statewide-elective-executive-office-2022 [https://perma.cc/A4MG-6UHE].

[273] *Women in the U.S. Congress 2023*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels-office/congress/women-us-congress-2023 [https://perma.cc/2SHX-A3PK].

[274] *See Age*, REPRESENT WOMEN, https://www.representwomen.org/age [https://perma.cc/Y8CT-VEJS].

[275] *Id.*

[276] *Id.*

[277] *Id.*

State legislatures reflect a similar age imbalance in representation (although data here are more dated). In 2001, 39% of male state legislators were under fifty, while only 24% of female state legislators were under fifty.[278] "While 28 percent of male state senators and 30 percent of male state representatives entered office when they were 40 years old or younger, the same was true of only 11 percent of female state senators and 14 percent of female state representatives."[279]

Women are also woefully underrepresented in the ecosystem that surrounds Congress. As scholars have shown, from 2008 to 2015, "women account[ed] for only 37% of the lobbyist[s] . . . in Washington."[280] Women are also much less likely than men to donate to political candidates. In fact, a 2020 study by the Center for American Women and Politics showed that men out-donated women in state legislative elections by a 2:1 ratio.[281] Studies confirm these disparities in federal elections, both congressional and presidential; a recent paper analyzing contributions from 1980 to 2008 found that in 1980, women made only a little more than 20% of federal campaign contributions and that by 2008 the number was still a little less than 37%.[282] Another recent study found an even starker divide in the context of women of color, who accounted for merely 2% of individual contributions to House races in 2010, despite constituting approximately 18% of the population.[283]

By any measure, these metrics make plain the enduring disparity in women's political power at both the state and federal levels. And important recent work reveals the impact of women's representation (or more often, underrepresentation) on abortion policy: "[T]here is a very significant relationship between women's presence in the legislature and the degree of permissiveness of abortion policy," with legislatures that

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[278] *Id.*

[279] *Id.*

[280] Timothy M. LaPira et al., *Gender Politics in the Lobbying Profession*, 16 POL. & GENDER 816, 816 (2020).

[281] KIRA SANBONMATSU & CLAIRE GOTHREAU, CTR. FOR AM. WOMEN & POL., THE MONEY RACE FOR THE STATE LEGISLATURE 8 (2020), https://cawp.rutgers.edu/sites/default/files/2021-12/cawp_money_race_a11y.pdf [https://perma.cc/DF3Y-3HX4].

[282] Jennifer A. Heerwig & Katie M. Gordon, *Buying a Voice: Gendered Contribution Careers Among Affluent Political Donors to Federal Elections, 1980–2008*, 33 SOCIO. F. 805, 814 (2018) ("[L]arge and persistent gendered inequalities of political voice continue to characterize this significant form of political influence." *Id.* at 805.).

[283] Jacob M. Grumbach et al., *Gender, Race, and Intersectionality in Campaign Finance*, 44 POL. BEHAV. 319, 330 (2022); *see also* Abhay P. Aneja et al., *Financial Inclusion in Politics*, 97 N.Y.U. L. REV. 566, 586–92 (2022). Interestingly, however, on the candidate side, some research has found that once they have surmounted the considerable obstacles to actually becoming candidates for office, women are as effective at fundraising as their male counterparts. *See* Carole Jean Uhlaner & Kay Lehman Schlozman, *Candidate Gender and Congressional Campaign Receipts*, 48 J. POL. 30, 46 (1986); Barbara Burrell, *Campaign Financing: Women's Experience in the Modern Era*, *in* WOMEN AND ELECTIVE OFFICE: PAST, PRESENT, AND FUTURE 26, 26 (Sue Thomas & Clyde Wilcox eds., 2d ed. 2005); Danielle M. Thomsen & Michele L. Swers, *Which Women Can Run? Gender, Partisanship, and Candidate Donor Networks*, 70 POL. RSCH. Q. 449, 450 (2017).

contain higher percentages of women enacting policies that are more protective of abortion access.[284]

Further, the Court's uncritical account of women's political power is linked to its limited understanding of *who* comprises the polity. On one level, the Court's vision of the polity is limited to those who have managed to overcome state-imposed obstacles to voting — obstacles that the Court, through many of its voting rights decisions, has credited and blessed.[285] On another level, however, the Court's vision of democratic deliberation prioritizes and privileges moments of democratic debate that included only some members of the political community. For example, when the *Dobbs* majority insisted that *Roe* interrupted state-level debate and deliberation of the abortion issue, it was often referring to mid-twentieth-century debates over whether to repeal or liberalize then-extant abortion restrictions. What is missing from the Court's account of these debates is the fact that the laws and policies being debated were enacted through democratic processes that were categorically closed to all but white men. That is, they were democratic processes in which "the polity" affirmatively *did not include* women and people of color.[286] On this account, the "debates" that *Roe* preempted — and that the *Dobbs* majority prioritized and sought to vindicate in returning the abortion issue to the states — were debates over whether to retain or liberalize laws enacted under conditions of extreme democratic deficit.

And meaningfully, the impulse to tout such laws as reflective of democratic deliberation endures in the aftermath of *Dobbs*. Consider the recent debate over Wisconsin's 1849 abortion prohibition.[287] This prohibition, which predates the Nineteenth Amendment by 70 years and the Wisconsin Constitution's amendment granting women's suffrage by 85 years,[288] was enacted at a time when women were without formal political power. Despite this demonstrably undemocratic provenance, Republican politicians now argue that post-*Dobbs*, the state should be permitted to enforce the 1849 law, which remained on the books after *Roe* in a state of desuetude.[289] And critically, even though women and people of color are eligible to participate, the current "debate" over whether the law should remain in force is unlikely to produce true democratic deliberation. Wisconsin is subject to one of the worst

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[284] Forman-Rabinovici & Johnson, *supra* note 251, at 116.

[285] *See infra* section IV.A, pp. 777–85.

[286] For example, the Texas criminal abortion statute at issue in *Roe v. Wade*, 410 U.S. 113 (1973), was first enacted in 1854 and was subsequently amended in 1866, 1879, and 1911, after which it had "remained substantially unchanged" until it was taken up in *Roe*. *Id.* at 117–18.

[287] *See* Ruth Conniff, Commentary, *How Are Wisconsin Women Doing Under the 1849 Abortion Ban?*, WIS. EXAM'R. (Jan. 24, 2023, 6:45 AM), https://wisconsinexaminer.com/2023/01/24/how-are-wisconsin-women-doing-under-the-1849-abortion-ban [https://perma.cc/EXK3-RHJC].

[288] WIS. CONST. art. III, § 1 (amended 1934).

[289] Tori Otten, *Wisconsin Republicans Are Fighting to Keep a 200-Year-Old Abortion Law on the Books*, NEW REPUBLIC (May 5, 2023, 10:46 AM), https://newrepublic.com/post/172485/wisconsin-lawsuit-abortion-laws-like-zachary-taylor-president [https://perma.cc/CA6K-3FKC].

gerrymanders in the country, meaning that there is virtually no prospect of repealing the 1849 law through ordinary legislative processes.[290]

4. Methodological Myopia. — Finally, the *method* the Court used in overruling *Roe* and *Casey* and concluding that the Constitution does not protect the right to terminate a pregnancy reveals the hollowness of the Court's professed commitment to principles of democracy. The Court held that when determining whether an unenumerated right is nevertheless a protected liberty, courts must look to "history and tradition."[291] In the words of the opinion: "[G]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term 'liberty.'"[292] Focusing on that question, Justice Alito concluded that "in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion."[293]

But on what does the Court's history-and-tradition analysis rely? As the *Dobbs* majority made clear, its prescribed methodology consisted primarily of examining a slew of mid-nineteenth-century statutes. Notably, many of these statutes were enacted during a wave of nativist furor aimed at increasing the birthrate among native-born (white) women.[294] That is the context in which these statutes were enacted. But more than that, the laws that were central to the majority's conclusion that the Fourteenth Amendment does not protect abortion rights were, every one of them, enacted in an era in which "women could not vote, run for political office,"[295] or participate in any way as full and equal members of the polity.[296] Apparently oblivious to this democratic deficit, the *Dobbs* majority compounded it, reaching back still further to cite Sir Matthew Hale, a seventeenth-century barrister and jurist, for

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290 *See Adopted Wisconsin State Senate Plan (Assembly Bill 624 / Senate Bill 621)*, PLANSCORE (Apr. 18, 2022), https://planscore.org/plan.html?20220418T182621.925335697Z [https://perma.cc/V6KR-G8V6]; *Adopted Wisconsin State Assembly Plan (Assembly Bill 624 / Senate Bill 621)*, PLANSCORE (Apr. 18, 2022), https://planscore.org/plan.html?20220418T182910.688258000Z [https://perma.cc/NQ3Q-2TMX].

291 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022).

292 *Id.*

293 *Id.*

294 *Id.* app. A at 2285–96 (collecting statutes); *id.* app. B at 2296–300 (same); *see also* Murray, *Race-ing* Roe, *supra* note 166, at 2038 (discussing the "cultural climate that fueled the criminalization of abortion and contraception"); Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 AM. SOCIO. REV. 498, 507 (2004) (noting that physicians advocating for antiabortion laws tried to generate widespread concern over abortion among native-born white women by invoking the consequences of declining birthrates for "native-born" social and political power).

295 David Landau & Rosalind Dixon, Dobbs*, Democracy, and Dysfunction*, 2023 WIS. L. REV. (forthcoming 2023) (manuscript at 2).

296 Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-democratic Living Constitutionalism — And Some Pathways for Resistance,* 101 TEX. L. REV. 1127, 1186 (2023) [hereinafter Siegel, *Memory Games*]; *see also* Landau & Dixon, *supra* note 295 (manuscript at 1–2).

the proposition that "abortion of a quick child who died in the womb [is] a 'great crime' and a 'great misprision.'"[297]

Put differently, the *Dobbs* majority's method of analysis and interpretation bound the contemporary meaning of the Constitution to a body of law and authority in whose enactment and creation neither women nor people of color played any part,[298] "recogniz[ing] only those rights already recognized by a ruling minority elite, who were chosen to govern through undemocratic (or at best partially democratic) means."[299] This is a methodological approach that reifies the conditions of democratic deficit — hardly a methodology that values democracy and true democratic engagement.[300]

More troublingly, the *Dobbs* decision failed to grapple with the ways in which withdrawing the abortion right would restrict the full democratic participation and equal citizenship of women.[301] There is a powerful argument that women's full citizenship under the Fourteenth Amendment's Equal Protection Clause, as well as the Nineteenth Amendment's right to vote, requires control over their reproductive lives.[302] The majority's refusal even to grapple seriously with those

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[297] *Dobbs*, 142 S. Ct. at 2249 (quoting MATTHEW HALE, PLEAS OF THE CROWN 53 (P. Glazebrook ed. 1972); 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 433 (1736)).

[298] Siegel, *Memory Games*, *supra* note 296, at 1196 ("*Dobbs* is antidemocratic because it locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies."); *see also* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 108 (2023) [hereinafter Siegel, *The History of History and Tradition*] ("*Dobbs* defines the Constitution's liberty guarantee through lawmaking in 1868 from which women and minorities were excluded, and the democratic processes it sanctions perpetuate these same political inequalities . . . .").

[299] Joy Milligan & Bertrall L. Ross II, We (Who Are Not) the People: Interpreting the Undemocratic Constitution 6 (unpublished manuscript) (on file with the Harvard Law School Library).

[300] Siegel, *Memory Games*, *supra* note 296, at 1194.

[301] *See Dobbs*, 142 S. Ct. at 2245 ("Some of respondents' *amici* have now offered as yet another potential home for the abortion right . . . the Fourteenth Amendment's Equal Protection Clause. . . . Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to such 'heightened scrutiny' that applies to such classifications." (citation omitted)). *But see* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva Siegel as Amici Curiae in Support of Respondents at 4, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (arguing that restrictions on abortion are a species of sex-based discrimination that raise equal protection concerns).

[302] *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1031 (2002); Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva Siegel as Amici Curiae in Support of Respondents, *supra* note 301, at 5–6; *see also* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 10 (1997) (discussing the abolitionist roots of the Reconstruction Amendments and their implications for constitutional equality doctrines); Murray, *Children of Men*, *supra* note 15, at 851 (arguing that "the drafters of the Reconstruction Amendments infused their understanding of [those Amendments] with . . . concerns for family integrity and bodily integrity"); Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion,*

arguments is further evidence of the opinion's crabbed and thin commitment to democracy.

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In the initial aftermath of *Dobbs*, it appears that the public not only does not share the *Dobbs* majority's substantive views about abortion — it also does not share its cramped vision of democracy. Instead, *Dobbs* has fueled considerable public interest in state-level direct democracy — initiatives, referenda, ballot questions and similar devices, all of which allow individual voters to directly register their preferences unmediated by other institutions or actors. As we noted earlier, in the wake of *Dobbs*, direct democracy initiatives have allowed voters to weigh in on the abortion issue at the state level — and in these circumstances, voters have overwhelmingly registered their preferences for reproductive freedom.[303] Indeed, in the post-*Dobbs* era, *every time* voters have gone to the polls to vote directly on abortion, they have voted to protect or expand access to abortion.

The first such state was Kansas, where in August 2022 a resounding fifty-nine percent of voters rejected an amendment that would have removed abortion-rights protections from the constitution and allowed state legislators to ban or restrict the procedure.[304]

This trend only accelerated during the November 2022 election, when voters in California, Michigan, and Vermont enshrined abortion protections in their state constitutions.[305] California voters added language to their constitution to explicitly guarantee that "the state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives."[306] Michigan voters adopted a constitutional amendment guaranteeing abortion rights and reproductive freedom,[307] overriding a 1931 abortion ban that might otherwise have taken effect. And

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and the Thirteenth Amendment, 2022 U. CHI. LEGAL F. 191, 219 (2022) (arguing that "at the heart" of the Thirteenth Amendment were equality-laced concerns about the sexual autonomy of Black women and girls); *cf.* Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. 27 (2020).

303 Smith & Sasani, *supra* note 245.

304 Smith & Glueck, *supra* note 1.

305 Smith & Sasani, *supra* note 245.

306 Jackie Fortier, *California Voters Enshrine Right to Abortion and Contraception in State Constitution*, NPR (Nov. 9, 2022, 1:39 AM), https://www.npr.org/2022/11/09/1134833374/california-results-abortion-contraception-amendment-midterms [https://perma.cc/7U7U-ND8A].

307 Rick Pluta, *Michigan Voters Approve Amendment Adding Reproductive Rights to State Constitution*, NPR (Nov. 9, 2022, 3:59 AM), https://www.npr.org/2022/11/09/1134834724/michigan-abortion-amendment-midterm-results [https://perma.cc/K5AF-C9S9].

in Vermont, where a 2019 law already guaranteed abortion rights,[308] voters used the referendum process to install an additional layer of protection, enacting Article 22, the Reproductive Liberty Amendment, which broadly guarantees "personal reproductive autonomy unless justified by a compelling State interest."[309]

To be sure, direct democracy was not simply a vehicle for expanding reproductive freedom; in various states, voters also went to the polls to register their objections to efforts to limit reproductive rights. Following Kansas's lead, Kentucky voters rejected a constitutional amendment that would have made it harder to challenge abortion restrictions.[310] The amendment sought to direct "question[s] of access to abortion to the state's Republican-controlled legislature and prevent[] [state] courts from . . . interpreting" the state constitution in favor of abortion rights.[311] In Montana, voters rejected LR-131, a ballot initiative that, in circumstances involving unsuccessful abortion procedures, declared those fetuses legal persons with rights to medical care.[312] The proposed initiative also required doctors to provide resuscitative care for newborns with a fatal prognosis, even when no amount of medical care would save them, and despite the wishes of parents.[313] Widely viewed as an effort to stigmatize abortion and constitutionalize fetal personhood, the measure lost by a vote of 53% to 47%.[314]

Given the robust interest in direct democracy in the post-*Dobbs* era, it is notable that we also have seen state actors, in particular state legislatures, laboring mightily to limit access to such initiatives. For example, in Ohio, lawmakers convened a special election to raise the threshold for using ballot initiatives as a means of amending the state constitution from fifty percent to sixty percent.[315] The proposal, which

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[308] Mikaela Lefrak, *Vermont Votes to Protect Abortion Rights in State Constitution*, NPR (Nov. 9, 2022, 12:23 AM), https://www.npr.org/2022/11/09/1134832172/vermont-votes-abortion-constitution-midterms-results [https://perma.cc/YR3S-GC9V].

[309] *Id.*

[310] Lindsay Whitehurst, *Voters Uphold Abortion Rights in Michigan, California, Vermont Ballot Measures*, PBS (Nov. 9, 2022, 9:26 AM), https://www.pbs.org/newshour/politics/voters-uphold-abortion-rights-in-michigan-california-vermont-ballot-measures [https://perma.cc/9C9J-69TA].

[311] Rickert, *supra* note 245.

[312] Press Release, Ctr. for Reprod. Rts., Montana Voters Reject Anti-abortion Ballot Initiative (Nov. 10, 2022), https://reproductiverights.org/montana-voters-reject-anti-abortion-ballot-initiative [https://perma.cc/BCG9-TWUX].

[313] *Id.*

[314] Mara Silvers, *Montanans Reject LR-131 "Born Alive" Referendum*, MONT. FREE PRESS (Nov. 10, 2022), https://montanafreepress.org/2022/11/10/montanans-reject-lr-131-born-alive-referendum [https://perma.cc/Y4JB-NZYB].

[315] Julie Carr Smyth, *GOP State Lawmakers Try to Restrict Ballot Initiatives, Partly to Thwart Abortion Protections*, AP NEWS (May 14, 2023, 11:05 PM), https://apnews.com/article/democracy-ballot-initiatives-abortion-republicans-ohio-missouri-c480333113701071cceceoda975818cb [https://perma.cc/5FHK-V4DY]. Notably, in the November 2023 election, Ohioans voted to enshrine protections for reproductive rights in the state constitution. Julie Carr Smyth, *Ohio Voters Enshrine*

was broadly understood as a means of thwarting efforts to amend Ohio's constitution to protect abortion rights, was roundly defeated in August 2023.[316] The Arkansas legislature was more successful, tripling the number of counties from which signatures must be collected in order to qualify an initiative for the ballot — a move that was widely regarded as a hedge against efforts aimed at protecting and expanding reproductive rights in the state.[317] Likewise, in Mississippi, the state legislature has taken steps to prohibit ballot and voter initiatives in the substantive area of reproductive rights.[318] Similar measures are being pursued in North Dakota[319] and Missouri.[320]

These dynamics are striking and worthy of further scholarly attention. We will only note here that the Court itself has effectively underwritten these efforts to thwart direct democracy. As we discuss in the following Part, in recent years, the Court has issued a raft of decisions that distort and alter the electoral landscape, making the prospect of true democratic deliberation elusive.[321] To the extent that voters have been able to deploy direct-democracy initiatives to articulate their preference for reproductive freedom, it has been in spite of, not because of, the Roberts Court's jurisprudence of democracy.

IV. THE COURT AND DEMOCRACY: RHETORIC AND REALITY

Considering the *Dobbs* opinion from these perspectives reveals the shallow nature — indeed, the cynicism — of the Court's paeans to democracy. *Dobbs*'s hollow commitment to democracy is even more pronounced when considered alongside the Court's active interventions to distort and disrupt the functioning of the electoral process. Indeed, *Dobbs* arrives in the wake of a series of high court decisions that, taken

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Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights, AP NEWS (Nov. 7, 2023, 11:31 PM), https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270 [https://perma.cc/EZN4-RUU4].

316 Julie Carr Smyth & Samantha Hendrickson, *Voters in Ohio Reject GOP-Backed Proposal that Would Have Made It Tougher to Protect Abortion Rights*, AP NEWS (Aug. 9, 2023, 8:26 AM), https://apnews.com/article/ohio-abortion-rights-constitutional-amendment-special-election-227cde039f8d5172361287852516 4f1a [https://perma.cc/2UEH-NJVB].

317 Andrew DeMillo, *Arkansas Senate OKs New Requirement for Ballot Measures*, AP NEWS (Mar. 6, 2023, 8:23 PM), https://apnews.com/article/arkansas-ballot-measures-marijuana-casinos-medicaid-1f44e394c57fb37909798169bee45b60 [https://perma.cc/SB82-CE7H].

318 Tori Otten, *Mississippi Republicans Want to Ban Ballot Initiatives on Abortion*, NEW REPUBLIC (Mar. 2, 2023, 5:50 PM), https://newrepublic.com/post/170905/mississippi-republicans-want-ban-ballot-initiatives-abortion [https://perma.cc/A92A-QCB4].

319 Rachel Selzer, *North Dakota Legislature Proposes Amendment to Restrict Ballot Measures*, DEMOCRACY DOCKET (Apr. 12, 2023), https://www.democracydocket.com/news-alerts/north-dakota-legislature-proposes-amendment-to-restrict-ballot-measures [https://perma.cc/V6AE-KVXA].

320 Summer Ballentine, *Missouri Lawmakers Fail to Raise Bar to Amend Constitution, Easing Path for Abortion Rights*, AP NEWS (May 12, 2023, 7:53 PM), https://apnews.com/article/ballot-initiative-petition-voter-missouri-republican-8e4d5b8293eb864235cf347410d5d7f5 [https://perma.cc/74GD-5487].

321 Murray, *Children of Men*, *supra* note 15, at 859.

together, have made our democracy decidedly less representative and less democratic.[322] These cases, and their evident hostility to voting rights, take on new salience in the context of the *Dobbs* Court's insistence on returning the question of abortion to non-court entities for resolution. We hasten to note, as we did in the preceding Part, that our discussion here is by design limited: we do not consider democracy in its full scope and breadth, but rather we mostly limit our discussion to the electoral process.[323] The Part that follows turns more directly to what *Dobbs* tells us about this Court's role in our democracy.

This Part begins with the Court's recent jurisprudence on various aspects of the democratic process. Although the cases involve discrete legal questions, they are remarkably similar in valence and outcome, invariably erecting obstacles to participation or invalidating efforts of state and federal lawmakers to facilitate participation and access to the franchise. After considering the Court's cases dealing explicitly with the infrastructure of democracy, we then examine a series of cases in which the Court, or some of its members, as in *Dobbs*, prioritized democratic deliberation ahead of judicial intervention. As we note, in these moments where the Court prioritizes democratic deliberation, it is also avoiding a judicial settlement that would preserve and protect the interests of less politically powerful minority groups.

A. The Infrastructure of Democracy

The topic of the Court's democracy-undermining interventions is vast and well canvassed,[324] so our discussion here does not purport to be comprehensive. But we offer examples of the Court's moves to limit the exercise of the franchise and the prospect of an inclusive democracy. Taken together, these cases have produced a landscape in which any post-*Dobbs* deliberation will happen under conditions of severe democratic deficit.

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[322] *Id.* ("[N]o actor has done more to distort the landscape of democratic deliberation — that is, to make it difficult for individuals to register their policy preferences at the ballot box — than the Court itself.").

[323] *Cf.* Pildes, *The Constitutionalization of Democratic Politics*, *supra* note 210, at 43 (discussing the centrality of elections to any theory of "representative democracy").

[324] *See* Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 178–79 (2020) ("The Court is at the peak of its institutional legitimacy when it intervenes to bolster democracy. . . . Unfortunately, today's Republican Justices seem insensitive, or even hostile, to this conception of the Court's constitutional role . . . ." (footnotes omitted)); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2344–45 (2021) ("In sharp contrast to the Warren and Burger Courts, the current Supreme Court has done virtually nothing to make elections more inclusive or more responsive."); Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 116 (2020) ("[T]he franchise is a freedom, too, yet the Roberts Court has never found a violation of it."); Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 214 (2019); *see also* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644–45 (1998) (discussing judicial efforts that undermine democratic processes).

First, in a series of cases, the Court has hobbled the Voting Rights Act[325] (VRA), a federal statute enacted in 1965 with the explicit purpose of ending racial discrimination in voting. The VRA, in the words of Justice Kagan, "marries two great ideals: democracy and racial equality. And it dedicates our country to carrying them out."[326] Despite these lofty aspirations, again and again, the Roberts Court has undermined these ideals and the landmark legislation intended to enshrine them as law. In 2013, a 5–4 Court in *Shelby County v. Holder*[327] struck down a provision of the law that required states and localities with especially egregious histories of race discrimination in voting to obtain preapproval from a federal court or the Department of Justice before implementing any change to their voting policies or procedures.[328] In invalidating the preclearance formula, the Court gave short shrift to the Act's reauthorization by overwhelming congressional majorities and the extensive legislative record of the continued disenfranchisement of minority voters compiled in the course of the reauthorization.[329]

In 2021, in *Brnovich v. Democratic National Committee*,[330] the Court continued its assault on the VRA, narrowly interpreting Section 2 of the statute to limit the scope of cases in which litigants can successfully challenge suppressive voting policies.[331] As commentators have noted, the Court's decision in *Brnovich* rendered meaningful enforcement of the VRA's prohibition on discriminatory voting laws exceedingly difficult[332] — although in the 2023 case *Allen v. Milligan*,[333] the Court maintained a meaningful role for Section 2 in the context of racial gerrymandering.[334]

In addition to limiting the reach of the VRA, the Court, in 2019's *Rucho v. Common Cause*,[335] announced that federal courts will not enforce any limits on partisan gerrymandering,[336] a process that allows

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325 Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

326 Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Kagan, J., dissenting).

327 570 U.S. 529 (2013).

328 *Id.* at 537, 557; Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1391 (2015).

329 *See Shelby County*, 570 U.S. at 538–39. *See generally* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act*, 43 HARV. C.R.-C.L. L. REV. 385 (2008) (comparing "the breadth and quality of evidence underlying the 2006 reauthorization with the evidence presented to Congress during the 1975 and 1982 reauthorization periods and find[ing] notable similarities," *id.* at 387).

330 141 S. Ct. 2321.

331 *Id.* at 2337–38, 2345–46.

332 *See, e.g.*, Press Release, ACLU, ACLU Comment on Supreme Court Ruling in Arizona Voting Case (July 1, 2021), https://www.aclu.org/press-releases/aclu-comment-supreme-court-ruling-arizona-voting-case [https://perma.cc/R55Q-Y2WL] ("The court's decision adopts a standard for proving violations of Section 2 of the Voting Rights Act that is unduly cramped and at odds with the law's intent . . . .").

333 143 S. Ct. 1487 (2023).

334 *See id.* at 1516–17.

335 139 S. Ct. 2484 (2019).

336 *Id.* at 2508.

self-interested politicians to draw legislative district lines in ways that ensure a particular party's continued hold on power. The Court's dramatic 2019 announcement that challenges to political gerrymanders represent nonjusticiable political questions followed a series of cases over several decades in which the Court had signaled serious concerns about the constitutionality of excessive partisan gerrymanders. In 1973, the Court noted in passing that "[a] districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'"[337] In 1986, a majority of the Court held that challenges to partisan gerrymanders were justiciable, but no majority coalesced around a methodology that courts could deploy to resolve such challenges.[338] In 2004 and 2006, the Court again acknowledged the serious constitutional concerns that excessive partisan gerrymanders posed, but again it could not reach consensus about how to craft a manageable standard for policing the practice.[339]

But in *Rucho*, a 5–4 Court held that while excessive partisan gerrymanders are "incompatible with democratic principles"[340] — leading to "results that reasonably seem unjust"[341] — federal courts are nevertheless powerless to stop them.[342] According to the Court, because challenges to partisan gerrymanders present "political questions," challenges to such efforts to distort the democratic process are better left to other institutions, including state politicians and legislatures[343] — the very actors who stand to benefit from these distortions.[344]

In the wake of *Rucho*, state legislators, apparently emboldened by the knowledge that federal courts would not enforce any limits on partisan gerrymanders, have engaged in ever more aggressive gerrymanders.[345] Wisconsin supplies a particularly egregious recent example of the practice. In 2022, the Democratic governor was reelected by a

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[337] Gaffney v. Cummings, 412 U.S. 735, 751 (1973) (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

[338] Davis v. Bandemer, 478 U.S. 109, 185 n.25 (1986) (Powell, J., concurring in part and dissenting in part) (noting that there was "no 'Court' for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander.").

[339] *See* Vieth v. Jubelirer, 541 U.S. 267, 305–06 (2004) (plurality opinion); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 423 (2006).

[340] *Rucho*, 139 S. Ct. at 2506 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

[341] *Id.*

[342] *Id.* at 2507 ("Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.").

[343] *Id.* at 2507–08 (discussing state-level measures to address partisan gerrymandering).

[344] *Id.* at 2524 (Kagan, J., dissenting) (noting the lopsided incentives for state legislatures to address partisan gerrymandering).

[345] Michael Wines, *Four States Will Use Congressional Maps Rejected by Courts, Helping G.O.P. Odds*, N.Y. TIMES, Aug. 9, 2022, at A16.

margin of 51.2% to 47.8%[346] statewide, and a Democrat also won the statewide race for attorney general.[347] Yet one of the most aggressively partisan legislative maps in the country meant that Republicans held approximately 64% of seats in the state assembly and 67% of seats in the state senate.[348]

Following *Rucho*, some states have tried to address partisan gerrymandering, either by creating independent districting commissions to draw legislative maps,[349] or through state court litigation in which state supreme courts are asked to determine whether partisan gerrymanders violate state constitutional guarantees.[350] These outcomes proceed directly from the Court's directive in *Rucho*, which emphasized at length that the federal courts' inability to address partisan gerrymandering did

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[346] *Wisconsin Election Results*, WASH. POST (Nov. 30, 2022, 2:06 PM), https://www.washingtonpost.com/election-results/2022/wisconsin [https://perma.cc/D8V2-HZLF].

[347] *See Wisconsin Attorney General Election Results*, N.Y. TIMES (Nov. 22, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-wisconsin-attorney-general.html [https://perma.cc/FCQ2-K8FP].

[348] Karnopp, *supra* note 231.

[349] Eight states have independent redistricting commissions: Alaska, Arizona, California, Colorado, Idaho, Michigan, Montana, and Washington. *See Independent and Advisory Citizen Redistricting Commissions*, COMMON CAUSE, https://www.commoncause.org/independent-redistricting-commissions [https://perma.cc/Y5W5-HSFC]; *Who Draws the Lines?*, LLS: ALL ABOUT REDISTRICTING, https://redistricting.lls.edu/redistricting-101/who-draws-the-lines [https://perma.cc/6R9J-3HX7].

[350] *See, e.g.*, Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 493 (Wis. 2021) (holding that partisan gerrymander does not offend the Wisconsin Constitution and applying the "least-change approach"); Johnson v. Wis. Elections Comm'n, 972 N.W.2d 559, 586 (Wis. 2022) (choosing a map under the same principle); Carter v. Chapman, 270 A.3d 444, 464, 471 (Pa. 2022) (choosing between various redistricting maps submitted and accepting the one generated by a least-change analysis), *cert. denied*, 143 S. Ct. 102 (2022); Harkenrider v. Hochul, 197 N.E.3d 437, 456 (N.Y. 2022) (affirming trial court's ruling that congressional map violated the constitutional rule against partisan gerrymandering); Hicks v. 2021 Haw. Reapportionment Comm'n, 511 P.3d 216, 225–26 (Haw. 2022) (upholding the power of an independent commission to redraw legislative districts as a constitutional delegation of power that was exercised without constitutional or statutory violation); *In re* 2022 Legis. Districting, 282 A.3d 147, 211 (Md. 2022) (finding that the evidence brought by the challengers failed to clear the "high bar" of the presumption of validity applied to the political branches when redistricting); Harper v. Hall, 868 S.E.2d 499, 553, 555–56, 559 (N.C. 2022) (finding that voters' rights groups stated a justiciable claim under North Carolina's Free Elections Clause, and that the new maps violated the "fundamental right to substantially equal voting power," *id.* at 555, under North Carolina's Equal Protection Clause), *overruled by* Harper v. Hall, 886 S.E.2d 393 (N.C. 2023), *and aff'd on other grounds sub nom.* Moore v. Harper, 143 S. Ct. 2065 (2023); N.C. State Conf. of the NAACP v. Moore, 876 S.E.2d 513, 526, 540–41 (N.C. 2022) (remanding after holding that claims of unconstitutional racial gerrymander presented a justiciable question); Rivera v. Schwab, 512 P.3d 168, 178, 187 (Kan. 2022) (holding that the Federal Constitution's Elections Clause did not prevent a court from reviewing redistricting maps for compliance with the Kansas Constitution but that claims of partisan gerrymander were nonjusticiable political questions); League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 199 N.E.3d 485, 507 (Ohio 2022) (ordering a new map drawn but refusing to adopt a particular map).

not foreclose antigerrymandering efforts undertaken in other venues, including state redistricting commissions and state courts.[351]

And yet there is every reason to worry about how these modest interventions might fare before this Court. In 2015, Chief Justice Roberts insisted in a dissent that independent redistricting commissions were unconstitutional,[352] and given intervening personnel changes that have occurred at the Court, there may, in the future, be sufficient votes to enshrine Chief Justice Roberts's view into law. And, although the Court in the 2023 case *Moore v. Harper*[353] rejected a strong form of the so-called "independent state legislature theory,"[354] which would have prevented state courts from *ever* enforcing state constitutional limits on gerrymandering, the *Moore* opinion emphasized that federal courts could play a role in reviewing state-court interpretations of their own state constitutions.[355] Such a view could further undermine state-level efforts to combat gerrymandering.[356]

The Court's decisions in recent decades have also dramatically altered the financial landscape in which elections are conducted. In 2010, the Court in *Citizens United v. FEC*[357] opened the floodgates to corporate spending in federal elections, allowing moneyed interests to dominate political campaigns.[358] Its decision striking down longstanding limits on corporate spending in federal elections fundamentally transformed the campaign finance landscape.[359] But the impact of the opinion and its logic have extended well beyond the particular corporate-spending provision at issue in the case, dramatically limiting lawmakers' ability to enact all manner of reforms designed to combat

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[351] Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) ("Our conclusion does not condone excessive partisan gerrymandering. . . . The States . . . are actively addressing the issue on a number of fronts . . . [including] by placing power to draw electoral districts in the hands of independent commissions."); *id.* ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

[352] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting) ("Art. I, § 4 . . . vests congressional redistricting authority in 'the Legislature' of each State. An Arizona ballot initiative transferred that authority from 'the Legislature' to an 'Independent Redistricting Commission.' The majority approves this deliberate constitutional evasion by . . . revising 'the Legislature' to mean 'the people.'").

[353] 143 S. Ct. 2065 (2023).

[354] *See generally* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law,* 90 U. CHI. L. REV. 137 (2023).

[355] *See Moore,* 143 S. Ct. at 2089–90.

[356] *See* Litman & Shaw, *supra* note 234, at 1258.

[357] 558 U.S. 310 (2010).

[358] *Id.* at 372; *see also* SpeechNow.org v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010) (striking down federal contribution limits as applied to independent expenditure committees based on the reasoning of *Citizens United*).

[359] *See* Jennifer A. Heerwig & Katherine Shaw, *Through A Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1445–46 (2014) (discussing the impact of *Citizens United* on the campaign finance landscape).

both corruption and the appearance of corruption in campaigns for office.[360]

To the extent that federal legislation aims to ensure political participation, the Court's decisions have eroded such protections. In 2018's *Husted v. A. Philip Randolph Institute*,[361] the Court voted 5–4 to allow states to purge voters for failing to vote, notwithstanding a provision of federal law that appears to limit states' authority to "do[] just that."[362] In *Husted*, the Court found that Ohio could remove *eligible* voters from voting rolls[363] where such voters had not voted for two years, had failed to return an official postcard, and had not voted for another four years after failing to submit the postcard.[364] The Court's decision in *Husted* put a significant percentage of Ohio voters[365] — really, voters everywhere — at risk of being purged from voter rolls for sitting out a few election cycles. *Husted* is concerning in its own right; it is also doubly concerning because it suggests that the Court will credulously accept even unsupported claims of voter fraud or the need for deterrence in defense of ever more burdensome restrictions on the right to vote.[366]

Consider, next, the Court's role in blessing the voter ID requirements that have gone into effect in many states, and whose ostensible predicate — preventing fraud in voting — has been squarely repudiated in the years since the Court allowed states to enforce such requirements. In a case decided in 2008, *Crawford v. Marion County Election Board*,[367] the Court approved an Indiana voter identification law, and in so doing, credited state representations that the law was an effort to combat in-person voting fraud.[368] Even in 2008, the evidence that such fraud was a genuine problem was exceedingly thin,[369] and the

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[360] *See* Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1387–88 (2013) (noting that the Court's narrow conception of "corruption" has prevented legislative efforts predicated on a broader understanding). For a broad examination of *Citizens United* and political corruption, see generally Samuel Issacharoff, *The Supreme Court, 2009 Term — Comment: On Political Corruption*, 124 HARV. L. REV. 118 (2010).

[361] 138 S. Ct. 1833 (2018).

[362] *Id.* at 1850 (Breyer, J., dissenting).

[363] *See id.* at 1843 (majority opinion); Manheim & Porter, *supra* note 324, at 214.

[364] *Husted*, 138 S. Ct. at 1840–41.

[365] *See* Press Release, Frank LaRose, Ohio Sec'y of State, LaRose Maintains Accurate Voter Lists for Ohio While Improving Process Long-Required Under State and Federal Law (Jan. 19, 2021), https://www.ohiosos.gov/media-center/press-releases/2021/2021-01-19 [https://perma.cc/NE3K-AEMR] (announcing the removal of approximately 100,000 registrations from Ohio's voter rolls).

[366] Manheim & Porter, *supra* note 324, at 214–16.

[367] 553 U.S. 181 (2008).

[368] *Id.* at 196, 204 (plurality opinion).

[369] *Id.* at 194 ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.").

intervening years have further eroded any plausible claims of significant in-person fraud.[370]

And yet, since *Crawford* was decided, many states have implemented and enforced voter ID requirements.[371] Some lower courts have invalidated such laws,[372] but they remain in force in many states.[373] And, although research suggests that restrictive voter ID laws often create sufficient political mobilization to offset any significant impact on election outcomes,[374] it is also clear that the burden of these laws falls disproportionately on low-income voters, voters of color, and the youngest and oldest voters.[375] Such laws, then, undermine basic notions of political equality, even if they do not always impact election results.

The Court's pandemic voting cases are also a striking display of the Court's neglect of free and open access to the franchise. During the spring, summer, and fall of 2020, as the COVID-19 pandemic swept the country, local election administrators in some states took steps to facilitate early and absentee voting to allow individuals to vote safely in the period before vaccines were widely available.[376] In decision after

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[370] *See* Benjamin L. Ginsberg, Opinion, *Republicans Have Insufficient Evidence to Call Elections "Rigged" and "Fraudulent*," WASH. POST (Sept. 8, 2020, 6:12 PM), https://www.washingtonpost.com/opinions/2020/09/08/republicans-have-insufficient-evidence-call-elections-rigged-fraudulent [https://perma.cc/M2B3-NCBE] ("The truth is that after decades of looking for illegal voting, there's no proof of widespread fraud."); Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1377–78 (2015) (detailing lack of evidence of in-person voter fraud despite individuals holding strong beliefs that such fraud is occurring); Christina A. Cassidy, *Far Too Little Vote Fraud to Tip Election to Trump, AP Finds*, AP NEWS (Dec. 14, 2021, 5:56 PM), https://apnews.com/article/voter-fraud-election-2020-joe-biden-donald-trump-7fcb6f134e528fee8237c7601db3328f [https://perma.cc/8X3D-QGCT] ("An Associated Press review of every potential case of voter fraud in the six battleground states disputed by former President Donald Trump has found fewer than 475 . . . ."); Andrew C. Eggers et al., *No Evidence for Systematic Voter Fraud: A Guide to Statistical Claims About the 2020 Election*, PNAS, Nov. 9, 2021, art. e2103619118, at 1, 6 (disproving the most prominent statistical claims of anomalous voter fraud in the 2020 election).

[371] *See Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Nov. 9, 2023), https://www.ncsl.org/elections-and-campaigns/voter-id#statebystate [https://perma.cc/65KU-DH9V] (listing voter identification requirements in force in thirty-six states).

[372] *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 272 (5th Cir. 2016) (en banc) (finding Texas's strict voter ID law requiring specific forms of photo identification to be racially discriminatory under the Voting Rights Act); Holmes v. Moore, 881 S.E.2d 486, 510 (N.C. 2022) (holding that state voter identification legislation was discriminatory in intent and violated the state constitution's equal protection provisions), *withdrawn and superseded on reh'g*, 886 S.E.2d 120 (N.C. 2023); Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *27 (Pa. Commw. Ct. Jan. 17, 2014) (holding that under the state constitution, Pennsylvania voter identification law violated fundamental rights but not equal protection); Martin v. Kohls, 444 S.W.3d 844, 846 (Ark. 2014) (finding that Arkansas's voter identification law was "unconstitutional on its face"); Priorities USA v. State, 591 S.W.3d 448, 461 (Mo. 2020) (striking down the affidavit requirement of Missouri's voter identification law).

[373] *See Voter ID Laws*, *supra* note 371.

[374] Jeffrey J. Harden & Alejandra Campos, *Who Benefits from Voter Identification Laws?*, PNAS, Feb. 14, 2023, art. e2217323120, at 1–3.

[375] Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate — New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 115 (2009); Bernard L. Fraga & Michael G. Miller, *Who Do Voter ID Laws Keep from Voting?*, 84 J. POL. 1091, 1091 (2022).

[376] *See infra* notes 379–83 and accompanying text.

decision, the Court, by the narrowest of margins, voted to prevent state officials and state and federal judges from taking steps to facilitate voting, relying largely on an underdefined principle that voting rules should not be changed close in time to elections.[377]

These interventions included the Court itself introducing election-eve changes into state voting procedures. For example, in *Republican National Committee v. Democratic National Committee*,[378] the Court intervened the day before an election to stay a district court order that, responding to concerns regarding pandemic-related postal delays and potential widespread disenfranchisement, had extended Wisconsin's absentee ballot receipt deadline.[379] The Wisconsin stay was accompanied by a short per curiam opinion, but in other cases in the same preelection period, the Supreme Court intervened without explanation to reinstate restrictive voting rules that had been invalidated in reasoned decisions by lower federal courts. In one particularly egregious case out of Alabama, the Court overruled the appellate court, which had upheld a district court order enjoining the state's ban of curbside voting during the pandemic.[380] In that case, the district court reasoned that such a restriction violated the Constitution and the Americans with Disabilities Act of 1990.[381] Although the district court had enjoined the state's prohibition in a lengthy and carefully reasoned written opinion following an eleven-day trial,[382] the Supreme Court stayed the district court's injunction without an opinion explaining its reasoning, and less than two weeks before the election.[383]

Taken together, these cases make clear that the Court does not see its task as facilitating democratic participation. In fact, the Roberts Court has *never* invalidated a state or federal law on the grounds that the challenged law impermissibly undermined or interfered with the right to vote.[384] Where it has invalidated election-related laws, it has been on the grounds that they violate the speech rights of campaign donors,[385] or the rights of states in conducting elections[386] — but never

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377 For a survey of many of these opinions, see Wilfred U. Codrington III, Purcell *in Pandemic*, 96 N.Y.U. L. REV. 941, 969–84 (2021).

378 140 S. Ct. 1205 (2020) (per curiam).

379 *Id.* at 1206–07.

380 Merrill v. People First of Ala., 141 S. Ct. 25, 25 (2020) (mem.); People First of Ala. v. Sec'y of State, No. 20-13695-B, 2020 WL 6074333, at *1 (11th Cir. Oct. 13, 2020); People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1180 (N.D. Ala. 2020).

381 *People First of Ala.*, 491 F. Supp. 3d at 1154, 1166; 42 U.S.C. §§ 12101–12213; 47 U.S.C. § 225.

382 *People First of Ala.*, 491 F. Supp. 3d at 1092.

383 *Merrill*, 141 S. Ct. at 25 (granting the stay on October 21, 2020).

384 Stephanopoulos, *The Anti-*Carolene *Court*, *supra* note 324, at 116, 160.

385 Citizens United v. FEC, 558 U.S. 310, 372 (2010); McCutcheon v. FEC, 572 U.S. 185, 193 (2014).

386 Shelby County v. Holder, 570 U.S. 529, 556 (2013).

on the ground that such restrictions interfere with the right to vote, a right the Court once described as "preservative of all rights."[387]

Professor Nicholas Stephanopoulos has referred to the Roberts Court's destructive tendency in cases involving the law of democracy as an "anti-*Carolene*" impulse.[388] The *Carolene Products*[389] view, refracted through John Hart Ely's *Democracy and Distrust*, understood the judicial role as bolstering or supporting the infrastructure of democracy, not dismantling it.[390] Vigorous judicial review was legitimate, even where it invalidated the actions of elected officials, if it was undertaken to protect "discrete and insular minorities" from the vicissitudes of the majority, or to preserve access to democratic participation.[391] But viewing the Roberts Court's many interventions in this sphere in tandem, it is clear that this is a Court that no longer understands itself as largely or primarily functioning to facilitate the exercise of meaningful democracy in these ways; rather, in many instances, it appears to be actively working to undermine these goals.[392]

B. Invoking Democracy in Other Contexts

As we showed in the preceding section, the Court has done more than perhaps any other institution to disrupt the electoral landscape, making it harder for individuals to register their preferences in majoritarian politics. It is therefore quite striking, and likely no accident, that the Court consigned the abortion question to the democratic process at this moment of all moments.

In this section, we canvass cases where members of the Court have demonstrated enthusiasm for using majoritarian processes to resolve questions that implicate the welfare of "discrete and insular minorities." While minority groups often experience greater difficulty vindicating their interests in the political process, in these cases, such concerns do not appear to loom large in the Justices' deliberations.

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387 Reynolds v. Sims, 377 U.S. 533, 562 (1964) (describing the right to vote as "a fundamental political right, because preservative of all rights" (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886))); *see* Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131, 132 (2019) (describing how the Roberts Court has "upheld strict voter identification laws" and authorized states to "purge[] . . . thousands of voters from the voting rolls").

388 Stephanopoulos, *The Anti*-Carolene *Court*, *supra* note 324, at 114–15.

389 United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

390 *See* ELY, DEMOCRACY AND DISTRUST, *supra* note 42, at 75–77 (arguing that judicial review is not countermajoritarian where it aims to bolster democratic infrastructure and enhance democratic participation).

391 *Carolene Prods.*, 304 U.S. at 152 n.4.

392 Stephanopoulos, *The Anti*-Carolene *Court*, *supra* note 324, at 122 (arguing that in many recent cases "the Court declines to step in because it rejects *Carolene*'s basic tenet . . . that it should exercise its power of judicial review to break up blockages of the political process," and indeed, in the face of other actors seeking to "engag[e] in pro-democratic policymaking," has begun to "invoke[] its power of judicial review not to promote democracy but to ensure its continued subversion").

This section identifies a number of circumstances and situations, in addition to abortion, in which some of the Justices' enthusiasm for abstract conceptions of democracy is quite pronounced, and in which their professed interest in preserving democratic deliberation is especially robust. In these contexts, members of the Court forcefully articulate an understanding of the judicial role that involves dispatching contested questions to be resolved through the mechanisms of democratic engagement and deliberation — even in circumstances where other important constitutional values are at stake.

1. Sex Discrimination. — Decided in the same year as *Roe v. Wade*, the facts and disposition of *Frontiero v. Richardson*[393] are well-known to students of constitutional law. Sharron Frontiero, a lieutenant in the United States Air Force, sought — and was denied — dependent benefits for her husband, Joseph.[394] The government conceded that "[a]lthough such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services," Frontiero's claim for dependent benefits for her spouse was denied "because she failed to demonstrate that her husband was dependent on her for more than one-half of his support."[395] The government conceded that the differential treatment "serve[d] no purpose other than mere 'administrative convenience'" in the processing of dependent benefits.[396] In defense of the policy, the government asserted that, "as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives."[397]

A majority of the Supreme Court, however, disagreed with the government's logic. By an 8–1 vote, the Court invalidated the sex-based preference.[398] But although eight members of the Court were united in invalidating the policy, they could not agree on the appropriate standard of review for sex-based classifications. Writing for a plurality of four Justices, Justice Brennan maintained that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[399] As support for this position, Justice Brennan noted that, like "recognized suspect criteria, . . . the sex characteristic frequently bears no relation to ability to perform or contribute to society."[400] Moreover, other constitutional actors seemed to agree. Justice Brennan pointed to recent congressional actions — the enactment of Title VII of

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393 411 U.S. 677 (1973).
394 *Id.* at 680 (plurality opinion).
395 *Id.*
396 *Id.* at 688.
397 *Id.* at 688–89.
398 *Id.* at 691.
399 *Id.* at 688.
400 *Id.* at 686.

the Civil Rights Act of 1964[401] and the Equal Pay Act of 1963,[402] both of which prohibited sex-based discrimination, and the recent submission of the Equal Rights Amendment (ERA) to the states for ratification — as evidence that "Congress itself has concluded that classifications based upon sex are inherently invidious."[403] "[T]his conclusion of a coequal branch of Government is not without significance," Justice Brennan intoned.[404]

Justice Powell, who authored an opinion concurring in the judgment that Chief Justice Burger and Justice Blackmun joined, also found the submission of the ERA to state legislatures for ratification to be a "compelling" development.[405] However, unlike Justice Brennan, who saw Congress's approval of the ERA as a signal of its assent to treating sex-based discrimination as on par with racial discrimination, Justice Powell understood the ERA's progress from the federal legislature to state legislatures as a sign of ongoing democratic deliberation on the question of how to deal with sex-based discrimination. If the Court intervened, as the plurality wished, to subject sex-based classifications to strict scrutiny, it would be "acting prematurely and unnecessarily" to "pre-empt by judicial action a major political decision which is currently in process of resolution."[406] To be sure, Justice Powell allowed, "[t]here are times when [the] Court . . . cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people."[407] But this was not one of those moments where the Court was obliged to weigh in. "[D]emocratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes."[408]

Justice Powell's faith in the ERA and state legislatures was perhaps misplaced. Although Congress enacted the ERA and submitted it to the state legislatures for ratification, the amendment's once-rosy prospects soon dimmed. Missouri "housewife" Phyllis Schlafly launched "STOP ERA," a campaign that decried the loss of "the right to be a housewife"[409] and the material benefits of that status, while also connecting the ERA to support for abortion, gay rights, and civil rights more generally.[410] In the end, Schlafly's STOP ERA campaign was as good

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401 42 U.S.C. § 2000e to 2000e-17.
402 29 U.S.C. § 206(d).
403 *Frontiero*, 411 U.S. at 687 (plurality opinion).
404 *Id.* at 687–88.
405 *Id.* at 692 (Powell, J., concurring in the judgment).
406 *Id.*
407 *Id.*
408 *Id.*
409 Melissa Murray, *The Equal Rights Amendment: A Century in the Making*, 43 HARBINGER 91, 95 (2019).
410 *Id.* at 96.

as its word. As the ratification deadline closed, the ERA was narrowly defeated, just three states shy of the number required for ratification, thirty-eight.[411]

As democratic deliberation proved unavailing in the effort to provide robust protection against sex-based classifications, so, too, were the courts an uneven guarantor of women's rights. In 1976, the Court eventually settled on intermediate scrutiny as the appropriate standard of review for sex-based classifications,[412] permitting the government to distinguish on the basis of sex so long as the classification was substantially related to an important government interest.[413] Under this standard, which is less rigorous than the strict scrutiny standard considered in *Frontiero*, the Court has upheld a range of sex-based classifications, including laws that preclude women from the draft[414] and make it easier for mothers to transmit citizenship to children born out of wedlock in foreign countries.[415]

To be sure, the Court's jurisprudence on sex discrimination did not end with *Frontiero* or with Justice Powell's confident assurances that the political process would resolve the issue once and for all. Indeed, the Court, over a series of decisions that includes *United States v. Virginia*,[416] *Nevada Department of Human Resources v. Hibbs*,[417] and *Sessions v. Morales-Santana*,[418] went beyond the tentative protections for sex equality first identified in *Frontiero*. Given these developments, the *Dobbs* majority's breezy assurances that a woman's right to choose an abortion should be consigned to majoritarian politics threatens a return to the logic of Justice Powell's concurrence.

2. LGBTQ Rights. — The domain of LGBTQ civil rights has also been an arena in which the Court's deliberations have evinced the tension between judicial protection for minorities and the prospect of preserving opportunities for democratic deliberation. To be sure, in these cases, the Court, with narrow majorities, has intervened to protect LGBTQ civil rights. But doing so has often prompted vigorous dissents that focus on judicial restraint as a means of preserving opportunities for democratic debate on fraught issues. In this regard, these dissents often mirror — and in some cases, directly invoke — critiques of *Roe* and the narrative of disrupted democratic deliberation that we earlier

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411 *Id.*

412 *See* Craig v. Boren, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting) (describing the majority's "application . . . of an elevated or 'intermediate' level of scrutiny").

413 *Id.* at 197 (majority opinion) (concluding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

414 *See* Rostker v. Goldberg, 453 U.S. 57, 83 (1981).

415 *See* Nguyen v. INS, 533 U.S. 53, 73 (2001).

416 518 U.S. 515, 556–58 (1996).

417 538 U.S. 721, 738–40 (2003).

418 137 S. Ct. 1678, 1701 (2017).

discussed.[419] The Court's decisions in *Romer v. Evans*[420] and *Lawrence v. Texas*[421] are exemplary of this impulse. In *Romer*, the Court invalidated Amendment 2, a Colorado voter referendum that amended the state constitution to prohibit any state recognition of and protection for "Homosexual, Lesbian or Bisexual Orientation."[422] In a 6–3 decision, the Court struck down the amendment on the ground that it reflected impermissible "animus toward the class it affect[ed]" and "lack[ed] a rational relationship to legitimate state interests."[423]

In a stinging dissent, Justice Scalia emphasized that the challenged amendment was an expression of the popular will — the result of ongoing statewide deliberation on the issue of gay rights.[424] Indeed, "[b]y the time Coloradans were asked to vote on Amendment 2, . . . [t]hree Colorado cities — Aspen, Boulder, and Denver — had enacted ordinances that listed 'sexual orientation' as an impermissible ground for discrimination"[425] and the governor "had signed an executive order [endorsing] . . . 'diversity['] . . . [and denouncing ']discrimination in any form,' and directing state agency-heads to 'ensure non-discrimination' in hiring and promotion based on, among other things, 'sexual orientation.'"[426] These successes, Justice Scalia maintained, were the result of democracy *working*. Without judicial intervention to secure their rights, gay Coloradans had engaged in debate and persuaded their fellow citizens to confer civil rights protections through legislative and executive action.[427]

On this logic, Amendment 2 was merely further evidence of democracy at work.[428] According to Justice Scalia, the challenged amendment reflected "lawful, democratic countermeasures" to these gay rights successes, and thus was merely an iteration of the democratic process[429] — a process that the Court, through its invalidation of Amendment 2, disrupted.[430] And critically, on Justice Scalia's view, the Court's decision was doubly disruptive. Not only had the majority foreclosed the

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[419] *See supra* section I.B, pp. 739–48.

[420] 517 U.S. 620 (1996).

[421] 539 U.S. 558 (2003).

[422] *Romer*, 517 U.S. at 624 (quoting COLO. CONST. art. II, § 30b).

[423] *Id.* at 632.

[424] *Id.* at 645–46 (Scalia, J., dissenting).

[425] *Id.* at 646 (citing ASPEN, COLO., MUN. CODE § 13-98 (1977); BOULDER, COLO., REV. MUN. CODE §§ 12-1-1 to 12-1-11 (1987); DENVER, COLO., REV. MUN. CODE art. IV, §§ 28-91 to 28-116 (1991)).

[426] *Id.* (quoting Colo. Exec. Order No. D0035-90 (Dec. 10, 1990)).

[427] *Id.* (noting these "legislative successes" and acknowledging that "homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society").

[428] *Id.* at 647 ("That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals . . . .").

[429] *Id.* at 646.

[430] *See id.* at 647 ("The Court today asserts that this most democratic of procedures is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it *must* be unconstitutional, because it has never happened before.").

ongoing statewide debate on the question of gay rights, but it also did so by rendering "seemingly tolerant Coloradans,"[431] who wished to express their preference for "traditional attitudes"[432] through the political process, akin to "racial and religious bigot[s]."[433]

Justice Scalia would elaborate these themes in subsequent cases concerning gay rights. Seven years later, the Court issued a 6–3 decision in *Lawrence v. Texas*, striking down a Texas antisodomy law on the ground that "[the] right to liberty under the Due Process Clause gives [gay individuals] the full right to engage in their conduct without intervention of the government."[434] In so doing, the *Lawrence* Court overruled an earlier precedent, *Bowers v. Hardwick*,[435] on the ground that it overlooked, among other things, changing attitudes regarding homosexuality.[436] In particular, the *Lawrence* majority emphasized the repeal or desuetude of criminal laws prohibiting homosexual conduct,[437] as well as other nations' efforts to affirm "the protected right of homosexual adults to engage in intimate, consensual conduct."[438]

To be sure, the *Lawrence* majority did not frame its logic explicitly in the language of democracy and democratic deliberation. But it is worth observing that these nods to nonenforcement and shifting attitudes implicitly preempted objections that, in decriminalizing sodomy, the majority was thwarting the will of the people and their elected representatives.

But, even as the *Lawrence* majority sought to frame its decision as consistent with the popular will, the dissenting Justices insisted that the Court's intervention had displaced legitimate democratic reform on the question of same-sex sodomy. In a brief dissent that echoed Justice Stewart's dissent in 1965's *Griswold v. Connecticut*,[439] Justice Thomas pronounced the challenged Texas law a waste of "valuable law enforcement resources"[440] but insisted that legislative repeal, rather than judicial declaration of a constitutional right, was the proper way to deal with this "uncommonly silly" law.[441]

Justice Scalia, who authored the principal dissent, took issue with the majority's overruling of *Bowers*.[442] He drew a direct comparison between *Lawrence* and *Roe*,[443] which four of the Justices in the *Lawrence*

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431 *Id.* at 636.
432 *Id.* at 652.
433 *Id.* at 646.
434 Lawrence v. Texas, 539 U.S. 558, 578 (2003).
435 478 U.S. 186 (1986).
436 *Lawrence*, 539 U.S. at 570–76.
437 *Id.* at 573.
438 *Id.* at 576.
439 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).
440 *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting).
441 *Id.* (quoting *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting)).
442 *Id.* at 586–87 (Scalia, J., dissenting).
443 *Id.* at 587 (quoting H.R. REP. NO. 104-664, at 12 (1996)).

majority had upheld in *Planned Parenthood v. Casey*.[444] But as important to Justice Scalia as the majority's casual dismissal of a seventeen-year-old precedent was its resolution of an issue that was better suited to democratic deliberation. The Court, Justice Scalia inveighed, "has taken sides in the culture war," abandoning its constitutional role "as neutral observer" ensuring "that the rules of democratic engagement are observed."[445] Social acceptance of homosexuality was not as settled as the *Lawrence* majority claimed. Instead, Justice Scalia observed, it was a topic of considerable debate, with "[m]any Americans" harboring reservations about the prospect of gay business partners, scoutmasters, teachers, and tenants.[446] Their efforts to "protect[] themselves and their families from a lifestyle that they believe to be immoral and destructive" were evidence of continued debate — a debate that the Court had again short-circuited.[447]

Perhaps mindful of the *Romer* majority's logic, Justice Scalia insisted that his views were not born of animus against gay people but rather reflected a sincere commitment to the judicial role. As he explained, "I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means."[448] And again, he reiterated that "homosexuals have achieved some success" in persuading "fellow citizens" of the rightness of their cause.[449] "But," Justice Scalia continued, "persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else."[450] The challenged Texas antisodomy law was "well within the range of traditional democratic action, and [the people's] hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change."[451]

Justice Scalia's objections to the decriminalization of sodomy by judicial fiat migrated easily to the Court's consideration of a right to same-sex marriage. In *United States v. Windsor*, a 2013 decision invalidating section 3 of the Defense of Marriage Act,[452] Justice Scalia reprised his concerns regarding judicial settlement of a contentious social issue. But notably, he was not alone in appealing to democracy. The *Windsor* majority also invoked democratic deliberation and the will of the people in striking down DOMA. According to Justice Kennedy, who wrote for the majority, "After a statewide deliberative process that enabled its

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444 *Id.* at 561 (majority opinion); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843–44 (1992).

445 *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

446 *Id.*

447 *Id.*

448 *Id.* at 603.

449 *Id.*

450 *Id.*

451 *Id.*

452 United States v. Windsor, 570 U.S. 744, 775 (2013).

citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."[453] On this account, DOMA "frustrate[d] that objective" by imposing a "systemwide" federal definition of marriage.[454] More troublingly, DOMA sought "to injure the very class New York [sought] to protect,"[455] expressing "moral disapproval of homosexuality" and treating state-recognized same-sex unions as "second-class marriages for purposes of federal law."[456]

Indifferent to the majority's attempt to cloak itself in the mantle of democracy, Justice Scalia, in dissent, elaborated on themes honed earlier in *Romer* and *Lawrence*. In particular, Justice Scalia objected to the majority's conclusion that DOMA evinced unconstitutional animus toward same-sex couples.[457] On his account, if the question was the disruption and frustration of democratic debate, the problem did not lie with DOMA's articulation of a federal definition of marriage, but rather, with the majority's animus rhetoric, which "formally declar[ed] anyone opposed to same-sex marriage an enemy of human decency."[458] "Since DOMA's passage," Justice Scalia mused, "citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices — in other words, *democracy*."[459] The majority's rhetoric, equating a preference for the traditional understanding of marriage with "'the purpose and effect to disparage and to injure' the 'personhood and dignity' of same-sex couples,"[460] threatened an end to a theretofore-productive debate by casting those who objected to same-sex marriage as bigots.[461] In this regard, although the *Windsor* majority explicitly sought to *vindicate* state-level deliberation on same-sex marriage, Justice Scalia now insisted that the decision was effectively a "judicial distortion of our society's debate over [same-sex] marriage" that would, as the debate over marriage equality intensified, "arm[] well every challenger to a state law restricting marriage to its traditional definition."[462] Put differently, challenging discrimination *as discrimination* undermined democracy.

Two years later, in *Obergefell v. Hodges*, a 5–4 decision legalizing same-sex marriage, Justice Scalia, now joined by the Chief Justice and Justices Thomas and Alito, again raised the issue of democratic

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453 *Id.* at 764.
454 *Id.* at 771.
455 *Id.* at 769.
456 *Id.* at 771.
457 *See id.* at 795–96 (Scalia, J., dissenting).
458 *Id.* at 800.
459 *Id.* at 801 (emphasis added).
460 *Id.* at 800 (quoting *id.* at 775 (majority opinion)).
461 *See id.* at 800–01.
462 *Id.*

deliberation — and emphasized the majority's disruption of ongoing debate at the state level over whether to expand civil marriage to include same-sex couples.[463] Both Chief Justice Roberts and Justice Alito emphasized the linkages between democratic deliberation, enumerated rights, and constitutional protection.[464] As the Chief Justice mused, because "our Constitution does not enact any one theory of marriage," the question of whether "to expand marriage to include same-sex couples, or to retain the historic definition" rested with the people.[465] Like Chief Justice Roberts, Justice Alito bemoaned federal court intervention in this ongoing debate "about whether . . . States should recognize same-sex marriage."[466] On this account, the majority's decision that legalized same-sex marriage was not a vindication of a civil right, but an expression of judicial imperialism.

Justices Thomas and Scalia agreed — particularly on the point of the *Obergefell* Court's disruption of ongoing state-level debate about same-sex marriage rights. According to Justice Thomas, "[t]he definition of marriage ha[d] been the subject of heated debate in the States," with "35 States hav[ing] put the question to the People themselves."[467] Likewise, Justice Scalia extolled the "public debate over same-sex marriage" as "democracy at its best" — that is, "[u]ntil the courts put a stop to it."[468]

Perhaps anticipating these objections, the *Obergefell* majority underscored its commitment to a limited judicial role — one that imagined the courts intervening in order to protect minorities against the vicissitudes of majority will. Under the Constitution, the majority allowed, "democracy is the appropriate process for change, so long as that process does not abridge fundamental rights."[469] The people's right to debate and determine fraught issues could not eclipse the protection of fundamental rights — particularly for those groups who could not vindicate their interests in the political process. "Thus, when the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking."[470]

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[463] 576 U.S. 644, 714 (2015) (Scalia, J., dissenting) ("This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.").

[464] *Id.* at 686 (Roberts, C.J., dissenting) ("[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be."); *id.* at 741 (Alito, J., dissenting) ("Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.").

[465] *Id.* at 686–87 (Roberts, C.J., dissenting).

[466] *See id.* at 736 (Alito, J., dissenting).

[467] *Id.* at 732–33 (Thomas, J., dissenting).

[468] *Id.* at 714 (Scalia, J., dissenting).

[469] *Id.* at 676 (majority opinion).

[470] *Id.* at 677 (quoting Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN), 572 U.S. 291, 313 (2014) (plurality opinion)).

Indeed, in terms that evoked the logic of *Carolene Products*'s footnote four,[471] the majority reasoned that "[t]his is why 'fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'"[472]

These appeals to other constitutional commitments were ignored, however, as the dissenters doubled down on the view that judicial recognition of same-sex marriage deprived the polity of the opportunity to debate and determine another contentious question. Indeed, according to Justice Thomas, the majority's recognition of same-sex marriage rights not only deprived the people of a voice in the debate but also deprived them of the established process for "protect[ing their] liberty from arbitrary interference."[473] On this account, vindicating the liberty of same-sex couples required depriving the people of the opportunity to protect their liberties through the process of "representative government at the state level."[474]

3. Affirmative Action and the Political-Process Doctrine. — As the previous sections make clear, the issue of democratic deliberation often has surfaced in cases directly contesting the scope and substance of individual rights. However, it has also surfaced in cases that more generally contest the fitness of the political process for resolving disputes involving individual rights. The Court's disposition of 2014's *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*[475] is exemplary of this impulse.

Schuette concerned Proposal 2,[476] a Michigan voter referendum enacted in the wake of *Grutter v. Bollinger*,[477] a 2003 Supreme Court decision that upheld the limited use of race-conscious admissions policies.[478] Proposal 2 amended the state constitution to prohibit public universities from using race-conscious affirmative action measures.[479] The plaintiffs, most notably the Coalition to Defend Affirmative Action by Any Means Necessary (BAMN), argued that the referendum violated the political-process doctrine.[480]

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

472 *Obergefell,* 576 U.S. at 677 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

473 *Id.* at 732 (Thomas, J., dissenting).

474 *Id.*

475 572 U.S. 291.

476 Codified at MICH. CONST. art. I, § 26; *see also Schuette,* 572 U.S. at 299.

477 539 U.S. 306 (2003).

478 *See id.* at 343.

479 *Schuette*, 572 U.S. at 299 (describing Proposal 2).

480 *See* Coal. to Def. Affirmative Action, Integration & Immigr. Rts. & Fight for Equal. by Any Means Necessary (BAMN) v. Regents of Univ. of Mich., 539 F. Supp. 2d 924, 933–34 (E.D. Mich. 2008), *aff'd in part*, *rev'd in part sub nom.* Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN) v. Regents of Univ. of Mich., 652 F.3d 607 (6th Cir. 2011), *aff'd en banc*, 701 F.3d 466 (6th Cir. 2012), *rev'd sub nom. Schuette*, 572 U.S. 291.

First announced in the 1969 case *Hunter v. Erickson*[481] and elaborated in *Washington v. Seattle School District No. 1*,[482] the political-process doctrine provides that citizens cannot vote to establish special procedures that create hurdles for minorities wh o seek to advance their interests through the political process.[483] Although the doctrine was announced and elaborated in the *Hunter-Seattle* line of cases, its roots lie in *Carolene Products*'s footnote four, which elaborated the view that more searching judicial scrutiny and intervention may be required in circumstances where state action is the product of "prejudice against discrete and insular minorities . . . , which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[484] Indeed, in invalidating a statewide voter initiative "designed to terminate the use of mandatory busing for purposes of racial integration,"[485] the Court in *Seattle* relied explicitly on *Carolene Products*'s logic.[486] As the *Seattle* Court explained, where "the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities,'"[487] thereby triggering "the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[488]

As BAMN explained, Proposal 2 bore the hallmarks of the actions invalidated in *Hunter* and *Seattle*.[489] The voter referendum was proposed to eliminate the use of race-conscious admissions policies — and to make the restoration of such measures subject to the political process going forward.[490] If Proposal 2 passed, those seeking to restore race-conscious admissions policies would first have to persuade the state's regents of the desirability of doing so, and then would have to secure the hundreds of thousands of signatures needed to place the issue on the

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481 393 U.S. 385, 391–93 (1969); *id.* at 393–95 (Harlan, J., concurring).

482 458 U.S. 457 (1982).

483 *See id.* at 470.

484 United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); *see also Schuette*, 572 U.S. at 367 (Sotomayor, J., dissenting) ("The values identified in *Carolene Products* lie at the heart of the political-process doctrine.").

485 *Seattle*, 458 U.S. at 462.

486 *Id.* at 486.

487 *Id.* (alteration in original) (quoting *Carolene Prods.*, 304 U.S. at 153 n.4).

488 *Id.* (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

489 Brief of Appellants at 24, Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN) v. Regents of Univ. of Mich., 652 F.3d 607 (6th Cir. 2011) (No. 08-1387) ("Proposal 2 follows the exact method struck down in *Hunter*, *Seattle* and *Romer*.").

490 *See id.* at 17–18.

ballot and fund a costly campaign to convince Michigan's voters — all with no guarantee of success.[491]

And critically, those seeking admissions preferences on other grounds — like geographic diversity — encountered a less arduous process: simply persuading the state regents to adopt their position. They were not required, as proponents of race-based measures were in the wake of Proposal 2, to advance their cause through multiple iterations of majoritarian politics.[492] In this regard, the challengers argued, Proposal 2 functioned in much the same way as did the policies invalidated in *Hunter* and *Seattle*.[493] Using a voter initiative and majority rule, Proposal 2 disrupted the landscape to make it more difficult for those who would benefit from race-conscious admissions — racial minorities — to advance their interests.

A plurality of the Supreme Court, however, disagreed,[494] and in so doing, significantly narrowed the scope and substance of the political-process doctrine.[495] Writing for the plurality, Justice Kennedy disavowed a "broad reading of *Seattle*" and the application of strict scrutiny to "any state action with a 'racial focus' that makes it more difficult for certain racial minorities than for other groups" to vindicate their interests in the political process.[496] Rather than determine whether the challenged state action was racially focused — an inquiry that might promote reliance on "demeaning stereotypes"[497] and fuel "racial antagonisms and conflict"[498] — the plurality instead held that strict scrutiny should apply only in circumstances where the action caused or risked injury on the basis of race.[499] With this intent-inflected standard in mind, the plurality concluded that "no authority in the Constitution . . . or in th[e] Court's precedents" allowed courts to override Michigan's voters' decision regarding race-conscious admissions.[500]

In a searing dissent defending the now-hobbled political-process doctrine, Justice Sotomayor recounted a long history in which majorities had distorted the political process in order to suppress minority votes, prevent minorities from holding office, and thwart desegregation

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491 *See id.*; MICH. CONST. art. II, § 9.

492 Brief of Appellants, *supra* note 489, at 47 ("[Proposal 2] allows universities full discretion to adopt explicit measures designed to assure a class that is diverse in every way *except* the one that has been most difficult and most important — diversity by race.").

493 *Id.* at 24.

494 *See* Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN), 572 U.S. 291, 315 (2014) (plurality opinion).

495 *See id.* at 313–14 (distinguishing *Hunter*, *Seattle*, and the line of cases comprising the political-process doctrine).

496 *Id.* at 307 (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982)).

497 *Id.* at 308.

498 *Id.* at 309.

499 *See id.* at 313.

500 *Id.* at 314.

efforts.[501] In circumstances where the majority exploited its political might to suppress the interests of minority groups, the courts were obliged to intervene.[502] The political-process doctrine, Justice Sotomayor maintained, was "a central check on majority rule"[503] — one that ensured that majorities and minorities alike "play[ed] by the same rules"[504] in the political process. In hobbling the political-process doctrine, the *Schuette* plurality, she argued, dismantled the long-held view "that a majority may not reconfigure the existing political process in a manner that creates a two-tiered system of political change, subjecting laws designed to protect or benefit discrete and insular minorities to a more burdensome political process than all other laws."[505] In terms that presaged the *Dobbs* majority's democratic myopia, Justice Sotomayor chided the *Schuette* plurality for concluding that the Court's role in ensuring political participation was limited to securing minority access to the franchise.[506] Not so, she countered. In addition to ensuring access to the franchise, the Court was obliged to "vigilantly polic[e] the political process to ensure that the majority did not use other methods to prevent minority groups from partaking in that process on equal footing."[507]

* * *

As the foregoing sections suggest, *Dobbs* is not the only instance where the Court — or at least some members of the Court — has sought to prioritize democratic deliberation and democracy at the expense of individual rights. Indeed, as *Frontiero* and *Schuette* make clear, even in those circumstances where there is a recognized commitment to individual rights, the Court may nonetheless decline to intervene to protect the interests of certain constituencies if it concludes that those interests might also be secured through democratic deliberation that is already occurring or if those interests run counter to outcomes that might be achieved in the political process. And meaningfully, many of the circumstances in which the Court has prioritized preserving opportunities for democratic deliberation are situations in which minority groups are seeking judicial recognition — or confirmation — of their civil rights.

To be sure, the cases canvassed here do not always involve a majority of the Court. In *Frontiero*, only Justice Powell appealed to democratic deliberation.[508] In the gay rights cases, a durable minority of the Court underscored the importance of popular debate in the context of

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[501] *Id.* at 342–46 (Sotomayor, J., dissenting) (canvassing this history).

[502] *See id.* at 365 ("Under our Constitution, majority rule is not without limit.").

[503] *Id.*

[504] *Id.* at 366.

[505] *See id.* at 368.

[506] *Id.* at 369 ("As th[e plurality] see[s] it, the Court's role in protecting the political process ends once we have removed certain barriers to the minority's participation in that process.").

[507] *Id.*

[508] Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring in the judgment).

fraught social issues. But even if these dissenting voices comprised only a minority of earlier Courts, *Dobbs* made clear that the mathematics have shifted considerably. Voices once in dissent now likely reflect a majority — or supermajority — of the Court. With these dynamics in mind, it is worth focusing greater attention on the degree to which the pivot to democratic debate — and the prospect of resolving fraught issues through the political process — intersects with the interests of underrepresented minority groups who, historically, have struggled to vindicate their interests in majoritarian politics.[509]

V. *DOBBS*, DEMOCRACY, AND DISTRUST

In his *Yale Law Journal* essay, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, Ely famously denounced the 1973 decision as "*not* constitutional law" — with "almost no sense of an obligation to try to be."[510] Ely would go on to author *Democracy and Distrust: A Theory of Judicial Review*,[511] the 1980 book that is among the most influential texts in constitutional law.[512] If *Wages* focused principally on the *Roe* Court's substantive error in announcing a right to abortion,[513] *Democracy and Distrust* addressed broader themes — the defense of judicial review where it was exercised for the purpose of ensuring or enhancing democratic participation and engagement.[514] Responding to scholars like Professor Alexander M. Bickel and Professor Herbert Wechsler, who questioned judicial review as "countermajoritarian"[515] and inconsistent with principles of judicial neutrality,[516] Ely sought to reconcile constitutional adjudication with representative democracy by defending exercises of judicial review that sought to vindicate the political process and reinforce representation.[517]

Given Ely's interest in preserving democracy and enhancing the conditions of democratic deliberation, it is curious — or perhaps telling — that the *Dobbs* majority disregarded *Democracy and Distrust*,

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[509] *See, e.g.*, Gabriele Magni & Andrew Reynolds, *Voter Preferences and the Political Underrepresentation of Minority Groups: Lesbian, Gay, and Transgender Candidates in Advanced Democracies*, 83 J. POL. 1199, 1203 (2021).

[510] Ely, *Wages*, *supra* note 39, at 947.

[511] ELY, DEMOCRACY AND DISTRUST, *supra* note 42.

[512] *See* Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 J. LEGAL STUD. 397, 403 (2000) (identifying *Democracy and Distrust* as "the most-cited [non-treatise] legal book of the period"); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 747 (1991) (describing *Democracy and Distrust* as "the most important contribution to constitutional theory of the past generation").

[513] *See, e.g.*, Ely, *Wages*, *supra* note 39, at 926 (footnote omitted).

[514] ELY, DEMOCRACY AND DISTRUST, *supra* note 42, at 87–88.

[515] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

[516] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

[517] *See generally* ELY, DEMOCRACY AND DISTRUST, *supra* note 42.

focusing almost entirely on *Wages*, Ely's critique of *Roe*.[518] But even if it is not explicitly discussed, Ely's political-process defense of judicial review as a means of preserving democracy and fostering democratic deliberation shadows every corner of the *Dobbs* majority opinion.[519]

When he published *Democracy and Distrust* in 1980, Ely sought to defend the Warren Court and its decisions against charges of judicial activism and overreach.[520] His account of political-process theory did so by framing the Warren Court's most controversial decisions on issues of malapportionment and voting rights as efforts to bolster and advance democracy.[521] Drawing on *Carolene Products*'s footnote four and its articulation of the circumstances in which searching judicial review was warranted,[522] Ely offered a defense of the Warren Court's decisions as efforts to enhance and preserve the political process and to ensure the rights — and thus, the political participation — of discrete and insular "minorities" who would otherwise find themselves at the mercy of the majority.[523]

Unlike *Wages*, *Democracy and Distrust* was not singularly focused on *Roe*. Nevertheless, Ely's antipathy for the decision was as evident in the book as it was in the 1973 article. In *Democracy and Distrust*, Ely associated *Roe* with *Lochner*, describing both as exemplars of the Court's "sporadic ventures into across-the-board substantive review of legislative action,"[524] and describing such "ventures" as "probably wrong."[525] *Dobbs*, then, could certainly have located support for its result in *Democracy and Distrust*. So, what explains the oversight?

Perhaps the explanation can be found in a deeper analysis than Ely presented — or could perceive — of the actual interaction between reproductive freedom and democracy. In a recent article, Professors Douglas NeJaime and Reva Siegel challenge Ely's assessment of

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[518] The *Dobbs* majority mentioned *Democracy and Distrust* just once, in a footnote discussing the view that the Privileges or Immunities Clause guarantees substantive rights. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 n.22 (2022). By contrast, the *Dobbs* majority opinion quoted *Wages* early on for the view that the abortion issue should have been resolved legislatively and that *Roe* does not embody principles of constitutional law. *Id.* at 2241 ("One prominent constitutional scholar wrote that he 'would vote for a statute very much like the one the Court end[ed] up drafting' if he were 'a legislator,' but his assessment of *Roe* was memorable and brutal: *Roe* was 'not constitutional law' at all and gave 'almost no sense of an obligation to try to be.'" (quoting Ely, *Wages*, *supra* note 39, at 926, 947 (emphasis omitted))).

[519] *See, e.g.*, *id.* at 2247, 2265.

[520] *See* Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 514 n.74 (1997) (discussing Ely's defense of the Warren Court).

[521] Stephanopoulos, *The Anti-*Carolene *Court*, *supra* note 324, at 135 ("Ely's book was the academic analogue of the Warren Court's reapportionment decisions: a full-throated defense of *Carolene*'s thesis that democratic malfunction should prompt judicial intervention.").

[522] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

[523] ELY, DEMOCRACY AND DISTRUST, *supra* note 42, at 135.

[524] *Id.* at 14.

[525] *Id.* at 15.

substantive due process as democracy-diminishing,[526] forcefully arguing that Ely's account of political-process theory did not fully appreciate — or even acknowledge — the degree to which judicial deliberation and recognition of substantive due process rights actually *responded to* democratic engagement on issues of sex and sexuality.[527] As they explain, judicial review of issues like abortion, sexual intimacy, and same-sex marriage did not always lead to recognition of rights, but it occurred in the context of growing engagement with these questions in a wide variety of fora — grassroots organizing, state court litigation, and political mobilization.[528] As NeJaime and Siegel argue, Ely's account of substantive due process not only fails to appreciate the democracy-enhancing potential of judicial review of these issues, but it also fails to appreciate the degree to which recognition of substantive due process rights has enhanced equality values by allowing certain constituencies to participate in the polity as equal citizens.[529]

Or perhaps the *Dobbs* majority's interest in *Wages*, as opposed to *Democracy and Distrust*, simply served other rhetorical and discursive purposes in *Dobbs*. Just as Ely sought to insulate the Warren Court from claims of judicial imperialism by recasting its decisions as democracy-enhancing, the *Dobbs* majority sought to insulate its overruling of *Roe* and *Casey* from charges of judicial imperialism by recasting it as an effort to restore and preserve democracy.[530] Certainly, there is considerable rhetorical power in this framing. The invocation of democracy allowed the majority to claim that it had not "taken sides in the culture war," but rather merely performed its constitutional role as a "neutral observer" ensuring "that the democratic rules of engagement are observed."[531]

But it is not just that an appeal to democracy (paradoxically) confers a patina of neutrality on a majority opinion laying waste to almost fifty years' worth of precedent. It is that it presents the Court as the *hero* — the Knights Templar,[532] if you will — vindicating the historic *injustices* that *Roe* and *Casey* wrought.[533] In this regard, it is

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526 *See* NeJaime & Siegel, *supra* note 42, at 1907.

527 *Id.* at 1927 (discussing how lawyers and activists used the legal system to "amplify women's voices, making audible claims that legislators failed to take seriously"); *see also id.* at 1926–27 (discussing the civil rights tradition informing speak-outs).

528 *Id.* at 1927–29.

529 *Id.* at 1943. While NeJaime and Siegel challenge *Democracy and Distrust*'s failure to appreciate the imbrication of rights and democracy, Professors Ryan Doerfler and Samuel Moyn would jettison Ely's account of judicial review in its entirety. *See* Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely,* 75 VAND. L. REV. 769, 820–21 (2022).

530 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

531 Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

532 *See* Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins — and more specifically with the Templars . . . .").

533 *See Dobbs*, 142 S. Ct. at 2262.

unsurprising that the *Dobbs* majority equated its work with the work of the Court in *Brown v. Board of Education*,[534] which famously overruled *Plessy v. Ferguson*[535] in order to correct the injustices done to racial minorities during Jim Crow segregation.[536] Or the Court in *West Virginia State Board of Education v. Barnette*,[537] which overruled *Minersville School District v. Gobitis*[538] in order to correct the injustices done to religious minorities.[539]

With this in mind, the majority's pronounced interest in *Wages*, as opposed to *Democracy and Distrust*, is perhaps more obviously legible. In *Wages*, Ely's critique of *Roe* is not limited to the view that the decision is unmoored from constitutional text.[540] In addition to lacking a constitutional foundation, Ely notes, the Court's decision in *Roe* failed to grapple fully with the "compelling" interest in the protection of the fetus.[541] "Having an unwanted child can go a long way toward ruining a woman's life,"[542] Ely concedes, but abortion "is too much like infanticide on the one hand, and too much like contraception on the other, to leave one comfortable with any answer; and the moral issue it poses is as fiendish as any philosopher's hypothetical."[543] On this account, what makes abortion especially vexing is that there are "discrete and insular minorities" on both sides — women and fetuses.[544] According to Ely, the problem with *Roe* is that the Court prioritized the interests of only one of these groups.

Simply put, Ely in *Wages* gestures toward the view that the Court may have a role to play in mediating the competing interests at stake in abortion, but that a proper understanding of its role would require protecting the fetus, which is perhaps more vulnerable and politically powerless than the women prioritized in *Roe*. As Ely explains at length:

> Compared with men, very few women sit in our legislatures . . . . But *no* fetuses sit in our legislatures. . . . Compared with men, women may constitute such a "minority"; compared with the unborn, they do not. I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer.[545]

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[534] 347 U.S. 483 (1954).
[535] 163 U.S. 537 (1896); *Dobbs*, 142 S. Ct. at 2265 (comparing *Roe* to *Plessy v. Ferguson*).
[536] *Brown*, 347 U.S. at 493, *overruling Plessy*, 163 U.S. 537. *See generally* Siegel, *The History of History and Tradition, supra* note 298 (discussing the Court's effort to analogize *Brown* and *Dobbs*).
[537] 319 U.S. 624 (1943).
[538] 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. 624.
[539] *Dobbs*, 142 S. Ct. at 2263 (discussing *Barnette*).
[540] *See, e.g.*, Ely, *Wages*, *supra* note 39, at 922–23.
[541] *Id.* at 924.
[542] *Id.* at 923.
[543] *Id.* at 927.
[544] *Id.* at 935.
[545] *Id.* at 933–35 (footnotes omitted).

Meaningfully, this account of the fetus as an underrepresented constituency in need of judicial protection can be glimpsed in *Dobbs*. Throughout the opinion, there are repeated references to the fetus, and acknowledgments that some individuals and institutions, including the Mississippi legislature, view the fetus as an "unborn human being."[546] Further, the majority's effort to sequester the Court's treatment of *Roe* and *Casey* from other substantive due process decisions rests on the distinction that, unlike *Roe* and *Casey*, those other decisions did not involve "the destruction of . . . 'potential life.'"[547] But perhaps most telling on this front is the majority's discussion of abortion's eugenic potential. In a footnote,[548] the majority reiterated a view, husbanded by Justice Thomas,[549] that those who seek "liberal access to abortion . . . have been motivated by a desire to suppress the size of the African-American population."[550]

The *Dobbs* majority's nod to the "abortion [as] . . . racial genocide" argument is, on some level, "gratuitous" given that the decision to overrule *Roe* and *Casey* rested on the view that "the abortion right is unmoored from constitutional text and lacks deep roots in the country's history and traditions."[551] But even if it does not serve a jurisprudential purpose in the *Dobbs* analysis, the footnote serves an important discursive purpose: it builds the case for viewing limits on abortion as antidiscrimination measures,[552] and more importantly, for viewing fetuses as a *minority group*.

Critically, then, the majority's reliance on *Wages* does more than simply allow the Court to reframe its actions in more palatable terms. Obviously, the *Dobbs* majority's pivot to democracy has considerable rhetorical power, allowing it to reshape the public's understanding of its actions as democracy-enhancing, as opposed to a bald exercise of judicial power. But, more profoundly, the invocation of democracy, alongside these other discursive maneuvers, has the broader potential to reshape, however subtly, the understanding of *who* is in the polity and

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546 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243–44 (2022).

547 *Id.* at 2260 (quoting Roe v. Wade, 410 U.S. 113, 150 (1973) (emphasis omitted)).

548 *Id.* at 2256 n.41.

549 *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

550 *Dobbs*, 142 S. Ct. at 2256 n.41 (citing Brief for Amici Curiae African-American, Hispanic, Roman Catholic & Protestant Religious & Civil Rights Organizations & Leaders Supporting Petitioners at 14–21, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring)).

551 Melissa Murray, *Thomas and Alito Are Appropriating Racial Justice to Push a Radical Agenda*, MOTHER JONES (June 28, 2022), https://www.motherjones.com/politics/2022/06/thomas-and-alito-are-appropriating-racial-justice-to-push-a-radical-agenda [https://perma.cc/Y5SS-736A].

552 *See* Murray, *Race-ing* Roe, *supra* note 166, at 2063–65 (discussing the view of abortion restrictions as antidiscrimination protections for the fetus).

the identity of those "discrete and insular minorities" whom the Court is obliged to protect.[553]

In this way, the *Dobbs* majority's allegiance to *Wages* — and its relative neglect of *Democracy and Distrust* — is revealing. By itself, *Democracy and Distrust* could cloak the majority in the mantle of democracy, allowing it to portray itself as the hero, even as it performed the arguably unheroic act of withdrawing a fundamental right. *Wages*, however, not only serves this rhetorical purpose; it goes further, gesturing toward future acts of judicial heroism that build upon the foundation that *Dobbs* lays. For *Wages*, more so than *Democracy and Distrust*, makes clear that the majority's vision of democracy and democratic deliberation on abortion does not end with "return[ing] abortion" to the states,[554] but with an acknowledgment of the constitutional interests of the unborn.

There are hints in the opinion — and elsewhere — that this is afoot. The majority's decision to focus primarily on principles of democracy, rather than the illegitimacy of the doctrine of substantive due process,[555] may reflect a desire to preserve the possibility of later reliance on substantive due process to justify constitutionalizing a rule that would prohibit all abortions. And the Court's repeated references to "fetal life," "potential life," and "unborn human being[s]"[556] may have been designed

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[553] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

[554] *Dobbs*, 142 S. Ct. at 2279.

[555] The majority's democratic focus stands in stark contrast to Justice Thomas's concurrence, which critiqued substantive due process, provided a template for discrediting the Court's substantive due process precedents, and invited reconsideration of the line of substantive due process cases. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring); *cf.* Gamble v. United States, 139 S. Ct. 1960, 1989 (2019) (Thomas, J., concurring) (decrying the "legal fiction" of substantive due process as inconsistent with the "original understanding of the Due Process Clause" and elaborating that "'this fiction is a particularly dangerous one' because it 'lack[s] a guiding principle to distinguish fundamental rights that warrant protection from nonfundamental rights that do not'" (alteration in original) (quoting McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in the judgment))); Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring) ("Whatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions. . . . In light of the Court's denial of certiorari today, the constitutionality of other laws like Indiana's thus remains an open question.").

[556] *See Dobbs*, 142 S. Ct. at 2268 ("[N]one of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed 'potential life.'"); *id.* at 2258 ("What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'" (citing Roe v. Wade, 410 U.S. 113, 159 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992))); *id.* at 2243 ("*Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called 'fetal life' and what the law now before us describes as an 'unborn human being.'"); *id.* at 2261 ("The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life."); *id.* at 2256 ("[O]ur decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests.").

both to lay the foundations for constitutionalizing such a rule and to broadcast receptivity to such claims to litigants and lower courts. And indeed, some courts have eagerly embraced this fetus-forward posture. In *Alliance for Hippocratic Medicine v. FDA*,[557] a challenge to the Food and Drug Administration's 2000 approval of mifepristone, the first drug in the two-drug medication abortion protocol, Judge Kacsmaryk adopted the nomenclature of the antiabortion advocates challenging the approval, repeatedly referring to fetuses as "unborn humans," "babies," and "children."[558]

While scholars have for many years sounded the alarm on the marshaling of anodyne laws to support "fetal endangerment" claims,[559] such efforts have intensified in the post-*Dobbs* landscape. In Texas, Marcus Silva recently filed a wrongful death suit against three women who, he alleges, assisted his estranged wife in securing a medication abortion.[560] Although the Texas Heartbeat Act allows individuals to file suit against those who assist someone in obtaining an abortion,[561] Silva did not avail himself of this litigation avenue. Instead, he chose to file a traditional wrongful death claim to recover "for the wrongful death of baby Silva."[562] In addition to the wrongful death claim, Silva further alleges that two of the women "conspired with each other to murder baby Silva

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[557] No. 22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023), *aff'd in part*, *vacated in part*, 78 F.4th 210 (5th Cir. 2023).

[558] *See, e.g.*, *id.* at *1 ("Mifepristone . . . ultimately starves the unborn *human* until death." (emphasis added)); *id.* at *2 (noting that medication abortion drugs "were limited to women and girls with unborn *children* aged seven-weeks gestation or younger" (emphasis added)); *id.* at *5 ("Women who have aborted a *child* — especially through chemical abortion drugs that necessitate the woman seeing her aborted *child* once it passes — often experience shame, regret, anxiety, depression, drug abuse, and suicidal thoughts because of the abortion." (emphasis added)); *id.* at *13 ("Many women also experience intense psychological trauma and post-traumatic stress from excessive bleeding and from seeing the remains of their aborted *children*." (emphasis added)); *id.* at *22 (noting the psychological impact of a "mother seeing the aborted *human*" (emphasis added)).

[559] *See, e.g.*, MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 28 (2020); LINDA C. FENTIMAN, BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH 110–11 (2017) (describing the first high-profile criminal prosecutions, which relied on the theory that using drugs caused fetal harm, thereby constituting child endangerment); Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475, 481 (2021) (discussing the use of anodyne criminal laws for prosecuting "fetal endangerment" claims); Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 786–87 (2014); Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947, 996 (2017); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 322 (2013); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1420–21 (1991).

[560] Plaintiff's Original Petition ¶ 24, Silva v. Noyola, No. 23-CV-0375 (Tex. Dist. Ct. Mar. 9, 2023), https://www.courthousenews.com/wp-content/uploads/2023/03/marcus-silva-sb-8-lawsuit.pdf [https://perma.cc/ESF7-5DH4].

[561] Texas Heartbeat Act, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West Supp. 2021)).

[562] Plaintiff's Original Petition, *supra* note 560, ¶ 25.

with abortion pills,"[563] and that "[a]ssisting a self-managed abortion in Texas is also an act of murder."[564]

Silva's insistence on filing a tort suit — and analogizing medication abortion to "an act of murder" — is meaningful. Under Texas law, wrongful death claims may be brought against anyone who negligently or wrongfully causes the death of an *individual* — a category that specifically includes "an unborn child at every stage of gestation from fertilization until birth."[565] Likewise, under Texas law, murder is committed when a person "intentionally or knowingly causes the death of an *individual*."[566] In this regard, the resort to traditional tort and criminal law vehicles, which typically are deployed to redress offenses to the *person*, may be understood as an effort to normalize and embed the view that a fetus is a *person*[567] — and indeed, a person who is vulnerable and in need of the state's protection.

Antiabortion groups make the point explicitly. In social media and media talking points, some of the most prominent pro-life groups in the nation have indicated they are not content to let the citizens of the several states make their own decisions about abortion within their respective jurisdictions. Instead, these groups have made clear that their desired outcome is the recognition of fetal personhood.[568]

Taken together, these developments suggest that *Dobbs*'s state-by-state settlement is likely just a way station, and not the final destination. Instead, the true potential of the *Dobbs* majority's vision of democracy-enhancing jurisprudence likely will be achieved when the rights of an overlooked "discrete and insular" minority — the fetus — are finally recognized, whether through majoritarian politics or judicial fiat.

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563 *Id.* ¶ 30.

564 *Id.* ¶ 24.

565 TEX. CIV. PRAC. & REM. CODE ANN. § 71.001.4 (West 2017) (defining the term "individual").

566 TEX. PENAL CODE ANN. § 19.02(b)(1) (West Supp. 2023) (emphasis added).

567 *See* Michelle Goldberg, Opinion, *Abortion Opponents Want to Make Women Afraid to Get Help from Their Friends*, N.Y. TIMES (Mar. 13, 2023), https://www.nytimes.com/2023/03/13/opinion/abortion-lawsuit-texas.html [https://perma.cc/HQD5-N8WE] ("If the idea of fetal personhood is normalized in the law through wrongful-death cases like Silva's, applying murder statutes to abortion becomes easier to imagine.").

568 *See* Americans United for Life (@AUL), TWITTER (Apr. 8, 2023, 7:41 PM), https://twitter.com/AUL/status/1644847974889971712 [https://perma.cc/YH4G-XEQ2] (retweeting and commenting on a tweet from Robert L. Tsai (@robertltsai)) ("Restoring the constitutional right to life for the preborn has been the entire point of the pro-life movement since Roe. No human being can be excluded from the circle of humanity or the equal protection of the law."); LifeSiteNews (@LifeSite), TWITTER (July 28, 2023, 1:30 PM), https://twitter.com/LifeSite/status/1684979532531413007 [https://perma.cc/QC6L-ANWA] (encouraging the public to "demand" that the Supreme Court "explicitly affirm federal protection for our most excluded class of citizens — the unborn"); Tom Shakely (@TomShakely), TWITTER (Apr. 13, 2023, 4:29 PM), https://twitter.com/TomShakely/status/1646611583546580 99 [https://perma.cc/A7DY-T3XU] (discussing "the pro-life movement's 50+ year purpose" to "restor[e] the constitutional right to life for all persons").

CONCLUSION

As we have shown, *Dobbs* cannot be understood to rest on or further principles of democracy. Rather, a careful examination of the intellectual origins of the "democratic deliberation" argument reveals that *Dobbs* and its refashioning of the doctrine of stare decisis are products of a set of interconnected legal, movement, and political efforts designed to undermine and ultimately topple *Roe* and *Casey* on the grounds that democracy demands that result.

But even on its own terms, the Court's appeal to democracy fails. Throughout, the *Dobbs* majority opinion presented an extraordinarily limited, even myopic, conception of democracy — one that misapprehended the processes and institutions that are constitutive of democracy, while also reflecting a distorted vision of political power and representation. The opinion compounded these distortions by refusing to grapple with the antidemocratic quality of the interpretive method it deployed to identify fundamental rights that are worthy of judicial protection. Indeed, the majority's adherence to a history-and-tradition analysis binds constitutional interpretation to a less democratic past in which very few Americans were meaningful participants in the production of law and legal meaning.

The cynicism of the *Dobbs* Court's invocation of democracy is even more pronounced when considered alongside the Court's active interventions to distort and disrupt the functioning of the electoral process. On this account, *Dobbs* purported to "return" the abortion question to the people at the precise moment when the Court's own actions have ensured that the extant system is unlikely either to produce genuine deliberation or to yield widely desired outcomes.

Focusing on these dimensions of the *Dobbs* majority's discussion of democracy, however, may reveal a more profound — and jarring — truth about the opinion. Beyond its cramped myopia, the *Dobbs* majority's vision of democracy and democratic engagement was one that posited the Court as a hero — vindicating democratic processes, while also vindicating the rights of particular minority groups. While its ostensible focus was the vindication of democratic values, the *Dobbs* majority can also be viewed as laying the ground for greater protections for the fetus as a "discrete and insular" minority. Accordingly, the Court's "democratic deliberation" settlement is likely just a way station en route to a final destination — the abolition of legal abortion in the United States. Here, past may be prologue: just as the initial resistance to *Roe* sought not to leave abortion to the democratic process, but to end it entirely, *Dobbs* may represent an intermediate step that aims to shift political dynamics and desensitize the populace to the deprivation of access to legal abortion.

For now, legal and political fights around access to abortion will largely be waged in state legislatures, state courts, state executive-

branch offices, and through the mechanisms of popular democracy. But it seems all but certain that, despite its broad endorsement of democratic deliberation, the Supreme Court has not spoken its final word on this question.